TITLE CONCERNS IN FORECLOSURE

18TH ANNUAL ROBERT C. SNEED
TEXAS LAND TITLE INSTITUTE
AND
ST. MARY'S UNIVERSITY SCHOOL OF LAW
DECEMBER 5, 2008

G. Tommy Bastian
Barrett Daffin Frappier Turner & Engel, L.L.P.
15000 Surveyor Blvd., Ste. 100
Addison, Texas 75001
972.341.0500
tommyb@bbwcdf.com

G. Tommy Bastian is Board Certified in Residential Real Estate Law by the Texas Board of Legal Specialization and focuses his practice on mortgage banking issues related to title, real estate, probate and class action litigation, as well as legislative matters. He is the author of more than 30 articles and publications and a frequent lecturer on mortgage banking related issues in both Texas and nationwide. Mr. Bastian is a graduate of Howard Payne University, Texas Tech Law School, the U.S. Army Command and General Staff College, and the U.S. National Defense Security University. Currently, he is a member of the Executive Committee and a Director of the Texas Mortgage Bankers Association; a member of the American Land Title Association Education Committee; member of the MBA State Legislative and Regulatory Committee; and the State Bar of Texas Real Estate Legislative Affairs Committee. In 2006 he was appointed to serve on the Residential Foreclosure Task Force mandated by House Bill 1582 and Texas Government Code § 2306.260 and was the Course Director for the State Bar of Texas 2006 Real Estate Advanced Course. Mr. Bastian has served on the three Texas Supreme Court Home Equity Task Forces and was the principal draftsman of the Texas home equity and reverse mortgage foreclosure statutes. Mr. Bastian has also been designated as a Texas "Super Lawyer" for the years 2004, 2005, 2006,2007, and 2008.

Table of Contents

I. Introduction.

In 2002, a law firm that specializes in foreclosure conducted a study to determine how many foreclosure files had title issues that needed to be addressed before the secured property could be sold at a foreclosure sale. The conclusion was that 63% of all files referred for foreclosure contained title issues.

Though some of the title issues arose after loan origination, the vast majority of files contained title issues that were present at loan origination or were created at loan origination. It should be noted that this 2002 study was done three years before underwriting standards gave way to the practice of closing loans as quickly as possible to feed the "securitization beast". Though the evidence is only anecdotal, the body of loans originated in the 2005 to 2007 era probably contains more title issues than 63%.

From a public policy standpoint, the meltdown in bad real estate loans presents an interesting conundrum for the title industry. As part of the clean-up, should the title industry attempt to cure the imbedded title issues or take the easy way out and use the master indemnity agreement to side-step, instead of resolve, potential title claims and title issues.

The path the title industry chooses will not be easy in light of the economic devastation the industry is suffering from the easy loan era. However, if the government is going to bail out bad loan portfolios and lenders are going to attempt to modify hundreds of thousands of loans, would it make sense that part of the process should include curing the title issues related to these loans? Now is the time to decide whether the industry should advocate a title clean-up at the same time as bad loans are modified or sold in federal bailout programs. Otherwise, the residual effect of the bad loan era will affect land title records for the next 20 years.

Enough philosophizing – this presentation is intended to be a quick reference for an attorney who needs ideas on how to solve a pre- or post-foreclosure title issue. The case law cited throughout the presentation is not necessarily black letter law, or in accordance with law review standards, on the issue discussed but rather the cases are referenced to give a creative lawyer, i.e., a lawyer who seemingly has no options in a difficult fact situation, ideas on how to fashion an argument to save a client from a possible disaster.

Though the background section that follows may not seem to have any connection to title issues in foreclosure, the materials are the tools or concepts needed to devise a solution to many title issues in foreclosure. The background section attempts to assist a busy attorney in "asking the right question of the right person to get the right answer".

II. Background.

To conduct a foreclosure, the chain of title to the property must be examined to identify any potential issue that may affect title. The failure to do a thorough title search can be expensive. For example: the mortgagee acquires the secured property for its credit bid at the foreclosure sale and finds the property was encumbered by a federal tax lien, which could have been extinguished by notice to the IRS, if the lien had been discovered at least 25 days before the foreclosure sale.

The best practice is to review copies of the actual instruments recorded in the chain of title and not depend on an abstractor's run sheet or a computer summary of a property's title history. The cost difference for obtaining copies of the actual title documents recorded in the chain of title, as opposed to a run sheet, may be significant, but the GSEs, VA, HUD, and most investors, will pay the cost for

obtaining copies of the instruments in the chain of title. Therefore, it is not worth the risk to depend on a run sheet to prosecute a foreclosure.

Contrary to the view of many multi-state lenders and mortgage servicers, when it comes to real property title issues state law applies unless there is a clear and manifest intent that federal law should preempt the state law. *Matter of T.F. Stone Co., Inc., 72 F.3d 466 (5th Cir. 1995)* and *In re Robertson, 203 F.3d 855 (5th Cir. 2000)*.

A. Effect of Foreclosure on Other Liens.

Foreclosure extinguishes the rights of all inferior lienholders to enforce their liens against the secured property. *Hampshire v. Greeves, 104 Tex. 620, 143 S.W. 147 (Tex.1912)*. However, if a junior lien is foreclosed, the foreclosure sale purchaser takes title subject to all superior liens. *Mercer v. Bludworth, 715 S.W.2d 693 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)*. Whether the lien foreclosed is a first or inferior lien, the foreclosure sale purchaser is not personally liable for payment of any lien extinguished by foreclosure. *Blanco, Inc. v. Porras, 897 F.2d 788 (5th Cir. 1990).*

B. Foreclosure Presumptions.

There is a rebuttable presumption that a foreclosure sale has been conducted properly. *Roland v. Equitable Trust Co.*, *584 S.W.2d 883 (Tex.Civ.App.—San Antonio 1979, writ ref'd n.r.e.)*. If there are recitations in a substitute trustee's deed that all foreclosure prerequisites were accomplished properly, such recitations will be *prima facie* evidence of the truth of the matter stated. *McCallum v. Jones, 141 S.W. 1032 (Tex.Civ.App.—Fort Worth 1911 writ ref'd.)* and *Cunningham v. Paschall, 135 S.W.2d 293 (Tex.Civ.App.—Fort Worth 1939 writ dis. judgm't corr.)*. To invoke this presumption, most foreclosure professionals attach an affidavit to the trustee or substitute trustee's deed averring that the foreclosure was conducted properly to allay title abstractors' concerns on whether a foreclosure was conducted properly.

The rebuttable presumption of a proper foreclosure should be a part of any motion for summary judgment because it shifts the burden of proof to the debtor to state a specific foreclosure infirmity – not just a general statement that the foreclosure was bad.

C. The Players.

1. The Borrower.

Texas foreclosure statutes refer to the "debtor" but the term debtor is never defined. However, debtor is defined as "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is the obligor" in *Tex. Bus. & Com. Code §9.102(a)(28)*. "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."*

Only the maker or assumptor of a note is obligated for a debt. Until the mortgagee forecloses, the obligor of the debt is entitled to title, possession, and all rents and revenues of the secured property. If the security instrument expressly provides – and most commercial deeds of trust do – the lender is

entitled to all rents and revenues if its loan goes into default. Otherwise, the lender must open a receivership to obtain the rents and revenues. *Loving v. Milliken*, *59 Tex. 423, 1883 WL 9191 (Tex.1883)* and *Robinson v. Smith, 133 Tex. 378, 128 S.W.2d 27 (Tex.Com.App. 1939).*

It is a common practice for a borrower to sell the secured property to a buyer who agrees to assume the debt which encumbers the property the borrower is selling. In an assumption transaction, the new buyer does not sign a note. Instead, assumption language in the deed or an assumption deed of trust obligates the buyer to pay the seller's debt secured by the property. In an assumption transaction, the buyer becomes the principal obligor and the seller becomes the surety of the debt. *Straus v. Brooks, 136 Tex 141, 148 S.W.2d 393 (Tex.Com.App. 1941).* Though the buyer does not sign the note, the assumption agreement is an unconditional promise to pay the debt and the assumptor's liability for payment of the note is independent of the original note maker's liability. *Barber v. Federal Land Bank of Houston, 204 S.W.2d 74, 78 (Tex.Civ.App.—Texarkana 1947, writ ref'd n.r.e.).*

A borrower who assumes a debt 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 the debt. *Green v. White, 137 Tex. 361, 153 S.W.2d 575, 583 (1941).* In addition, the fraud of the original maker does not absolve the borrower for liability on the debt assumed. *Presidential Village, Ltd. v. Lone Star Gas Co., 585 S.W.2d 335 (Tex.Civ.App.—Dallas 1979, no writ).*

If a borrower conveys all interest in the property under an assumption agreement, an argument can be made that the original borrower is not required to receive foreclosure notices, even though the borrower was never released from the debt. *Fenimore v. Gonzales County Sav. & Loan Ass'n, 650 S.W.2d 213 (Tex.App—San Antonio [4th Dist.] 1983, no writ) citing Burnett v. Manufacturer's Hanover Trust Co., 593 S.W.2d 755 (Tex.Civ.App.—Dallas 1979, writ ref'd n.r.e.).* The *Fenimore* argument is buttressed by *Citizens Nat. Bank in Abilene v. Cattleman's Production Credit Ass'n, 617 S.W.2d 731 (Tex.Civ.App.—Waco 1981)*, where, in a judicial foreclosure suit, the court found that the original obligor was not a necessary party to the foreclosure because all of the borrower's interest in the property had been conveyed.

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 because notes are now "authenticated" instead of signed or executed, to accommodate e-mortgage loan agreements. *Tex. Bus. & Com. Code §§3.401* and *6.402.* The authority of an agent to "authenticate" a real property conveyance must be in writing. *Donovan v. Mercer*, *747 F.2d 304 (5th Cir. 1984)* citing *Tex. Prop. Code §5.021*.

2. The Note Holder.

There is no presumption of ownership of a note that is held by a noteholder. *Tex. Bus. & Com. Code §3.201(c)* and *Dillard v. NCNB Texas Nat. Bank, 815 S.W.2d 356 (Tex.App.—Austin 1991, no writ).* By definition, the "note holder" is the person in possession of an instrument that is drawn, issued, or endorsed to the order of the person or to a bearer in blank. *Tex. Bus. & Com. Code §1.201(20).* If the owner of a note materially alters the terms of the debt without the maker's consent, the borrower's obligation is discharged. *Tex. Bus. & Com. Code §3.407(b)(1). Oehler v. Scahamel*, *242 S.W.2d 403 (Tex.Civ.App.—Dallas 1951, writ ref n.r.e.)*.

Foreclosure may be initiated by any person who obtains the unconditional endorsement and delivery of the note. *Lawson v. Gibbs*, *591 S.W.2d 292 (Tex.App.—Houston [14th Dist] 1979, second motion on reh. overruled)*. *Lawson* contains an excellent analysis of the concepts of owner and holder and the rule that the lien follows the note. However, it should be noted that the securitization of

mortgages has made the concept of owner and note holder obsolete. *Lawson* also discusses the principle that only the person obligated for the debt is required to receive foreclosure notices.

Whether the holder of a note can enforce a debt in the holder's name, instead of the owner's, is the issue presented in *Jernigan v. Bank One Tex, N.A.*, *803 S.W.2d 774 (Tex.App.—Houston [14th Dist] 1991, no writ)*. *Jernigan* provides an analysis of the differences between the owner and holder enforcing a debt in the holder's name under *Tex. Bus. & Com. Code §3.301*. *Jernigan* should be also cited for proof of a note by affidavit with a photocopy of the note attached.

With the advent of the secondary market, the customary business practice of the mortgage banking industry is that notes that are sold are not specifically endorsed but rather endorsed "in blank" and held by a "bearer". The definition of the term bearer and the term holder, as defined in *Tex. Bus. & Com. Code §§1.201(5)* and *(21),* make it clear that a bearer may be a holder. Pursuant to a pooling and servicing agreement ("PSA") between the mortgage servicer and investor, the mortgage servicer, as the investor's duly authorized agent for loan service administration, is usually the bearer or holder of the notes for all the loans it services.

Contrary to popular opinion, the mortgagee of record in the chain of title is not usually the lender but rather the mortgage servicer. The servicer is the mortgagee of record to ensure that the servicer is the point of contact for all loan information requests instead of the owner of the note. In a foreclosure, the mortgage servicer, as the authorized agent for loan service administration for the owner or holder of the note, initiates the foreclosure process.

3. The Investor.

If a loan is secured by real estate, particularly residential property, in all probability the investor will be a GSE, i.e., "government sponsored enterprises," such as Fannie Mae, Freddie Mac, or Ginnie Mae, or a Wall Street or banking institution represented by a trustee for a pool of loans. If a servicer is the subsidiary of a large lending institution, the investor may be the servicer's parent or affiliate.

"Freddie Mac" (Federal Home Loan Mortgage Corporation or FHLMC), "Fannie Mae" (formerly known as the Federal National Mortgage Association or FNMA), and "Ginnie Mae" (Government National Mortgage Association) are the largest players in the secondary market. According to *NATIONAL MORTGAGE NEWS*, approximately seven of every ten conventional residential mortgages are owned by Fannie Mae or Freddie Mac. Interestingly, of all foreclosures initiated in 2008, only 20% of the foreclosures were loans in a Fannie or Freddie securitization while private securitizations accounted for 60% of all foreclosures. Because Fannie Mae and Freddie Mac's higher underwriting requirements, it would seem this proves that loans that were properly underwritten at loan origination were not toxic waste loans.

Mortgage-backed securities ("MBSs") issued by the GSEs and Wall Street are collateralized by a pool of home loans that have similar maturity dates and interest rates. MBSs provide insurance companies, banks, foreign governments and other investors with an undivided ownership interest in the pool of loans. Although repayment of the security is not guaranteed, credit enhancements, such as mortgage and pool insurance, make these securities attractive. Pooling loans into securities means standardized loan commitments and documentations, and more important, liquidity.

Securitization has been so successful that even the Department of Veteran's Affairs ("VA") has begun to securitize loans. When Congress resurrected the VA vendor loan program allowing non-veterans to acquire VA foreclosed properties, Congress required the VA to finance 60 to 85 percent of the sale price. To generate the capital to make these loans, the VA sold 11,384 loans in four securitizations totaling $1 billion.

Most mortgage servicing personnel have no idea who is the "owner" or "holder" of the loans they service, because the mortgage servicing software, databases, and computer servicing platforms use the term "investor" to mean the entity that owns or holds the loan being serviced. Therefore, attorneys should use the word investor when dealing with mortgage servicing personnel when referring to an owner or holder issue.

For a discussion of the business practices that have evolved because of the role of the secondary market in home loan financing, see *Peter M. Carrozzo, "MARKETING THE AMERICAN MORTGAGE", 39 Real Property, Probate and Trust Journal 765, (Winter 2005.)*

4. The Mortgage Servicer.

As a practical matter, most borrowers assume the owner or holder of their home loan is the mortgage servicer because it is the servicer who collects the borrower's monthly loan payments and handles all the day-to-day, loan level administrative details related to the borrower's home loan.

Recognizing the critical role that a mortgage servicer performs in the mortgage banking industry, Texas and Michigan are the only states that have changed their foreclosure statutes to allow a mortgage servicer to initiate foreclosure instead of the owner or holder of the note. *Tex. Prop. Code §51.0001(3)* states:

> *"(3) 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."*

The term "mortgage servicer" is also subsumed in the definition of "mortgagee" found in *Tex. Prop. Code §51.0001(4)* which provides:

> *"(4) '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."*

Further recognizing that a mortgage servicer is the mortgagee's agent for loan service administration, *Tex. Prop. Code §51.0025* allows a mortgage servicer to manage the foreclosure process:

> *"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."*

The definition of mortgage servicer in *Tex. Prop. Code §51.0001(3)* fails to mention all the other loan administration activities a mortgage servicer provides on a daily basis in addition to collecting borrowers' payments. These services include responding to borrowers' inquiries and complaints, calculating and collecting escrow funds for taxes and insurance, and enforcing security instruments if borrowers default.

These seemingly new mortgage servicing provisions do not represent a departure from current law. Since January 1994, the Department of Housing and Urban Development ("HUD") has required Federal Housing Administration ("FHA") loans to 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 C.F.R. §203.502*.

D. The Deed of Trust.

The recorded security instrument to be foreclosed should be examined because it may contain handwritten or typewritten modifications, deletions, or riders that radically change the typical "boiler plate" language.

For example, if the loan is a Texas Veteran's Land Board ("VLB") loan, an inattentive foreclosure professional will miss the fact that one deed of trust secures two notes – a "program" note owned by the Texas Veteran's Land Board and a "participant" note owned by a conventional lender – that are of equal dignity. Generally, the two notes are serviced by different mortgage servicers, which results in chaos because neither servicer coordinates with the other.

A common VLB loan problem arises when a loan closer attempts to obtain pay-off figures for the sale of the property. Usually, the closer contacts the participant note holder because its name is on the face of the security instrument or assignment, but fails to get the loan balance on the program note because it is serviced by another servicer, usually CitiFinancial, which bought First Nationwide. Consequently, the program note which is owed to the VLB is not paid off at closing. After the loan closes and the VLB demands its money from the sale proceeds, the lenders, servicers and closer realize the mistake and the finger pointing and lawsuits begin.

Many times, a deed of trust to be foreclosed will have an alleged property description defect. To determine whether the description will pass muster for statute of fraud purposes, use the two-part test outlined in *Pickett v. Bishop, 148 Tex. 207, 223 S.W.2d 222 (Tex.1949)* and expanded in *Moudy v. Manning, 82 S.W.3d 726 (Tex.App.—San Antonio 2002, rev. den)*. The general test for determining the sufficiency of the land description is whether the tract can be identified with reasonable certainty by an experienced title professional. *Zobel v. Slim, 576 S.W.2d 362 (Tex. 1978).*

For ideas on how to proceed with a bad property description, see *Escamilla v. Estate of Escamilla by Escamilla, 921 S.W.2d 723 (Tex.App.—Corpus Christi 1996)* that deals with reforming a property description as well as several collateral issues that usually arise in this type of case, such as unilateral mistakes and the four-year statute of limitation.

The Texas Title Examination Standards found in *Tex. Prop. Code, Title 2-Appendix §§1.10-16.30,* which are located immediately following *Tex. Prop. Code §5.151,* can also be used to resolve many title issues arising from sloppy loan origination and title underwriting.

Assignment of the security instrument is not proof of ownership of the note and the naked assignment of a lien without express language as to the transfer of the note cannot support a foreclosure. *Shepard v. Boone, 99 S.W. 3d 263 (Tex.Civ.App.—Eastland 2003)*.

A person can encumber property for the debt of another and not be obligated for the debt. *Hodges v. Roberts, 74 Tex. 517, 12 S.W. 222 (Tex. 1889)*. An owner of an interest in real property is not bound to search the deed records for subsequent instruments affecting title. *Company v. Jack County Oil and Gas Association, 328 S.W.2d 912 (Tex.App.—Fort Worth 1964, n.r.e.).*

A surprise to many lawyers may be the "master form" deed of trust provision in the Texas Property Code that allows deeds of trust to incorporate, by reference, the terms and conditions of the master deed of trust. *Tex. Prop. Code §13.001*. In the future, title examiners should expect to see more master form deeds of trust because the cost savings on filing fees is substantial. A standard Fannie Mae deed

of trust is approximately 17 pages and the declaration or summary page for a master form deed of trust is approximately 3 pages.

If the deed of trust contains an arbitration clause, see *In re MacGregor (FIN) Oy, 126 S.W. 3d 176 (Tex.App.—Houston [1st Dist] 2003, reh overruled.)* and *In re Kellogg Brown & Root, Inc., 166 S.W. 3d 732, (Tex. 2005),* which discuss the application of the federal and Texas arbitration Acts, i.e. *9 U.S.C. §2* and *Tex. Civ. Prac. & Rem. Code §171.001, et. seq.*

E. The Note.

How the language contained in a note should be construed is the subject analyzed in *EMC Mortgage Corp v. Davis, 167 S.W. 3d 406 (Tex.App—Austin 2005, 53.7(f) motion granted Jul. 24 2005).* In a motion for summary judgment, the lender is not required to file a detailed proof of what is owed and an affidavit of the amount due is sufficient. *Martin v First Republic Bank, 799 S.W. 2d 482, (Tex. App. – Ft Worth 1990, writ den.)* The elements that must be established in the prove-up of a note are: (a) the note exists; (b) the plaintiff is the legal owner or holder of the note; (c) the defendant is the maker or obligor of the note; and (d) a certain balance is due under the note. *Scott v. Commercial Services of Perry Inc., 121 S.W. 3d 26 (Tex. App – Tyler 2003 pet.den.)* and *Wheeler v. Security State Bank, 159 S.W. 3d 754 (Tex.App.--Texarkana 2005).*

Invariably, lenders and mortgage servicers lose notes. A guide on what to do in the "lost note" situation is *Western Nat'l Bank v. Rives, 927 S.W. 2d 681 (Tex.App.—Amarillo 1996, reh. den).* It should be noted that *Western Nat'l Bank* focused on *Tex. Bus. & Com. Code §3.804*, which has been renumbered as *Tex. Bus. & Com. Code §3.309*. Using *Tex. Bus. & Com. Code §3.309*, an assignee who bought a loan from the FDIC was able to enforce the debt with only a copy of the original note, which had been lost while the note was in the FDIC's possession. *Southeast Investments, Inc. v. Clade, 1999 WL 476865, (N.D. Tex. July 7, 1999) affirmed in 212 F.3d 595 (5th Cir.[Tex.] 2000).*

For examples of presumptions that may be helpful in the prove-up of a lost note, also see *Resolution Trust Corp. v. Camp, 965 F.2d 25 (5th Cir. 1992)*. The rights and remedies of the holder or owner of a lost note are also outlined in *Jernigan v. Bank One, Texas, N.A., 803 S.W. 2d 774 (Tex.App.—Houston [14th Dist.] 1991)*.

For a case that contains the actual language used in a lost note affidavit that was approved by the court, see *Diversified Financial Systems, Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C., 99 S.W.3d 349 (Tex.App.—Fort Worth 2003).* In contrast, a lender's creative, yet unsuccessful, efforts to draft a lost note affidavit can be found in *Priesmeyer v. Pacific Southwest Bank, F.S.B., 917 S.W. 2d 937 (Tex.App.—Austin 1996)*.

Many times a foreclosure professional will have difficulty locating a financial institution that seems to have disappeared. If the "lost" institution was insured by the FDIC, the name and address of its successor and their successors in interest may be obtained at the FDIC's website at *www.fdic.gov*. The Federal Financial Institutions Examination Counsel also has a website at *www.ffiec.gov* that can be searched for the names and addresses of institutions that acquired the assets of failed, merged or acquired institutions.

To assess whether a purported document is a note, the document must contain the material terms of the note, which are the amount of principal loaned, the maturity date, the interest rate and the repayment terms. *T.O. Stanley Boat Co. v. Bank of El Paso, 847 S.W. 2d 218 (Tex.1992)*. The rules of construction for notes are the same as any other type of contract. *Shaver v. Schuster, 815 S.W. 2d 818 (Tex.App.—Amarillo 1991, no writ).* A note does not have to be specifically described in the pleadings,

so long as the note is attached as an exhibit. *Hammond v. All Wheel Drive Co., 707 S.W. 2d 734 (Tex.App.—Beaumont 1986).*

III. Title Issues.

This section attempts to cover some of the more esoteric title issues and lets the section entitled "Passing the Torch" that follows discuss common pre-foreclosure and post-foreclosure title issues.

A. Constitutional Mechanic's and Materialman's Liens.

An original contractor may have a silent but superior constitutional mechanic's and materialman's lien based on *TEX. CONST. art. XVI §37*. For an excellent discussion of the constitutional mechanic's and materialman's lien, see *In re A&M Operating Company In. 182 B.R. 997 (E.D.Tex. 1995*) and *Matter of A & M Operating, 84 F.3d 433(5th Cir. 1996)*. This lien is self-executing, but is only valid if the lien claimant had a direct contractual relationship with the owner. *Hayek v. Western Steel Co*., *478 S.W.2d 786 (Tex.1972)* and *Berry v. McAdams, 93 Tex. 431, 55 S.W. 1112 (Tex.1900).*

This obscure lien does not have lien priority over a mortgagee or bona fide purchaser who had no actual or constructive knowledge of the constitutional lien. *Irving Lumber Co. v. Alltex Mortg. Co*., *446 S.W.2d 64 (Tex.Civ.App.—Dallas 1969), aff'd, 468 S.W.2d 341 (Tex.1971)* and *Detering Co. v. Green, 989 S.W.2d 479 (Tex.App.—Houston [1st Dist.] 1999, no writ)*.

B. Deceased Mortgagor.

When a mortgagor dies, in accordance with *Tex. Prob. Code §§37, 38* and *45,* title to the decedent's interest in all real and personal property is immediately vested in the mortgagor's heirs-at-law, as the term "heir" is defined in *Tex. Prob. Code §3*. Once a probate proceeding is opened, title of all real and personal property of the decedent vests in the probate estate subject to the custody and control of the personal representative .

As a practical matter, a deceased mortgagor file, more commonly known as a "dead debtor" file, is not a default problem but rather a title problem. If the mortgagee forecloses, the foreclosure extinguishes the note and security instrument, which are the only tools the mortgagee needs to obtain title and possession of the property from the heirs.

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

If an independent probate administration is opened for the deceased mortgagor, under *Tex. Prob. Code §147*, the independent executor has six months to inventory and collect the assets of the estate before a security instrument can be foreclosed. It is well settled that real property in an independent administration may be non-judicially foreclosed so long as notice is properly given to the independent executor and all other persons obligated for the debt. *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, which is usually found in the warranty deed and many times in the deed of trust, is an alternative to a creditor's administration if the loan is in default. *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)*.

Neither the decedent's estate nor heirs can prevent rescission of a vendor's lien if the loan remains in default after the mortgagor's death because the mortgagee could rescind the vendor's lien and obtain title and possession of the property while the mortgagor was living. *Hudson v. Norwood, 147 S.W.2d 826 (Tex.Civ.App.—Eastland 1941, writ dism'd judgm't corr.)*. So long as the purchase price for the property remains unpaid, the mortgagee has superior title to the property secured by a vendor's lien. As the Texas Supreme Court held in *Estes v. Browning*, *11 Tex. 237 (1853),* "no man shall claim title to the land of another without payment of the price agreed upon."

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

C. Easements.

An easement is defined as: 'A liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil and gives a person the right to use the land of another for a specific purpose. A purchaser is deemed to have knowledge of an easement if a reasonable inspection of the premises would have put the buyer on notice. *Fender v. Schaded, 420 S.W.2d 468,473 (Tex.Civ.App.—Tyler 1967, writ ref'd n.r.e.)*. If a mortgagor grants an easement after executing a deed of trust, foreclosure will extinguish all rights granted under the easement. *Motel Enterprises Inc v. Ahmad I. Nobani, 784 S.W.2d 545 (Tex.App.—Houston [1st Dist.], no writ).*

D. Federal Tax Liens.

Though federal tax liens generally have priority over all other liens regardless of the date of filing, IRS liens do not have priority over a purchase money lien, the theory being that but for the purchase money loan process the borrower could not have acquired the property. *Slodov v U.S., 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978)*, and *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 basic priority rules for tax liens are found in *26 U.S.C. §§6321–6323* but principally *§6323(b) (1)* to *(7)*. The subordination of the federal tax lien to certain perfected security interests and addresses bona fide purchasers. *C.I.R. v. Stern, 357 U.S. 39, 78 S. Ct. 1047, 2 L.Ed.2d 1126 (1958)* and *U.S. v. City of New Britain, Conn., 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954)*.

An IRS lien is applicable to, "all property and rights to the property, whether real or personal, belonging to such person." *26 U.S.C. §6321.* State law determines whether a lien is perfected but federal law determines the priority. *Commissioner of Internal Revenue v. Stern, 357 U.S. 39, 78 S.Ct. 1047, 2 L. Ed.2d 1126 (1958).*

An inferior IRS lien can continue to encumber a foreclosed property if the mortgagee fails to provide the IRS with certain specific information at least 25 days before the foreclosure sale. *26 C.F.R. §§307.7425-2(b)* and *307.7425-3(d)* and *26 U.S.C.A. §7425c(1).*

It is critical that an IRS foreclosure notice must be post marked by the U.S. Postal Service on the envelope at least 25 days before the foreclosure sale. *26 C.F.R. §301.7502-1*. The date of sale is not included in the 25-day calculation. *26 C.F.R. §301.7425-2*.

For a number of years, foreclosure notices to the IRS were addressed to Kimberly Lester in Tulsa, Oklahoma, which appeared to be in direct contravention of IRS Publication 786 (Rev. 1-2006). Now, all foreclosure notices mailed to the IRS must be addressed in accordance with IRS Publication 786 (Rev. 1-2006) which can be found at *www.irs.gov* under the Forms and Publications menu.

A pre-foreclosure notice does not extinguish the IRS lien, but rather gives the IRS the right to redeem the property for the foreclosure sale price within 120 days of the foreclosure sale date. *26 U.S.C.A. §7425* and *Treasury Regulations 26 C.F.R. §301.7425-4.* If the IRS does not redeem, the purchaser at the foreclosure sale takes the property free of the IRS lien.

If proper notice is not given, the property remains subject to the IRS lien. A creative lawyer might use the subrogation argument made in *Dietrich Industries Inc v. U.S., 988 F.2d 568 (5th Cir. 1993)*, if the lender failed to give proper notice to the IRS when foreclosing a loan that had paid off a prior lien that primed the IRS lien. See also *U.S. Clifford, 1993 WL 306669, (N.D.Tex. 1993)* which approved the *Dietrich* argument.

The statute of limitation bars the enforcement of an IRS tax lien ten years from the date of assessment of the taxes - not from the date of filing in the real property records. *26 U.S.C.A. §6502*.

A right of reverter is a non-taxable interest in real estate; therefore, foreclosure of a tax lien does not extinguish reversionary rights. *Cypress-Fairbanks Independent School Dist. v. Glenn W. Loggins, Inc., 115 S.W.3d 67 (Tex.App.—San Antonio 2003, rev. den).*

E. Lis Pendens.

Black's Law Dictionary defines a lis pendens as a "notice recorded in the chain of title to real property… to warn all persons that certain real property is the subject matter of litigation." The purpose of a lis pendens is to put the world on notice as to the facts and issues related to the lawsuit. It also serves to put interested third-party purchasers on notice that the property may be subject to an enforceable judgment affecting the property. *Gene Hill Equip. Co. v. Merryman, 771 S.W.2d 207, 209 (Tex.App.—Austin 1989, no writ).* A lis pendens is appropriate when title or the enforceability of an interest to the real property is in question. *Tex. Prop. Code § 12.007, §13.004* and *Tex. Civ. Prac. & Rem. Code § 125.002*. A lis pendens must relate to a "direct interest" in the real property, *In re Collins, 172 S.W.3d 287, 293 (Tex.App.—Fort Worth 2005, no pet.),* and not a collateral interest. *Flores v. Huberman, 915 S.W.2d 477, 478 (Tex. 1995).*

F. Mechanic's and Materialman's Liens.

Perfection of a valid mechanic's, contractor's, or materialman's ("M&M") lien against the homestead requires exacting compliance by those who furnished labor or materials. *Tex. Prop. Code*

§§53.021-53.059. Architects, engineers, and landscapers who have written contracts with the original owner also have M&M lien rights. *Tex. Prop. Code §§53.02a(c)* and *53.021(d),* respectively.

If a purchaser has knowledge that improvements were being made to the property at or prior to closing, the buyer cannot avoid paying M&M liens because the buyer is not a bona fide purchaser. *Texas Wood Mill Cabinets, Inc. v. Butter*, *117 S.W.3d 98 (Tex.App.—Tyler 2003, no pet)*.

Though "substantial compliance" is the legal standard for perfecting an M&M lien, the standard is still exacting. For example, when the claimant used an acknowledgement instead of a jurat, the lien was declared invalid. *Crockett v. Sampson*, *439 S.W.2d 355 (Tex.Civ.App.—Austin 1969, no writ)*.

A subcontractor must file the M&M lien affidavit within 30 days of the contemplated termination of the subcontractor's performance of the contract, instead of 30 days after termination of the entire project contemplated by the contract. *Page v. Structural Wood Components*, *102 S.W.3d 720 (Tex.2003)*. This interpretation should benefit subcontractors because they can enforce an M&M lien within 30 days of finishing their portion of the project.

For a residential construction project, the statute of limitation for enforcing a lien is one year after the last day the claimant could file a lien affidavit or the termination, completion, or abandonment of the original contract. *Tex. Prop. Code §53.158.*

The statutory procedures for discharging an M&M lien are outlined in *Tex. Prop. Code §53.157.* In addition, *Tex. Prop. Code §53.160* describes a summary motion type of procedure for removing a lien with at least 21 days notice to the lien claimant.

If a patently bogus or fraudulent mechanic's and materialman's lien clouds title to the property, the mortgagee might consider customizing the lien expungement proceedings found in the *Tex.Gov. Code §51.901*, *et. seq.*, but plan on the court requiring a hearing.

If the M&M lien security instrument does not have a power of sale, the M&M lien cannot be foreclosed without a judgment ordering the lien be foreclosed. *Tex. Prop. Code §53.154.*

Since many construction and mechanic's lien contracts contain arbitration clauses, *CVN Group Inc. v. Delgado*, *95 S.W.3d 234 (Tex.2002) reversing 47 S.W.3d 157*, should be reviewed because the Texas Supreme Court upheld an arbiter's findings that a lien was valid even though the trial court came to the opposite conclusion.

Vendors' and purchase money liens have priority over subsequently recorded M&M liens. If, however, the M&M lien is secured by "removables," i.e., any improvements that can be removed from the structure without material damage, the contracting lienholder can use self help to repossess the "removables" from the property. *Exchange Sav. & Loan Ass'n v. Monocrete Pty.*, *629 S.W.2d 34 (Tex.1982)*; and *Hoarel Sign Co. v. Dominion Equity Corp., 910 S.W.2d 140 (Tex.App.—Amarillo 1995, writ den)*. Otherwise, a removable lien has priority over a previously recorded security instrument. *First Nat. Bank in Dallas v. Whirlpool Corp.*, *517 S.W.2d 262 (Tex.1974).*

Examples of removables that can be repossessed by self–help by the lien claimant, so long as there is no damage to the structure, are:

1) Garbage disposals and dishwashers, *First Nat. Bank in Dallas v. Whirlpool Corp., 517 S.W.2d 262 (Tex.1974),* and windows and doors. *First Continental Real Estate Inv. Trust v. Continental Steel Co., 569 S.W.2d 42 (Tex.Civ.App.—Fort Worth 1978, no writ).*

2) Carpets, appliances, smoke detectors, burglar alarms, light fixtures and door locks. *Richard H. Sikes, Inc. v. L & N Consultants, Inc., 586 S.W.2d 950 (Tex.Civ.App.—Waco 1979, writ ref'd n.r.e.)*; and

3) Pumps, compressors, air conditioning and heating systems, fans, toilets, basins, light fixtures, wall switches, electrical control panels, hardware and cabinets. *In re Orah Wall Financial Corp., 84*

B.R. 442 (Bankr.W.D. Tex.1986) and *Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc., 517 S.W.2d 593 (Tex.Civ.App.—Waco 1974, no writ)*.

The test to determine whether an improvement is a removable is found in *Exchange Sav. & Loan Ass'n v. Monocrete Pty. Ltd.*, *629 S.W.2d 34 (Tex. 1982)* and refined in *In re Orah Wall Financial Corp., 84 B.R. 442 (Bankr.W.D.Tex. 1986)*.

A mortgagee should consider demanding that a lien claimant repossess removables from the property, instead of paying off the lien claim, prior to foreclosure. If the mortgagee forecloses the property and later sells the REO, the mortgagee must make sure the earnest money contract does sell the stove, refrigerator, air conditioner or other removables that are still subject to an enforceable lien.

G. Municipal Utility Liens.

A municipality can impose a utility lien on real property for "unpaid municipal utility services provided to real property". This type of municipal lien is superior to all other liens including previously recorded judgment liens. *Tex. Local Gov't Code, §402.002(b)*. However, a municipal utility lien is inferior to a "bona fide mortgage" if the bona fide mortgage was recorded before the municipality's lien. *Tex. Local Gov't Code, §402.002(h)*.

A municipality's lien is perfected by recording in the real property records of the county where the property is located and must contain a legal description of the property and the utility's account number. The lien may include penalties, interest and collection costs. *Tex. Local Gov't Code, §402.002(g)*. However, a municipality cannot enforce a municipal or utility lien against a homestead because these liens are not described in *Tex. Const. art. XVI, §50*.

H. Prior Unreleased Liens.

If a loan has been paid off, the mortgagee has the obligation to prepare and file a release of lien; otherwise, the mortgagee may be liable for damages. *Bayless v. Strahan*, *182 S.W.2d 262 (Tex.Civ.App.—Amarillo 1944, writ ref'd)*. If a lien was paid off at a closing conducted at a title company and the mortgagee fails to prepare and file a release, the title company can record a release using the procedure found in *Tex. Prop. Code §12.017*. This provision, however, is very cumbersome. Most title companies ignore the §12.017 procedure because the distribution of the closing proceeds to each party releases the title company from liability. *FCLT Loans, L.P. v. United Commerce Center, Inc.*, *76 S.W.3d 58 (Tex.App.—Eastland 2002, no writ)*. Further, because a settlement statement or HUD-1 is signed under penalty of perjury, most authorities accept a properly prepared and executed HUD-1 as proof of payment. In addition, since the title company must keep a copy of the check or proof of electronic payment of a loan payoff for three years, the cancelled check or wire transfer can provide additional proof that a prior lien was released by payment.

I. Receiverships.

If a borrower is involved in an acrimonious divorce, the divorce docket sheet should be reviewed for a receivership. Although a lienholder is entitled to notice, most receivers fail to give notice of the receivership to the mortgagees and also fail to file a *lis pendens* in the real property records. *North Side Bank v. Wachendorfer*, *585 S.W.2d 789 (Tex.Civ.App.—Houston [1st Dist.] 1979, no writ)*. Consequently, most lenders and mortgage servicers never know a receivership exists and that the property is in *custodia legis*, i.e. under the custody and control of the court and receiver.

A property subject to a receivership proceeding cannot be foreclosed without a court order. *Texas Trunk Ry. Co. v. Lewis, 81 Tex. 1, 16 S.W. 647 (Tex. 1891) and Cline v. Cline 323 S.W.2d 276 (Tex.Civ.App.—Houston 1959, writ ref'd n.r.e.)*. A receivership, however, does not extinguish the mortgagee's security interest, but only preserves the status quo. *First Southern Properties, Inc. v. Vallone, 533 S.W.2d 339 (Tex. 1976)*.

Rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver as well as the receivership powers of the court. *Tex. Civ. Prac. & Rem. Code §64.00 et. seq.* and *Tex. Rule Civ. Prac. §695* and *695(a)*. A receiver who performs any act without court approval may be held personally liable. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver*, *191 S.W. 591 (Tex.Civ.App.—El Paso 1917, writ ref'd)*.

Receiverships arising because of marital property disputes fall under *Tex. Fam. Code §6.502* and *6.709*. For mineral interest receiverships, see *Tex. Civ. Prac & Rem. Code §§64.091* and *64.092* and *Jones v. Colle*, *727 S.W.2d 262 (Tex. 1987)*.

In a receivership action, the borrower has the burden of proof that the property is in danger of being materially injured and that a sale of the property is sufficient to discharge the mortgage debt. *Tex. Civ. Prac. & Rem. Code §64.001(b)* and *(e)*. *Greenland v. Pryor*, *360 S.W.2d 423 (Tex.Civ.App.—San Antonio 1962, no writ)*.

Contrary to most receivers' assumptions, a superior lien against the property is entitled to a full pay-off before receivership fees are paid, unless the lienholder asked for or consented to the receivership. *Chase Manhattan Bank v. Bowles, 52 S.W.3d 871 (Tex.App.—Waco [10th Dist.] 2001, no writ)*. If the lender expects to object to fees, to perfect an appeal any fee objections must be made at the post trial hearing on fees. *Jocson v. Crabb*, *133 S.W.3d 268 (Tex. 2004),* though *Jocson* deals with ad litem fees.

If there appears to be no equity in the property, the mortgagee should seek to vacate the receivership. *Couch Mortg. Co. v. Roberts*, *544 S.W.2d 944 (Tex.Civ.App.—Houston [1st Dist.] 1976, dism'd); King Land & Cattle Corp. v. Fikes, 414 S.W.2d 521 (Tex.Civ.App.—Fort Worth 1967, writ ref'd n.r.e.; and Best Inv. Co. v. Whirley, 536 S.W.2d 578 (Tex.Civ.App.—Dallas 1976, no writ)*.

The failure of the mortgagor to pay taxes and keep the property insured are not grounds for a receivership because the mortgagee can pay these expenses and add them to the original loan obligation. *Ferguson v. Dickenson*, *138 S.W. 221 (Tex.Civ.App.—Fort Worth 1911)*.

J. Republic of Texas ("ROT") and Debt Elimination Scams.

Over the last several years, a proliferation of specious liens and claims inspired by the Republic of Texas ("ROT") like disciples and "debt elimination scams" have been used to thwart foreclosures and evictions. Because of fanatical behavior of these borrowers who use common law liens, bogus lien releases, and numerous weird and nonsensical documents filed in the chain of title to stymie foreclosure, many title insurance underwriters refuse to insure a foreclosure REO title policy because of the litigation risk unless the lender judicially forecloses.

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

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

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

Whenever faced with a ROT issue or debt elimination scam, the provisions in *Tex. Govt. Code §§51.901-51.905* should be used to expunge any instrument that clouds title or purports to be a UCC filing. However, the nuances and pitfalls connected with using *Tex. Govt. Code §§51.901 – 51.095* should be studied in light of *In re Purported Judgment Lien Against Barcroft*, *58 S.W. 3d 799 (Tex.App.—Texarkana [6th Dist.] 2001)*. In *Barcroft*, the case was remanded to the trial court because the order expunging the bogus lien was not drafted to comply with each nuance of *Tex. Govt. Code §§51.901-51.903*.

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

Though the claims made by Republic of Texas militants and debt elimination scammers are specious, lenders can spend years in protracted litigation trying to foreclose and obtain title and possession of the secured property. The best defense against these zealots is immediately filing a judicial foreclosure suit with: (a) *Tex. Govt. Code §§51.901-51.905* and *Tex.Civ.Prac. & Rem. Code §§12.001 – 12.007* allegations to remove bogus liens and UCC filings; (b) a request that non-judicial foreclosure be conducted against the property with the lender filing a report of sale and getting a order confirming sale similar to *Tex. Prob. Code §346* and *353* after the non-judicial foreclosure sale; (c) a request for a permanent injunction to prevent further document harassment by the zealot; and (d) a request for a writ of possession from the District Court to evict any occupant of the property under *Tex. R. Civ. P. 310*. If you call the author, I will send you sample pleadings that have been tested in practice against mortgage scammers.

K. Texas Labor Code Liens.

Two liens causing confusion to title professionals that arise under the Texas Labor Code are: (a) *Tex. Labor Code §61.001, et. seq.,* which deals with non-payment of wage claims; and (b) *Tex. Labor Code §213.001, et. seq.* which relates to overpayment of unemployment compensation. These liens are easily distinguishable because the lien instrument recorded in the real property records recites which Texas Labor Code provision gives rise to the lien.

The wage claim lien arising under *Tex. Lab. Code §61.001* is superior to all other liens encumbering the property except for ad valorem taxes. *Tex. Lab. Code §61.0825*. Unemployment compensation claims are assessed and collected under the provisions of *Tex. Lab. Code §§213.031-213.036*. Once the notice of levy is filed, the notice is effective against all property rights of the delinquent tax payer, but this lien is not superior to preexisting liens. *Tex. Lab. Code §213.059*.

L. Texas Tax Liens.

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

Taxing authorities must mail delinquent tax notices to property owners by first class mail, postage pre-paid. There is a statutory presumption of mailing. *Tax Code §1.07*. If the mailing presumption is challenged, the taxing authority has the burden of proof. *WHM Prop Inc. v. Dallas County, 119 S.W.3d 325 (Tex.App.—Waco 2003, reh. overruled) and New v. Dallas Appraisal Review Bd., 734 S.W.2d 712, 714 (Tex.App.—Dallas 1987, writ ref'd).*

When it comes to tax liens, the bane of title examiners are the transferred tax liens authorized under *Tex. Tax Code §§32.06* and *32.065*. With the borrower's consent, an investor called a "transferee" can pay the taxpayer's delinquent taxes and obtain a certificate of payment from the taxing authorities. As between the taxpayer and the transferee, the taxpayer executes a note and deed of trust secured by the taxpayer's property in an amount that includes the taxes and penalties paid to the taxing authority, as well as additional transaction and closing costs that may range between twenty to fifty percent more than the amount paid to the taxing authorities. In addition, the Texas Tax Code allows the interest rate on the taxpayer's note to be as much as eighteen percent. Though it has never been tested, most lenders assume the note and deed of trust obtained by the transferee to secure the taxpayer's debt has the same superior lien status as the taxing authority's ad valorem tax lien.

Until September 1, 2005, a transferred tax lien could be non-judicially foreclosed without notice to any preexisting lienholder because foreclosure notices are sent only to the person obligated for the debt. Since a transferred tax lien has putative superior lien status, a transferred tax foreclosure extinguished all prior liens against the borrower's property, including the purchase money lien and other liens recorded first in time.

In 2005, the Tax Code was changed to require what amounted to a 21-day notice to a preexisting lienholder prior to foreclosure. Then in 2007, amendments to *Tex. Tax Code §§32.06* and *32.065*, make transferred tax lien investors foreclose in accordance with Tex. R. Civ. Proc. 735 and 736. Because Rule 735 and 736 contained no provisions for how transferred tax liens should be foreclosed, the Texas Supreme Court appointed a task force that includes a district clerk, court coordinator, and two title representatives to draft proposed tax lien foreclosure amendments. The proposed rules are expected to be finished by the end of 2008.

After non-judicial foreclosure of an investor tax lien, any mortgagee with a lien encumbering the foreclosed property has one year to redeem the foreclosed property from the foreclosure sale buyer. The redemption price is the amount paid at the foreclosure sale, plus costs and accrued interest to the date of redemption or 118 percent of the judgment amount, whichever is less. If a mortgagee, including a purchase money lienholder, fails to timely redeem, its security interest in the property is extinguished.

Except for transferred tax liens created under *Tex. Tax Code §§32.06* and *32.065*, all other tax liens must be judicially foreclosed and all lienholders of record must be made a party in the delinquent tax suit; otherwise, the judgment against the non-party lienholder is void. *Murphee Property Holdings, Ltd. v. Sunbelt Sav. Ass'n of Texas, 817 S.W.2d 850 (Tex.App.—Houston [1st Dist.] 1991, no writ).*

To challenge a tax sale, an interested person should consider whether a restricted appeal is appropriate. *See Quaestor Inv. Inc. v. Chiapas 997 S.W.2d 226 (Tex. 1999)* and *Texaco Inc. v. Central Power & Light Co. 925 S.W.2d 586 (Tex.1996)*. However, a restricted appeal must be filed within six months of the date the judgment was signed. *Tex. Civ. Prac. & Rem. Code §51.013.*

A mortgagee who pays the mortgagor's taxes to preserve and protect the mortgagee's interest in the property is not considered a volunteer and is subrogated to the rights of the taxing authority. *Smart v. Tower Land and Inv. Co., 582 S.W.2d 543 (Tex.Civ.App—Dallas 1979), appeal on other grounds, 597 S.W.2d 333 (Tex.1980)* and *Vista Development Joint Venture II v. Pacific Mut. Life Ins. Co., 822 S.W. 2d 305 (Tex. App—Houston [1st Dist] 1992, writ den).*

It should not be presumed that the person who holds legal title to the real property is the "owner" for tax purposes. The Tax Code does not define the term "owner" and the Texas Supreme Court has indicated that the meaning of the term "owner" is not the same under all circumstances. *Realty Trust Co. v. Craddock, 131 Tex. 88, 112 S.W.2d 440, 443 (1938).* For example, a person may be considered the taxable owner if the person is the record title owner and another person could be considered the taxable owner because the person is in possession of the property. *Childress County v. State*, *127 Tex. 343, 92 S.W.2d, 1011, 1015 (1936).* If there is no apparent holder of legal title, then any holder of equitable title is considered the taxable owner. The holder of equitable title is considered the taxable owner over a party with a contingent interest. *Travis County Appraisal District v. Signature Flight Support Corporation, 140 S. W. 3d 833.*

A mortgagee's security interest is a "substantial property interest" which is very important in the tax lien foreclosure process because it means a mortgagee must receive notice of foreclosure to conform to constitutional notions of due process. *Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).*

IV. Passing the Torch.

For the last several years Michelle Anderson and Clark Royle have been responsible for all title curative issues related to foreclosure for the firm of Barrett, Daffin, Frappier, Turner & Engel, LLP. Ms. Anderson handles pre-foreclosure title issues and Mr. Royle handles post-foreclosure title issues. For manufactured housing title issues, Matthew Norvell, who is new to the firm but with experience in the manufactured housing industry, is responsible for ensuring that the manufactured home in a land-home transaction has been properly converted to real property.

To give Ms. Anderson, Mr. Royle, and Mr. Norvell an opportunity to demonstrate their "down-in-the-trenches" title experience, this section is reserved for each of them to discuss their title niches. Their work product was not edited so as to make them accountable for what they say and how they say it in a formal presentation as they hone their skills as practicing attorneys. It would be interesting to ask each of them a year from now, five years from now, and ten years from now if they would change their presentation – since experience is such a powerful teacher.

A. Resolving Title Issues Prior to Foreclosure Sale – *Michelle Anderson*

Many title issues come to light during the foreclosure process. Some are fatal to the validity of your client's lien and the subsequent foreclosure, while others are minor and will not affect the foreclosure. The key is determining which is which. The most common issues that arise are no lien of record, legal description discrepancies, gaps in the chain of title, defects in the security instrument and/or vesting deed, lis pendens, and prior liens.

The most important issues to resolve immediately relate to legal description discrepancies and no lien of record since these go directly to the validity and strength of the foreclosure itself. In the event that the title search reflects that the subject Deed of Trust ("DOT") or Texas Home Equity Security Instrument ("HESI") has not been recorded of record, your first inquiry should be to your client. Determine whether your client still has the original security document in their possession. If so, file the document immediately in the real property records where the subject property is located. It is important to be aware of any liens or warranty deeds recorded against the property between the time of origination and ultimate recording as this may negatively affect the priority of your client's lien. If the transaction was insured by a title company and your client does not have the original DOT or HESI (and/or additional liens or conveyance deeds have been recorded in the interim), then a title claim is in order. Keep in mind that if the security instrument was not recorded, a Mortgagee Title Policy ("MTP") will not have been issued. Therefore, a claim may be filed using only the Title Commitment and the HUD-1 Settlement Statement from closing evidencing that a MTP was purchased.

Once the lien has been established against the property, the next most critical matter to address is the legal description. Does the legal description contained within the DOT or HESI adequately describe the subject property? The current standard for making this determination is reasonable certainty. *Zobel v. Slim, 576 S.W.2d 362 (Tex. 1978).* If the legal description contains minor typographical errors (i.e., "map records" spelled "mpa recrods"), these errors are considered nonfatal to the lien and to the subsequent foreclosure. In addition, incorrect plat references are not considered fatal so long as the Lot, Block, Subdivision, and County are correct so that the property may still be identified with reasonable certainty. Should the legal description error be fatal, for instance, the Lot, Block, or Subdivision is incorrect or there is a discrepancy between the legal description on the security instrument and a vesting deed recorded prior in the chain of title, then this matter must be investigated further and a title claim may be necessary. In the past, legal description title claims were frequently resolved by refiling an Affidavit setting forth the correct legal description with a certified copy of the previously recorded DOT or HESI. While this manner of resolution is not uncommon, we are seeing an increase the requirement of judicial reformation suits to resolve these legal description issues. Once the legal description has been corrected, the posting for foreclosure may proceed.

While the no lien of record and legal description issues must be resolved prior to proceeding with foreclosure posting, other defects may be cured during the period between posting and the foreclosure sale date. Chain of title issues are one such category of defect. These types of issues can range anywhere from missing conveyance deeds up the chain to an unrecorded Power of Attorney or defects on the face of the recorded documents. If faced with any issues of this nature, the first step is to contact your client to confirm whether a MTP was issued. If it was, then a notice of title claim should be submitted to the insurer. If replacement or corrective documents can be located and recorded, then this may be the resolution to your claim. Otherwise (and oftentimes) a letter agreeing to indemnify or reinsure at the REO sale will likely be the response received from claims counsel. In these situations, a recommendation might be made by you to your client that they close their REO transaction through a title office of the insurer to avoid having to address the same title issue at REO.

You will also likely see conveyances occurring after the origination of your client's lien. Unless the post-origination conveyance deed specifically states that the Grantee assumes the existing liens recorded against the property, then the conveyance is made subject to your client's lien. The foreclosure should proceed and the result will be that the conveyance will be extinguished. Without going into a great deal of detail as it is a subject for another paper, if there

is a post-origination assumption, it is good practice to confirm with your client whether they were aware of and approved this assumption as that will impact your notices to any obligors on the debt. Lack of adequate notice to approved assumptors will result in a "bad" foreclosure.

Notices of lis pendens and civil lawsuits (where no notice of lis pendens is filed) are found quite frequently in title searches conducted prior to foreclosure. Oftentimes, the suit will be filed by a homeowner's association ("HOA") for nonpayment of assessments. The key item to review is the association's covenants and restrictions. If the restrictions contain language indicating that their lien is subordinate to your client's lien, then the suit (and even possible HOA foreclosure) does not impact your client's lien. The times to be very cautious are when there is no language to suggest the HOA's lien is subordinate to your client's. Monitoring those suits and possible foreclosure sales is integral to protecting your client's lien. The lien may be so threatened that your client will need to pay the delinquent amount to the HOA in order to preserve their own lien. Other civil suits filed against your client's borrower, but not directly affecting the property (i.e., suits for money damages only), may be dismissed as an issue if the suit (or final judgment) is dated after the recording date of your client's lien as any resulting judgment, if it attaches to the property, would be subordinate to your client's lien. More serious suits, which potentially will affect your client's interest in the property, may be grounds for a title claim. For instance, if the facts giving rise to a trespass to try title suit predate the loan origination, then a title claim should be filed so that the insurer may intervene on your client's behalf and protect your client's interest.

Another common issue found in pre-foreclosure title searches are prior unreleased liens. Many of these liens can be resolved with application of the Texas Master Indemnity Agreement ("MIA") (Addendum 1). If the prior lien meets the requirements set forth in the MIA, then this issue may be dismissed. If you or your client have any reason to believe the lien remains unpaid (rather than simply unreleased), then a title claim accompanied by a payoff of that prior lien to evidence the "loss" to your client is highly recommended. Even if the title company's claims counsel decides to take no action to pay the lien off and simply offers indemnity, at least you have done your due diligence and duty under the MTP and given the requisite notice to the title company of this title defect.

In pre-foreclosure, the concern is that your client's lien is free of any defects that will render it invalid and affect the integrity of the foreclosure sale. The amount of time from discovering a title issue to concluding the foreclosure is short; which means the time you have to cure a matter is even shorter. Delay costs our clients greatly, so having a process for reviewing the issue (at least initially) can save a great deal of time. To that end, I have attached a flow chart for quick reference. Obviously, some issues are more complex and will take longer than other to both research and resolve, but most can be reviewed and resolved quite expeditiously.

Addendum 1

TEXAS MASTER INDEMNITY AGREEMENT (T-29)

[Insert Name of Indemnifying Title Insurance Company](hereinafter called in this Agreement "We"), subject to the terms, provisions, and conditions of this Agreement, agree to indemnify [Insert Name of Title Insurance Company Requesting the Indemnity] (hereinafter called in this Agreement "You") against loss, cost damage or expense You may suffer by relying on this Texas Master Indemnity Agreement (called in this Agreement "Agreement") because of those "POTENTIAL DEFECTS" described below, if:

1. We previously have issued: (i) an owners policy to the current title holder; or (ii) a mortgagee policy to a lender who subsequently has acquired the insured land and is the seller or mortgagor in the current transaction and remains an insured under the mortgagee policy following foreclosure or a deed in lieu of foreclosure (hereinafter called in this Agreement "Our Policy");

2. Our Policy covers some or all of the land insured under Your Policy (hereafter called in this Agreement the "Land"); and

3. Our Policy did not take exception to the POTENTIAL DEFECTS.

POTENTIAL DEFECTS

I. Questions as to a Homestead interest in the Land

II. Questions as to whether a recorded Abstract of Judgment Lien, Federal Lien or State Tax Lien applies to a prior owner or has been satisfied or released.

III. Questions as to whether a recorded mortgage or other consensual lien, including but not limited to a vendor's lien, deed of trust, mechanic's lien contract, home equity lien, reverse mortgage, or owelty lien (hereinafter called in this Agreement a "Mortgage") has been satisfied or released;

IV. Questions as to whether a trustee or attorney in fact had the proper authority to convey the title to the Land to the current insured owner or a predecessor in title;

V. Questions as to the authority of an executor/executrix, or administrator/administratrix to convey the title to the Land to the current insured owner or a predecessor in title.

HOMESTEAD

Item I above applies when a deed in the chain of title to the Land, prior to or contemporaneously with Our Policy, does not contain either:

1. Joinder by the spouse of the grantor; or

2. A statement on the deed that the grantor is a single person; or

3. A statement on the deed or other recorded instrument that the Land conveyed by the deed is not the homestead of the grantor; or

4. A statement that the property is community property under the sole management and control of the grantor.

JUDGMENT LIENS OR FEDERAL OR STATE LIENS

Item II above applies to a recorded judgment lien(s), including a federal judgment lien(s) or a federal lien(s) securing the payment of a criminal fine/restitution pursuant to 18 USC §3613 or appropriate state law, when the lien or judgment states what appears to be a sum certain, or when a recorded federal tax lien(s) or state tax lien(s) were recorded prior to the date of Our Policy; if

1. The Lien(s) are not against the insured under Our Policy;

2. The face amount of the Lien(s), exclusive of costs, interest and attorneys' fees, do not exceed $500,000.00; and

3. No notice of any proceedings or levy to collect the Lien(s) have been recorded

4. We did not take exception to such Lien(s) in Our Policy.

"State tax lien shall not include: (i) any lien securing the payment of ad valorem taxes; and/or (ii) any municipal/city or county lien for weed or sanitary liens, demolition liens, street assessment or paving liens, and/or utility service liens or other similar matters.

MORTGAGES
Item III above applies when a recorded Mortgage(s) was recorded prior to the date of Our Policy if:

1. No foreclosure proceedings respecting the Mortgage(s) have been recorded;

2. No Mortgage(s) secure a principal amount of more that $500,000.00; and

3. We did not except to such Mortgage(s) in our Policy.

AUTHORITY OF TRUSTEES AND ATTORNEYS IN FACT
Item IV above applies when your search of the title finds insufficient or no recorded evidence of the power or authority of the conveying trustee or attorney in fact to make the conveyance of the Land, provided that there is no notice of record in the county where the Land lies of any proceeding to attack or set aside the conveyance by the trustee or attorney in fact. Item IV applies when Our Policy insures the current seller or mortgagor of the Land.

AUTHORITY OF EXECUTOR OR ADMINISTRATOR
Item V above applies when your search of title finds insufficient or no recorded evidence of the power or authority of the conveying executor/executrix or administrator/administratrix to sell and convey the Land, provided that there is no notice of record in the county where the Land lies of any proceeding to attack or set aside the conveyance by the executor/executrix or administrator/administratrix. Item V applies when Our Policy insures the current seller or mortgagor of the Land.

CONDITIONS:
The indemnity provisions of this Texas Master Indemnity Agreement are subject to the following conditions:

1. The agreement is only applicable to policies issued on Texas property.

2. You are not required to authenticate Our Policy that appears valid on its face. However, if We request, You agree to provide a copy of Our Policy as a condition to making a claim under this Agreement.

3. Our liability is limited to the face amount of Our Policy or $500,000.00, whichever is less, subject to the terms and conditions of Our Policy, and shall not enlarge Our liability and obligations beyond those provided in Our Policy.

4. You agree to notify Us of a claim under this Agreement as if You were an insured claimant under Our Policy. The notice should be sent by: (i) certified mail, return receipt requested, to:

[Insert Mailing Address of the Indemnifying Title Insurance Company]

Such notice shall be given as soon as possible after receipt by You of a notice of claim under Your Policy, but in no event, more than thirty (30) days thereafter. Provided, however, a notice provided after such 30 day notice period may still be timely, so long as We are not prejudiced by any delay in giving such notice.

5. If any claim is made under this Agreement, You agree to perform in accordance with the terms hereof, promptly and in good faith. However, until We are notified of a claim hereunder, there is no obligation to take any action allowed or required under Our Policy.

6. This Agreement may be supplemented or superseded by a specific written indemnity by and between You and Us and such specific agreement shall not be deemed to suspend, cancel, or otherwise terminate any of the rights or obligations of Yours or Ours under this Agreement as to policies which may be written by You in the future.

7. We may cancel this Agreement by giving written notice to You thirty (30) days after the date We mail such notice. However, it is agreed that such cancellation shall not diminish or impair any of the indemnities arising under this Agreement prior to the expiration of such thirty (30) day period.

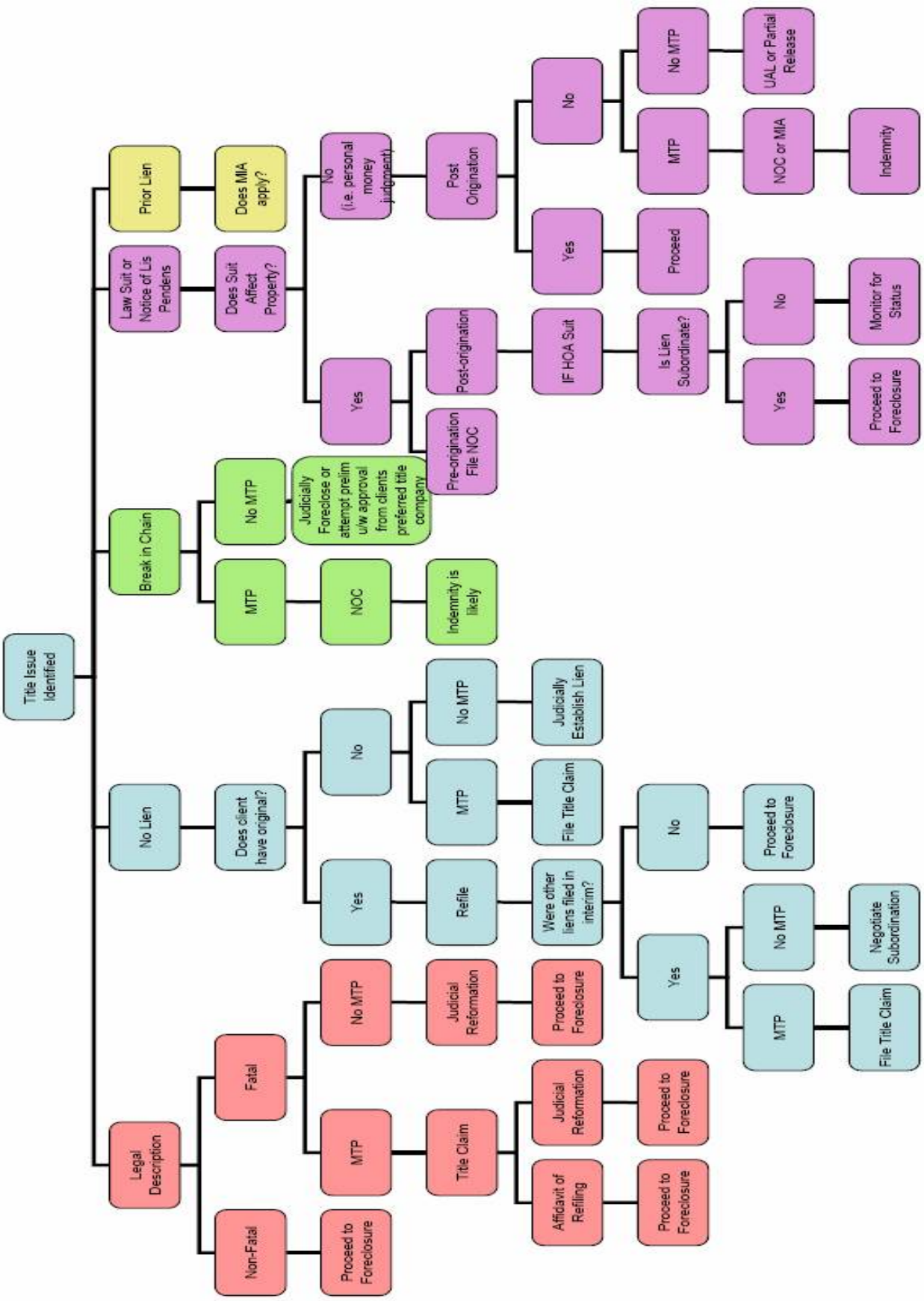
8. This Agreement applies when We, the signatory to this Agreement, have issued: (i) an owners title policy to the transferor or mortgagor of the Land in the current transaction; or (ii) a mortgage title policy to a lender who has acquired the title, is the seller or mortgagor in the current transaction, and remains an insured under the policy following foreclosure or a deed in lieu of foreclosure. For this indemnity to apply, you must have issued a title policy to the transferee or mortgagee of Our Insured. We and You understand and agree this agreement shall continue in force so long as You have liability under Your Policy or under its Indemnity(ies) to subsequent insurers for a POTENTIAL DEFECT covered by Our Policy subject to the terms and conditions of this Agreement.

The effective date of this Texas Master Indemnity Agreement is _____, 20___.

INDEMNITOR:

[Insert Name of Indemnifying Title Insurance Company]

By:_____


Title Issue Identified
Legal Description
Fatal
Non-Fatal
MTP
No MTP
Proceed to Foreclosure
Title Claim
Judicial Reformation
Affidavit of Refiling
Proceed to Foreclosure
Proceed to Foreclosure
No Lien
Does client have original?
Yes
Refile
Were other liens filed in interim?
No
Proceed to Foreclosure
Yes
MTP
No MTP
File Title Claim
Negotiate Subordination
No
Judicially Establish Lien
MTP
File Title Claim
Break in Chain
MTP
NOC
Indemnity is likely
No MTP
Judicially Foreclose or attempt prelim u/w approval from clients preferred title company
Law Suit or Notice of Lis Pendens
Does Suit Affect Property?
Yes
Pre-origination File NOC
Post-origination
IF HOA Suit
Is Lien Subordinate?
Yes
Proceed to Foreclosure
No
Monitor for Status
Yes
Proceed
No (i.e. personal money judgment)
Post Origination
No
No MTP
UAL or Partial Release
MTP
NOC or MIA
Indemnity
Prior Lien
Does MIA apply?

B. Resolving Title Issues After Foreclosure – *Clark Royle*

There are several types of problems that are not addressed prior to the foreclosure sale that must be handled before conveyance to a purchaser. Many of these issues must be addressed considering not only legal consequences, but also solutions that are acceptable to the title company insuring the transaction. Such issues include survey discrepancies, Federal Tax Liens, home owners associations, mechanic's liens, and UCC filings. All of the scenarios can be resolved with the aid of title companies and some title curative knowledge.

Post-foreclosure issues with surveys present a peculiar problem for lenders trying to sell a foreclosed property, because oftentimes the issue raised by the title company or HUD at the REO sale is not an issue that is insured by the title policy. A good example of this is access to a water well. Many properties outside of the city limits have shared-well agreements with their neighbors. If the agreements are not recorded, the property where the well is located might deny the neighboring property access to the well. HUD is particularly sensitive to this issue, and will require a remedy. The first step is to see if a recorded shared-well agreement exists. If one does not, it is worth researching (the title company's file and the loan-origination file) to see if there is an unrecorded shared-well agreement. If no trace of an agreement can be located, then the options include drilling a new well or negotiating a new shared-well agreement with the neighbor. Title companies have consistently denied title-claims that a shared-well constitutes an existing overlapping improvement; however, the notion is not beyond the realm of possibility.

Other issues faced post-foreclosure include acreage amounts and access. When a title company (or FHA) disputes the acreage amount that can be conveyed, a person performing the title curative review should analyze the loan origination documents to discern the intent of the parties and to ascertain whether the borrower owned the acreage encumbered. If the borrower did own the land and the intent of the parties was followed, then the legal description on the security instrument is definitive. Access issues often arise when a smaller tract of land out of the borrower's landholding was encumbered. If the foreclosed property does not have access to a roadway, it is advisable to have an access agreement drawn with the roadway's legal description clearly delineated for the involved parties to sign. This action will most likely require having a licensed surveyor survey the access easement required. Obtaining access from the neighboring property-owner can be particularly delicate when the neighbor is the same person as the foreclosed debtor. The requirements for establishing an easement by necessity are outlined in *Koonce v. Brite Estate*, 663 S.W.2d 451 (Tex. 1984).

Lis pendens filed after the foreclosed deed of trust must be addressed before conveying to a third party. The first step should be attempting to obtain a release from the attorney representing the party who filed the lis pendens. If this is not an alternative, then some underwriters will still insure the transaction if it is clear that the property could no longer be a part of the suit. In a case where the defendant is also the foreclosed property owner, there is a persuasive argument that the defendant is no longer the owner of the property, and therefore the lis pendens does not affect the property. If these options are not satisfactory, then the pleadings may have to be amended to meet the underwriter's requirement.

The United States should be noticed before a lender forecloses on a property where a Federal Tax Lien attaches; however, if a foreclosing lender failed to notice the IRS regarding a specific lien, then the lender can still request a discharge from the United States. The IRS provides Publication 783: Instructions How to apply for a Certificate of Discharge of Property from Federal Tax Lien.

Homeowners' associations must be monitored to ensure that they're playing by their own rules, as established by their restrictions. A careful reading and comprehension of the restrictions is essential to obtaining an accurate and fair transfer of title from the foreclosing lender to the third-party purchaser.

Inferior HOA liens should not require the foreclosing lender to pay fees accruing before the date of the bank's foreclosure; neither should the bank pay bogus fees or assessments that allegedly accrued after foreclosure to compensate for the eradication of the HOA's lien. Some title companies may require a deed from the homeowner's association into the foreclosing lender, even when the HOA's lien was inferior. While this request for title curative action may be honored for expediency's sake, it is best to avoid unnecessary curative action.

Mechanic's Liens and UCC liens are among the most problematic issues facing attorneys handling post-foreclosure conveyances. When dealing with a mechanic's lien, the first step is to analyze the form and content of the filed lien to ensure that it complies with Section 53 of the Texas Property Code. A mechanics lien that is defective on its face, or has expired by its own terms should be removed from Schedule "C" of the title commitment; a release of lien should be sent to the lien-claimant along with a letter detailing the inadequacy or unenforceable nature of the lien. If the lien-claimant fails to release the lien, then the lien-claimant should be informed that judicial removal will be sought, and the process should be begun.

Fixture filings present a peculiar problem because while they do not affect title to the real estate itself, title companies will not issue a clean policy without having the UCC liens removed. Sending a letter to the lien-claimant advising that he or she may either release the lien or remove the fixture is a good first step; a copy of the UCC-3 should be included with this letter. If the lien-claimant is unresponsive, then the lien-claimant should be advised that judicial removal of the lien will commence.

Rescinding a foreclosure sale is very costly and time-consuming for a lender. In addition to the requirements set out in Section 51 of the Property Code, consideration must be given to requirements of agencies such as HUD and the VA (when applicable) and title company's requirements. Fatal errors that would require rescinding the foreclosure sale and re-foreclosing include incorrect lot or blocks in the Notice of Sale, grossly inaccurate metes and bounds descriptions, failure to give notice to all debtors, and posting in the incorrect county. Issues that do not require re-foreclosure include omission of the plat's recording information, misspellings (as long as the property can be identified), or omission of the city's name in the legal description. Since the Property Code does not outline many requirements for the fatality of legal descriptions, a good rule of thumb when deciding whether a sale needs to be rescinded and re-foreclosed is: Could there be any confusion regarding the exact location of the property based on the legal description?

C. Resolving Title Issues in Manufactured Housing – *Matthew Norvell*

What is the goal of a land-home foreclosure?

The end goal of a land-home foreclosure is to foreclose upon both the land and the home together as real property. A manufactured home is not considered to be attached to the real property until the proper jurisdictional steps have been taken to purge or surrender the manufactured housing title. If these steps are not completed prior to foreclosure, it is considered a title defect.

Who are the entities involved in a land-home foreclosure?

The primary entities involved in manufactured housing are the Government Sponsored Entities ("GSE") and the Texas Department of Housing and Community Affairs ("TDHCA"). The TDHCA registers manufactured home titles as both real and personal property with the State of Texas. TDHCA rules and regulations affected how manufactured houses in Texas are titled and conveyed as real property.

Why are title defects so dangerous to land-home foreclosures?

If the land-home loan is a HUD loan, then it is covered by FHA insurance. This insurance coverage enables the holder of a land-home loan to submit a claim to HUD for any deficiency that results from the sale of the property. As rapid collateral depreciation is an almost certainty in the manufactured housing industry, mitigating that deficiency is a priority.

However, if a loan is conveyed to HUD post-sale without the proper jurisdictional steps having been taken to purge or surrender the title, then HUD will consider that loan to have a title defect. HUD will reject the conveyance and the loan will have to be repurchased. In addition, any deficiency that exists will not be covered by HUD.

For example, a land-home loan in the amount of $100,000.00 is originated in 2004. The collateral is a 2004 double-wide home on a .5 acre plot of land in a rural community. The loan goes into default in 2006. After two years of loss mitigation, the loan goes into foreclosure and eventually is taken to sale. The total debt at time of sale is $110,000.00. The home is vacant at the time of sale and reverts to the noteholder. The noteholder conveys a warranty deed to HUD. HUD is responsible for marketing and carrying the property, and ultimately has to sell the home for $63,000.00. There is at that time a -$47,000.00 deficiency on the loan.

If the home was conveyed to HUD without any defects in the title, HUD will reimburse a significant portion of the deficiency and the prior noteholder will receive a full payoff or an amount close to the full payoff.

If the home was conveyed to HUD with defects in the title, HUD will reject the conveyance and convey it back to the noteholder. The noteholder will then be responsible for marketing and selling the property, and will have to absorb -$47,000.00 loss.

How is a Texas MHU properly conveyed as part of the real property?

In order to secure a real property lien on a manufactured home under *Tex. Prop. Code §2.001*, the manufactured home must be classified as real property by way of an executed and recorded Certificate of Attachment ("COA") or a Statement of Ownership and Location ("SOL"). The COA or SOL must be registered with the TDHCA and also recorded in the real property records in the county in which the home is located.

However, if no COA or SOL was properly executed or recorded at origination, *Tex. Occ. Code §1201.2055* provides for the application to the TDHCA for the issuance of an SOL following the expiration of a 60-day written demand notice that is sent to the borrower and all of those individuals in

the chain of title (see Application as Addendum 1 and 60-day Notice as Addendum 2). This represents a new procedure for obtaining an SOL from the TDHCA in Texas. Once the 60-day notice period expires, an application for an SOL can be made and sent to the TDHCA for issuance of a SOL. This document is then returned to the applicant for recording, and a recorded copy must be returned to the TDHCA within 60 days.

The issuance of the SOL before sale is the key to having the loan successfully conveyed to HUD after sale. Once the SOL is recorded in the county of the deed and returned to the TDHCA, the home is conveyed as part of the real property and the property can be foreclosed upon. Because the law provides a means for obtaining a SOL even if one was not issued and recorded at loan origination, additional work must be done in the review of the land-home file to ensure proper servicing.

Can I submit a title claim post-sale for a home on which a SOL was not issued?

This question arises most often when the conveyance to HUD has been rejected and a repurchase situation has arisen. One option is to make a title claim demand; however, a title claim is not going to solve the underlying problem.

The title company will probably resolve the defect by agreeing to indemnify a future sale of the home. This does not prevent HUD from rejecting the conveyance. HUD does not want an indemnification; HUD wants no title defects.

What is the process for handling a MHU file?

To accomplish the goal of issuance and proper recording of an SOL before the foreclosure sale, the most efficient method is a five step process: Identification, Research, Execution, Application, and Issuance.

I. Identification Phase

The identification phase involves assessing the credibility of the information indicating that the loan is a land-home transaction. This information can come from several different sources and all must be taken into consideration.

Recorded Deed of Trust

Reviewing the chain of title is the first step in determining whether a MHU has been converted to real property If a SOL is recorded, conversion has taken place. If there is no recorded and executed SOL, but the deed-of-trust includes MHU serial or label numbers or as part of the legal description, an application to the TDHCA for a SOL can be prepared.

Client Contact

The client is often a source for information on the loan. The client's belief that the home is a MHU will often be based upon how the loan was boarded at loan origination and set up on the mortgage servicing platform. Due to electronic boarding, it is entirely possible that the loan was incorrectly coded as a "stick and brick" home instead of a MHU. The origination file must be examined to determine whether the client's assumptions are correct.

Suspicion

A MHU might be suspected because of a document or notation in the origination file, such as an unexecuted SOL or an affidavit of affixation. The file should be carefully reviewed for documents that show intent of the parties at loan origination whether the MHU was to be converted to real property and the MHU and land serve as security for the loan.

"Box Loan" Files

If a loan is identified as being secured by only the manufactured home and not the land ("box loan"), foreclosure under *Tex. Prop. Code §51.002* is no longer an option. The loan is legally classified as personal property and therefore foreclosure is controlled by *Tex. Bus. & Com. Code Art. 9*.

II. Research Phase

The research phase begins when the origination file is ordered from the mortgage servicer and reviewed. In addition, the TDHCA website must be searched to determine the history, if any, of the MHU. The origination file should contain documents that can demonstrate whether or not the loan was intended as a land-home or box loan. The TDHCA website will show to whom and when a SOL has been issued for a particular MHU.

Examination of Title

Recorded title should be reviewed to determine if there is a previously recorded SOL. If so, the legal description and serial numbers identifying the MHU to ensure the subject of the inquiry is the same MHU as well as other description errors that may require additional title curative work.

SOL Application

It is not unusual that a SOL application was completed at closing and placed in the origination file unrecorded because the closing agent was not familiar with the legal consequences. If the unrecorded application is an old form, it must be re-executed on the new SOL form that became effective August 2008.

Loan Documents Showing Intent for a Land-Home Transaction

The origination file may contain documents that will clearly identify the loan as a land-home transaction. These documents tend to be unique to land-home originations and are not typically used for other residential property transactions.

These documents include purchase contracts that contain serial number or labels referencing a manufactured housing unit; affidavits of affixation showing the intent to permanently affix the home to the land; or deeds-of-trust that may have a renewal and extension exhibit showing separate amounts for the land and the home or a manufactured home rider.

Receipts, disclaimers, or certificates of compliance with state and federal government manufactured housing regulations will also flag the loan as a MHU. This would include receipts for pulling the home to the landsite, add-ons at installation such as skirting, and retention of the wheels and axles. Two primary certificates of compliance required by *Title 24 C.F.R §3280* are for the home tie-down according to the federal wind-zone rating of the site, and the notice of formaldehyde emissions.

Title Policy Endorsements

If a title policy contains a T. 31 or, more recently, a T. 31.1 MHU title endorsement, then it is clear the loan was intended to be a land-home transaction. Item 6 of the new T. 31.1 form applies if someone failed to take the steps necessary to convert a MHU into real property.

TDHCA Records

Under Texas law, the SOL must be recorded both in the real property records and the TDHCA. If the TDHCA shows that a SOL was previously issued, a duplicate can be requested.

After the TDHCA receives an application for a SOL and issues the completed SOL to the applicant, the applicant has 60 days to record the SOL in the real property records of the county where the MHU is located and return a recorded copy to TDHCA. Under current interpretation of *Tex. H.B. 2438, 79th Leg., R.S. (2005)*, a duplicate must be requested if the certified copy issued by the TDHCA is not recorded within 60 days. Compliance with the TDHCA recording timelines is critical in having a SOL properly registered with the state.

Refinanced Loan

A refinance transaction on a MHU loan can present the noteholder with additional difficulties in obtaining necessary information. Many refinances are streamlined and can often be underwritten based only on a CAD value and tax roll listing. It is typical for the documents in a refinance pertaining to the manufactured home to remain in the origination file of the refinanced loan. It may be necessary to review the HUD-1 and contact the previous noteholder for information that may have been provided for the original loan origination.

Tax Records

As part of the conversion process from MHU to real property, the taxing authorities must be apprised of the MHU status. However, the taxing authority records are not prima facie evidence of whether a home is personal or real property. It is possible for the county to show the home as being affixed when the legal steps have not been taken.

Serial Numbers or Labels

Serial or label numbers needed to complete the SOL application may be found on certain documents in the loan origination file. Since a manufactured housing unit is a unique product, many documents not found in residential loan files will be present.

Casualty Insurance

Many times a casualty insurance carrier will add the serial numbers to its policy to evidence the right home.

Occupancy Status of Home

Under *Tex. Occ. Code §1201.217*, the owner of the real property on which a manufactured home is located may declare the home abandoned when it has been continuously unoccupied for at least 4 months and any indebtedness secured by the manufactured home is delinquent. The owner of the real property must send notice of intent to declare a manufactured home abandoned to the record owner of the home, the lienholder, and the tax assessor-collector that imposes ad valorem taxes on the real property. The notice must describe the location of the home and grant reasonable access to the home for removal. If the manufactured home remains on the real property for at least 45 days after the date the notice is postmarked, all liens on the home are extinguished and the real property owner may apply to the TDHCA for a SOL.

This procedure is an alternative to the 60-day notice letter and SOL application process for a noteholder for a home that is confirmed as abandoned. If the noteholder chooses to send out the 45 day notice, foreclosure upon the land can begin immediately. The potential risk is that the home will be reoccupied during the foreclosure and post-sale period and the status of the home can be challenged.

III. Execution Phase

When the file has been reviewed and evidence has been produced that support the classification of the loan as a MHU, the noteholder must elect whether to pursue a foreclosure of the land and abandonment or enforcement action on a vacant home. If they choose not to, assuming that no SOL has been found and confirmed to have been properly recorded, it will be necessary to move forward with the issuance of a 60-day notice under *Tex. Occ. Code §1201.55(i)* and a subsequent application for the issuance of a new SOL from the TDHCA.

Pre-foreclosure/Post-foreclosure

In the last legislative session, converting a MHU to real property became easier. *Tex. Occ. Code §1201.2055(i)* provides:

> *"Notwithstanding the 60-day deadline specified in Subsection (d), if the closing of a mortgage loan to be secured by real property including the manufactured home is held, the loan is funded, and a deed of trust covering the real property and all improvements on the property is recorded and the licensed title company or attorney who closed the loan failed to complete the conversion to real property in accordance with this chapter, the holder or servicer of the loan may apply for a statement of certified copy of the statement of ownership and location, and make the necessary filings and notifications to complete such conversion at any time provided that: (1) the record owner of the home, as reflected on the department's records, has been given at least 60 days' prior written notice at: (A) the location of the home and, if it is different, the mailing address of the owner as specified in the department records; and (B) any other location the holder or servicer knows or believes, after a reasonable inquiry, to be an address where the owner may have been or is receiving mail or is an address of record; (2) such notification shall be given by certified mail; and (3) the department by rule shall require evidence that the holder or servicer requesting such after-the-fact completion of a real property election has complied with the requirements of this subsection."*

The option of a post-foreclosure title cure, if the deed-of-trust described the MHU by its unit numbers and HUD approves the assumption that it was intended to be real property, the Substitute Trustee's Deed can be used as authority to transfer title to the noteholder's name. The law firm of Barrett, Daffin, Frappier, Turner & Engel, LLP no longer gives clients the option of a post-foreclosure sale cure due to the complications and higher scrutiny of curing methods.

Title Policy

If a title policy has been located, or if one is evidenced on the HUD-1, a demand should be sent to the title company. The title demand will put the insurance carrier on notice of the defect.

An Errors & Omissions claim can be made when there are specific recording charges that appear on the HUD-1 and which were not completed. This is a more aggressive approach than the demand, and should only be done after a thorough review.

Establish the Chain of Title

Prior to preparing the notice under Texas Occupations Code §1201.55(i), the chain of title of the manufactured home must be established to determine the current record owner. The TDHCA requires that the registered owner receive a 60-day notice. If the registered owner is different from the current title owner, the intervening unregistered owners must receive the same notice.

If the last record owner is a manufacturer, the manufacturer must be contacted and the dealer researched. If the manufacturer has gone out of business, a search must be performed on the business entity and business relationship to see if the prior business entity merged with another company or

changed names. The 60-day notice is sent to the manufacturer's last known address by certified mail, and an affidavit of due diligence is executed.

60-Day Letter

The 60-day notice letter must comply with the requirements of Texas Occupations Code §1201.2055(i). Notice must be sent to the record owner of the home at the location of the home, additional mailing addresses listed in the records of TDHCA, and any other possible addresses where the owner may be receiving mail. The notice must disclose the location of the home and be sent via certified mail. This notice must be sent to all parties in the chain of title. It is advisable for servicing companies to request the application fee from the investor when the 60-day notice is sent.

IV. Application Phase

Following the expiration of the 60-day notice, an application can be submitted to the TDHCA under Texas Occupations Code §1201.206 for the issuance of a SOL.

Application

The application, MHD Form 1023, is available on the TDHCA website. The application requests the home's serial numbers, location, ownership information, lien information, designated use, real or personal property election and right-of-survivorship for husband-wife applicants. It is important to note that an application must be made for the last registered owner and any subsequent non-registered owners in the chain of title. The application fee is $55.00 for each owner.

The form itself is brief, but the attached supporting documentation is exhaustive. Currently, the application includes:

1. Manufacturer's Certificate of Origin;
2. Copy of County Appraisal District Report;
3. Copy of the current year's taxes paid receipt from the county;
4. Application for Statement of Ownership & Location for each owner;
5. Legal description;
6. Installation report;
7. Copy of deed information;
8. Copy of the deed-of-trust;
9. Copy of the title policy;
10. Affidavit of Fact for retailer signature;
11. Copies of certified mail green cards;
12. Delivery tracking confirmation from USPS or CM/RRR sent; and
13. Application fee.

Regular Follow-Ups

According to the statute, the TDHCA is required to process any completed application no later than the 15th working day after the date the application is received. As of fall 2008, the TDHCA is running 20 days behind in beginning the review process. Realistically, the process time averages 42 days for the issuance of a new SOL, but there are cases where processing takes months. Routine follow-ups via phone and/or email must be made to the TDHCA to monitor the status of the application. As clients are not always aware of the TDHCA backups, regular updates are a benefit to both parties.

Grounds for Refusal

The primary grounds under Texas Occupations Code §1201.209 for refusal by the TDHCA to issue a SOL are fraud and incomplete applications. If the application for the issuance of a SOL contains a false or fraudulent statement, if the issuance would defraud the owner or a lienholder, or if the application is not complete, the TDHCA will refuse to issue. In the event the TDHCA refuses to issue a SOL, notice will be sent to the applicant via certified mail. A notice of appeal and request for a hearing may be filed by with the director of the TDHCA no later than the 30th day after the date of the refusal notice. All activity relating to the issuance of the SOL is put on hold during this period.

Title Company Authorization

If a demand was made to the title company, be sure to follow up on status and confirmation of reimbursement for costs to prepare and submit the application.

V. Issuance Phase

The issuance phase includes the period of time in which the SOL is issued by the TDHCA, received by the applicant, recorded in the real property records, and a recorded copy is returned to the TDHCA. Once this phase is completed, the MHU title curative part is completed and the land and manufactured home can be foreclosed as one entity.

Issuance of the SOL

If the application is approved, the Statement of Ownership and Location will be issued and sent to the applicant. The SOL is a two-page document that lists the information identifying the home including size, manufacturer, serial numbers, and legal description of the real property. The SOL declares that the owner has elected to have the manufactured home treated as real property.

Statutory Recordings and Timeframes

Under Texas Property Code §2.001, a manufactured home is considered real property if the SOL is filed in the real property records of the county where the home is located. Texas Property Code §1201.2055(d) states that once the SOL is issued by the TDHCA, the SOL must be filed in the real property records of the county where the home is located and the tax assessor-collector of the county is notified of the real property election of the home. Texas Property Code §1201.2055(e) states that the manufactured home is not considered real property until a certified copy of the recorded SOL has been returned to the TDHCA for filing.

In practice, once the SOL is issued by the TDHCA the applicant has 60 days in which to record the SOL in the real property records where the home is located and return a copy of the recorded SOL to the TDHCA with documentation, such as a certified mail receipt or fax confirmation sheet, that the tax assessor-collector has been notified. If the 60-day timeframe is missed, a request must be submitted to the TDHCA for the issuance of a duplicate SOL and the process repeated.

Addendum 1

In Re: Manufactured home located at: [*Location Address*]
Serial Numbers: [*Serial Numbers*] and Label Numbers: [*Label Numbers*]

Dear Madam or Sir:

Pursuant to Texas Occupations Code, Section 1201.2055(i), our client, who is the current holder/mortgagee of record and/or servicer of that certain Note and Deed of Trust covering the herein described property, has requested we notify you of the holder/servicer's intent to submit an Application for Statement of Ownership and Location (SOL) to the Texas Department of Housing and Community Affairs (TDHCA) in order to elect the subject manufactured home as real property on or after 60 (sixty) days from the date of this letter. The manufactured home is located at [*Location Address*] and is more particularly described as:
[*Model*], Serial Numbers: [*Serial Numbers*] and Label Numbers: [*Label Numbers*]

You are receiving this letter because you may be one of the following:

1) the record owner of the home as reflected on the TDHCA's records; or
2) the retailer who originally sold the subject manufactured home; or
3) the present owner, according to the County Deed Records, of the real estate upon which the manufactured home sits; or
4) the present owner of the land and/or manufactured home pursuant to a Deed of Trust encompassing the property; or
5) any other person we deem may have an interest, valid or not, after a thorough search of public records.

Please be notified on or after 60 (sixty) days from the date this letter is postmarked, the mortgagee/holder/servicer shall file, if applicable, an Application for SOL with the TDHCA to elect the manufactured home as real property.
Please contact me to discuss this matter at [*Attorney Contact Information*].
Sincerely,

[*Name of Attorney*]

Please be advised this firm is a debt collector attempting to collect a debt and any information obtained from you will be used for that purpose.

Addendum 2

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR STATEMENT OF OWNERSHIP AND LOCATION

The filing of an application for the issuance of a Statement of Ownership and Location, later than sixty (60) days after the date of a sale to a consumer for residential use, may result in a fee of up to one hundred dollars ($100). Any such application that is submitted late may be delayed until the fee is paid in full.

BLOCK 1: Transaction Identification

This application is for:
- ☐ New home application
- ☐ Used home application
- ☐ Other

_____

(For Department Use Only) Coding:

Lien on file: Y / N Lienholder Code

County Code: Right of Surv.: Y / N

Retailer #: Manufacturer #:

BLOCK 2(a): Home Information (required)

Manufacturer Name:		Model:	
Address:		Date of Manufacture:	
City, State, Zip:		Total Square Feet:	
License Number:		Wind Zone:	

	Label/Seal Number	*Complete Serial Number*	*Weight*	*Size**
Section 1:				X
Section 2:				X
Section 3:				X
Section 4:				X

**NOTE: Size must be reported as the outside dimensions (length and width) of the home as measured to the nearest ½ foot at the base of the home, exclusive of the tongue or other towing device.*

2(b) ☐ Is home being sold? ☐ No ☐ Yes
If yes, and **if there is/are no HUD Label(s) or Texas Seal(s)** on your home, a Texas Seal will be need to be purchased and will be issued to each section of your home at an **additional cost** of $35.00 per section.
Single - $35 Double - $70 Triple - $105

BLOCK 3: Home Location (required)

Physical Location of Home: *(or 911 address)*

Physical Address (cannot be a Rt. or P. O. Box) City State ZIP County

Was home moved for this sale? ☐ No ☐ Yes
Was Home Installed for this sale? ☐ No ☐ Yes If yes, provide installer information below, if known

Installer Name, address and phone:

BLOCK 4: Ownership Information (required)

4(a) Seller(s) or Transferor(s)		4(b) Purchaser(s), Transferee(s), or Owner(s)	
Name	License # if Retailer:	Name	License # if Retailer:
Name		Name	
Mailing Address		Mailing Address	
City/State/Zip		City/State/Zip	
Daytime Phone Number ( ) -		Daytime Phone Number ( ) -	

4(c) Date of sale, transfer or ownership change:

4(d) Did the buyer trade-in a home to purchase this home? ☐ No ☐ Yes If yes, provide the following:

HUD Label _____, Serial No. _____

MHD FORM 1023 / APPL SOL.DOC Page 1 of 2 Rev. 08/03/2008

HUD Label #:	Serial #:	GF# (for title co.):

BLOCK 5: Right of Survivorship (if no box is checked, joint owners will NOT have right of survivorship)

If joint owners desire right of survivorship, check the applicable box below:

☐ Husband and wife will be the only owners and agree that the ownership of the above described manufactured home shall, from this day forward, be held jointly and in the event of death, shall pass to the surviving owner.

☐ Joint owners are other than husband and wife, desire right of survivorship, **and** have attached a completed Affidavit of Fact for Right of Survivorship or other affidavits as necessary to meet the requirements of §1201.213 of the Standards Act.

BLOCK 6: Personal/Real Property Election - Purchaser(s)/Transferee(s)/Owner(s) check one election type:

☐ Personal Property – Applicant elects to treat this home as personal property. All documents affecting title to the home will be filed in the records of the Department.

☐ Real Property – I (we) elect to treat this home as real property and certify that I am (we are) entitled to make this election in accordance with Section 1201.2055 of the Occupations Code because (**one** box **must** be checked):

☐ I (we) own the real property that the home is attached to. ☐ I (we) have a qualifying long-term lease for the land that the home is attached to.

I (We) understand that the home will not be considered to be real property until a certified copy of the SOL has been filed in the real property records of the county in which the home is located AND a copy stamped "Filed" has been submitted to the Department.

Legal description must be provided for real property: _____

_____

If a title company, list your file or GF #: _____

☐ **Inventory – *(FOR RETAILER USE ONLY)*** Retailer number must be provided in Block 4b if this election is checked.

BLOCK 7: Designated Use - to be designated by purchaser(s), transferee(s), or owner(s)

☐ Residential Use (as a dwelling) OR

☐ Non-Residential - Check **one** of the following: ☐ *Business Use* ☐ *Salvage*

BLOCK 8: Liens – To specify any liens on the SOL the NOTICE OF LIEN FORM must be completed and submitted with the application. To prevent an SOL from being issued without a lien, in the event the Notice of Lien is detached, indicate name and phone number of lienholder's contact person and phone number.

Lienholder's Representative: _____ **Phone:** _____

BLOCK 9: Special Mailing Instructions.

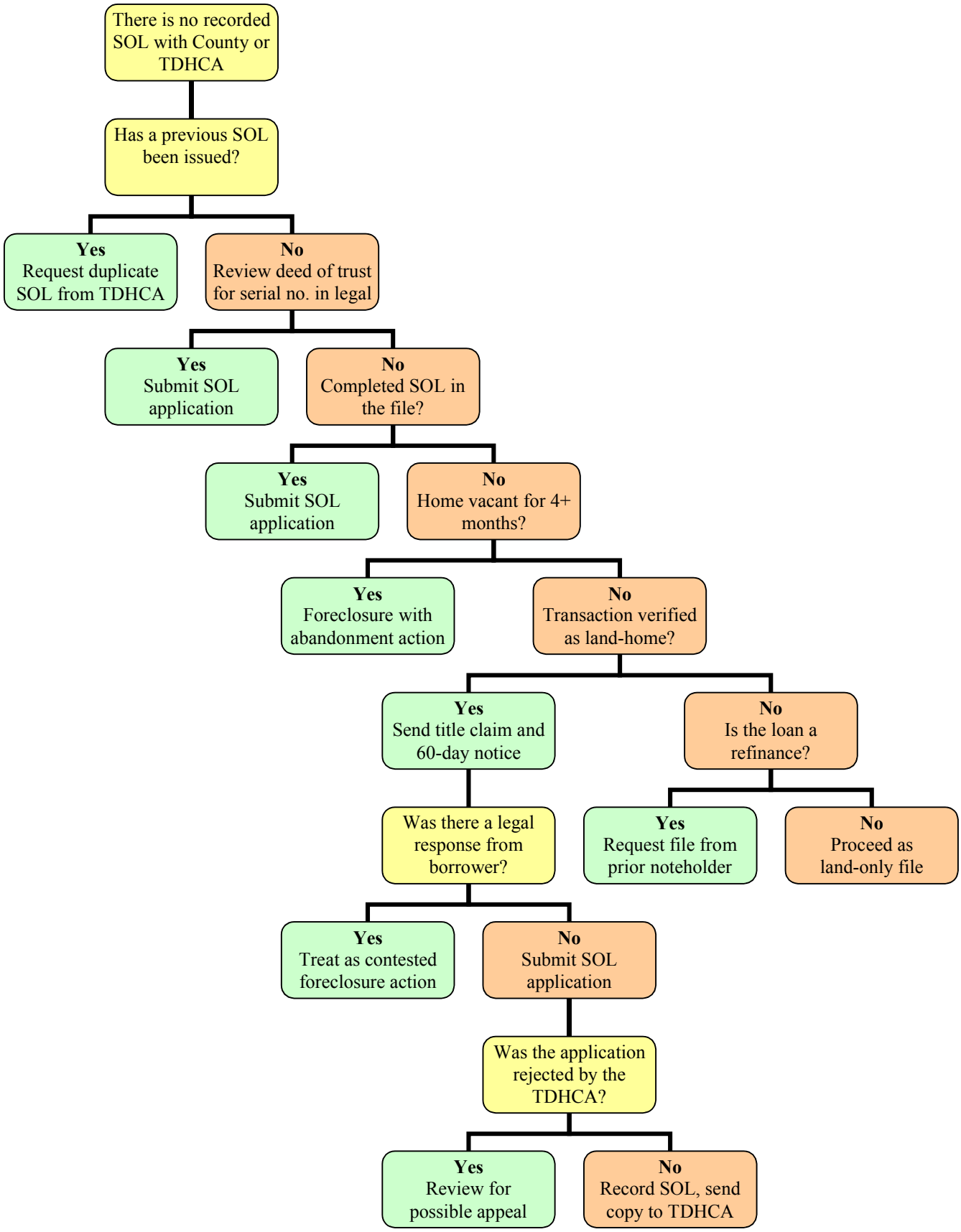
IF a copy of an SOL is to be mailed to anyone other than the owner or lienholder of record (such as a closing agent), please provide that mailing address here and enclose the additional fee.	Name:	
	Company:	
	Street Address:	
	City, State, Zip:	
	Area Code/Phone	

BLOCK 10: Certification and Notarization - The statements set forth herein are made under oath and are true and correct.

☐ *Seller* certifies that any required habitability warranty has been delivered (consumer to consumer sales are exempt).

☐ *Seller* certifies that the purchaser has been given a written disclosure on a form prescribed by the Department describing the condition of the home and of any appliances that are included in the home.

10(a) Notarized signature of each seller/transferor	10(b) Notarized signature of each purchaser/transferee or owner
_____ *Signature of owner or authorized seller*	_____ *Signature of purchaser/transferee or owner*
Sworn and subscribed before me this ____ day of _____, 20__	*Sworn and subscribed before me this ____ day of _____, 20__*
_____ *Signature of Notary*	_____ *Signature of Notary*
SEAL	*SEAL*
_____ *Signature of owner or authorized seller*	_____ *Signature of purchaser/transferee or owner*
Sworn and subscribed before me this ____ day of _____, 20__	*Sworn and subscribed before me this ____ day of _____, 20__*
_____ *Signature of Notary*	_____ *Signature of Notary*
SEAL	*SEAL*


There is no recorded SOL with County or TDHCA
Has a previous SOL been issued?
Yes
Request duplicate SOL from TDHCA
No
Review deed of trust for serial no. in legal
Yes
Submit SOL application
No
Completed SOL in the file?
Yes
Submit SOL application
No
Home vacant for 4+ months?
Yes
Foreclosure with abandonment action
No
Transaction verified as land-home?
Yes
Send title claim and 60-day notice
No
Is the loan a refinance?
Was there a legal response from borrower?
Yes
Request file from prior noteholder
No
Proceed as land-only file
Yes
Treat as contested foreclosure action
No
Submit SOL application
Was the application rejected by the TDHCA?
Yes
Review for possible appeal
No
Record SOL, send copy to TDHCA