

**TEXAS FORECLOSURE EXPERIENCES**  
*(So Many Ways To Leave Your Lover)*

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EDUCATION: B.A., The University of Texas (1969); and J.D. with Honors, The University of Texas (1972).

PROFESSIONAL ACTIVITIES:

- Board Certified in Real Estate Law: Commercial Real Estate Law (1984 – 2022), Residential Real Estate Law (1984 – 2022) and Farm and Ranch Real Estate Law (1985 - 2022).
- Life Fellow, Texas Bar Foundation (1985 – 2022).
- Member of State Bar of Texas Real Estate Forms Manual Committee (2017 – 2022).
- Past Board Member of REPTL Council of the State Bar of Texas (2011 – 2013).
- Fellow of the Texas Bar College (35 Year Maintaining Member, 1987 - 2022). <https://texasbarcollege.com/>
- American College of Real Estate Lawyers (ACREL), Insurance Committee (Past Chairman).
- Past President (1987-1988), Corpus Christi Bar Association (and numerous of its offices and committees).
- Founding Director, Texas College of Real Estate Lawyers (1991).
- Member of State Bar of Texas Assignment of Rents Committee to draft and obtain State Legislature adoption of the “Texas Assignments of Rents Act”, Texas Property Code Chapter 64 (2010 - 2011).
- Member, Statewide Committee to Support Adoption of MCLE (1986).
- Member, American Bar Association (1972 - 2022).
- Planning Committees: Numerous Mortgage Lending Institutes and Advanced Real Estate Law and Drafting Courses.

HONORS:

- Real Estate, Probate and Trust Law Section, State Bar of Texas, Distinguished Real Estate Attorney Lifetime Achievement Award (2020).
- Texas Bar CLE, The Jerry Charles Saegert Award for "Best CLE Paper" for State Bar of Texas, Annual Advanced Real Estate Law Course 2018 *Texas Risk Management Manual* and 2011 *Annotated Insurance Specifications*.
- ACREL Fellow, (2007 – 2022).
- The Best Lawyers in America (Real Estate) (2000 - 2022).
- Who’s Who in American Law; Who’s Who in America; and Albert Nelson Marquis Lifetime Achievement Award.
- Texas Monthly, Super Lawyer - Real Estate (2001 - 2022).

COMMUNITY:

Austin:

- Conceived of and assisted in obtaining designation of the Mexic-Arte Museum as “The Official Mexican and Mexican American Fine Arts Museum of the State of Texas” (2003).
- Rotary Club, International Friendship Committee – founded Rotary Club in St. Petersburg, Russia (2002).
- Leadership Austin Class 25 (2003).
- Revived PDAP of Austin (2000).

Corpus Christi:

- Founder of PDAP Corpus Christi (Board President for many years) (1979 – 2000). <http://pdapcc.org/>
- Past Chairman, Zoning and Planning Commission of City of Corpus Christi (1984 – 1985).
- Rotary Club conceived and chaired Community Drug Abuse Prevention Conference – selected by Rotary International to be 1 of 8 projects to be disseminated worldwide as a model project for local clubs (1985).
- Leadership Corpus Christi Class 13 (1984); conceived of and assisted in obtaining designation of the Corpus Christi Aquarium as the “Official Aquarium of the State of Texas” (1985).
- Past Director, Gulf Coast Council of Boy Scouts.
- Past Director, National Conference of Christians and Jews, Corpus Christi Chapter.

#### LAW RELATED PUBLICATIONS:

Books: State Bar of Texas: TEXAS FORECLOSURE MANUAL (Co-Editors Locke, Novak and Bastian 3rd Ed. 2014) (Co-Authors Locke, Novak and Bastian 2nd Ed. 2006) (Co-Authors Locke and Novak 1st Ed. 1991) and Co-Author of the 2008; 2010; 2012; 2015; 2017 - 2022, Annual Supplements. <http://texasbarbooks.net/texas-foreclosure-manual/>

Numerous articles, webcasts and seminar presentations including the following, copies of which may be found and downloaded at <https://www.gdhm.com/attorneys/william-h-locke/>

2022:

- CLE article and presentation, State Bar of Texas Advanced Real Estate Strategies Course, *Texas Foreclosure Experiences* (Dec., 2022); and this article *Insurance for AIA Construction Contracts* (Dec., 2022).
- Webcast, American College of Real Estate Lawyers, Locke and Comiskey, *Insurance for AIA Construction Contracts* (Oct., 2022).

2020:

- ALI-ABA, PRACTICAL REAL ESTATE LAWYER, Locke and Maloney, *Top Ten Insurance Tips for Lenders* (2020).
- Webcast, ACREL, Locke and Johnson, *Waiver of Subrogation* (June, 2020).
- CLE article and presentation, State Bar of Texas, 42<sup>nd</sup> Advanced Real Estate Law Course, *Insurance for AIA Construction Contracts* (July 2020).

2019:

- Article, South Texas College of Law Houston, THE TEXAS JOURNAL OF BUSINESS LAW, Vol 47, Issue 4, *Insurance 101* (April 2019).
- Webcast, American Law Institute and American College of Real Estate Lawyers (ALI-ACREL, Locke and Johnson, *Waiver of Subrogation* (April 2019).

2018:

- CLE article and presentation, University of Texas School of Law, 52<sup>nd</sup> Mortgage Lending Institute, *Effective Risk Management* (Austin, Texas, Sept. 2018).
- CLE article and presentation, State Bar of Texas, 40<sup>th</sup> Advanced Real Estate Law Course, *Texas Risk Management Manual* (San Antonio, Texas, July 2018).
- CLE article and presentation, State Bar of Texas, 9<sup>th</sup> Annual Course – Essentials of Business Law: Protecting Your Business, *Insurance 101 and 201* (Houston, Texas, March 2018).
- CLE article and presentation, ALI CLE, *Commercial Leases – Allocating and Avoiding Risk* (February 2018).

2017:

- CLE article and presentation, New Mexico Bar Association, *Insurance for the Real Estate Law Practitioner* (Albuquerque, NM, Dec. 2017).
- CLE article and presentation, State Bar of Texas, 39<sup>th</sup> Advanced Real Estate Law Course, Locke and Comiskey, *Three Scofflaws Are on the Loose, But There is a New Sheriff in Town - (The Good, the Bad and the Ugly of CGL Endorsements - and the Solution)* (San Antonio, Texas, July, 2017).
- CLE article, Georgetown University Law Center, Advanced Commercial Leasing Institute, *Leases and Property Insurance* (March 2017).
- CLE article and presentation, State Bar of Texas, 28<sup>th</sup> Annual Advanced Real Estate Drafting Course, *Drafting Indemnities and their Relationship to Insurance* (Houston, Texas, March 2017).

**Ralph Martin (“Marty”) Novak**  
Retired

**EDUCATION:**

- 1973: Rice University – B.A. with honors in History and Anthropology.
- 1975: The University of Chicago – Masters in Roman History.
- 1982: The University of Houston Law Center – J.D. with honors.

**LEGAL CAREER:**

During his career in private legal practice, Mr. Novak was a partner at Kleberg, Dyer, Redford and Weil P.C. in Corpus Christi; and at Hilgers and Watkins P.C. and Brown McCarroll L.L.P. in Austin, Texas.

Mr. Novak participated as a speaker at over 15 CLE programs for the State Bar of Texas and The University of Houston Law Center.

The last ten years of his legal career, Mr. Novak was an attorney in The Office of General Counsel for The University of Texas System Administration. At his retirement in 2017, he was an Assistant General Counsel and the senior real estate attorney.

**CURRENT CAREER:**

Prior to and during retirement, Mr. Novak has been a frequent speaker in the areas of ancient and medieval Mediterranean history, including lecturing on 25 cruises for Azamara Club Cruises, with another eight lecture cruises currently scheduled for Azamara Club Cruises and Viking Ocean Cruises.

**BOOKS:**

CHRISTIANITY AND THE ROMAN EMPIRE: BACKGROUND TEXTS. Trinity Press International (2001)

TEXAS FORECLOSURE MANUAL. State Bar of Texas (Co-Author with William H. Locke, Jr. for 1991 and 2006 editions and 2008 Supplement; Coeditor with William H. Locke, Jr. and Tommy Bastian of the 2014 Edition and the 2010, 2012, 2015, 2017-2020 annual supplements.



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**OUR TEXAS FORECLOSURE EXPERIENCES**  
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**I. INTRODUCTION**

**A. The 1<sup>st</sup> Edition (1991)**

The TEXAS FORECLOSURE MANUAL arose out of Marty's and my experiences in the 1980's when we represented various financial institutions in the Gulf Coast region of Texas. As lending decreased and loan defaults increased, our practice shifted in part from negotiating and drafting loan documents to loan workouts and foreclosures. I recall the feelings I had as I drove the streets of the business sector of my home town and knew of or had a story about many of the properties I passed. Out of this experience grew a degree of "expertise," the kind I guess that the executioner had in France at the time of the fall of the monarchy. The idea about putting this experience in written form grew from our experience in not finding a good source that connected the law, as explained in TEXAS JURISPRUDENCE, with the practice, as documented in the TEXAS REAL ESTATE BAR FORMS MANUAL.

The State Bar of Texas published the original edition of the TEXAS FORECLOSURE MANUAL in 1991. The impetus for the State Bar to create and publish a foreclosure manual grew out of the tremendous number of residential and commercial foreclosures that occurred in Texas during the economic recession of the second half of the 1980's. In the course of handling the massive volume of commercial and residential foreclosures that occurred during those years, Texas lawyers were discovering that many every-day, real life practice issues in both foreclosure law and the related legal areas of lending, usury and debt collection had not been clearly resolved by either the courts or the legislature. The State Bar recognized the need for a resource that collected and organized the then current state of Texas foreclosure statutes and case law into an understandable whole for use by Texas lawyers practicing "in the trenches" during that period of economic downturn.

The State Bar was fortunate in that two real estate attorneys with the Kleberg and Head law firm in Corpus Christi, Bill Locke and Marty Novak, had already recognized the need for just this sort of compendium of foreclosure law and had made a major start on this project with the preparation of a paper entitled a "*Texas Foreclosure Manual*" presented at the State Bar's 10th Annual Advanced Real Estate Law Course in May of 1988. Following discussions with Bill Locke and Marty Novak, the State Bar broke with its prior practice of producing only forms

manuals drafted by committees of attorneys and asked Bill Locke and Marty Novak to develop the CLE paper into a comprehensive discussion of the then current state of Texas foreclosure law, to be published as the State Bar's new manual.

The original CLE paper by Bill Locke and Marty Novak had grown out of their practical experience in handling foreclosures for a number of regional and state banking systems, and their paper emphasized the wide range of practice issues that an attorney could face during the foreclosure process. This emphasis on the nuts and bolts of a day to day foreclosure practice was intentionally carried over to the State Bar's TEXAS FORECLOSURE MANUAL and it proved to be extremely popular with Texas lawyers. With the passage of years, however, the TEXAS FORECLOSURE MANUAL was not regularly updated by the State Bar and the discussion of law in certain areas became dated, and in response to the foreclosure crisis of the 1980's new statutes were adopted, and new case law developed out of the many foreclosure cases handled by the state and federal courts.

**B. 2<sup>nd</sup> Edition (2006)**

In the ensuing years, the amendment of the Texas Constitution opened a new area of foreclosure law with the creation of new types of homestead loans and new requirements for the foreclosure of such loans. In 2005, the State Bar - recognizing both the material changes in foreclosure law since 1991 and that Texas might shortly again go through a period of significant foreclosure activity - decided to revise and update the TEXAS FORECLOSURE MANUAL. Bill Locke and Marty Novak, practicing law in different firms in Austin, again agreed to produce the updated second edition, which was released in 2006. The second edition of the TEXAS FORECLOSURE MANUAL contained approximately 200 pages of legal commentary, 77 revised and expanded practice forms (not counting the many forms in the CLE articles included on the CD Rom), and new appendices (i) describing the designated foreclosure sale sites, county clerk internet sites, and appraisal district internet sites for all 254 Texas counties, and (ii) containing a set of 43 Texas Bar CLE articles by attorneys from around the state on various aspects of law related to foreclosure practice, such as professional ethics, creditor's rights, tax, usury, and environmental law.

The second edition of the TEXAS FORECLOSURE MANUAL maintained its prior emphasis on the nuts and bolts of the law underlying a real-life foreclosure practice, with numerous discussions of the practical problems that can arise in foreclosures. The second

edition covered the major statutory and case law developments that had occurred through mid-2005. The State Bar committed to regularly up-date the manual to reflect continuing developments in foreclosure law.

The second edition also took advantage of the many technological changes that occurred since 1991. A CD-ROM containing the entire TEXAS FORECLOSURE MANUAL, with all forms in Word and WordPerfect, was included at no additional charge. The CD Rom version of the TEXAS FORECLOSURE MANUAL was hyper-linked, so that a user was able to jump back and forth between the manual's discussions of law, related sections of the manual, the related practice forms, and the specialized CLE articles.

### C. 3<sup>rd</sup> Edition (2010) And Annual Supplements (2011 – 2022)

Because securitization radically changed mortgage banking and brought with its radical changes to foreclosure practices, the 3<sup>rd</sup> Edition was conceived. The 3<sup>rd</sup> Edition addressed the new questions brought by securitization, including who has the authority to foreclose, whether the law pertaining to the note, or the deed of trust controls the foreclosure process, and the effect of the mortgage servicer replacing the owner or beneficiary of the note in foreclosures. The 3<sup>rd</sup> Edition also addressed the merits of legal theories and defenses that arose after the 2nd Edition. Tommy Bastian (now retired) joined as a Co-Editor of the 3<sup>rd</sup> Edition and its Supplements. He brought his expertise in understanding and implementing the new issues arising out of residential foreclosures in the residential loan crisis post 2007. Among the experience that Tommy Bastian brought to the manual was his experience as the principal drafter for the three Texas Supreme Court Task Forces responsible for creating Rules 735 and 736 dealing with foreclosure of home equity, reverse mortgage, home equity line of credit, and transferred tax liens. The 3<sup>rd</sup> Edition and the subsequent Supplements also benefited from the contributions of twenty plus lawyers that contributed their down-in-the trenches experience in prosecuting or defending foreclosures on a daily basis. The format also changed. The first seventeen chapters provide a general overview of the various elements that are important to consider in conducting a foreclosure. The subsequent chapters comprise the "how-to-do" section of the manual and address foreclosure areas like property owners association liens, reverse mortgages and property tax loan foreclosures. The manual is now blessed with its reins being taken by Sara Dysart and a committee of subject-matter experts responsible for the 2022 Supplement and onwards toward a 4<sup>th</sup>

Edition.

## II. SOME OF OUR EXPERIENCES

The following is a recounting of a number of experiences we encountered. In some cases, "to protect the innocent", we have deleted names or conclusions. Some experiences were and are learning experiences, and in some cases the learning is repeated below, and in others the learning is omitted, but the experience is shared as a self-deprecating humorous story. Many experiences are the source of legends, such as Marty learning that lawyers avoid foreclosing in Real County.

### A. Mortgaged Property

#### 1. Real Property Or Personal Property

##### a. *Foreclosing On Both Real Property And Personal Property At Same Sale*

(1) Bill's Experience:

##### *Weighing Tons Does Not Make It Real Property*

The following is the first story (aka an "*experience*"). We were foreclosing on an "oil tank farm". The lender client had financed an independent producer's oil storage facility, having taken a deed of trust lien on the land and improvements, including fixtures. The question was raised: are the oil tanks full of oil, that are only connected by a valve to a pipe in the ground, mortgaged real property covered by the deed of trust? The deed of trust did not reference oil storage tanks or oil.

(2) Learning: Thankfully, we did not have to litigate, as after posting and before the foreclosure, the bank and borrower worked out a settlement.

(3) Manual: See TEXAS FORECLOSURE MANUAL discussion at Ch. 6 The Deed of Trust, at § 6.6 *Identifying Secured Collateral*, § 6.6:1 *Real Property*, § 6.6:2 *Improvements*, § 6.6:3 *Fixtures*, and § 6.6:9 *Personal Property*; Ch. 4 Preforeclosure Title Concerns, at § 4.9:6 *Removables*; and Ch. 14, at § 14.1 *Presale Considerations*.

##### b. *Foreclosing First On Real Property And Separately On Personal Property Under Separate Security Agreement*

(1) Marty's Experience:

### *The Drinks Are On The House*

In the 1980's, the law pertaining to the interrelationship between real property foreclosures on mortgaged property and personal property foreclosures of collateral on the real property was much less developed and clear than today. This created a great deal of anxiety for lenders, as under the then-current law an improperly conducted UCC sale would eliminate the loan deficiency. As the older state bar deeds of trust did not adequately cover the personal property located on the mortgaged real property, such personal property was typically covered by a separate UCC security agreement. In such situations, lenders would do the real property foreclosure prior to the UCC foreclosure sale to ensure that the real property was always foreclosed regardless of any challenges to the UCC sale. A national bank client of our firm had us foreclose on a restaurant operation by foreclosing on the real property first, and then later foreclosing the security agreement against the inventory and equipment. The bank acquired the real property at foreclosure and in preparing for the UCC sale, a number of the bank's officers went on site to inventory the personal property. They knew the unopened and sealed liquor bottles had to be dealt with and disposed of separately from the public sale, as the bank did not have a license to sell liquor to the public (*i.e.*, the UCC sale). They also knew that opened liquor bottles could not be sold at all. Unknown to us, the officers decided to divide up the opened liquor bottles amongst themselves and take the bottles home for personal use. In the subsequent suit to collect the loan deficiency, the borrower argued that the bank officers' appropriation of the opened bottles constituted the bank's acceptance of the collateral in lieu of foreclosure, with a resulting "no deficiency." Fortunately for the bank (and the officers involved), the judge decided to merely give the borrower credit against the deficiency for the retail value of unopened bottles of the same liquor.

(2) Learning: Cheers.

(3) Manual: See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at § 14.9 *Personal Property Foreclosure Sales* including § 14.9:3 *Retention of Collateral in Satisfaction of Debt* and 14.9:4 *Deficiencies in Personal Property Foreclosures* and discussion of TEX. BUS. COMM. CODE § 9.626 *Action in Which Deficiency or Surplus Is in Issue* legislatively overturning *Tanenbaum v. Economics Laboratory*, 628 S.W.2d 769 (Tex. 1982)

as to non-consumer transactions (the judge in Marty's case was ahead of her time).

## **2. Describing The Property**

a. *Bill's Experience:*

### *Six - Love Wins At Tennis And At Foreclosures*

This experience arose out of a lender's foreclosing on a very high-end residential property. The ex-husband was behind in making payments on the house and was in divorce proceedings with the wife. Both husband and wife moved out of the house; the wife moved to an apartment; and the husband bought another high-end house. The lender took possession of the property prior to foreclosure. As fate would have it, the house was significantly damaged by a storm and leaks ensued. The lender ignored demands that they protect the house from the storm-caused leaks and thereafter the ensuing mold. The residence suffered from the lender's neglect, both prior to and after the foreclosure sale. Lender bid in the property for less than the loan balance. There was considerable equity in the property at the time the lender took possession of the residence; and less so at the time of the foreclosure. The IRS had filed federal tax liens on the property prior to the foreclosure sale. Subsequent to the foreclosure, the lender sought to collect on the "deficiency". The ex-wife filed for bankruptcy protection. We requested mediation with the lender. At mediation I informed the lender that its deed of trust that it had foreclosed covered only half (1 of 2 lots), with the tennis court being the lot they foreclosed on, but the house on the adjoining lot not being included. The loan was a renewal of another lender's loan. The original loan's loan documents described both lots as the mortgaged property. The renewal loan documents only described one of the lots. The lender argued that it had the right to reform the deed of trust and the foreclosure deed. We argued that the right to correct the deed of trust was an equitable right arising out of equitable subrogation by the lender to the original loan documents, and that this right was cut off by the ex-wife's bankruptcy. We also argued that if the lender prevailed in equitably reforming the deed of trust that it had not bid in 80% of the fair market value of the property assuming the lender had not let the property deteriorate after it took possession prior to foreclosure. Lender settled and dropped its deficiency suit in exchange for a deed.

b. *Learning:* Justice prevails sometimes.

c. *Manual*: See TEXAS FORECLOSURE MANUAL discussion at Ch. 3 Evaluating the Options for Collecting the Debt, at §§ 3.5:2 *Unilateral Acts by Creditor to take Control of All or Part of Mortgaged Property – Mortgagee in Possession and Rescission of Vendor’s Lien* 3.5:4; Chapter 4 Preforeclosure Title Concerns, at § 4.3 *Federal Tax Liens*; Chapter 14 *Conducting the Sale*, at § 14.11 *Reforeclosure and Correcting the Trustee’s Deed*; Chapter 17 Suits for Deficiency, at §§ 17.4 *Calculation of Deficiency*, 17.5 *Credit for Fair Market Value in Deficiency Action*, and 17.6 *Continued Liability of Obligors under Recourse and Nonrecourse Loans*; Chapter 21 Residential Foreclosure Process; and Appendix A IRS Collection Advisory Group Addresses and Counties by Areas.

### 3. Visiting The Site before Deciding To Foreclose

a. *Bill’s Experience*:

#### ***Schools May Be Hazardous***

Lender’s collateral was a former elementary school bought from the school district by the borrower. Due to the presence of asbestos in the school, the lender elected not to foreclose on the mortgaged property. The lender worked with the borrower and guarantor to facilitate the sale of the property to a developer.

b. *Learning*: Sometimes not foreclosing is better than foreclosing.

c. *Manual*: See TEXAS FORECLOSURE MANUAL discussion at Ch. 3 Evaluating the Options for Collecting the Debt, at §§ 3.2 *Analyzing the Circumstances* and 3.3 *Negotiated Agreements to Restructure the Debt*; Ch. 35 Environmental Issues Affecting the Foreclosure Process, at § 35.2 *Federal Environmental Regulation*, § 35.2:1 *Secured Creditor Exemption under Federal Law*, and § 35.2:8 *Asbestos*.

## B. Appointment Of Trustee

### 1. Trustee’s Liability

a. *Bill’s Experience*:

#### ***An Honor To Serve***

I recall being stopped by a county clerk’s employee expressing that she was so proud that I was the “Trustee” on her home. She thought that was some honor. At the time I was routinely named Trustee on deeds of trust by banks in South Texas, even when I did not do the paper work. I thanked her for her good

words and explained to her the role and responsibilities of the Trustee.

b. *Learning*: The TEXAS PROPERTY CODE § 51.0074 *Duties of Trustee* at subsection (b) provides the Trustee some protection. ¶

c. *Manual*: See TEXAS FORECLOSURE MANUAL discussion at Ch. 11 Trustees and Substitute Trustees.

## 2. Trustee’s Safety

a. *Bill’s Experience*:

#### ***Being A Trustee May Be Hazardous***

There was a time in the late 1980’s when I checked my car for bombs each morning pending a foreclosure sale I was to have foreclosing on a Libyan ex-pat.’s property.

b. *Learning and Manual*: TEXAS PROPERTY CODE § 51.0074 *Duties of Trustee* is not much help in such cases.

## C. Preparing For The Sale

### 1. Pre-Foreclosure Record Search

a. *Federal Tax Lien Search*

(1) *Bill’s Experience*:

#### ***Ask The County Clerk***

I had a memorable experience in Duval County. Before a pending foreclosure sale on Archer and George Parr, I went to Duval County to search the Federal Tax Lien Records. Not finding the “P” book on the shelf, I asked the County Clerk if there was a “P” book. I was told by the Clerk that they had to keep it under lock and key as someone routinely came to the Clerk’s office and ripped out the “Ps”.

(2) *Learning*: Ask the county clerk.

(3) *Manual*: See TEXAS FORECLOSURE MANUAL discussion at Ch. 4 Preforeclosure Title Concerns, § 4.2:1 *Meaning of “Owner”*, § 4.3 *Federal Tax Liens*, and *Title Search Conclusion*.

b. *Oil And Gas Lease Search*

(1) *Marty’s Experience*:

***Yes, Ask The County Clerk***

As an associate, I also had cause in the early 1980's to do research in the Duval County Real Property Records - in my case, involving oil and gas leases of Mr. Pharr, then a client of our firm. After running the oil and gas lease index, I then went to the books and found that every instrument in my document list was missing from the official books – the page numbering in the bound books was actually interrupted by the missing pages for the leases in question. I took several of the books over to the County Clerk (whose desk was in the same room as the Real Property Records) and showed her the situation. When she realized whose records were involved, she asked if I could wait a moment while she made a phone call. She made the call, and a few minutes later a county deputy arrived. He asked that I produce identification and explain why I wanted to see those particular leases. I told him that my firm had been engaged by Mr. Pharr to research the chain of title to the leases in question as part of a new oil and gas lease he was considering. After a few moments' consideration, the deputy nodded to the County Clerk and told her it was all right. She then went to a safe behind her desk, unlocked it, and pulled out a file folder. She then went through the folder and pulled out the recorded leases that were on my list. She told me that I could sit at the table near her desk to review the leases and make hand-written notes, but I would not be allowed to make xerox copies or obtain certified copies. All things considered, I thanked her very politely for her assistance, reviewed the leases and made my notes, returned the leases to her with another round of thanks, and then left quickly and quietly.

(2) Learning and Manual: See Learning And Manual in the preceding experience.

**2. Visiting Site On Foreclosure Day Before The Sale**

a. *Bill's Experience:*

***Always A Good Idea To Inspect The Collateral Before Foreclosing***

Once I foreclosed on a hotel in Orange, Texas. I visited the hotel before proceeding to the foreclosure sale. I was surprised to see a long line of folks at the hotel carrying out all of the "removables": silverware, dishes, mattresses ....

b. *Learning:* The post-foreclosure buyer from the bank had to buy all new mattresses, as there is not a good market to buy used mattresses.

c. *Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 4 Preforeclosure Title Concerns, at § 4.9:6 *Removables*.

**3. Visiting The Site Before And After The Sale**

a. *Bill's Experience:*

***A House May Not Be A Permanent Improvement***

This foreclosure involved foreclosing on a development loan for a residential subdivision. A preclosing visit to the subdivision brought surprise to the banker. There was a 3 bedroom house on one of the unreleased lots. He greeted several neighbors who came to the house. He passed out business cards. A couple of days after the foreclosure a neighbor alerting him to the fact that the prior evening (after the sale) a big truck and crane came by and jacked the house off the piers and hauled it off. The neighbor wanted to know if she could have the loose lumber.

b. *Learning:* Fortunately, the bank had not counted on the house value in determining the subdivision development loan. There was still a nice cement driveway.

c. *Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 4 Preforeclosure Title Concerns, at § 4.9:6 *Removables*.

**4. Borrower Preparing For The Foreclosure**

a. *Bill's Experience:*

***Don't Sweat The Small Stuff***

My best advice to the daughter of a client, she was being foreclosed on, was to walk away from the house, pitch the keys inside, and tell the lender where the keys were.

b. *Learning and Manual:* Sometimes the best advice comes from experience.

**5. Verification Of Legality Of The Debt**

a. *Bill's Experience:*

***Interesting Principal***

This experience involved seller financing that was usurious. The principal amount of the Note had been

increased by \$3M over the original all cash sales price, resulting in a usurious demand for interest. The resulting penalty imposed by court decision was loss of principal and 3 times the interest charged. Borrower wound up owning the property free and clear and with the Seller owing the borrower \$.

*b. Learning:* The sales, loan, and foreclosure documents had been prepared by the seller's in-house legal counsel. The borrower was a lawyer. Look up time price differential in the TEXAS FINANCE CODE.

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 10 Borrower Challenges to Foreclosure and Lender Responses at § 10.27 *Miscellaneous Claims - Usury*.

## 6. Debtor Stops Paying Ad Valorem Taxes

*a. Bill's Experience:*

### *Failing To Pay Property Taxes Is Expensive And Hazardous*

A mortgagee failed to require the mortgagor to escrow taxes and ignored notices of the accrual of delinquent property taxes.

*b. Learning:* Delinquent property taxes accrue penalty, interest and tax authority legal fees at a rate higher than most loans. Property tax loans can be made by lenders other than the mortgagee and are superior to previously recorded liens, including purchase money liens. The mortgagee should seriously consider paying the mortgaged property taxes as soon as possible to cut off these exorbitant accruals, accruals that have a 1<sup>st</sup> lien priority over the lender's lien, and cut off the risk of a loan from a property tax loan lender.

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 4, Preforeclosure Title Concerns at §§ 4.2.2 *Property Tax Lien Loan*, 4.2:3 *Foreclosure of Ad Valorem Tax Liens*, Chapter 22.2:2 *Title Concerns – Ad Valorem Taxes*, Ch. 24 *Foreclosures Resulting from Ad Valorem Taxation*, and Ch. 25 *Property Tax Loan Foreclosure Process*.

## D. Posting For Foreclosure Sale

### 1. At The Courthouse Door

*a. Bill's Experience:*

### *Take Thumbtacks*

Posting foreclosure notices at the “courthouse door” may take ingenuity. Many counties provide a public bulletin board for this purpose as opposed to cluttering up the courthouse door. For example, a bulletin board on the outside of the county courthouse (a public location designated by the count commissioners for posting). Depending on the velocity of the wind, an unshielded bulletin board is a poor place for posting public notices. I have posted notices on such a bulletin board, and when the glass door to the board was opened, observed numerous notices blow down the street, especially when one borrows the thumbtack of another posted notice.

*b. Learning:* Before posting a foreclosure notice, find out from the county clerk where and how notices are to be publicly posted. Take thumbtacks. 🚩

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 12 *Notice of Foreclosure Sale*, at § 12.3:1 *Posting at Courthouse Door*.

## 2. Three Public Places

### *a. Posting Notice At Courthouse Door*

(1) Bill's Experience:

### *Take Scotch Tape Too*

An earlier version of the public posting of foreclosure notices provided for notices to be posted in three public places, and did not call for filing of the notice with the county clerk. Once I faced posting the notice at the County Courthouse in Brownsville, Texas after 5 p.m. I worried that thumbtacking or nailing the notice to the large wooden courthouse door might be a crime. Luckily, I was armed with scotch tape.

(2) Learning And Manual: Be sure to arrive at the courthouse before the county clerk's office closes so that you can file the notice with the county clerk before her office closes. She can then assist you in posting the foreclosure notice on the public bulletin board. I have found some clerks that lock the public bulletin board at 5 p.m.. 🚩


### *b. An Earlier Requirement*

(1) Bill's Experience:



### *Know How To Get There, Before You Go*

Back in the day when notices were to be posted in three public places, I chose to go to Robstown to post one of the notices. The mortgaged property was located near Robstown, so I thought it appropriate to post in Robstown at the County Building. Regretfully, I had never been to the County Building, and this was before Google Maps and cell phones. I wanted to get to the County Building before it closed at 5 p.m. Once I got to Robstown I hurriedly stopped at a filing station for directions. I got directions to head north on the county road and was told that the County Building was located just north of an alligator farm. As I drove off in the countryside, and saw Robstown disappear in my rear view mirror, and no alligator farm appearing, I wheeled around and went back to the filling station and there the gents were having the biggest laugh.

(2) Learning And Manual: Know how to get where you are going before you go there. (Google maps may help). 

### **E. Notice Of Default And Foreclosure Sale**


#### **1. Notice to Debtor At Last Known Address**

##### **a. *Property Address is Not Last Known Address***

(1) Bill's Experience:

#### ***Ask The Right Question To Get The Right Answer***

In one foreclosure I handled, the borrower moved out before the foreclosure sale and notified the lender of its forwarding address. The lender's employee handling the collection was new to the matter and was unaware of the change of address.

(2) Learning: Oh well, the lender was not seeking a deficiency anyway. 


(3) Manual: See TEXAS FORECLOSURE MANUAL discussion at Ch. 12 Notice of Foreclosure Sale, at § 12.3:3 *Serving Notice on Debtor* and Chapter 8 Demand for Payment, Notice of Intent to Accelerate, and Notice of Acceleration.

##### **b. *Certified Mail Not Claimed***

(1) Bill's Experience:

#### ***The Post Office Can Be Your Friend***

In a foreclosure, the certified mailed notice was not claimed by the debtor and prior to the foreclosure sale the debtor told the lender that the debtor never was notified.

(2) Learning: See Practice Tips in the Manual. 

(3) Manual: See TEXAS FORECLOSURE MANUAL discussion at Ch. 12 Notice of Foreclosure Sale, at § 12.3:3 *Serving Notice on Debtor* and Chapter 8 Demand for Payment, Notice of Intent to Accelerate, and Notice of Acceleration.

##### **c. *Lender Learns Of New Address After Mailing***

(1) Bill's Experience:

#### ***It Is Cheaper To Repost and Renotify, Than To Argue Later***

In another foreclosure, the foreclosure notice was sent to the property address, but before the sale occurred, the Post Office returned the certified mail to the lender stamped with debtor's forwarding address.

(2) Learning: I have found and recommended that it is cheaper to repost and renotify than to argue about such things later, especially if there is significant equity in the mortgaged property; and, if the debtor wants to work out the loan. Since this experience, the legislature has added provisions addressing "last known address". I likely would give the same advice though.

(3) Manual: See the discussions in the Manual sections cited in the prior two experiences.

#### **2. Notice to Debtor But not to Buyer**

a. *Bill's Experience:*

#### ***Another Reason Not To Buy Under A Contract For Deed***

In another matter, a buyer under a contract for deed was unaware that the seller had borrowed money on the house being purchased under a contract for deed. The loan to the seller was secured by a deed of trust lien on the property. The contract for deed buyer had been paying the seller for years, but the seller stopped forwarding payments to the lienholder. A neighbor after the foreclosure sale called the contract for deed buyer expressing sorrow over the buyer's house being foreclosed upon. On behalf of the contract for deed buyer, I visited with the seller at his office. His office was a one room office, you entered

the front door and there was a back door immediately behind the seller's desk. He had a suitcase beside his desk. He bolted for the backdoor with his suitcase when I explained I was there to learn how he intended to make it right for the contract for deed buyer.

b. *Learning:* Never buy under a contract for deed from a seller whose nickname is "Peaches".

### 3. **The Foreclosure Sale Date**

a. *Marty's Experience:*

#### ***The Advantage Of Local Banks***

In the 1980's, our firm represented the largest national bank in Corpus Christi. One of bank's borrowers, a very well-liked and upcoming individual in the local business community, was killed in an automobile accident, leaving a wife and several young children. He had no life insurance and so after a few months his wife was unable to make payments on the family home. Around the first of November, the senior bank officer responsible for the loan (who I normally thought of as being rather gruff and firm in his loan dealings) called me in to say that the home loan had to be foreclosed, but under no circumstances whatsoever was I to start the demand letter process until after Christmas, and then the actual foreclosure sale was not to be conducted before the end of the spring semester of the kids' school. I followed his instructions to the letter, and as events worked out, the wife was able to arrange alternative housing and move after the school semester ended and before the foreclosure sale, with few if any people in the community aware of the foreclosure in the family's life. I cannot imagine such a thing happening in today's world of 1-800 and .com residential mortgage lending, and I have always been glad to have played a small part in this situation.

b. *Learning and Manual:* Good lenders make good neighbors.

### F. **Debtor Dies Intestate before Foreclosure Sale**

1. **Bill's Experience:**

#### ***Lend Only To Borrowers That Have A Will***

After a long and contentious relationship between the lender and the borrower, the lender posted for foreclosure sale and held the sale. Unknown to the lender, the debtor died the day before the foreclosure from a heart attack. The debtor died intestate.

2. **Learning:** It was hard to resell this property for four years without settling up with the "heirs".

3. **Manual:** See TEXAS FORECLOSURE MANUAL discussion at Ch. 26 Deceased Mortgagor Foreclosure Process, at § 26.2:3 *Intestate Succession*.

### G. **Debtor Abandons Hotel**

1. **Bill's Experience:**

#### ***Being A Mortgagee in Possession Can Be Hazardous***

The debtor owned an operating hotel and before foreclosure abandoned the hotel and delivered the keys to the lender.

2. **Learning:** We obtained the appointment of a receiver as opposed to becoming a mortgagee in possession of an operating hotel with guests arriving daily.

3. **Manual:** See TEXAS FORECLOSURE MANUAL discussion at Ch. 4 Preforeclosure Title Concerns, at § 4.18 *Receiverships*; Ch. 6 The Deed of Trust, at § 6.7:10 *Properties in Receivership*; and Ch. 37 Miscellaneous Topics at § 37.2 *Mortgaged Properties in Receivership*.

### H. **Conducting The Sale**

1. **Public Sale At Auction** ?

a. *Marty's Experience:*

#### ***Well, The Borrower Can Sue Then***

In the early 1990's, I was set to conduct a foreclosure sale at the Travis County Courthouse in Austin, Texas. Because a fairly raucous county ad valorem tax sale was underway, I decided to wait a bit before starting my sale. Seeing a gentleman over in a corner reading from an apparent foreclosure transcript, I wandered over to watch his sale. As I approached, he stopped his sale and asked my interest in the sale. I introduced myself and explained I was merely waiting for the tax sale to end before conducting my own sale. I asked his name and what he was selling, and he replied, "I identified myself and the property at the start of the sale, and I am not required to repeat it now." Somewhat taken aback, I said, "Well, go ahead with your sale and I will just watch." He replied, "No, I am not going to continue while you are here." I said, "You are not going to proceed with the sale while anyone is here to watch?" "That's right," he said. I

said, “Doesn’t that create some potential issues with the foreclosure sale?” He responded, “Well, the borrower can sue then.” We both stood there silently for a couple minutes, and then I left to move to a different place to conduct my sale. Before I started my sale, I looked back and saw that he had started to read again from his transcript.

*b. Learning:* And now you know why Texas adopted its anti-deficiency statutes.

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at §§ 14.4 *Manner of Sale*, 14.4 *Manner of Sale* and 14.6 *Chilling Bidding*.

## 2. 1<sup>st</sup> Tuesday Of The Month <sup>8</sup>

*a. Bill’s Experience:*

*Sometimes the 3<sup>rd</sup> Thursday is Just as Good as the 1<sup>st</sup> Tuesday*

On another occasion I got a call from a NY investor that wanted to bid \$20 M at a foreclosure sale on an apartment project being held on the third Thursday of the month! I mentioned to the investor that was not the right day in Texas to foreclose on mortgaged property. He said he had been assured by the Trustee that it was Ok. He also mentioned that there was a webpage that listed this property and a number of others that were being foreclosed on that third Thursday. I called the Trustee, and he assured me that this was a legit sale and gave me the contact info. for a title company willing to insure purchasers at the sale. I called the title company, and they were less enthusiastic. When I went to the sale on the third Thursday, there were a “hundred” folks there bidding. I cornered the Trustee, and the Trustee explained to me that this was a HUD loan foreclosure, and under HUD regulations, they superseded state law. I showed him the Deed of Trust calling for foreclosure on the 1<sup>st</sup> Tuesday. He said that HUD regulations superseded the Deed of Trust recital and showed me a bankruptcy decision as to a foreclosure in Waco where this procedure was approved.

*b. Learning:* I bid \$20 M, but was glad that I was outbid.

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 14, at § 14.2 *Place and Time of Sale*.

## 3. Highest Bidder For Cash; Sale On July 4

*a. Bill’s Experience:*

*Thankfully You No Longer Need to Worry About Whether July 4 Is On A Tuesday*

Once I had to worry about how to accept several million dollars to be bid at a foreclosure sale to be held on the 1<sup>st</sup> Tuesday of the month that turned out to be July 4.

*b. Learning:* July 4 is no longer a worry. Getting millions of dollars still may be. <sup>9</sup>

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at § 14.4:3 *Terms of Sale – To Highest Bidder for Cash*.

## 4. On The “Courthouse Steps”

*a. Inside The Door*

(1) Bill’s Experience:

*Close Is Good Enough In Horseshoes, But Not In Foreclosures*

After the County Commissioners started publishing the location for foreclosures to occur, which I studiously followed, I watched others foreclose at different locations, primarily because the published place was not as convenient as where they chose.

(2) Learning: Good in horseshoes, but not in foreclosures. <sup>10</sup>

(3) Manual: See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at § *Place of Sale*.

*b. Outside The Door*

(1) Bill’s Experience:

*Make Sure You Are At The Right Courthouse Door*

On another occasion, I was foreclosing at a courthouse (but this was before there was designation of a location by the Commissioners) on the West steps, and the debtor had been waiting at the East steps and missed the sale.

(2) Learning: Oh well. I put him in touch with the lender to see if they could work it out.

(3) Manual: See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at § *Place of Sale*.

## 5. Appearing At The Sale

a. *Marty's Experience:*

### *You Never Know Who Is Watching*

In the mid 1980's, a bank client asked me to post and foreclose on some real property located near the town of Leakey, the county seat of Real County, Texas. At that time, Leakey had a population of under 500 people, and after some searching, I discovered that no licensed Texas attorney actually lived in Real County— even the county attorney lived over in Uvalde County. I was able to arrange for the pre-foreclosure title searches thru a title company in Uvalde County and the postings of the foreclosure through messenger clerks at our firm, but as foreclosure day came around, the bank wanted me to conduct the sale, so on that Tuesday I left Corpus Christi fairly early in the morning and drove the several hours to Leakey.

The bulletin board and designated foreclosure site for Real County were at that time both located inside the main hall of the county court house, across from the entrance to the County Clerk's office. When I arrived to conduct the sale, a gentleman was seated in a chair nearby. When I announced I was there to conduct a foreclosure sale, he approached me and asked if I might wait a few minutes before starting so that he could get another gentleman in the building who wanted to see the sale. I agreed and in just a few minutes he was back with two other gentlemen, one an older individual in a nice suit and tie. I then conducted the sale with no other people present besides these three and with no questions or bids from the three, other than to confirm my name and the property being sold.

After the sale was completed. I asked the older gentleman what interested him about this foreclosure sale. He explained he was the County Judge for Real County and that recently the County Clerk had informed him that while she regularly received through the mail foreclosure deeds for recording, no one in her office had ever actually seen a foreclosure conducted in the courthouse. After some investigation, the judge had decided to post a county employee at the foreclosure site for this particular foreclosure day to keep a record of all foreclosures conducted that day. He further explained that he intended to compare the subsequently filed foreclosure deeds with the employee's list of sales actually conducted on site, and that as County Judge he would

thereafter send a written notice to the borrower in any situation where a foreclosure deed was filed but no sale was observed.

Because of the distance from Corpus Christi to Leakey, I never actually heard the result of his little experiment, but I must admit I hoped that any attorney engaging in such practices got hammered.

b. *Learning And Manual:* Get title insurance if buying in Leakey.

## 6. Bidding

a. *Bill's Experience:*

### *If You Bid A Million Dollars, You Need To Have A Million Dollars*

Margo of Water Bed Gallery local TV fame, kept on bidding up at a foreclosure sale, millions of dollars at a highly attended foreclosure sale. I was the attorney for the bond holders and the Trustee was a trust officer of the bank. At my suggestion, the Trustee asked Margo if she would be bringing the \$ M's back to the sale after an hour's adjournment. Her reply "oh never mind."

b. *Learning:* This was in the days before Chapter 51 was amended to expressly provide for the announcing of reasonable conditions in advance of a foreclosure sale. This had been done though, but Margo had shown up after the bidding started. H

c. *Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at § 14.4:3 *Terms of Sale – To Highest Bidder for Cash* and – *Reasonable Conditions*, and § 14.4:4 *Recessing Sale*.

## 7. Conducting The Sale

a. *Marty's Experience:*

### *Speedy Service Is Our Name*

In the late 1980's and early 1990's, enormous numbers of homes went to foreclosure sale during the economic downturn. I had cause to discuss the situation with an associate attorney at one of Houston's very large "Two Name" law firms, and she mentioned that she and a number of other associates at her firm were each posting and attempting to conduct about 300 to 350 residential foreclosures a month. I asked how it was physically possible to do that many sales in the six hour foreclosure window. She said, "Oh, the mortgage lender's contract with our firm provides that as long as the foreclosure sale is merely

voidable, and not void, the lender will indemnify the trustee and our firm against all claims and damages arising from a suit by a borrower.” The reality, of course, was (and still is) that any person losing their home at foreclosure rarely has the assets to pursue a wrongful foreclosure suit against the lender.

*b. Learning And Manual:* Oh well, sad.


## I. Sale

### 1. As Is

*a. Bill's Experience:*

#### *Tanks Everywhere!*

I also had the pleasure of foreclosing on a Webb County ranch. At the sale I was alerted before the sale that there were tanks on the property. I took this as a positive sign thinking they were water tanks, but on further inquiry they were army tanks. To raise \$, the ranch owner/borrower had leased the property to the National Guard, and they were doing maneuvers on the ranch. I mentioned this newly learned information to those in attendance, and reiterated that the sale was “as is”.

*b. Learning:* It is a good idea to visit the mortgaged property before foreclosing. 

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at § 14.6 *Chilling Bidding*, at § 14.10 *Warranties and Title Delivered at Sale* and at § 14.10:4 *Warranties Binding Mortgagee or Trustee*.

### 2. Priority Of Lien

*a. Bill's Experience:*

#### *Take A Second To Find Out If It Is A First*

I was foreclosing a 2<sup>nd</sup> lien. I had prepared and read in a loud voice from a transcript. I adjourned the sale to allow the successful bidder to go to his bank. When he reappeared at the appointed time, I presented the bidder with the Deed. To his apparent chagrin he said that he thought the sale was as to a first lien.

*b. Learning:* Luckily, I had a transcript and had read aloud that I was foreclosing on a 2<sup>nd</sup> lien. The bidder said he would take it anyway. I speculate that he knew it was a 2<sup>nd</sup> lien foreclosure and was angling for a better deal.

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at § 14.10 *Warranties and Title Delivered at Sale*.

## J. Post-Foreclosure Actions

### 1. Securing The Premises

*a. Bill's Experience:*

#### *Where's My Furniture?*

Post foreclosure, I received a call from a debtor telling me the following story: He said that his house had been foreclosed upon, but that he had not gotten notice of the foreclosure sale. While he was at work, the foreclosing lender had a company clear out the debtor's furniture before the debtor returned home from work. As circumstances would have it, a third party bought the house at the foreclosure sale and the furniture was also sold to a third party. Prior to the foreclosure sale, the debtor and the lender's servicer had visited about the debtor's delinquency, but the debtor was told that the lender would “take care of the debtor”.

*b. Learning:* At the time, I had a friend that I referred cases like this to.

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 14 Conducting the Sale, at § 14.10:2 *Position of Foreclosure Sale Purchaser* and Ch. 34 § 34.15:6 *Intervening Third-Party Purchaser*.

### 2. Evicting The Occupants

*a. Hank's Experience:*

#### *Sometimes Being Old Has Its Advantages*

In this case the debtor, an elderly infirm widow, was foreclosed upon by Hank, the Trustee. Post foreclosure, the lender sought to evict her. The debtor sued the Hank and the lender to avoid the eviction and to set aside the foreclosure. She alleged that the lender had assured her that it would pass the sale and work it out with her. Under the judge's threat to set aside the foreclosure, the parties compromised to allow the debtor to stay in the house rent-free for the remainder of her life provided she paid the property taxes and maintained the house.

*b. Learning:* Sometimes justice prevails.

*c. Manual:* See TEXAS FORECLOSURE MANUAL discussion at Ch. 34 Residential Evictions Following

Foreclosure, at § 34.3 *Eviction Following Foreclosure*  
and § 34.15:6 *Intervening Third-Party Purchaser*.

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**Endnotes:**

**1** **Trustee's Liability.** The TEXAS PROPERTY CODE **§ 51.0074(b)** *Duties of Trustee* provides:

(b) A trustee may *not* be:

- (1) assigned a duty under a security instrument other than to exercise the power of sale in accordance with the terms of the security instrument; or
- (2) held to the obligations of a fiduciary of the mortgagor or mortgagee.

**2** **Posting for Foreclosure Sale - Notice at the Courthouse Door and Filing with the County Clerk.** TEXAS PROPERTY CODE **§ 51.002(b)** *Sale of Real Property Under Contract Lien* provides:

(b) Except as provided by Subsection (b-1), notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by:

- (1) *posting at the courthouse door* of each county in which the property is located a written notice designating the county in which the property will be sold;
- (2) *filing in the office of the county clerk* of each county in which the property is located a copy of the notice posted under Subdivision (1); and
- (3) *servicing written notice of the sale by certified mail on each debtor* who, *according to the records of the mortgage servicer* of the debt, is obligated to pay the debt.

**3** **See Endnote 2.**

**4** **Posting for Foreclosure Sale - Notice at the Courthouse Door.** At the time of the referenced foreclosure sale TEXAS PROPERTY CODE **§ 51.002(b)** *Sale of Real Property Under Contract Lien* did not include subsection (2) requiring the notice to also be filed in the office of the county clerk.

**5** **Notice to Debtor at Debtor's Last Known Address.** TEXAS PROPERTY CODE **§ 51.002(e)** *Sale of Real Property Under Contract Lien* provides:

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

TEXAS PROPERTY CODE **§ 51.0001(2)** *Definitions* provides:

(2) *"Debtor's last known address" means:*

- (A) for a debt secured by the debtor's residence, *the debtor's residence* address unless the debtor provided the mortgage servicer *a written change of address before the date the mortgage servicer mailed* a notice required by Section 51.002; or
- (B) for a debt other than a debt described by Paragraph (A), *the debtor's last known address as shown by the records of the mortgage servicer* of the security instrument unless the debtor provided the current mortgage servicer a written change of address *before the date the mortgage servicer mailed a notice* required by Section 51.002.

TEXAS PROPERTY CODE **§ 51.0021** *Notice of Change of Address Required (1/1/2004)* provides:

*A debtor shall inform the mortgage servicer* of the debt in a reasonable manner of any *change of address of the debtor for purposes of providing notice* to the debtor under Section 51.002.

**6** **Certified Mail Not Claimed.** TEXAS PROPERTY CODE **§ 51.002(e)** *Sale of Real Property under Contract Lien* provides:

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

**7** **Public Sale at Auction.** TEXAS PROPERTY CODE **§ 51.002(a)** *Sale of Real Property Under Contract Lien* provides:

(a) Except as provided by Subsection (a-1), a sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a **public sale at auction** ....

**8** **First Tuesday of the Month.** TEXAS PROPERTY CODE **§ 51.002(a)** *Sale of Real Property Under Contract Lien* provides:

(a) Except as provided by Subsection (a-1), a sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held **between 10 a.m. and 4 p.m.** of the **first Tuesday of a month**....

**9** **Highest Bidder for Cash; Sale on July 4.** TEXAS PROPERTY CODE **§ 51.002(a-1)** *Sale of Real Property Under Contract Lien* provides:

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

The foreclosure sale was before the adoption of this provision of the Texas Property Code.

**10** **On the Courthouse Steps.** TEXAS PROPERTY CODE **§ 51.002(a)** *Sale of Real Property Under Contract Lien* provides:

...The **commissioners court shall designate the area** at the courthouse where the sales are to take place and shall record the designation in the real property records of the county. **The sale must occur in the designated area**....

**11** **Bidding.** TEXAS PROPERTY CODE **§ 51.0075(a)** *Authority of Trustee or Substitute Trustee* provides:

(a) A trustee or substitute trustee may set reasonable conditions for conducting the public sale **if the conditions are announced before bidding is opened for the first sale of the day held by the trustee or substitute trustee**.

**12** **Sale "As Is"**. TEXAS PROPERTY CODE **§ 51.009** *Foreclosed Property Sold "As Is"* provides:

A purchaser at a sale of real property under Section 51.002

- (1) acquires the foreclosed property **"as is"** without any expressed or implied warranties, **except as to warranties of title**, and at the purchaser's own risk; and
- (2) is not a consumer.