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## **After the Foreclosure: Issues Faced by the Buyer**

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## **AFTER THE FORECLOSURE: ISSUES FACED BY THE BUYER**

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## AFTER THE FORECLOSURE: ISSUES FACED BY THE BUYER

The purpose of this paper is to provide some insight as to why “let’s go shopping” does not have the same refrain on the first Tuesday of the month at county courthouses in Texas as on the Friday after Thanksgiving at shopping malls in Texas.

### I. Time and Place of a Non-Judicial Foreclosure Sale

In Texas, on the first Tuesday of every month, between the hours of 10:00 am and 4:00 p.m., non-judicial foreclosure sales of real property are conducted at county courthouses in an area designated by the commissioners courts of each respective Texas county.<sup>1</sup> Each non-judicial foreclosure sale is conducted by a “trustee” named in a deed of trust or a substitute trustee appointed by the beneficiary of the deed of trust. The trustee or substitute trustee conducts the non-judicial foreclosure sale pursuant to a power of sale set forth in the deed of trust and Texas Property Code Sections 51.001 – 51.015. The trustee or substitute trustee is charged with the responsibility of obtaining the highest bid for the purchase of the real property.<sup>2</sup>

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<sup>1</sup> Texas Property Code Section 52.002 **Sale of Real Property Under Contract Lien** states:

A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. Except as provided in Subsection (h), the sale must take place at the county courthouse in the county in which the land is located, or if the property is located in more than one county, the sale may be made at the courthouse in any county in which the property is located. The commissioners court shall designate the area at the courthouse where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by that notice is to take place, and the sale must occur in that area.

<sup>2</sup> The Texas Supreme Court in *Hampshire v. Greeves*, 143 S.W. 146 (1912) set forth the duty of the trustee when conducting a non-judicial foreclosure sale. The court states:

His duty as trustee was to act in that matter alone for both parties in “the utmost good faith and strictest impartiality.” When requested to sell the property, it was his duty to do so, and, if there existed any reason known to him why he should not make the sale as provided in the power of sale given in the mortgage, it was the duty of those who were immediately interested and who were in possession of the facts to notify the trustee the agent of them all for purposes of executing the terms of the trust.

*Id.* at 151.

The court in *McClure v. Casa Claire Apartments, Ltd.*, 560 S.W.2d 457 (Tex.Civ.App.—Beaumont 1977, no writ) sets forth the dual role of the trustee. Holding that a mistaken overbid entered by the substitute trustee on behalf of the lender could not be rescinded, the court stated:

McClure [the substitute trustee] was simultaneously performing two roles at the time of the sale. As substitute trustee, he was required to accept the highest bid made. As agent for Metropolitan [the lender], he has at least apparent authority to bid for the principal. Any mistake by McClure was made in his role as agent for Metropolitan, not in his role as trustee.

In Texas, on the first Tuesday of every month, between the hours of 10:00 am and 4:00 p.m., third party buyers “may” be present at county courthouses in an area designated by the commissioners courts of each respective Texas county with a plan to enter one or more bids to purchase real property. Third party buyers’ attendance and participation at non-judicial foreclosure sales are optional. A third party can elect to attend the sale or not, bid or not bid, and stop bidding at any time.

The lender’s participation at the foreclosure is not optional. The lender is relying upon the foreclosure sale to bring the highest bid possible as a means of repaying its loan. The lender’s bid is usually the lesser of the amount of the secured indebtedness or the lender’s determination of the market value of the property.<sup>3</sup> If a third party is not willing to bid more than the lender’s bid, the lender will be the high bidder and its bid amount will be applied to the indebtedness secured by the deed of trust being foreclosed. If a lender is not willing to take these steps, the lender would not have caused the trustee or substitute trustee to post the property for foreclosure and to conduct the sale.

If a third party is the highest bidder, the third party must tender cash in the amount of the highest bid

on the acceptance of the bid or within such reasonable time as may be agreed upon by the purchaser and the trustee or substitute trustee if the purchaser makes such a request for additional time to deliver the purchase price.

Tex. Prop. Code Sec. 51.0075(f). Although the statute does not require the payment in cash, most deeds of trust require the trustee to sell to the highest bidder for cash. The payment in cash requirement has been upheld by Texas courts. *See Kirkman v. Amarillo Sav. Ass’n*, 483 S.W.2d 302, 307-309 (Tex. Civ. App.—Amarillo 1972, writ ref’d n.r.e.). A trustee may allow for a

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*Id.* at 463.

These two cases point out the trustee’s duty when there is an event of default and the lender has directed the trustee to enforce the power of sale.

1. “His duty as trustee was to act in that matter alone for both parties in ‘the utmost good faith and strictest impartiality.’”
2. “As substitute trustee, he was required to accept the highest bid made.”

The objective of the auction format is for the trustee to accept the highest bid which will be applied to the indebtedness secured by the deed of trust. If there are insufficient sale proceeds to pay the indebtedness, the borrower may be liable for a deficiency. If there are excess sale proceeds, the trustee must distribute them to any subordinate lienholders, in the order of their priority, then to the borrower. The lender, the borrower, and any subordinate lienholders have an interest in the trustee selling the property for the highest bid possible.

<sup>3</sup> There is no statutory or case law requiring this bid amount. It is the author’s experience that this is the usual bid amount, especially where the lender has a right to seek a deficiency. In a suit for a deficiency, the borrower and any guarantors have the right to defend by obtaining a finding of fair market value as an off-set against the lender’s claim for a deficiency. Tex. Prop. Code Sec. 51.003 & Sec. 51.005.

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