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Excess Proceeds: Deceptively Simple or Just Plain Simple?

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Excess Proceeds: **Deceptively Simple or Just Plain Simple?**

Who is entitled to excess proceeds after a foreclosure sale – inferior lienholders, borrowers, or nefarious others? Explore the intricacies associated with a seemingly straightforward process and how it can become a convoluted quandary.

I. INTRODUCTION

While our lovely Lone Star State may be the biggest state in the contiguous United States, the second most populous, have the best food (hands-down), and also honor both John Wayne and Chuck Norris as "honorary" Texas Rangers, one thing Texas does not have is a statute governing the distribution of excess proceeds of foreclosure sales (excluding tax sales). Everyone learns in law school that excess proceeds flow down to inferior liens, never up to senior liens. But…..why? Where does that come from? Other states are kind enough to codify this for their lawyers. For example, Arizona has A.R.S. § 33-812(A) and Colorado has C.R.S § 38-38-111 which expressly provide how proceeds are disbursed and specifies the priorities given to the parties entitled to the proceeds. It is undisputed that Texas law holds when excess proceeds exist after payments of the expenses of sale, the secured debt, and the other claim required by law to be paid before the mortgagor, the excess belongs to the mortgagor. *Bonilla v. Roberson*, 918 S.W.2d 17, 23 (Tex. App – Corpus Christi 1996, no writ). However, other than some case law, Texas law is silent as to where the funds are to go and in what order. By the end of this paper, an appreciation for the following quote by the late Steve Jobs be taken as gospel, "Simple can be harder than complex: You have to work hard to get your thinking clean to make it simple."

II. EXCESS PROCEEDS

a. DEFINED

Excess proceeds, also commonly referred to as surplus proceeds or funds, are what's left over after a foreclosure sale when the sales price exceeds the amount bid by the trustee. Typically, the trustee will start bidding at total debt, plus certain fees and costs authorized under the terms of the deed of trust. Simply put, the remainder is excess proceeds. Identification of excess proceeds is not difficult; as for their lawful distribution, the same cannot be said.

b. WHO IS RESPONSIBLE FOR DISTRIBUTION?

For all the obscurities associated with excess proceeds and their distribution, the party responsible for doing so is as clear as the water at Barton Springs on a sunny, spring day: the trustee. TEX. PROP. CODE § 51.0075(f) states, among other things, "The trustee or substitute trustee *shall* disburse the proceeds of the sale as provided by law." While this clarifies who was expressly responsible for the distribution of excess proceeds, unforeseen consequences and issues were created by additional verbiage added to the statue discussed shortly.

c. DUTIES OF THE TRUSTEE

The Texas legislature was kind enough to provide precise insight as to the duties of a trustee. Specifically, the Texas Property Code states:

> (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.

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