

Mortgage Lending Institute

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## **FORECLOSURE REFRESHER: THE UPDATED BASICS**

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# FORECLOSURE REFRESHER: THE UPDATED BASICS

## INTRODUCTION

This presentation focuses only on the foreclosure of commercial real property and primarily non-judicial foreclosures under powers of sale conferred by deed of trust or other contract liens pursuant to Chapter 51 of the Texas Property Code. Additional notice requirements apply to non-judicial foreclosures of a lien on real property used as the debtor's residence (See, Texas Property Code §51.002(d)), and for liens secured by the debtor's residence, the practitioner should consult the Texas Debt Collection Act (Texas Finance Code §392.001, et. seq.) and the Federal Fair Debt Collection Practices Act (15 U.S.C. 1692, et. seq.) because additional requirements may apply to the notices depending on who sends the notice.

## **ALTERNATIVES TO NON-JUDICIAL FORECLOSURE**

### **Deed in Lieu**

A deed in lieu is essentially a voluntary conveyance by the mortgagor of the mortgaged property to the mortgagee or the mortgagee's designee in full or partial satisfaction of the secured indebtedness. The conveyance transfers title to the mortgagee without the necessity of any foreclosure proceeding.

The conveyance requires a voluntary transfer by the mortgagor and a voluntary and freely given acceptance by the mortgagee. The mortgagor cannot simply execute a deed and force the mortgagee to accept it. See, Martin v. Uvalde Sav. & Loan Ass'n, 773 S.W.2d 808, 812-13, (Tex. App. – San Antonio, 1989, no writ).

Texas law does not establish the requirements for a deed in lieu, nor is a deed

in lieu “a specific type of deed,” but is a “deed given in the satisfaction of debt [which] may serve as a convenient, efficient transfer of title upon default of a debt.” Morrison v. Christie, 266 S.W.3d 89, 92-93 (Tex. App. – Fort Worth 2008, no pet.), citing, Flag-Redfern Oil Co. v. Humble Exploration, Inc., 744 S.W.2d 6, 8 (Tex. 1987).

A significant concern with a deed in lieu is the transferee taking the property subject to subordinate liens or other inferior interests in the property which would be extinguished by a foreclosure of the superior deed of trust lien but which are not extinguished by a conveyance of the property by deed or deed in lieu. (See p. 35, Impact of Foreclosure Rights of Others). It is common for the deed of lieu agreement to expressly preserve the deed of trust lien and the mortgagee's ability to foreclose the deed of trust lien to extinguish subordinate liens and other inferior interests.

Texas Property Code §51.006 provides some protection for undisclosed liens or encumbrances to a party who accepts a deed in lieu in satisfaction of the debt. Tex. Prop. Code §51.006. Texas Property Code §51.006 provides as follows:

- (a) This section applies to a holder of a debt under a deed of trust who accepts from the debtor a deed conveying real property subject to the deed of trust in satisfaction of the debt.
- (b) The holder of a debt may void a deed conveying real property in satisfaction of the debt before the fourth anniversary of the date the deed is executed

and foreclosed under the original deed of trust if:

- (1) The debtor fails to disclose to the holder of the debt a lien or other encumbrance on the property before executing the deed conveying the property to the holder of the debt in satisfaction of the debt; and
  - (2) The holder of the debt has no personal knowledge of the undisclosed lien or encumbrance on the property.
- (c) A third party may conclusively rely upon the affidavit of the holder of a debt stating that the holder has voided the deed as provided in this section.
- (d) If the holder elects to void a deed in lieu of foreclosure as provided in this section, the priority of its deed of trust shall not be affected or impaired by the execution of the deed in lieu of foreclosure.
- (e) If a holder accepts a deed in lieu of foreclosure, the holder may foreclose its deed of trust as provided in said deed of trust without electing to void the deed. The priority of such deed shall not be affected or impaired by the deed in lieu of foreclosure. Tex. Prop. Code §51.006.

### **Judicial Foreclosure**

A mortgagee has the option of instituting a suit to obtain a judgment establishing the debt and fixing the lien and for an order of sale pursuant to Rule 309 of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 309; Bonilla v. Roberson, 918 S.W.2d 17, 21 (Tex. App. – Corpus Christi 1996, no writ). Suits for a foreclosure of real property pursuant to a judgment for foreclosure and order of sale are governed by Texas common law, the Texas Rules of Civil Procedure, and statute.

Given the delay and expense inherent with obtaining a judgment for foreclosure compared with the speed, efficiency and relatively small expense of non-judicially foreclosing the deed of trust lien pursuant to a power of sale, non-judicial foreclosure is the preferred option in Texas, and suits for judicial foreclosure are rare. There are, however, circumstances where a judicial foreclosure may be required or is the preferable alternative.

Although a power of sale is not necessary for a deed of trust to create a lien against the property, the deed of trust or other contract lien must include a power of sale in order for a non-judicial foreclosure of the lien to be possible. See, Tex. Prop. Code §51.002; Bonilla, 918 S.W.2d at 21. Texas Property Code §51.002 provides the procedures for a non-judicial foreclosure “of real property under a power of sale conferred by a deed of trust or other contract lien.” Tex. Prop. Code §51.002(a). If the deed of trust lien or other contract does not include a power of sale, non-judicial foreclosure is unavailable. See, Slaughter v. Qualls, 139 Tex. 340, 162 S.W.2d 671, 675 (1942) (a trustee has no power to sell the mortgaged property except as provided for in the deed of trust.). If the deed of trust or contract lien does not include a power of sale,

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