

PRESENTED AT

50th Annual William W. Gibson, Jr.
Mortgage Lending Institute

September 29-30, 2016 ▪ Austin, Texas
October 20-21, 2016 ▪ Dallas, Texas

Case Law Update

DAVID A. WEATHERBIE, *Dallas*
Cramer Weatherbie Richardson Walker
dweatherbie@cwrwlaw.com

Author Contact Information:
DAVID A. WEATHERBIE
Cramer Weatherbie Richardson Walker LLP
Dallas, Texas

dweatherbie@cwrwlaw.com
(214) 369-1170
www.cwrwlaw.com

CASE LAW UPDATE
DAVID A. WEATHERBIE
CRAMER WEATHERBIE RICHARDSON WALKER LLP
DALLAS, TEXAS

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 485 S.W.3d and Supreme Court opinions released through August 26, 2016.

The Texas Property Code and the other various Texas Codes are referred to by their respective names. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case, rather than to my summary, and to the statute or code in question, to determine whether there have been any amendments that might affect the outcome of any issue.

A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

This and past Case Law Updates are available at our website cwrwlaw.com.

TABLE OF CONTENTS

PART I MORTGAGES AND FORECLOSURES.....	1
PART II HOME EQUITY LENDING	4
PART III PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS.....	8
PART IV GUARANTIES.....	12
PART V LEASES.....	13
PART VI DEEDS AND CONVEYANCES.....	21
PART VII VENDOR AND PURCHASER.....	25
PART VIII EASEMENTS.....	34
PART IX ADVERSE POSSESSION, TRESPASS TO TRY TITLE, QUIET TITLE	37
PART X CONSTRUCTION AND MECHANICS' LIENS.....	39
PART XI CONDEMNATION	44
PART XII LAND USE PLANNING, ZONING, AND RESTRICTIONS	48
PART XIII MISCELLANEOUS	53

PART I MORTGAGES AND FORECLOSURES

Marhaba Partners Limited Partnership v. Kindron Holdings, LLC, 457 S.W.3d 208 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). Marhaba borrowed a loan from City Bank. It gave City Bank a deed of trust covering real property and also gave City Bank an assignment of its right to a reimbursement from the MUD district. After Marhaba defaulted, City Bank foreclosed on the real property for less than balance due, then sold the loan to Kindron, assigning it the notes and other loan documents, including the assignment of the MUD reimbursement.

Kindron notified Marhaba that it was going to conduct a UCC sale of the MUD reimbursement assignment and would apply the proceeds to the deficiency. Marhaba responded by claiming that the indebtedness had been discharged by the foreclosure sale. Kindron proceeded anyway and, at the UCC sale, sold the MUD reimbursement assignment to itself. It then brought a declaratory judgment action to have the court determine that it was entitled to foreclose on the MUD assignment.

Marhaba claimed that Property Code § 51.003 applied to the real property foreclosure sale, that the real property had a fair market value in excess of the debt, and that the debt was discharged, extinguishing the security interest in the MUD receivable.

Section 51.003 provides borrowers and guarantors with a mechanism to adjust foreclosure sales prices upward. The legislature created this mechanism in recognition that post-foreclosure deficiencies artificially can be inflated because the nonjudicial foreclosure sale often does not directly represent what a buyer might pay in the market. When the lender is the sole bidder, it has little incentive to bid high. Section 51.003 applies to any action brought to recover the deficiency.

Marhaba argues that section 51.003(a) applies here because Kindron's declaratory judgment is an action brought to recover the deficiency. Marhaba argues that a deficiency resulted from the property foreclosure sale because the sale proceeds did not fully pay the loan balance. Marhaba further asserts that, because a deficiency resulted, section 51.003 applies to Kindron's subsequent suit to collect the deficiency via the declaratory judgment action.

Section 51.003 does not explicitly address how courts should address deficiencies when multiple sources of collateral secure the same loan. The statute does not state whether the existence of a deficiency within the meaning of § 51.003 should be determined after each foreclosure sale or after all sales. Additionally, the statute does not state whether § 51.003 applies to situations involving mixed collateral encompassing real estate and personal property.

When a loan is secured by a single piece of real estate collateral, a deficiency judgment will impose personal liability upon the debtor for the unpaid amount of a debt after the foreclosure sale. In cases involving multiple sources of collateral, personal liability may not be at issue; the lender may be able to collect through a series of non-judicial foreclosure sales. In cases where multiple pieces of collateral are foreclosed upon in a series of non-judicial proceedings, the foreclosure sale price for each piece of collateral, not the collateral's fair market value, is applied to the loan balance after each sale. Moreover, § 51.003 does not apply to prevent the sales or to require the lender to offset the debt in the manner stated in § 51.003 before proceeding with additional sales.

The inapplicability of the fair market value offset mechanism in cases involving serial foreclosure on multiple sources of collateral suggests that a deficiency under § 51.003 should be calculated (1) after all

collateral has been sold; or (2) when the lender seeks to impose personal liability against the debtor through judicial action.

Landers v. Nationstar Mortgage, LLC, 461 S.W.3d 923 (Tex.App.-Tyler 2015, pet. denied). Aurora accelerated the Landerses' mortgage loan in November 2009. The Landerses then sued Aurora alleging fraud. They first obtained a TRO and later an agreed temporary injunction which enjoined Aurora from "conducting a foreclosure sale" while the fraud action was pending. In the meantime, Nationstar obtained the loan from Aurora. Judgment in the fraud suit was entered in Nationstar's favor and in December 2013, Nationstar filed suit for a judicial foreclosure.

The Landerses claimed that Nationstar's suit for judicial foreclosure was barred by limitations. Nationstar asserted that its suit was timely because limitations was tolled by the temporary restraining order and the temporary injunction. The trial court rendered summary judgment in favor of Nationstar.

Generally, if a note payable in installments is secured by a lien on real property, limitations for enforcement of the lien does not begin to run until the maturity date of the last installment. Civil Practice & Remedies Code § 16.035(e). If a note or deed of trust secured by real property contains an optional acceleration clause, the cause of action for enforcement accrues when the holder exercises its option to accelerate. When the four year limitations period expires, the real property lien and the power of sale to enforce the lien become void.

The court held that neither of the statutory tolling events has occurred here. Nationstar argued there is a general equitable rule that, where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time in which he is thus prevented should not be counted against him in determining

whether limitations have barred his right. Under this rule, it has been held that the statute of limitations for nonjudicial foreclosure was tolled during the time the lender was restrained by the trial court's injunction from exercising the power of sale in the deeds of trust. However, in those earlier cases, the courts held that an injunction restraining a sale under the deed of trust did not prevent a suit to recover on the debt and to foreclose the liens through the court.

In this case, the injunctions prevented Nationstar from "conducting a foreclosure sale or otherwise dispossessing [the Landerses] of their interest" in the subject property and then from "conducting a foreclosure sale" of the subject property. Neither injunction restrained Nationstar from filing suit for judicial foreclosure of its lien. Therefore, the limitations period for such a suit was not tolled, and it expired prior to the filing of Nationstar's suit.

Nationstar contends that even if the limitations period expired prior to the filing of its suit, quasi-estoppel prevents the Landerses from asserting their statute of limitations defense. Quasi-estoppel precludes a party, with knowledge of the facts, from taking a position inconsistent with its former position to the disadvantage or injury of another. Nationstar argues that the Landerses' current position that Nationstar could have filed its suit for judicial foreclosure during the periods of injunction is inconsistent with their previous position that the Landerses were entitled to injunctions against nonjudicial foreclosure. However, judicial foreclosure and nonjudicial foreclosure are distinct procedures, and injunction against one does not preclude proceeding under the other. . Therefore, the Landerses' positions are not inconsistent, and, further, did not disadvantage or injure Nationstar. Consequently, quasi-estoppel does not apply.

In re Nguyen, 456 S.W.3d 673

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Case Law Update

Also available as part of the eCourse

[2016 Mortgage Lending eConference](#)

First appeared as part of the conference materials for the
50th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"Case Law Update, Part I"