

**HOA ASSESSMENT LIENS:
EVERYTHING YOU NEED TO KNOW TO FIGURE OUT YOUR
HEAD FROM YOUR ASSESSMENT LIEN**

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HOA ASSESSMENT LIENS: EVERYTHING YOU NEED TO KNOW TO FIGURE OUT YOUR HEAD FROM YOUR ASSESSMENT LIEN

I. INTRODUCTION

The fastest growing form of housing in the United States today is “Common Interest Developments,” which include planned unit developments of single-family homes and condominiums. These Common Interest Developments are almost always governed by an association of property owners, commonly referred to as a “Homeowners Association” or simply a “HOA,” which is a legal entity created by the real estate developer for the purpose of managing the development, maintaining development amenities and commonly-owned improvements, and enforcing development restrictions. In fact, the Community Associations Institute, a national organization for association-governed communities, estimates that as of 2009, there are 305,400 association-governed communities in the United States, which govern more than 24 million homes and 60.1 million residents, an increase of more than 3,000 percent from the same data compiled in 1970.¹

Nowadays, Homeowners Associations often deliver services that were once the exclusive province of local governments, including trash pickup, street paving, and lighting, to name but a few. This transfer, or privatization, of services has become commonplace as the demand for housing has outpaced the ability of many local governments to provide services. In addition, many Homeowners Associations also maintain swimming pools, tennis courts, playgrounds, and other amenities that most Americans cannot afford on their own, as well as provide security, social activities, clubhouses, walking trails, and more for the benefit of their homeowners and residents.

In order for a Homeowners Association to perform such obligations and provide such services, the Homeowners Association must have a source of income. The Declaration of Covenants, Conditions and Restrictions (“Declaration”) for an association-governed community generally requires each member of a Homeowners Association to pay assessments that are used to cover the expenses of the community at

large. Some examples of these common expenses are: landscaping for the common areas; maintenance and upkeep of community amenities; insurance for commonly-owned structures and areas; restrictive covenant enforcement; mailing costs for newsletters and other correspondence; employment of a management company or on-site manager; security personnel and gate maintenance; and any other item delineated in the governing documents for the Homeowners Association or agreed to by the board of directors for the Homeowners Association. The Declaration also commonly vests the Homeowners Association with tools to collect unpaid assessments, and in a lot of cases, the ability to foreclose a lien against a delinquent homeowner’s property for non-payment of assessments (commonly referred to as an “Assessment Lien”).

Assessments are the lifeblood of Homeowners Associations, without which they would be unable to fulfill their duties to their community. Inevitably, some lot or unit owners in every Homeowners Association will not pay levied assessments and, by consequence, the Homeowners Association will be put in the unenviable position of having to engage in collection efforts against residents in its own community. While no Homeowners Association wants to be a debt collector, it is fundamentally wrong to shift the financial burden caused by a few homeowners who fail or refuse to pay assessments to the rest of the homeowners in a community who do timely pay the assessments levied against them. In addition, allowing some homeowners to simply not pay their assessments will eventually lead to dissension in the community by those homeowners who do pay, as well as result in additional delinquencies by more homeowners. Furthermore, boards of directors have a duty to act in the best interest of their community and with due care in the management of the Homeowners Association’s affairs, which in most cases means that the board of directors has an obligation to make efforts to collect these unpaid assessments and, in appropriate circumstances, to foreclose its Assessment Lien against a delinquent homeowner.²

Perhaps no function of a Homeowners Association has attracted as much public media attention as the collection of Assessments and the exercise of foreclosure rights in connection with such collection efforts. In fact, in response to certain public outcry following the foreclosure of an Assessment Lien

¹ <http://www.caionline.org/info/research/Pages/default.aspx>. In 1970, there were only 10,000 association-governed communities in the United States, which governed over 701,000 homes and 2.1 million residents. *Id.*

² As noted by the Texas Supreme Court in *Inwood North Homeowners' Association v. Harris*, “[t]he remedy of foreclosure is an inherent characteristic of the property right [and] is generally the only method by which other owners will not be forced to pay more than their fair share or be forced to accept reduced services.” 736 S.W.2d 632, 636 (Tex. 1987).

by a Homeowners Association in Harris County in 2001, the Texas legislature enacted the Texas Residential Property Owners Protection Act (which is generally referred to as Chapter 209 of the Texas Property Code).³ Chapter 209 of the Texas Property Code imposes certain due process requirements on Homeowners Associations that govern subdivision developments (commonly referred to as “Subdivision Associations”) before they can assess a fine, file a lawsuit, or seek reimbursement of attorneys fees against a Homeowner.⁴ Chapter 209 also imposes certain limitations on the ability of Subdivision Associations to foreclose Assessment Liens and creates new procedures for homeowners to redeem their lot after a foreclosure sale from the person or entity that purchases it.⁵ These new redemption procedures are similar to, but differ slightly from, the redemption procedures for foreclosed units that already existed under the Texas Uniform Condominium Act.⁶ The purpose of this paper is to provide a basic explanation of the creation, scope and priority of HOA Assessment Liens, as well as the regulations and procedures for foreclosure of Assessment Liens and redemption of a lot or unit by its owner following foreclosure of a Homeowners Association’s Assessment Lien.

II. COMMONLY USED TERMS AND DEFINITIONS

Articles of Incorporation is a defined term under the Texas Nonprofit Corporation Act and refers to the document required to be filed with the Texas Secretary of State’s office to form a nonprofit corporation, and includes any restated and amended Articles of Incorporation.⁷ Such term is synonymous with the term “Certificate of Formation” under the Texas Nonprofit Corporation Law.⁸

Assessment is a commonly-used term of art that refers to a monetary charge assessed by a Homeowners Association against a

Homeowner pursuant to its Declaration or Bylaws to fund the operation of the Homeowners Association and management of the community or other obligation specified by such Governing Documents.⁹ Such term includes regular Assessments, special Assessments, individual Assessments, or other types of charges specified by a Homeowners Association’s Governing Documents or Texas law. For purposes of a Condominium Association’s Assessment Lien, the term “Assessment” is defined by the Texas Uniform Condominium Act and includes regular Assessments, special Assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorneys fees, and any other amount due a Condominium Association by a Unit Owner.¹⁰

Assessment Lien is a commonly-used term of art that refers to a contractual lien created and reserved in a Declaration (and/or by the Texas Uniform Condominium Act) in favor of a Homeowners Association to secure payment of Assessments.¹¹

Association-Governed Community is a generic term of art that refers generally to any Subdivision Development or Condominium Development governed by an association of property owners, including single-family Subdivision Developments, Condominium Developments, and other types of planned-unit developments.

Association Rules is a commonly-used term of art that refers to rules adopted and amended from time to time by the Board of Directors of a Homeowners Association pursuant to its authority to do so under its applicable Declaration. Such rules are sometimes also called “rules and regulations” in a Declaration.

Board of Directors is a defined term under the Texas Nonprofit Corporation Law and means the group of persons vested with the management of the affairs of a Nonprofit

³ Tex. Prop. Code § 209.001. The enacting legislation notes that it was enacted in honor of Wenonah Blevins, a woman whose home was foreclosed upon by a Homeowners Association in Harris County, and that the Texas Residential Property Owners Protection Act may be unofficially referred to as the “Wenonah Blevins Residential Property Owners Protection Act.”

⁴ Tex. Prop. Code §§ 209.006-.009.

⁵ Tex. Prop. Code §§ 209.010, 209.011.

⁶ See Tex. Prop. Code § 82.113(g).

⁷ Tex. Rev. Civ. Stat. Ann. art. 1396-1.02(A)(4).

⁸ Tex. Bus. Org. Code § 1.002(6).

⁹ See generally, Tex. Prop. Code § 209.002(1).

¹⁰ Tex. Prop. Code § 82.113(a).

¹¹ See Tex. Prop. Code § 82.113.

Corporation HOA, regardless of the name used to designate such group.¹²

Bylaws is a defined term under the Texas Nonprofit Corporation Law and means the rules adopted to regulate or manage a Nonprofit Corporation HOA, regardless of the name used to designate such rules.¹³

Certificate of Formation is a defined term under the Texas Business Organization Code and refers to the document required to be filed with the Texas Secretary of State's office to form a nonprofit corporation, and includes any restated and amended Certificates of Formation.¹⁴ Such term is synonymous with the term "Articles of Incorporation" under the former Texas Nonprofit Corporation Act.¹⁵

Chapter 209 of the Texas Property Code, more commonly referred to as simply "**Chapter 209**" refers to the Texas law that imposes certain due process requirements on a Subdivision Association before it may suspend a Lot Owner's right to use a Common Area, initiate judicial enforcement of Restrictive Covenants against a Lot Owner, charge a Lot Owner for property damage, assess a fine against a Lot Owner for violation of a Restrictive Covenant, or charge a Lot Owner for attorneys fees incurred by the Subdivision Association, as well as imposes certain requisite procedures on a Subdivision Association prior to and following foreclosure of an Assessment Lien.¹⁶

Common Area is a commonly-used term of art that refers to real property in a Subdivision Development that is owned by the Subdivision Association for the benefit of the Lot Owners in such Subdivision Development.

Common Elements is a defined term under the Texas Uniform Condominium Act that refers to all portions of a Condominium Development other than the Units and includes

both General Common Elements and Limited Common Elements.¹⁷

Common Expenses is a defined term under the Texas Uniform Condominium Act that refers to expenditures made by or financial liabilities of the Condominium Association, together with any allocations to reserves.¹⁸

Common Expense Liability is a defined term under the Texas Uniform Condominium Act that refers to the liability for Common Expenses allocated to each Unit in a Condominium Development.¹⁹

Common Interest Development is a commonly-used term of art that refers to a real estate development in which a certain defined group of property owners have common-ownership interests, such as a Condominium Development, or are members of a Homeowners Association that owns property for the benefit of such property owners. The term includes Subdivision Developments, Condominium Developments, and any other type of planned-unit development.

Community Association is a defined term under Chapter 206 of the Texas Property Code that refers to an incorporated association created to enforce Restrictive Covenants.²⁰ Such term is commonly used synonymously with the term "Homeowners Association" or "Property Owners Association."

Community Associations Institute, also typically called "CAI," is a national educational membership organization composed of various interest groups serving the Association-Governed Community industry, with local chapters throughout the nation, including Texas.

Condominium Association (called simply an "Association" under the Texas Uniform Condominium Act) is a defined term under the Texas Uniform Condominium Act that refers to a Homeowners Association, organized as a for-profit or nonprofit corporation, whose

¹² Tex. Bus. Org. Code § 22.001(1); *see also*, Tex. Prop. Code § 82.003(4).

¹³ Tex. Bus. Org. Code § 22.001(2).

¹⁴ Tex. Bus. Org. Code § 1.002(6).

¹⁵ Tex. Rev. Civ. Stat. Ann. art. 1396-1.02(A)(4).

¹⁶ *See* Chapter 209 of the Texas Property Code.

¹⁷ Tex. Prop. Code § 82.003(5).

¹⁸ Tex. Prop. Code § 82.003(7).

¹⁹ Tex. Prop. Code § 82.003(6).

²⁰ Tex. Prop. Code § 206.001(1).

membership consists of the owners of all of the Units in a Condominium Development.

Condominium Declaration (called simply a “Declaration” under the Texas Uniform Condominium Act) is a defined term under the Texas Uniform Condominium Act that refers to the recorded instrument, however denominated, that creates a Condominium Development, and any recorded amendment to such instrument.²¹

Condominium Development (called simply a “Condominium” under the Texas Uniform Condominium Act) is a defined term under the Texas Uniform Condominium Act that refers to a form of real property ownership created by statute in which portions of a single Lot or tract of land is designated for separate ownership or occupancy (called Units), and the remaining portions of which are designated for common ownership or occupancy solely by the owners of the separately-owned portions (called Common Elements).²² Such term is synonymous with the term “Condominium Regime.”

Declarant is a defined term under the Texas Uniform Condominium Act that refers to a person, or group of persons, acting in concert: (1) who, as part of a common promotional plan, offers to dispose of the person's interest in a Unit not previously disposed of; or (2) reserves or succeeds to any Special Declarant Right.²³

Declaration is a commonly-used term of art that refers to the written instrument recorded in the Official Public Records of a county, commonly entitled “Declaration of Covenants, Conditions, and Restrictions,” which imposes contractual obligations (known as “Restrictive Covenants”) upon certain delineated real property that become binding upon any

subsequent owner of such real property.²⁴ Such contractual obligations typically make the owners of such real property mandatory members of a Homeowners Association and impose certain restrictions upon such owners’ use of their property. A “Declaration” is also sometimes synonymously referred to as “CCRs,” “land-use restrictions,” “Restrictive Covenants,” “Deed Restrictions,” or “Dedicator Instrument.”

Dedicator Instrument is a defined term under Chapter 202 of the Texas Property Code and refers to each Governing Document covering the establishment, maintenance, and operation of a Subdivision Development, Condominium Development, or any other similarly-planned development. The term includes a Declaration or similar instrument subjecting real property to Restrictive Covenants, Bylaws, or similar instruments governing the administration or operation of a Homeowners Association.²⁵ Such term is synonymous with the term “Governing Documents.”

Director is a defined term under the Texas Business Organizations Code that refers to an individual who serves on the Board of Directors of a Nonprofit Corporation HOA.²⁶

General Common Elements is a defined term under the Texas Uniform Condominium Act that refers to all portions of the Common Elements in a Condominium Development that are not designated Limited Common Elements.²⁷

²¹ Tex. Prop. Code § 82.003(11). The Texas Condominium Act defines the term “Declaration” as the instrument that establishes property under a condominium regime. Tex. Prop. Code § 81.002(5).

²² Tex. Prop. Code § 82.003(8). The Texas Condominium Act defines the term “condominium” as a form of real property ownership that combines separate ownership of individual apartments or units with common ownership of other elements. Tex. Prop. Code § 81.002(3).

²³ Tex. Prop. Code § 82.003(10).

²⁴ See generally, Tex. Prop. Code § 209.002(3).

²⁵ Tex. Prop. Code § 202.001(1).

²⁶ Tex. Bus. Org. Code § 1.002(16).

²⁷ Tex. Prop. Code § 82.003(14). The Texas Condominium Act defines the term “General Common Elements” as the property that is part of a Condominium Regime other than property that is part of or belongs to an Apartment in the regime, including: (A) land on which the building is erected; (B) foundations, bearing walls and columns, roofs, halls, lobbies, stairways, and all entrance, exit, and communication ways; (C) basements, flat roofs, yards, and gardens, except as otherwise provided; (D) premises for the lodging of janitors or persons in charge of the building, except as otherwise provided; (E) compartments or installation of central services such as power, light, gas, water, refrigeration, central heat and air, reservoirs, water tanks and pumps, and swimming pools; and (F) elevators and elevator shafts, garbage incinerators, and all other devices and installations generally existing for common use. Tex. Prop. Code § 81.002(6).

Governing Documents is a commonly-used term of art that refers to each governing instrument covering the establishment, maintenance, and operation of a Subdivision Development, Condominium Development, or any other similarly-planned development. The term includes: (1) a Declaration or Dedicatory Instrument subjecting real property to Restrictive Covenants; (2) Articles of Incorporation; (3) Bylaws; (4) Association Rules; and (5) any other similar instruments governing the administration or operation of a Homeowners Association. “Governing Documents” is also a defined term under the Texas Business Organizations Code and means the Articles of Incorporation (or Certificate of Formation) for a Nonprofit Corporation HOA and all other documents or agreements adopted by the Nonprofit Corporation HOA under the Business Organizations Code to govern the formation or the internal affairs of the Nonprofit Corporation HOA, including its Bylaws.²⁸

HOA is the commonly-used abbreviation for “Homeowners Association.”

Homeowners Association is a commonly-used term of art that refers to an incorporated or unincorporated association owned by, or whose members consist primarily of, the owners of the real property covered by a Declaration and through which such owners, or a Board of Directors or similar governing body, manage or regulate a residential Subdivision Development, Condominium Development, or similarly-planned development. Such term is often considered synonymous with the terms “Property Owners’ Association,” “Condominium Association,” “Subdivision Association,” and/or “Community Association.”²⁹

²⁸ Tex. Bus. Org. Code § 1.003(36).

²⁹ For simplicity, this paper refers to all residential associations of property owners as “Homeowners Associations” when no distinction is to be made between Homeowners Associations overseeing residential Subdivision Developments and Condominium Developments. However, where it is necessary to distinguish between these two types of property owners associations, this book refers to Homeowners Associations overseeing residential Condominium Developments as “Condominium Associations” and Homeowners Associations overseeing residential Subdivision Developments or similarly-planned developments in which all of the land has been divided into two or more parts as “Subdivision Associations.”

Homestead is defined term under the Texas Constitution and Chapter 41 of the Texas Property Code that refers to real property owned and utilized by a Texas citizen as his or her residence, which is afforded certain protection from foreclosure by creditors under the Texas Constitution and Texas Property Code.³⁰

Individual Assessment is a commonly-used term of art that refers to an Assessment levied against a specific individual Unit or Lot.

Judicial Foreclosure is a commonly-used term of art that refers to a foreclosure conducted by a county sheriff or constable upon entry of judgment by a court of law ordering the sale of real property subject to a lien in a lawsuit brought to foreclose such lien.

Limited Common Element is a defined term under the Texas Uniform Condominium Act that refers to the portion of the Common Elements in a Condominium Development allocated by the Condominium Declaration or by operation of Section 82.052 of the Texas Uniform Condominium Act for the exclusive use of one or more, but less than all, of the Units.³¹ In plain English, Limited Common Elements are those portions of a Condominium Development that are not part of an Owner’s separate Unit, but which are used exclusively by one or only a few of the Units Owners. The most illustrative example of a Limited Common Element is a balcony on the outside of an apartment-styled Condominium Development, which is accessible by only a single Unit and is intended to be used by only such Unit’s Owner.

Lot is a commonly-used term of art that refers to a parcel of land within a Subdivision Development created by the recording of a Subdivision Plat that is owned in fee simple by its owner.

³⁰ Tex. Const. art. XVI, § 50; Tex. Prop. Code § 41.002.

³¹ Tex. Prop. Code § 82.003(17). The Texas Condominium Act defines the term “Limited Common Elements” as a portion of the Common Elements allocated by unanimous agreement of a Council of Owners for the use of one or more, but less than all, of the Apartments, such as special corridors, stairways and elevators, sanitary services common to the Apartments of a particular floor, and similar areas or facilities. Tex. Prop. Code § 81.002(7).

Non-Judicial Foreclosure is a commonly-used term of art that refers to a foreclosure of a contractual lien against real property pursuant to the provisions of Chapter 51 of the Texas Property Code.

Nonprofit Corporation is a defined term under the Texas Nonprofit Corporation Law that refers to a corporation, no part of the income of which is distributable to a Member, Director, or Officer of such corporation.³²

Notice of Assessment Lien is a commonly-used term of art that refers to a document filed by a Homeowners Association in the Official Public Records of the county in which it is located to validly perfect an Assessment Lien and/or to put third-parties, including any potential purchasers or title companies, on notice that there are unpaid Assessments currently outstanding for a particular Lot or Unit that are secured by an Assessment Lien on such Lot or Unit.

Officer is a defined term under the Texas Business Organizations Code and means an individual elected, appointed, or designated as an Officer of a Nonprofit Corporation HOA by its Governing Authority or under its Governing Documents.³³

Official Public Records is a defined term under the Texas Local Government Code that refers to the collection of recorded deeds, mortgages, and other instruments that are required or permitted by law to be recorded kept by the clerk of each county in Texas.³⁴

Official Public Records of Real Property (formerly known as the Official Public Records of Deed Records) is a defined term under the Texas Local Government Code that refers to the class of Official Public Records related to real property.³⁵ Such records have previously been referred to under Texas law as “Property Records” or “Deed Records,” and

some Texas statutes still use such terms even today.

Planned Unit Development is a commonly-used term of art used by lenders, financial institutions, and title companies to primarily describe developments with individually-owned Lots and Common Areas owned by a Homeowners Association and other similar real estate developments other than Condominium Developments. Such term is commonly regarded as synonymous with “Subdivision Development.”

POA is a commonly used abbreviation for Property Owners’ Association.

PUD is a commonly used acronym for a Planned Unit Development.

Property Owners Associations is a defined term under Chapter 202 of the Texas Property Code that refers to an incorporated or unincorporated association owned by, or whose members consist primarily of, the owners of the property covered by a Declaration or other Dedicatory Instrument, and through which the property owners, or the Board of Directors or similar governing body, manage or regulate the Subdivision Development, Condominium Development, or other similarly-planned development.³⁶ Such term is also a commonly used term of art that refers generically to any type of association established by a Declaration and whose membership consists exclusively of the owners of property subject to such Declaration.

Redemption Period is a commonly-used term of art that refers to the specified time period following foreclosure of a Homeowners Association’s Assessment Lien during which the owner of the real property that was foreclosed upon may redeem (or reacquire) his or her property from the entity or person that purchased it at the foreclosure sale.³⁷

Regular Assessment is a commonly-used term of art that refers to an Assessment, charge, fee, or dues that each Lot Owner or Unit Owner is required to pay to the Homeowners Association on a regular basis and that are to

³² Tex. Bus. Org. Code § 22.001(5).

³³ Tex. Bus. Org. Code § 1.002(61).

³⁴ Tex. Loc. Gov’t Code §§ 192.001, 193.001, 193.008. The county clerk is required to certify on all recorded documents the specific location in the Official Public Records at which the instrument is recorded.

³⁵ Tex. Loc. Gov’t Code § 193.008.

³⁶ Tex. Prop. Code § 202.001(2).

³⁷ Tex. Prop. Code § 82.113; Tex. Prop. Code § 209.011.

be used by the Homeowners Association for the benefit of the Subdivision or Condominium Development in accordance with its Declaration.³⁸

Restrictive Covenant is a commonly-used term of art that refers to any covenant, condition, or restriction contained in a Declaration or other Dedicatory Instrument, whether mandatory, prohibitive, permissive, or administrative, that is binding upon real property and governs the ownership or use of such real property.³⁹ Other common terms of art that are synonymous with Restrictive Covenant include “Deed Restrictions,” “Restrictions,” “Covenants,” and “Land-Use Restrictions.”

Special Assessment is a commonly-used term of art that refers to an Assessment, other than a regular Assessment, that is levied in a uniform manner against all Homeowners in a Homeowners Association for a specific designated purpose and in accordance with the procedures set forth by a Homeowners Association’s Governing Documents.⁴⁰

Special Meeting is a commonly-used term of art that refers to a meeting of a Homeowners Association’s Board of Directors or Membership that is called for a specific purpose and at which only such items that were identified in the notice of such meeting may be considered and voted upon.

Subdivision Association is a commonly-used term of art that refers to a Homeowners Association that governs a Subdivision Development, as opposed to a Condominium Development, and whose Membership consists of Lot Owners in such Subdivision Development.

Subdivision Development is a commonly-used term of art that refers to all land encompassed within one or more recorded maps or plats of land that is divided into two or more parts (called “Lots”) and which is collectively subject to a Declaration or other Dedicatory Instrument imposing Restrictive

Covenants upon all such land, excluding streets and public areas.

Texas Condominium Act refers to the Texas law that governs Condominium Developments established prior to January 1, 1994.⁴¹

Texas Nonprofit Corporation Act refers to the Texas law that governed Texas nonprofit corporations incorporated prior to January 1, 2006, which expired on December 31, 2009.⁴²

Texas Nonprofit Corporation Law refers to the Texas law governing Texas nonprofit corporations incorporated on or after January 1, 2006, and which superseded the Texas Nonprofit Corporation Act and, as of January 1, 2010, now governs all Texas Nonprofit Corporations, regardless of when incorporated.⁴³

Texas Residential Property Owners Protection Act, also commonly referred to as Chapter 209 of the Texas Property Code or simply “Chapter 209,” refers to the Texas law that imposes certain due process requirements on a Subdivision Association before it may suspend a Lot Owner’s right to use a Common Area, initiate judicial enforcement of Restrictive Covenants against a Lot Owner, charge a Lot Owner for property damage, assess a fine against a Lot Owner for violation of a Restrictive Covenant, or charge a Lot Owner for attorneys fees incurred by the Subdivision Association, as well as imposes certain requisite procedures on a Subdivision Association prior to and following foreclosure of an Assessment Lien.⁴⁴

Texas Uniform Condominium Act refers to the Texas law that governs Condominium Developments established on or after January 1, 1994, as well as Condominium Developments created prior to January 1, 1994, whose Condominium Declaration states that Chapter 82 of the Texas Property Code

³⁸ See generally, Tex. Prop. Code § 204.001(3).

³⁹ See generally, Tex. Prop. Code § 202.001(4).

⁴⁰ See generally, Tex. Prop. Code § 204.001(4).

⁴¹ See Chapter 81 of the Texas Property Code.

⁴² See Article 1396 of the Texas Revised Civil Statutes.

⁴³ See Chapter 22 of the Texas Business Organizations Code.

⁴⁴ See Chapter 209 of the Texas Property Code.

hall apply to the Condominium Development.⁴⁵

Townhouse, also sometimes referred to as **Townhome**, is a commonly-used term of art that generally refers to row houses or dwellings that are attached side-by-side. A Townhouse is not a recognized form of real estate ownership under Texas law, and although most communities described as Townhouses are Subdivision Developments, they may be either a Subdivision or Condominium Development.

Unit is a defined term under the Texas Uniform Condominium Act that refers to a physical portion of the Condominium Development designated for separate ownership or occupancy, the boundaries of which are described by the Condominium Declaration.⁴⁶

Unit Owner is a defined term under the Texas Uniform Condominium Act that refers to a Declarant or other person who owns a Unit, or a lessee of a Unit in a Leasehold Condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the Unit from the Condominium Development, but does not include a person having an interest in a Unit solely as security for an obligation, such as a mortgagee.⁴⁷

III. COMMON-INTEREST DEVELOPMENTS IN TEXAS

There are two basic forms of Common Interest Developments under Texas law: “Subdivision Developments” and “Condominium Developments.” These types of developments are distinguished by the type of real property ownership contemplated by the development.

Subdivision Developments are Common Interest Developments that consist of parcels of land, usually called “Lots,” that are subject to separate conveyance and exclusive ownership. In most cases, Subdivision Developments arise where a large tract of land is owned by a real estate developer who divides the tract into separate, individually-owned Lots by filing a subdivision plat with the local governmental

entity. The subdivision plat must be approved by such local government entity and will typically divide the parcel of land into residential Lots that are to be separately owned by homeowners, “Common Areas” that are to be owned by a Homeowners Association made up of and for the benefit of the Lot owners, and streets to provide access by the owners to their Lots. The key distinguishing element of this type of development is that each Lot is a separate, exclusively-owned parcel of real property and the Common Areas of land are owned by the Homeowners Association for the benefit of the Lot owners.

Condominium Developments are a unique form of real property ownership created by statutory law. A Condominium Development differs significantly from a Subdivision Development in that a Condominium Development involves a single tract or Lot, specified portions of which are separately owned, called “Units,” and the remaining portions of which are owned in common by all of the Unit Owners, collectively called “Common Elements.” The most common example of a Condominium Development is an apartment building, where the interior of the individual apartments are exclusively owned by each respective Unit Owner, but the Lot on which the building is located, the exterior of the building, and all hallways, stairs and elevators are owned by all of the Unit Owners in common. Condominium Developments, however, come in all shapes and sizes and can include developments with detached, single-family homes that look and feel like traditional Subdivision Developments. The key distinguishing element of this type of development is that it consists of only one Lot or tract, which contains specific portions that are separately- and exclusively-owned Units, and other portions that are owned in common by all of the Unit Owners. Unlike Subdivision Developments, the Common Elements in Condominium Developments are owned by the Unit Owners in common with each other, not by the Homeowners Association.⁴⁸

The laws applicable to Subdivision and Condominium Developments differ significantly, and for this reason, it is important to determine what type of development a particular Common Interest Development is. Unfortunately, it is not always very

⁴⁵ See Chapter 82 of the Texas Property Code.

⁴⁶ Tex. Prop. Code § 82.003(23).

⁴⁷ Tex. Prop. Code § 82.003(24).

⁴⁸ See Tex. Prop. Code § 82.003(a)(8). Real property constitutes a Condominium Development only if one or more of the Common Elements are directly owned in undivided interests by the Unit Owners. Tex. Prop. Code § 82.003(a)(8). If all of the Common Elements are owned by a legal entity separate from the Unit Owners, even if the separate legal entity is owned by the Unit Owners (such as a Homeowners Association), then the real property is not a Condominium Development. Tex. Prop. Code § 82.003(a)(8).

easy to determine what kind of development a particular community is by looking solely at its physical characteristics. To add to the confusion, Subdivision and Condominium Developments can go by many different common descriptions or monikers, depending on the perception the developer is trying to create, including master-planned communities, planned unit developments, townhome communities, garden-home communities, estate communities, ranch communities, etc. And, Condominium Developments don't always call themselves condominiums or include the term "condominium" in the name of the community. The easiest way to determine whether a particular development is a Subdivision Development or a Condominium Development is to look at the legal description of the real property that is separately owned, which can be found within an owner's deed. If the legal description for the separately-owned real property identifies it as a specific "Lot" of a platted subdivision or a tract of land described by metes and bounds, then it is a Subdivision Development. On the other hand, if the legal description of the separately-owned real property describes it as a "Unit" or "Apartment," along with a proportionate ownership share or percentage in additional portions of a Lot or tract of land, then it is a Condominium Development.

IV. HOMEOWNERS ASSOCIATIONS IN TEXAS

A Homeowners Association is the organization made up of property owners in a residential Common Interest Development, which is generally vested with the management and maintenance of the community and its amenities and commonly-owned property. The term "Homeowners Association," or "HOA," is commonly used interchangeably to refer to associations of property owners in both residential Subdivision Developments and Condominium Developments in Texas. However, because there are many laws that apply differently to residential Subdivision and Condominium Developments, it is important to be specific in the terms used to refer to a Homeowners Association for a residential Subdivision Development versus a Homeowners Association for a Condominium Development. A "Condominium Association" is the proper term used in Texas to refer to a Homeowners Association that administers a Condominium Development. Most people, however, still generally refer to Homeowner Associations governing Condominium Developments as "HOAs." While it is not necessarily inaccurate to refer to a Condominium Association as an HOA, it would be incorrect to refer to a Homeowners Association overseeing a residential Subdivision Development as a Condominium Association.

Unlike Condominium Associations, there is no single term designated under Texas law for Homeowners Associations overseeing residential Subdivision Developments. The Texas Property Code uses the term "Property Owners' Associations" in Chapter 202 to describe any incorporated or unincorporated association owned by, or whose members consist primarily of, the owners of property covered by a dedicatory instrument through which the property owners or a board of directors (or similar governing body) manage or regulate a residential Subdivision Development, Condominium Development, or similar planned development. The Texas Property Code, however, uses the term "Community Association" in Chapter 206 instead of "Property Owners Association" to describe any incorporated Homeowners Association created to enforce restrictive covenants, which would necessarily include Homeowners Associations overseeing both residential Subdivision and Condominium Developments.⁴⁹ To add to the inconsistencies, the Texas Property Code uses the term "Property Owners' Association" again in Chapter 209, but defines such term as any incorporated or unincorporated association whose membership primarily consists of owners of Lots in a residential Subdivision that is designated as the representative of such Lot owners and manages or regulates such residential Subdivision Division for the benefit of such Lot owners. Thus, by definition the term "Property Owners Association" under Chapter 209 expressly excludes Condominium Associations from the scope of such term (even though the scope of such term under Chapter 205 expressly includes Condominium Associations).⁵⁰

As a result of the Texas Property Code's inconsistent use of terms to describe Homeowners Associations, most Texas attorneys practicing in this area of the law generally refer to any of these types of Homeowner Associations interchangeably as "Property Owners Associations" (POAs) or simply as "Community Associations." These terms are typically used to describe any organization of property owners (regardless of whether it is a Condominium Association or another type of owners association) that is a "mandatory membership organization" made up of Unit or Lot owners who become obligated to such membership as a result of their ownership of such Unit or Lot.⁵¹ For simplicity, all such property owners

⁴⁹ Tex. Prop. Code §§ 202.001(2), 206.001(1).

⁵⁰ Tex. Prop. Code § 209.002(7).

⁵¹ The term "Property Owners Association" is also preferred among attorneys because it is inclusive of associations made up of owners of residential and non-residential subdivision Lots and condominium Units as well; whereas the term "Homeowners

associations shall be referred to by their most common moniker, either “HOAs” or “Homeowners Associations” for the remainder of this paper when no distinction is to be made between Homeowners Associations overseeing both residential Subdivision Developments and Condominium Developments. However, where it is necessary to distinguish between these two types of associations, this paper will refer to Homeowners Associations overseeing Condominium Developments as “Condominium Associations” and Homeowner Associations overseeing residential Subdivision Developments or similar planned developments in which all of the land has been divided into two or more parts as “Subdivision Associations.” Similarly, owners of Units and Lots in an Association-Governed Community shall be referred to simply as “Homeowners” when no distinction is to be made between the two, but shall be referred to specifically as either “Lot Owners” or “Unit Owners” when necessary to distinguish between the two types of property owners.

V. AUTHORITY OF TEXAS HOMEOWNERS ASSOCIATIONS TO LEVY ASSESSMENTS AGAINST LOTS OR UNITS

The authority of a Texas Homeowners Association to levy Assessments is primarily derived from its Governing Documents. If the Homeowners Association is a Condominium Association, however, the Texas Uniform Condominium Act also provides authority for Condominium Associations to levy Assessments against their Unit Owners for Common Expenses of the Condominium Development.⁵²

The term “Assessment” refers to the charges that are assessed by a Homeowners Association against its Homeowners to pay for common expenses associated with the operation of the Homeowners Association and maintenance of the Common Areas or Common Elements in the community. Assessments can take many forms, but they are generally categorized as either Regular Assessments, Special Assessments, or Individual Assessments. The term “Regular Assessments” (also sometimes called “Annual Assessments”) refers to those Assessments that are levied by a Homeowners Association in a uniform manner against all Lots or Units in a community on some type of regular basis, such as monthly, quarterly, bi-annually, or annually.

The term “Special Assessments,” on the other hand, refers to Assessments that are levied by the

Homeowners Association in a uniform manner against all Lots or Units on a one-time basis due to some special circumstance. Under most Declarations, Homeowners must approve a Special Assessment before the Board of Directors can levy it against the Lots or Units.

Finally, the term “Individual Assessments” refers to Assessments that are levied by the Homeowners Association against Lots or Units on an individual, non-uniform, basis. An example of an Individual Assessment is an Assessment levied by the Homeowners Association against a particular Lot for damage to the Common Areas or when a Condominium Association pays for all water usage by the Unit Owners but levies Individual Assessments against each Unit based on the amount of water each uses. Depending on the basis for an Individual Assessment, it may be levied by the Homeowners Association on a regular basis or on a one-time basis due to some special circumstance.

The type of Assessments and the amount of Assessments that a Homeowners Association may levy against Lots or Units will generally be controlled by the provisions of the Homeowners Association’s Governing Documents, and the Board of Directors may not exceed such authority. The Declaration should also set out any procedures for approving a Special Assessment, as well as any limitations on the ability of the Homeowners Association to increase the amount of Regular Assessments or levy Individual or Special Assessments.

VI. OBLIGATION OF HOMEOWNERS TO PAY ASSESSMENTS

The authority of the Homeowners Association to levy Assessments necessarily includes an obligation of the Homeowners to pay such Assessments. This obligation is contractual in nature and is binding upon a Homeowner who acquires title to an applicable Lot or Unit. In most cases, where the Governing Documents create the authority to levy Assessments, there will also be a provision mandating that the obligation to pay such Assessments is a personal obligation of the Homeowner. Such a provision means that the Homeowner remains obligated to pay all Assessments levied against such Homeowner’s Lot or Unit during the time of his or her ownership of such property, regardless of whether such Homeowner subsequently ceases owning such property. In other words, if Assessments levied against a Lot or Unit during the period of a person’s ownership are not paid, such person continues to have a personal obligation to pay such unpaid Assessments even after his or her ownership terminates. This is because the obligation to pay the Assessments is personal to the Homeowner,

Association” is more indicative of an association of owners of only residential Lots and Units.

⁵² Tex. Prop. Code § 82.102(a)(2).

not the Lot or Unit. This is certainly true for Unit Owners, whether so provided in the Condominium Association's Governing Documents or not, because the Texas Uniform Condominium Act establishes the personal liability of Unit Owners to pay Assessments levied during their ownership of their Unit.⁵³

VII. CREATION AND PERFECTION OF ASSESSMENT LIENS

A lien is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. In the context of Homeowners Associations, a Homeowner's obligation to pay Assessments levied by a Homeowners Association is typically secured by an "Assessment Lien" in favor of the Homeowners Association that attaches to each Lot or Unit in the applicable community.

An Assessment Lien is essentially a contractual lien in favor of a Homeowners Association that is created by and reserved in the Declaration establishing such Homeowners Association.⁵⁴ If the Homeowners Association is a Subdivision Association, the creation and reservation of an Assessment Lien in favor of the Subdivision Association must be expressly specified in the Declaration. If the Homeowners Association is a Condominium Association, however, a lien securing payment of Assessments is automatically created in favor of the Condominium Association by the filing of its Declaration, whether expressly mentioned in the Declaration or not.⁵⁵

In most situations, a Homeowners Association's Declaration will also provide that the Assessment Lien is evidenced by the recordation of the Declaration alone, and that there is no requirement of the Homeowners Association to record additional documents or notices in the Official Public Records of the county in which the Subdivision or Condominium Development is located in order establish or perfect its lien. This is certainly true for Condominium Associations because the Texas Uniform Condominium Act expressly provides that a Condominium Association's Assessment Lien is created by the recording of its Declaration, which

constitutes record notice and perfection of such lien.⁵⁶ There is no comparable Texas law concerning establishment of an Assessment Lien in favor of a Subdivision Association and because Declarations of Texas Homeowners Association are rarely drafted in the same way, each Subdivision Association should carefully review its Declaration to ensure that an Assessment Lien in its favor has been properly established and to identify any specific procedural requirements to validly perfect its Assessment Lien, if necessary.

Regardless of whether a Homeowners Association is required to record any additional documents or notices in order to perfect its Assessment Lien, many Homeowners Associations still prefer to record a "Notice of the Assessment Lien" in the Official Public Records of the county in which the Homeowners Association is located so as to put third-parties, including any potential purchasers or title companies, on notice that there are unpaid Assessments currently outstanding with respect to a particular Lot or Unit that are secured by an Assessment Lien.

VIII. SCOPE OF ASSESSMENT LIENS

In most cases, a Homeowners Association's Declaration will provide that an Assessment Lien secures not only payment of unpaid Assessments levied by the Homeowners Association, but also late charges, reasonable costs of collections (including attorneys fees), interest, and in some case, even fines assessed by the Homeowners Association. The scope of a Condominium Association's Assessment Lien is defined by the Texas Uniform Condominium Act, which provides that such Assessment Lien secures payment for all regular and special Assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorneys fees, and any other amount due to the Condominium Association by the Unit Owner or levied against the Unit by the Condominium Association, unless the Condominium Association's Declaration provides otherwise.⁵⁷ There is no similar Texas law that defines the scope of a Subdivision Association's Assessment Lien, and consequently, an Assessment Lien in favor of a Subdivision Association only secures the payment of the types of debts specifically identified in the Declaration as being secured by the Assessment Lien.

⁵³ Tex. Prop. Code § 82.113(a).

⁵⁴ See *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

⁵⁵ Tex. Prop. Code § 82.113(a). There is no comparable Texas law that establishes an Assessment Lien in favor of Subdivision Associations, so the creation of an Assessment Lien in its favor must be expressly set out in the Subdivision Association's Declaration.

⁵⁶ Tex. Prop. Code § 82.113(c). The Texas Uniform Condominium Act further provides that unless the Condominium Association's Declaration provides otherwise, no other recordation of a lien or notice of lien is required. Tex. Prop. Code § 82.113(c).

⁵⁷ Tex. Prop. Code § 82.113(a).

The defined scope of a Homeowners Association's Assessment Lien is important because a Homeowners Association cannot foreclose its Assessment Lien as a result of non-payment of amounts not expressly secured by the Assessment Lien under its Declaration (or under the Texas Uniform Condominium Act if it is a Condominium Association).⁵⁸ In other words, a Subdivision Association may not foreclose its Assessment Lien upon a Lot for unpaid charges if the Declaration does not expressly state that the Assessment Lien secures payment of such type of charges.

IX. PRIORITY OF ASSESSMENT LIENS

The priority of a lien refers to its hierarchal relationship to other liens attached to a Lot or Unit, in which liens of greater priority are superior to liens of lesser priority. Under Texas law in general, but subject to several exceptions, the priority of a lien is established by the date that the document creating the lien is recorded in the Official Public Records of the county in which the real property subject to such lien is located. Under this "the first in time, first in right" rule, liens recorded first in time are considered to be "senior," or of higher priority than all liens recorded later in time and liens recorded later in time are considered to be "junior," or lower in priority than those liens recorded before it.⁵⁹ In simpler terms, every lien is junior to all liens recorded before it and senior to all liens created after it. There are some limited exceptions to this rule. A senior lienholder may agree to subrogate (or make subordinate) its lien to another lien that would otherwise be a junior lien. In addition, under the Texas Tax Code, liens that secure the payment of property taxes owed to ad valorem taxing entities take priority over all previously recorded liens, specifically including any Assessment Liens.⁶⁰

In most cases, the Assessment Lien created by a Declaration is effective upon the recording of the Declaration, which is almost always recorded by the "Declarant" of the Declaration before any applicable property is developed or sold to Homeowners. As a result, Assessment Liens are typically created prior to and preexist a Homeowner's purchase of his or her Lot or Unit and are perfected before a mortgage lien (also called a "Deed of Trust Lien") is recorded by the lending institution that financed the Homeowner's

purchase of such Lot or Unit. Notwithstanding, in almost all cases, the Declarations of Texas Homeowners Associations will provide that the Homeowners Association's Assessment Lien is subrogated in priority to purchase money mortgage liens and tax liens.⁶¹ As a result, there is almost always a Deed of Trust Lien that is senior to the Homeowners Association's Assessment Lien. In addition, there could be other potential liens that are given priority over the Homeowners Association's Assessment Lien by the Declaration, so a review of a particular Homeowners Association's Declaration and the local Official Public Records is required to determine the priority of its Assessment Lien.

For Condominium Developments, by virtue of the Texas Uniform Condominium Act, an Assessment Lien in favor of a Condominium Association has priority over any other lien except:

- (1) a lien for real property taxes and other governmental Assessments or charges against a Unit;⁶²
- (2) a lien or encumbrance recorded before the Condominium Association's Declaration is recorded;⁶³
- (3) a first vendor's lien or first deed of trust lien recorded before the date on which the Assessment sought to be enforced becomes delinquent under the Condominium Association's Declaration, Bylaws, or Association Rules;⁶⁴ and
- (4) unless the Declaration provides otherwise, a lien for construction of Improvements to a Unit or an assignment of the right to insurance proceeds on the Unit if the lien or assignment is recorded or duly perfected before the date on which the

⁵⁸ See *Brooks v. Northglen Assoc.*, 141 S.W.3d 158, 170-71 (Tex. 2004).

⁵⁹ See *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 668 (Tex. App.—Fort Worth 1998, pet. denied); *Windham v. Citizens Nat. Bank*, 105 S.W.2d 348, 351 (Tex. Civ. App.—Austin 1937, writ dismissed).

⁶⁰ Tex. Tax Code § 32.05.

⁶¹ This is because a lending institution will almost always require that it have the most senior lien on any real property collateralizing a mortgage loan. Since a Homeowners Association's Assessment Lien is generally created before an individual owner purchases his or her Lot or Unit, unless the Homeowners Association's Declaration subrogates the priority of its Assessment Lien under that of the lending institution's lien, most lending institutions would refuse to loan money to a Homeowner to purchase an applicable Lot or Unit for fear that foreclosure of the Homeowners Association's Assessment Lien could wipe out its lien.

⁶² Tex. Prop. Code § 82.113(b)(1). Foreclosure of a tax lien does not discharge the Condominium Association's Assessment Lien for amounts becoming due after the date of foreclosure of the tax lien. Tex. Prop. Code § 82.113(1).

⁶³ Tex. Prop. Code § 82.113(b)(2).

⁶⁴ Tex. Prop. Code § 82.113(b)(3).

Assessment sought to be enforced becomes delinquent under the Condominium Association's Declaration, Bylaws, or Association Rules.⁶⁵

X. FORECLOSURE OF ASSESSMENT LIENS

There are two types of procedures for foreclosing an Assessment Lien under Texas law: judicial foreclosure and non-judicial foreclosure. All Texas Homeowners Associations are authorized to foreclose their Assessment Lien by judicial foreclosure procedures, but they may only foreclose their Assessment Liens by non-judicial foreclosure if expressly authorized to do so by their Declaration or Texas law. Texas Condominium Associations are authorized by the Texas Uniform Condominium Act to foreclose their Assessment Lien by judicial or non-judicial procedures.⁶⁶ There is no comparable law authorizing Texas Subdivision Associations to conduct non-judicial foreclosure of its Assessment Lien. As a result, a Texas Subdivision Association may only foreclose its Assessment Lien by non-judicial procedures if expressly authorized to do so under its Declaration.

A. Judicial Foreclosure of Assessment Liens

Judicial foreclosure refers to the process by which the right to foreclose a lien is established by judicial proceeding and then is carried out by order of the court. In order to judicially foreclose an Assessment Lien, a Homeowners Association must file a lawsuit against the delinquent Homeowner and obtain a judgment against such Homeowner that: (1) establishes the amount owed to the Homeowners Association (including the specific amount owed that is secured by the Homeowners Association's Assessment Lien); and (2) orders the Homeowners Association's Assessment Lien be foreclosed on such Homeowner's property to satisfy the amount awarded to the Homeowners Association that is found to be secured by its Assessment Lien.

Burden of Proof in a Judicial Foreclosure Lawsuit

At a trial on the merits of a judicial foreclosure lawsuit, a Homeowners Association will have to prove: (1) the defendant-Homeowner's Lot or Unit is subject to the applicable Declaration; (2) the Declaration authorizes the Homeowners Association to levy Assessments against the defendant-Homeowner's Lot

or Unit; (3) the defendant-Homeowner has not paid the Assessments levied against his or her Lot or Unit; (4) the amount of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Associations; (5) the Declaration creates an Assessment Lien in favor of the Homeowners Association that secures payment of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Association; and (6) the amount of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Associations that is secured by the Homeowners Association's Assessment Lien. Assuming the Homeowners Association prevails at trial, the court will enter judgment in favor of the Homeowners Association in which it awards the Homeowners Association a monetary award and orders the Homeowners Association's Assessment Lien be foreclosed on the defendant-Homeowner's Lot or Unit to pay such monetary award that is secured by the Homeowners Association's Assessment Lien.

Conducting a Judicial Foreclosure Sale

Following the entry of a judgment ordering the foreclosure of the Homeowners Association's Assessment Lien upon the defendant-Homeowner's Lot or Unit, the clerk of the court will prepare an "Order of Sale," which directs the sheriff or constable of the county in which the defendant-Homeowner's Lot or Unit is located to sell such Lot or Unit by public auction and to apply the proceeds from such sale to the secured amount awarded to the Homeowners Association under the judgment. The Order of Sale should describe the Lot or Unit to be sold with legal sufficiency and contain appropriate directions as to the time, place, terms, and conditions of the sale.⁶⁷

Real property to be sold by a sheriff or constable pursuant to an Order of Sale is required to be sold by public auction, at the courthouse door of the county in which the property is located, on the first Tuesday of the month between the hours of 10 a.m. and 4 p.m.⁶⁸ Prior to conducting a sale of real property under an Order of Sale, the sheriff or constable is required to advertise the time and place of sale of such real property by having a notice of sale, specifying

⁶⁷ *Allday v. Whittaker*, 1 S.W. 794, 795 (Tex. 1886).

⁶⁸ Tex. R. Civ. P. 646a. For purposes of a judicial foreclosure, the term "courthouse door" of a county refers to either of the principal entrances to the building provided by the proper authority for the holding of the district court, or if from any cause there is no such building, then the door of the building where the district court was last held in such county shall be deemed to be the courthouse door. Tex. R. Civ. P. 648.

⁶⁵ Tex. Prop. Code § 82.113(b)(4).

⁶⁶ Tex. Prop. Code § 82.113(e).

such information, published in the English language in a newspaper published in the county in which the defendant-Homeowner's Lot or Unit is located, at least once a week for three consecutive weeks preceding the date of such sale.⁶⁹ In addition, the sheriff or constable must give the defendant-Homeowner (or his or her attorney) written notice of such sale, by either personal-delivery or mail.⁷⁰ The notice of sale that is required to be published and given to the defendant-Homeowner must contain a statement of the authority by virtue of which the sale is to be made, the time of levy, the time and place of sale, and a brief description of the property to be sold, as well as give the number of acres, original survey, locality in the county, and the name by which the land is most generally known.⁷¹

The sheriff or constable must sell the property to the highest bidder at the sale for cash, unless the highest bidder is the judgment creditor. In such event, the judgment creditor is entitled to apply the amount awarded in the judgment against his or her bid amount.⁷² The proceeds from the sale will be applied first to the amounts awarded to the judgment creditor, and if there is any remaining surplus proceeds, then to the defendant-Homeowner.

Advantages and Disadvantages of Judicial Foreclosure

There are many advantages and disadvantages to foreclosing an Assessment Lien by judicial proceeding. By seeking a judgment and court-ordered foreclosure, the process is supervised by a court of law and there is less likelihood that the foreclosure could be challenged on the basis of a lack of due process or abuse by the Homeowners Association. In addition, by obtaining a judgment for the amounts owed to the Homeowners Association by the Homeowner, the Homeowners Association can abstract the judgment, which creates a "Judgment Lien" that attaches to any non-exempt real and personal property owned by such Homeowner in each county in which the judgment is

⁶⁹ Tex. R. Civ. P. 647. The first of said three publications is required to appear not less than twenty (20) days immediately preceding the date of sale. Tex. R. Civ. P. 647. If there is no newspaper published in the county, or none which will publish the notice of sale for the requisite compensation set by court rule, the sheriff or constable must then post such notice in writing in three public places in the county, one of which shall be at the courthouse door of such county, for at least twenty days successively next before the date of sale. Tex. R. Civ. P. 647.

⁷⁰ Tex. R. Civ. P. 647.

⁷¹ Tex. R. Civ. P. 647.

⁷² *Blum v. Rogers*, 9 S. W. 595, 597 (Tex. 1888); *Needham v. Cooney*, 173 S.W. 979, 982 (Tex. Civ. App.—El Paso 1915, writ ref'd).

abstracted. This may give the Homeowners Association the ability to foreclose on other real or personal property owned by the delinquent-Homeowner in addition to the Lot or Unit subject to its Assessment Lien in order to satisfy the judgment.

The disadvantages of the judicial foreclosure procedure are basically the time involved in prosecuting a lawsuit in order to obtain the judgment and the increased amount of attorneys fees incurred in such endeavor. A lawsuit can, and if contested, often does, take more than a year to go to trial. Even after the trial, a judgment could be appealed, which could potentially extend the proceedings even longer. In addition, attorneys fees incurred in a judicial foreclosure lawsuit can be significant. Even if the court awards the Homeowners Association all of the attorneys fees it incurs, the foreclosure of the Homeowners Association's Assessment Lien may not generate enough proceeds to cover all of the amounts awarded to the Homeowners Association, and in some cases, the sales proceeds may not even be enough to cover just the attorneys fees incurred by the Homeowners Association in conducting the judicial foreclosure.

B. Non-Judicial Foreclosure of Assessment Liens

Non-judicial foreclosure is a faster, less expensive foreclosure procedure than judicial foreclosure. Unlike a judicial foreclosure, a non-judicial foreclosure is conducted without court supervision and is not carried out by the county sheriff. Instead, a non-judicial foreclosure sale is performed by a trustee appointed by the Homeowners Association without any prior hearing or judicial determination.

Non-judicial foreclosures of real property in Texas are governed by Chapter 51 of the Texas Property Code and non-judicial foreclosure of an Assessment Lien by a Homeowners Association must be done in compliance with both Chapter 51 and the Homeowners Association's Declaration. The non-judicial foreclosure process essentially consists of three steps: (1) appointment of a trustee; (2) notice of foreclosure sale; and (3) conducting the foreclosure sale.

Appointment of a Trustee to Exercise Power of Sale

The non-judicial foreclosure process requires the Homeowners Association to first appoint a person to act as a trustee for the purpose of conducting a non-judicial foreclosure sale of the subject property under the provisions of the Declaration.⁷³ The authority to

⁷³ In most cases, the trustee appointed by the Homeowners Association will be its attorney, but it is not required to be.

appoint a trustee to exercise a power of sale against another person's property must be granted by contract or law. Under the Texas Uniform Condominium Act, when a Unit Owner acquires ownership of a Unit, the Unit Owner is considered to have automatically granted the Condominium Association a power of sale in connection with the Condominium Association's Assessment Lien.⁷⁴ The Texas Uniform Condominium Act further provides that the Board of Directors of a Condominium Association may, by written resolution, appoint an officer, agent, trustee, or attorney of the Condominium Association to exercise such power of sale on behalf of the Condominium Association.⁷⁵

In the case of a Subdivision Association, there is no similar law providing for the automatic grant of a power of sale on behalf of Lot Owners in favor of their Subdivision Association, and any such power of sale must be expressly authorized by the Subdivision Association's Declaration. In almost all cases where a Declaration establishes an Assessment Lien in favor of a Subdivision Association and authorizes it to exercise non-judicial foreclosure procedures, the Declaration will include provisions granting the Subdivision Association a power of sale and setting forth procedures for appointing a trustee to conduct a non-judicial foreclosure sale of a delinquent Homeowner's Lot.

Notice of Non-Judicial Foreclosure Sale

The second step of the non-judicial foreclosure process consists of providing notice of the foreclosure sale to the delinquent Homeowner and the public. However, if the delinquent Homeowner's property is used as his or her residence, before an appointed trustee may initiate the notice of the foreclosure sale, the trustee must provide the delinquent Homeowner a written "Pre-Foreclosure Notice," by certified mail, that: (1) states that the Homeowner is in default of such Homeowner's obligation to pay Assessments under the Declaration; (2) identifies the amount of delinquent Assessments and other amounts owed by such Homeowner to the Homeowners Association that is secured by the Homeowners Association's Assessment Lien; and (3) gives such Homeowner at least twenty (20) days to cure the default by paying all outstanding amounts owed to the Homeowners Association.⁷⁶ If the

delinquent Homeowner does not cure his or her default within twenty (20) days of receipt of such Pre-Foreclosure Notice, the appointed trustee may then proceed with the non-judicial foreclosure process by providing the public and the delinquent Homeowner with notice of the intended foreclosure sale of the delinquent Homeowner's Lot or Unit. It is important to note, that the federal Fair Debt Collection Practices Act applies to the collection of Assessments by attorneys and requires any initial communication with a Homeowner by an attorney to include the "mini-Miranda" notice informing the Homeowner that unless he or she disputes the validity of the debt within thirty (30) days of receipt of such notice, the debt will be assumed to be valid.⁷⁷ Accordingly, if the Pre-Foreclosure Notice constitutes the initial communication between the attorney and the Homeowner, the Pre-Foreclosure Notice should include the thirty-day mini-Miranda notice and provide the Homeowner at least 30 days to cure the default.

A "Notice of Foreclosure Sale" must be provided to the public and the Homeowner by the appointed trustee at least twenty-one (21) days before the date of the foreclosure sale by the following methods:

- (1) posting a copy of the Notice of Foreclosure Sale at the courthouse door of each county in which the Lot or Unit is located;⁷⁸
- (2) filing in the office of the county clerk of each county in which the Lot or Unit is located a copy of the Notice of Foreclosure Sale that was posted at the courthouse door;⁷⁹ and
- (3) serving the delinquent Homeowner with a copy of the Notice of Foreclosure sale.⁸⁰

⁷⁷ 15 U.S.C. § 1692g(a). *See also Heintz v. Jenkins*, 514 U.S. 291 (1995) (holding that an attorney is a debt collector if the attorney regularly tries to obtain payment of consumer debts due to another, even if the attorney's collection activities are limited solely to litigation); *Ladick v. Van Gemert*, 146 F.3d 1205, 1206-07 (10th Cir. 1998) (holding that assessments levied by Homeowners Associations generally constitute a consumer debt under the Federal Fair Debt Collection Practices Act).

⁷⁸ Tex. Prop. Code § 51.002(b)(1). If the Lot or Unit is located in more than one county, a copy of the Notice of Foreclosure Sale must be posted at the courthouse door of each such county and the Notice of Sale must designate the county in which the Lot or Unit will be sold. Tex. Prop. Code § 51.002(b)(1).

⁷⁹ Tex. Prop. Code § 51.002(b)(2).

⁸⁰ Tex. Prop. Code § 51.002(b)(3). Service of a Notice of Foreclosure Sale on a delinquent Homeowner by certified mail is considered completed when the written Notice of Foreclosure Sale is deposited in the United States mail, postage prepaid, and

⁷⁴ Tex. Prop. Code § 82.113(d).

⁷⁵ Tex. Prop. Code § 82.113(d).

⁷⁶ Tex. Prop. Code § 51.002(d). Service of notice of default on a delinquent Homeowner by certified mail is considered completed when the written notice is deposited in the United States mail, postage prepaid, and addressed to the Homeowner at the Homeowner's last known address. Tex. Prop. Code § 51.002(e).

Conducting the Non-Judicial Foreclosure Sale

A non-judicial foreclosure sale of real property must be by public auction and may only be held between 10 a.m. and 4 p.m. on the first Tuesday of any calendar month.⁸¹ The foreclosure sale must take place at the area designated for foreclosure sales at the county courthouse in the county in which the Lot or Unit is located, or if the Lot or Unit is located in more than one county, the sale may be made at the courthouse in any county in which such Lot or Unit is located, so long as it is the county designated in the Notice of Foreclosure Sale.⁸²

On the date of the foreclosure sale, the appointed trustee will appear at the designated area of the courthouse for conducting foreclosure sales and simply read a copy of the Notice of Foreclosure Sale, state the terms of the sale (for example, cash bids only), and open the sale up for bidding. The appointed trustee may set reasonable conditions for conducting the public sale if the conditions are announced before bidding is opened by the appointed trustee.⁸³

The Texas Uniform Condominium Act authorizes Condominium Associations to bid for and purchase a Unit at foreclosure as a Common Expense.⁸⁴ Almost all Subdivision Associations also have authority under their Governing Documents to purchase a Lot being foreclosed upon. Bids to purchase the Lot or Unit by the Condominium or Subdivision Association at the foreclosure sale may be by credit against the amounts owed to such Homeowners Association by the delinquent Homeowners to the extent such bid amount does not exceed what the Homeowner owes the Homeowners Association. In other words, if the amount owed by the delinquent

Homeowner to the Homeowners Association that is secured by the Homeowners Association's Assessment Lien is \$1,000, then the Homeowners Association may bid on the subject property by credit up to a bid amount of \$1,000. If, however, the Homeowners Association bids an amount in excess of \$1,000, any amount above \$1,000 is considered a cash bid and the Homeowners Association must produce cash in the amount of its cash bid at the foreclosure sale if it is the highest bidder.

At the conclusion of the foreclosure sale, the appointed trustee will collect the purchase price from the highest bidder, if the highest bid is in whole or in part a cash bid, and will execute a trustee's deed conveying the property to such highest bidder. To the extent any part of the purchase price of the foreclosed property consists of cash, the appointed trustee must then disburse the sales proceeds as provided by Texas law.⁸⁵

*Advantages and Disadvantages of
Non-Judicial Foreclosure*

The advantage of a non-judicial foreclosure is that it is much quicker to accomplish and is less expensive than a judicial foreclosure. The disadvantage of conducting a non-judicial foreclosure is that it creates potential liability for the Homeowners Association if not properly conducted. Any deviation from the procedures set forth in the Homeowners Association's Declaration or Chapter 51 of the Texas Property Code may be grounds for a lawsuit by the Homeowner for damages resulting from a wrongful foreclosure.

In addition, the Texas Property Owners Protection Act (Chapter 209 of the Texas Property Code) caps the amount of attorneys fees a Subdivision Association may charge a delinquent Homeowner in a non-judicial foreclosure to the greater of: (1) one-third (1/3) of the amount of all unpaid Assessments and actual costs of collection (excluding such attorneys fees), plus interest and court costs (if interest and/or court costs are permitted to be included in the amount secured by the Assessment Lien pursuant to Texas law or the Subdivision Association's Declaration); or (2) \$2,500.⁸⁶

**XI. STATUTORY RESTRICTIONS ON THE
RIGHT TO FORECLOSE ASSESSMENT
LIENS**

Regardless of the foreclosure procedure a Texas Homeowners Association is authorized to use,

addressed to the Homeowner at the Homeowner's last known address. Tex. Prop. Code § 51.002(e).

⁸¹ Tex. Prop. Code § 51.002(a). The Notice of Foreclosure Sale must include a statement of the earliest time at which the sale will begin, and the foreclosure sale must begin no later than three (3) hours after the time stated in the Notice of Foreclosure Sale. Tex. Prop. Code § 51.002(b), (c).

⁸² Tex. Prop. Code § 51.002(a), (b)(1). The commissioners court of each Texas county is required to designate the area at the local courthouse where foreclosure sales are to take place and shall record the designation in the Official Public Records of such county. Tex. Prop. Code § 51.002(a). If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by such Notice of Foreclosure Sale is to take place, and the sale must occur in that area. Tex. Prop. Code § 51.002(a).

⁸³ Tex. Prop. Code § 51.0075(a).

⁸⁴ Tex. Prop. Code § 82.113(f). Texas Condominium Associations are also expressly authorized to own, lease, encumber, exchange, sell, or convey a Unit purchased at foreclosure. Tex. Prop. Code § 82.113(f).

⁸⁵ Tex. Prop. Code § 51.0075(f).

⁸⁶ Tex. Prop. Code § 209.008(f).

there are some statutory restrictions on the ability of a Homeowners Association to foreclose its Assessment Lien. Under the Texas Uniform Condominium Act, a Condominium Association may not foreclose its Assessment Lien against a Unit for unpaid Assessments consisting solely of fines.⁸⁷ A Subdivision Association, on the other hand, may not foreclose an Assessment Lien if the unpaid amounts owed by the Lot Owner consist solely of fines assessed by the Subdivision Association and/or attorneys fees incurred by the Subdivision Association solely associated with fines assessed by the Subdivision Association.⁸⁸

XII. TEXAS CONSTITUTIONAL HOMESTEAD PROTECTION

The Texas Constitution affords to its citizens a certain level of protection by keeping the family homestead safe from foreclosure by creditors who seek to satisfy debts, except for a few specifically enumerated types of liens that may be imposed against a Texan's "Homestead." One of the purposes of this constitutional protection is to prevent impoverished debtors from being unable to provide a home for their families.⁸⁹

Scope of Homestead Property and Invocation of Homestead Protection

Generally, a Texan's Homestead has historically consisted of the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected to such dwelling.⁹⁰ The amount of land that may constitute a Texan's Homestead is dictated by the Texas Property Code and depends on whether the property is used for purposes of an urban home or a rural home. If a Homestead is used for the purposes of an urban home (or as both an urban home and a place to exercise a calling or business), the Homestead of a family or a single, adult person shall consist of no more than ten (10) acres of land, which may be in one or more contiguous lots, together with any improvements located thereon.⁹¹ On the other hand, if a Homestead is

used for the purposes of a rural home, a Homestead shall consist of no more than two hundred (200) acres for a family or one hundred (100) acres for a single, adult person, and includes the improvements located thereon.⁹²

It is important to note, just because a property owner does not currently live at his or her property does not mean that such property is not his or her Homestead. The determination of whether a particular property constitutes a Homestead is dependent primarily on the intention of the property owner. Homestead protection may even be established upon undeveloped land if the property owner has a present intention to occupy and use the premises as his or her home in a reasonable and definite time in the future, and has made some preparations toward actual occupancy and use of such property that "are of such character and have proceeded to such an extent as to manifest beyond doubt the intention to complete the improvements and reside upon the place as a home."⁹³ In addition, even if a property owner moves from real property that he or she previously resided at as his or her Homestead, such property does not lose its Homestead status unless the property owner moves from the property with the intention not to return and claim such property as his or her Homestead.⁹⁴ It is the acquisition of a new Homestead, not merely the acquisition of a new home, which operates as an abandonment of Homestead rights, and even the temporary leasing of a property owner's Homestead to a third party does not constitute abandonment of the Homestead status where no other Homestead has been acquired by the property owner.⁹⁵

While it is nearly impossible to determine what a property owner's intent is with regard to real property that has no house on it or that is occupied by somebody other than the property owner, a good rule of thumb is that if the owners of the property reside there, the property is most likely their Homestead. If, however, the owners of the property do not reside at such property and own a home or other real property where they do reside, then the subject property is most likely

⁸⁷ Tex. Prop. Code § 82.113(e).

⁸⁸ Tex. Prop. Code § 209.009.

⁸⁹ *Lincoln v. Bennett*, 156 S.W.2d 504, 504 (Tex. 1941).

⁹⁰ *Gann v. Montgomery*, 210 S.W.2d 255 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.).

⁹¹ Tex. Prop. Code § 41.002(a). A Homestead is considered to be urban if, at the time the designation is made, the property is: (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to

a municipality: (A) electric; (B) natural gas; (C) sewer; (D) storm sewer; and (E) water. Tex. Prop. Code § 41.002(c).

⁹² Tex. Prop. Code § 41.002(b). A Homestead that is used for rural purposes may consist of one or more parcels. Tex. Prop. Code § 41.002(b).

⁹³ *Lilly v. Lewis*, 249 S.W. 1095, 1096 (Tex. Civ. App.—San Antonio 1923, no writ).

⁹⁴ *Burkhardt v. Lieberman*, 159 S.W.2d 847, 852 (Tex. 1942).

⁹⁵ *Rancho Oil Co. v. Powell*, 175 S.W.2d 960, 963 (Tex. 1943) ("The acquiring of a new home is not always the acquiring of a new homestead, and one does not necessarily abandon a homestead by merely moving his home.").

not their Homestead. A good way to determine whether the property owner resides at his or her property is to check the records of the local appraisal district to determine what mailing address property tax information is sent to. If the property owner listed an alternative mailing address other than the subject property, and the mailing address is for residential property in which they own and reside at, then the subject real property is most likely not being occupied by the property owners and it is not their Homestead.

Preemption of Homestead Protection by Preexisting Assessment Liens

Under the Texas Constitution, only specific types of liens enumerated as exceptions to Homestead protection may be foreclosed upon a Texan's Homestead.⁹⁶ Such enumerated liens, however, do not include Assessment Liens in favor of Homeowners Associations.

Notwithstanding, it is well established under Texas law that while the Texas Constitution's protection of Homestead may protect a Homeowner's Lot or Unit from foreclosure by certain creditors, it will not extinguish or subvert a lien that preexists the invocation of the Homeowner's Homestead status to his or her property.⁹⁷ On such basis, in 1987, the Texas Supreme Court held in *Inwood North Homeowners' Association v. Harris* that a preexisting Assessment Lien in favor of a Homeowners Association was superior to the Homeowner's Homestead rights because the Assessment Lien had been in existence prior to the Homeowner's ownership of the subject property, and the invocation of such Homestead status did not extinguish the preexisting Assessment Lien.⁹⁸ The controlling and determinative factor in the Texas Supreme Court's holding in *Inwood North Homeowners' Association v. Harris* was that the Assessment Lien had *attached* to the subject real property prior to the establishment of the Homeowner's Homestead and, therefore, preempted the subsequent invocation of such Homeowner's

Homestead protection.⁹⁹ Accordingly, the dispositive issue in determining whether a Homeowners Association's Assessment Lien preempts a Homeowner's Homestead protection on his or her property is whether the Homeowners Association's Assessment Lien attached to the Homeowner's property before he or she established it as his or her Homestead.

This issue is easily determined for Condominium Associations. By virtue of the Texas Uniform Condominium Act, an Assessment Lien in favor of a Texas Condominium Association is created by and attaches to the Units in the applicable Condominium Development upon the recording of the Condominium Declaration.¹⁰⁰ Thus, whether or not it is specifically stated within the Condominium Declaration, a Condominium Association's Assessment Lien attaches immediately to all Units within the Condominium Development upon the recording of the Condominium Declaration and will preempt any subsequent invocation of Homestead protection by a Unit Owner, except in one limited circumstance. If, on January 1, 1994 (the date the Texas Uniform Condominium Act became effective), a Unit was, and has continuously remained, the Homestead of the Unit Owner and such Unit is subject to a Condominium Declaration that does not contain a valid Assessment Lien against such Unit, the Assessment Lien created by the Texas Uniform Condominium Act does not attach against the Unit until the Unit ceases to be the Homestead of the Unit Owner who has continuously owned such Unit since before January 1, 1994.¹⁰¹

Unfortunately, there is no similar Texas law applicable to Subdivision Developments. In order to determine when a Subdivision Association's Assessment Lien attaches to the Lots in its Subdivision Development, the provision in its Declaration creating the Subdivision Association's Assessment Lien must be carefully examined. Not all Declarations are drafted in the same manner, and not all provisions creating an Assessment Lien in favor of a Subdivision Association provide that the Assessment Lien attaches to the subject Lots at the time the Declaration is recorded. When reviewing the language of a Declaration provision that establishes an Assessment Lien, a Subdivision Association must determine whether the

⁹⁶ The Texas Constitution enumerates eight exceptions to Homestead protection from forced sale, including: (1) purchase money security; (2) taxes due on the Homestead; (3) certain owelty on partition; (4) refinancing of certain liens; (5) security for improvements; (6) certain extensions of credit in the nature of an equity loan; (7) reverse mortgages; and (8) special financing concerning manufactured homes. See Tex. Const. art. XVI, § 50(a)(1)-(8).

⁹⁷ See *Inwood North Homeowners' Association v. Harris*, 736 S.W.2d 632, 634-35 (Tex. 1987).

⁹⁸ *Inwood North Homeowners' Association v. Harris*, 736 S.W.2d 632, 635-36 (Tex. 1987).

⁹⁹ *Inwood North Homeowners' Association v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987) ("Thus, this case revolves around when the lien attached on the property. If it occurred simultaneously to or after the homeowners took title, there is authority which would deem the homestead right superior.").

¹⁰⁰ Tex. Prop. Code § 82.113(c).

¹⁰¹ Tex. Prop. Code § 82.113(k).

creation language contains words of present intent to establish an Assessment Lien or future intent to establish an Assessment Lien. For example, where a Declaration states something to the effect of “by the recording of this Declaration, a lien to secure the payment of assessments is hereby created . . .,” such present-tense language clearly indicates that the Assessment Lien is created by the recording of the Declaration and it will preexist the eventual invocation of Homestead protection by the owners of Lots in such Subdivision Development.

On the other hand, a Declaration may state something to the effect of “in the event an owner shall fail to pay assessments, the Association's lien shall become a continuing lien on the property. . . .” This is the sort of future-tense language that suggests that the Declaration creates an immediate contractual right to place a lien on a subject Lot in the future upon the failure of a Lot Owner to pay his or her Assessments, but it does not create a lien that “attaches” to all of the Lots in the Subdivision Development at the time the Declaration was recorded.¹⁰² In such circumstance, a Texas court may determine that the Subdivision Association's Assessment Lien does not preexist a Homeowner's invocation of Homestead protection, in which event it would be unlawful for the Subdivision Association to foreclose its Assessment Lien if the Lot is the Homeowner's Homestead.¹⁰³

In general, if it is questionable as to whether a Declaration provision creating an Assessment Lien in favor of a Subdivision Association creates an Assessment Lien that attaches to the Lots in the Subdivision Development immediately upon the recording of the Declaration, the Subdivision Association should not conduct a non-judicial

foreclosure of its Assessment Lien if there is any chance that the subject Lot may be the Homeowner's Homestead. Instead, the Subdivision Association should judicially foreclose its Assessment Lien, which provides the Homeowner the opportunity to either raise or waive the affirmative defense of Homestead.¹⁰⁴

XIII. PROTECTION OF ACTIVE DUTY MILITARY SERVICEMEMBERS FROM FORECLOSURE

In addition to protections afforded to a Texan's Homestead, in 2009, the Texas legislature enacted certain statutory restrictions against foreclosure of contractual liens on real property owned by a “Military Servicemember” during a period of his or her “Active Duty Military Service” or during the nine months after the date on which such Active Duty Military Service concludes.¹⁰⁵ Such statute is only effective for foreclosure sales conducted on or after June 19, 2009, and only applies to an obligation: (1) that is secured by a contractual lien on real property that includes a dwelling owned by a Military Servicemember; (2) that originated before the date on which the Military Servicemember's Active Duty Military Service commenced; and (3) for which the Military Servicemember is still obligated.¹⁰⁶

A sale, foreclosure, or seizure of an applicable property owned by a Military Servicemember under a mortgage, deed of trust, or other contract lien (such as an Assessment Lien) may not be conducted during such Military Servicemember's period of Active Duty Military Service or during the nine months after the

¹⁰² See *Red Rock Properties 2005, Ltd. v. Chase Home Finance, L.L.C.*, No. 14-08-00352-CV, 2009 Tex. App. WL 1795037 (Houston [14th Dist.] June 25, 2009, n. pet. h.) (not designated for publication).

¹⁰³ While there is no Texas appellate case law, designated for publication, that specifically addresses a distinction between present-tense and future-tense language of a Declaration provision creating an Assessment Lien in regards to controlling the date of “attachment” of the lien, there are several cases concerning other types of contractual liens that do hold it is the attachment and not merely the right to attach a lien in the future that controls in the context of a preexisting lien being superior to a subsequent invocation of Homestead protection. In addition, a recent Houston Court of Appeal's opinion (that was not designated for publication) specifically held that a Subdivision Association's Declaration that stated that the Assessment Lien “shall attach from the date of the failure of payment of the assessment” did not create a preexisting lien superior to the Homeowner's invocation of Homestead protection. *Red Rock Properties 2005, Ltd. v. Chase Home Finance, L.L.C.*, No. 14-08-00352-CV, 2009 Tex. App. WL 1795037 (Houston [14th Dist.] June 25, 2009, n. pet. h.) (not designated for publication).

¹⁰⁴ *Watson v. Tipton*, 274 S.W.3d 791, 800 (Tex. App.—Fort Worth 2008, pet. denied) (“The plea of homestead is an affirmative defense, which must be affirmatively pleaded and cannot be raised for the first time on appeal.”).

¹⁰⁵ Tex. Prop. Code § 51.015(d). The Texas Property Code defines “Military Servicemember” as: (1) a member of the armed forces of the United States; (2) a member of the Texas National Guard or the National Guard of another state serving on active duty under an order of the President of the United States; or (3) a member of a reserve component of the armed forces of the United States who is on active duty under an order of the President of the United States. Tex. Prop. Code § 51.015(a)(3). The Texas Property Code defines “Active Duty Military Service” as: (1) service as a member of the armed forces of the United States; or (2) with respect to a member of the Texas National Guard or the National Guard of another state or a member of a reserve component of the armed forces of the United States, active duty under an order of the President of the United States. Tex. Prop. Code § 51.015(a)(1). In addition, a dependent of a Military Servicemember may also be entitled to the protections of Section 51.015 of the Texas Property Code if such dependent's ability to comply with an obligation that is secured by a mortgage, deed of trust, or other contract lien on real property is materially affected by such Servicemember's Active Duty Military Service. Tex. Prop. Code § 51.015(g).

¹⁰⁶ Tex. Prop. Code § 51.015(b).

date on which such Active Duty Military Service period concludes unless the sale, foreclosure, or seizure is conducted pursuant to either: (1) a court order issued before the sale, foreclosure, or seizure; or (2) a waiver agreement executed by the Military Servicemember.¹⁰⁷ If a lawsuit to foreclose a lien against applicable property owned by a Military Servicemember is filed during such Military Servicemember's period of Active Duty Military Service or during the nine months after the date on which such Active Duty Military Service period concludes, upon the application of a Military Servicemember whose ability to comply with the contractual obligations secured by the lien is materially affected by such Servicemember's Active Duty Military, a court must either: (1) stay the proceedings for a period of time as justice and equity require; or (2) adjust the obligations of the contract secured by the lien to preserve the interests of all parties.¹⁰⁸ More importantly, if a person knowingly makes or causes to be made a sale, foreclosure, or seizure of applicable property owned by a Military Servicemember during

such Military Servicemember's period of Active Duty Military Service or during the nine months after the date on which such Active Duty Military Service period concludes, then he or she commits a Class A misdemeanor criminal offense.¹⁰⁹ An individual adjudged guilty of a Class A misdemeanor may be punished by a fine up to \$4,000, confinement in jail for up to one year, or both.¹¹⁰

Accordingly, it is very important that a Homeowners Association contemplating initiation of foreclosure procedures on its Assessment Lien perform some reasonable due diligence to determine whether the delinquent Homeowner is a Military Servicemember who is in a period of Active Duty Military Service or in the nine-month period following the conclusion of his or her Active Duty Military Service. The most direct way to determine this is to request confirmation of such information from the Homeowner him or herself, or from other residents of the property or even the delinquent Homeowner's neighbors.

Alternatively, the Servicemembers Civil Relief Act Centralized Verification Service ("SCRACVS") maintains a website at www.servicememberscivilreliefact.com, at which a search can be performed to determine if an individual is on active military duty. SCRACVS's website covers Military Servicemembers serving in the Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service. In addition, a verification of an individual's active military status can be performed by sending a written inquiry to each of the seven agencies (i.e., Army, Navy, etc.) with an enclosed check for \$5.20 per name for each agency; however, some military agencies may take up to five months to respond.¹¹¹

XIV. POST-FORECLOSURE NOTICE REQUIREMENTS OF SUBDIVISION ASSOCIATIONS

A Subdivision Association that conducts a foreclosure sale of a Homeowner's Lot, whether by judicial or non-judicial foreclosure procedures, must

¹⁰⁷ Tex. Prop. Code § 51.015(d). An agreement by a Military Servicemember to waive his or her rights under Section 51.015 of the Texas Property Code must be: (1) in writing in at least twelve-point type; (2) executed as an instrument separate from the obligation to which the waiver applies; and (3) made under a written agreement that is executed during or after such Military Servicemember's period of Active Duty Military Service and specifies the legal instrument to which the waiver applies (and, if the Military Servicemember is not a party to such legal instrument, also specifies the Military Servicemember concerned). Tex. Prop. Code § 51.015(e). If a waiver agreement is executed by an individual who after the execution of such waiver agreement enters Active Duty Military Service, or by a dependent of an individual who after the execution of such waiver enters Active Duty Military Service, the waiver agreement shall not be valid after the beginning of the period of the Active Duty Military Service unless the waiver agreement was executed by the individual or dependent during the applicable period described by 50 U.S.C. App. Section 516, as that section existed on January 1, 2009. Tex. Prop. Code § 51.015(j) (which is described as the period beginning on the date of the Military Servicemember's receipt of an order to report for Active Duty Military Service and ending on the date on which the Military Servicemember reports for Active Duty Military Service or, if such order is revoked before the Military Servicemember so reports, then ending on the date on which such order is revoked).

¹⁰⁸ Tex. Prop. Code § 51.015(c). Even if a Military Servicemember does not specifically request relief from a court under Section 51.015 of the Texas Property Code, a court may on its own motion, after conducting a hearing on such motion: (1) stay the proceedings for a period of time as justice and equity require; or (2) adjust the obligations of the contract secured by the lien to preserve the interests of all parties. Tex. Prop. Code § 51.015(c). A court that issues a stay or takes any other action under Section 51.015 of the Texas Property Code regarding the enforcement of an obligation that is subject to such statute may grant a similar stay or take similar action with respect to a surety, guarantor, endorser, accommodation maker, co-maker, or other person who is or may be primarily or secondarily subject to such obligation. Tex. Prop. Code § 51.015(h).

¹⁰⁹ Tex. Prop. Code § 51.015(f). For purposes of Section 51.015 of the Texas Property Code, a "person" includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. Tex. Prop. Code § 51.015(a)(4); Tex. Gov't Code § 311.005(2).

¹¹⁰ Tex. Pen. Code § 12.21.

¹¹¹ The point of contact and address for each of the military agencies may be found at www.servicememberscivilreliefact.com/link/points-of-contact.php.

send to the Lot Owner and all lienholders of record, within thirty (30) days after the date of the foreclosure sale, a written notice stating the date and time the foreclosure sale occurred and informing the Lot Owner and such lienholders of the right of the Lot Owner and/or any such lienholders to redeem the Lot, or in other words, to get the Lot back.¹¹² Such post-foreclosure notice of redemption rights must be sent by certified mail, return receipt requested, to: (1) the Lot Owner at his or her last known mailing address, as reflected in the records of the Subdivision Association; (2) each lienholder of record at the address of such lienholder, as reflected in the most recent liens filed of record in the Official Public Records of the county in which the subject Lot is located; and (3) each assignee of a recorded lienholder who has provided proper notice to the Subdivision Association of such assignment.¹¹³ If a recorded lien does not include an address for the lienholder, then the Subdivision Association does not have a duty to provide a post-foreclosure notice of redemption rights to such lienholder.¹¹⁴

In addition, within thirty (30) days from the date the Subdivision Association sends such post-foreclosure notice of redemption rights to the Lot Owner and each lienholder of record, the Subdivision Association must record an affidavit in the Official Public Records of the county in which subject Lot is located, stating the date on which such notices were sent and containing a legal description of the subject Lot.¹¹⁵

¹¹² Tex. Prop. Code § 209.010(a), (d). For purposes of sending such post-foreclosure notice of redemption rights to lienholders of record, the term “lienholder of record” means a holder of a lien attached to the subject Lot that may be foreclosed by non-judicial foreclosure, such as a Deed of Trust lien. *See* Tex. Prop. Code § 209.010(b)(2).

¹¹³ Tex. Prop. Code § 209.010(b). In order to constitute a proper notice of assignment, the notice must be in writing, contain the mailing address of the assignee, and be mailed by certified mail, return receipt requested, or by United States mail, with signature confirmation, to the Subdivision Association at the mailing address specified in the most recent Management Certificate filed of record in the Official Public Records of the county in which the Subdivision Development is located. Tex. Prop. Code § 209.010(b)(3). In addition, for purposes of providing notice to the lienholders of record, the Lot Owner is deemed by law to have given approval to the Subdivision Association to notify such lienholders. Tex. Prop. Code § 209.010(b-2).

¹¹⁴ Tex. Prop. Code § 209.010(b-1).

¹¹⁵ Tex. Prop. Code § 209.010(c).

XV. HOMEOWNER’S RIGHT OF REDEMPTION FOLLOWING A FORECLOSURE SALE

Following a foreclosure sale of a Lot or a Unit, the former owner of the foreclosed Lot or Unit may redeem his or her property from foreclosure under certain limited circumstances. In other words, the former Lot or Unit Owner may be able to get their home back from whoever purchased it at the foreclosure sale. The procedures for redeeming a foreclosed Lot and Unit differ significantly and are explained separately below.

A. Redemption of a Lot Foreclosed by a Subdivision Association

If a Lot that was sold by foreclosure of a Subdivision Association’s Assessment Lien is located in a residential Subdivision Development, the former Lot Owner or a lienholder of record can redeem such foreclosed Lot from the person or entity that purchased it at the foreclosure sale any time within one hundred eighty (180) days from the date the Subdivision Association mails the post-foreclosure notice of redemption rights to the subject Lot Owner and applicable lienholders of record.¹¹⁶ During this one hundred eighty-day Redemption Period, a person or entity that purchases the Lot at the foreclosure sale may not transfer ownership of such Lot to a person or entity other than a redeeming Lot Owner.¹¹⁷ The

¹¹⁶ Tex. Prop. Code § 209.011(b). The term “lienholder of record” means a holder of a lien attached to the subject Lot that may be foreclosed by non-judicial foreclosure, such as a Deed of Trust lien. *See* Tex. Prop. Code § 209.010(b)(2). A lienholder of record, however, may not redeem an applicable Lot within the first ninety (90) days of such one hundred eighty-day Redemption Period and may only redeem such Lot if the Lot Owner has not already redeemed it. Tex. Prop. Code § 209.011(b). It is also important to note, if a redeeming Lot Owner or lienholder sends a written request to redeem an applicable Lot by certified mail, return receipt requested, to the person or entity that purchased the Lot at the foreclosure sale on or before the last day of the one hundred eighty-day Redemption Period, the Lot Owner’s or lienholder’s right of redemption is extended until the tenth (10th) day after the date the Subdivision Association or other person or entity that purchased the Lot provides written notice to the Redeeming Lot Owner or lienholder of the amounts that must be paid to redeem the Lot. Tex. Prop. Code § 209.011(m).

¹¹⁷ Tex. Prop. Code § 209.011(c). The person or entity that purchases the Lot at the foreclosure sale can, however, take possession of and occupy the Lot during the one hundred eighty-day Redemption Period, and even lease the Lot to a third-person and collect rents during such period. Notwithstanding, unless the occupants of a foreclosed Lot voluntarily vacate such Lot, the Subdivision Association or other person or entity who purchases an occupied Lot at a foreclosure sale of a Subdivision Association’s Assessment Lien must commence and prosecute an eviction lawsuit against the occupants of such Lot in order to recover possession of such Lot. Tex. Prop. Code § 209.011(a). In addition, any lease of a foreclosed Lot during the one hundred eighty-day Redemption

procedures for redemption of a foreclosed Lot by the former Lot Owner or a lienholder will depend on whether the foreclosed Lot was purchased at the foreclosure sale by the Subdivision Association or by a person or entity other than the Subdivision Association.

Redemption Procedures if a Foreclosed Lot is Purchased at the Foreclosure Sale by the Subdivision Association

If the Subdivision Association purchases the Lot at the foreclosure sale, in order to redeem the foreclosed Lot, a redeeming Lot Owner or lienholder must pay the Subdivision Association:

- (1) all amounts due the Subdivision Association at the time of the foreclosure sale;¹¹⁸
- (2) interest on all amounts owed the Subdivision Association, from the date of the foreclosure sale to the date of redemption, at the rate stated in the Subdivision Association's Declaration for delinquent Assessments or, if no interest rate is stated, at an annual interest rate of ten percent (10%);¹¹⁹
- (3) the costs incurred by the Subdivision Association in foreclosing its Assessment Lien and conveying the foreclosed Lot back to the Lot Owner upon redemption, including reasonable attorneys fees;¹²⁰
- (4) any Assessments levied against the foreclosed Lot by the Subdivision Association after the date of the foreclosure sale;¹²¹
- (5) any reasonable costs incurred by the Subdivision Association during its ownership of such foreclosed Lot, including mortgage payments, costs of repair and maintenance of such Lot, and any costs incurred in leasing such foreclosed Lot;¹²² and

- (6) the purchase price paid by the Subdivision Association at the foreclosure sale, less any amounts due the Subdivision Association at the time of the foreclosure sale that were satisfied out of the foreclosure sale proceeds.¹²³

If the Subdivision Association leases the foreclosed Lot, or otherwise generates income from the use of the foreclosed Lot, during the Redemption Period and the foreclosed Lot is subsequently redeemed, all rents and other income collected by the Subdivision Association from the date of the foreclosure sale until the date of redemption belong to the Subdivision Association, but the amount of such rents and income must be credited against the amounts owed to the Subdivision Association in order to redeem the foreclosed Lot.¹²⁴ In addition, if the former Lot Owner makes partial payment of the amounts due the Subdivision Association at any time prior to the expiration of the one hundred eighty-day Redemption Period, but fails to pay all amounts necessary to redeem the foreclosed Lot before the one hundred eighty-day Redemption Period expires, the Subdivision Association must refund any partial payments back to the former Lot Owner.¹²⁵

If a redeeming Lot Owner or lienholder pays the Subdivision Association all of the required amounts prior to the expiration of the one hundred eighty-day Redemption Period, the Subdivision Association must immediately execute and deliver to the redeeming party a deed transferring ownership of the foreclosed Lot back to the former Lot Owner.¹²⁶ If the Subdivision Association fails to do so, the redeeming Lot Owner or lienholder may file a cause of action against the Subdivision Association to compel the Subdivision Association to convey the foreclosed Lot back to the former Lot Owner.¹²⁷ In such event, if the redeeming Lot Owner or lienholder is the prevailing party, he or

Period is subject to the right of redemption by the Lot Owner or an applicable lienholder and the redeeming Lot Owner's right to reoccupy the Lot immediately after the Lot has been properly redeemed. Tex. Prop. Code § 209.011(k)

¹¹⁸ Tex. Prop. Code § 209.011(d)(1).

¹¹⁹ Tex. Prop. Code § 209.011(d)(2).

¹²⁰ Tex. Prop. Code § 209.011(d)(3).

¹²¹ Tex. Prop. Code § 209.011(d)(4).

¹²² Tex. Prop. Code § 209.011(d)(5).

¹²³ Tex. Prop. Code § 209.011(d)(6).

¹²⁴ Tex. Prop. Code § 209.011(i). In addition, if there is any remaining amount of rent or other income after applying it to the amounts to be paid the Subdivision Association, such surplus must be refunded to the Lot Owner. Tex. Prop. Code § 209.011(i).

¹²⁵ Tex. Prop. Code § 209.011(l). The refunded partial payments must be mailed to the Lot Owner at his or her last known address as shown in the Subdivision Association's records within thirty (30) days of the expiration date of the one hundred eighty-day Redemption Period. Tex. Prop. Code § 209.011(l).

¹²⁶ Tex. Prop. Code § 209.011(f).

¹²⁷ Tex. Prop. Code § 209.011(f).

she may also recover his or her reasonable attorneys fees from the Subdivision Association.¹²⁸

If the former Lot Owner and applicable lienholders fail to redeem the foreclosed Lot within the one hundred eighty-day Redemption Period, or before any extended Redemption Period expires, the Subdivision Association is required to record an affidavit in the Official Public Records of the county in which the foreclosed Lot is located stating that the former Lot Owner and applicable lienholders, if any, did not redeem the foreclosed Lot during the Redemption Period or any extended Redemption Period.¹²⁹ A Subdivision Association that purchases a Lot at the foreclosure sale (and any person or entity that subsequently purchases the foreclosed Lot from the Subdivision Association) may presume conclusively that the former Lot Owner and all applicable lienholders did not redeem the foreclosed Lot unless the former Lot Owner or any applicable lienholder files in the Official Public Records of the county in which the foreclosed Lot is located either: (1) a deed from the Subdivision Association conveying ownership of the foreclosed Lot back to the redeeming Lot Owner; or (2) an affidavit that states the foreclosed Lot has been redeemed, contains a legal description of the foreclosed Lot, and includes the name and mailing address of the person who redeemed the foreclosed Lot.¹³⁰ If the former Lot Owner or any applicable lienholder fails to either record a redemption deed from the Subdivision Association or an affidavit stating that the foreclosed Lot has been redeemed before the expiration of the one hundred eighty-day Redemption Period, the former Lot Owner's and lienholders' right of redemption as against a subsequent purchaser or lender expires after the expiration of such one hundred eighty-day Redemption Period.¹³¹

Redemption Procedures if a Foreclosed Lot is Purchased at the Foreclosure Sale by a Person or Entity other than the Subdivision Association

If a Lot is purchased at the foreclosure sale by a person or entity other than the Subdivision Association, the redemption requirements of the redeeming Lot Owner or lienholder differ slightly. In order to redeem a foreclosed Lot purchased by a person or entity other than the Subdivision Association, the former Lot Owner or lienholder must still pay the Subdivision Association:

- (1) all amounts due the Subdivision Association at the time of the foreclosure sale, less the foreclosure sales price received by the Subdivision Association from the person or entity that purchased the foreclosed Lot;¹³²
- (2) interest on all amounts owed the Subdivision Association, from the date of the foreclosure sale through the date of redemption, at the rate stated in the Declaration for delinquent Assessments or, if no rate is stated in the Declaration, at an annual interest rate of ten percent (10%);¹³³
- (3) all costs incurred by the Subdivision Association in foreclosing its Assessment Lien and conveying the foreclosed Lot back to the redeeming Lot Owner, including reasonable attorneys fees;¹³⁴
- (4) any unpaid Assessments levied against the foreclosed Lot by the Subdivision Association after the date of the foreclosure sale;¹³⁵ and
- (5) any taxable court costs incurred in an eviction proceeding brought by the Subdivision Association to acquire possession of the foreclosed Lot prior to redemption.¹³⁶

In addition, the Lot Owner must also pay to the person or entity that purchased the foreclosed Lot at the foreclosure sale:

- (1) any Assessments levied against the foreclosed Lot by the Subdivision Association after the date of the foreclosure sale that were paid by the person or entity to the Subdivision Association;¹³⁷
- (2) the purchase price paid by the person or entity that purchased the foreclosed Lot at the foreclosure sale;¹³⁸
- (3) the amount of any fees incurred for recording the deed conveying

¹²⁸ Tex. Prop. Code § 209.011(f).

¹²⁹ Tex. Prop. Code § 209.011(n).

¹³⁰ Tex. Prop. Code § 209.011(h).

¹³¹ Tex. Prop. Code § 209.011(g).

¹³² Tex. Prop. Code § 209.011(e)(1)(A).

¹³³ Tex. Prop. Code § 209.011(e)(1)(B).

¹³⁴ Tex. Prop. Code § 209.011(e)(1)(C).

¹³⁵ Tex. Prop. Code § 209.011(e)(1)(D).

¹³⁶ Tex. Prop. Code § 209.011(e)(1)(E).

¹³⁷ Tex. Prop. Code § 209.011(e)(2)(A).

¹³⁸ Tex. Prop. Code § 209.011(e)(2)(B).

- ownership of the foreclosed Lot back to the redeeming Lot Owner;¹³⁹
- (4) the amount of any ad valorem property taxes, penalties, and interest paid by such person or entity on the foreclosed Lot after the date of the foreclosure sale;¹⁴⁰ and
 - (5) any taxable court costs incurred in an eviction proceeding brought by the person or entity that purchased the foreclosed Lot at foreclosure to acquire possession of the foreclosed Lot prior to redemption.¹⁴¹

Similar to Subdivision Associations, if the person or entity that purchased the foreclosed Lot leases it, or otherwise generates income from the use of the foreclosed Lot, during the Redemption Period and the foreclosed Lot is subsequently redeemed, all rents and other income collected by such person or entity from the date of the foreclosure sale until the date of redemption belong to such person or entity, but the amount of such rents and income must be credited against the amounts owed to such person or entity in order to redeem the foreclosed Lot.¹⁴² Unlike Subdivision Associations, however, if the person or entity who purchased the Lot at foreclosure receives any partial payments of the amount due to redeem the foreclosed Lot from the former Lot Owner prior to the expiration of the one hundred eighty-day Redemption Period, but does not receive all amounts necessary to redeem the foreclosed Lot before the one hundred eighty-day Redemption Period expires, such person or entity has no duty to refund the partial payments it received back to the former Lot Owner.¹⁴³

If a redeeming Lot Owner or lienholder pays the person or entity that purchased the foreclosed Lot all of the required amounts prior to the expiration of the one hundred eighty-day Redemption Period, such person or entity must immediately execute and deliver

to the redeeming party a deed transferring ownership of the foreclosed Lot back to the former Lot Owner.¹⁴⁴ If the person or entity that purchased the foreclosed Lot fails to immediately execute and deliver to the redeeming party a deed transferring ownership of the foreclosed Lot back to the former Lot Owner upon completion of the redemption requirements, the redeeming Lot Owner or lienholder may file a cause of action against such person or entity to compel such person or entity to convey the foreclosed Lot back to the former Lot Owner. In such event, if the redeeming Lot Owner or lienholder is the prevailing party, he or she may also recover his or her reasonable attorneys fees from such person or entity.¹⁴⁵

If the former Lot Owner and all applicable lienholders fail to redeem the foreclosed Lot within the one hundred eighty-day Redemption Period or before any extended Redemption Period expires, the person or entity that purchased the Lot at the foreclosure sale is required to record an affidavit in the Official Public Records of the county in which the foreclosed Lot is located stating that the former Lot Owner and applicable lienholders, if any, did not redeem the foreclosed Lot during the Redemption Period or any extended Redemption Period.¹⁴⁶ The person or entity that purchased the Lot at the foreclosure sale (and any person or entity that subsequently purchases the foreclosed Lot from such person or entity) may presume conclusively that the former Lot Owner and lienholders did not redeem the foreclosed Lot unless the former Lot Owner or redeeming lienholder files in the Official Public Records of the county in which the Lot is located either: (1) a deed from the person or entity that purchased the foreclosed Lot at the foreclosure sale conveying ownership of the foreclosed Lot back to the former Lot Owner; or (2) an affidavit that states the foreclosed Lot has been redeemed, contains a legal description of the foreclosed Lot, and

¹³⁹ Tex. Prop. Code § 209.011(e)(2)(C).

¹⁴⁰ Tex. Prop. Code § 209.011(e)(2)(D).

¹⁴¹ Tex. Prop. Code § 209.011(e)(2)(E).

¹⁴² Tex. Prop. Code § 209.011(i). If there are remaining excess amounts, they shall be refunded to the Lot Owner. Tex. Prop. Code § 209.011(i).

¹⁴³ Tex. Prop. Code § 209.011(l). On the other hand, if a Subdivision Association receives any partial payments from a redeeming Lot Owner prior to the expiration of the one hundred eighty-day Redemption Period, but who fails to pay all amounts necessary to redeem the Lot before the one hundred eighty-day Redemption Period expires, the Subdivision Association must refund any partial payments it received back to the Lot Owner. Tex. Prop. Code § 209.011(l).

¹⁴⁴ Tex. Prop. Code § 209.011(f). Before executing a deed transferring the Lot back to the Lot Owner, the person or entity that purchased the Lot is required to obtain an affidavit from the Subdivision Association or its authorized agent stating that all amounts owed the Subdivision Association that must be paid by the redeeming Lot Owner or lienholder to redeem the Lot have been paid. Tex. Prop. Code § 209.011(j). The failure of the person or entity that purchased the Lot to comply with this requirement will not affect the validity of redemption. Tex. Prop. Code § 209.011(j). In addition, if all amounts owed a Subdivision Association in order to redeem a foreclosed Lot have been paid, the Subdivision Association is required to provide the person or entity that purchased the Lot with an affidavit stating that such amounts have been paid no later than the tenth (10th) day after the date the Subdivision Association receives all such amounts from the redeeming Lot Owner or lienholder. Tex. Prop. Code § 209.011(j).

¹⁴⁵ Tex. Prop. Code § 209.011(f).

¹⁴⁶ Tex. Prop. Code § 209.011(n).

includes the name and mailing address of the person who redeemed the foreclosed Lot.¹⁴⁷ If the redeeming Lot Owner or lienholder fails to record either the redemption deed from the person or entity that purchased the Lot at the foreclosure sale or fails to record an affidavit stating that the foreclosed Lot has been redeemed before the expiration of the one hundred eighty-day Redemption Period, the former Lot Owner's and lienholders' right of redemption as against a subsequent purchaser or lender expires after the expiration of such one hundred eighty-day Redemption Period.¹⁴⁸

B. Redemption of a Unit Foreclosed by a Condominium Association

The redemption procedures for a foreclosed Unit differ significantly from that of a foreclosed Lot. The most significant difference is that the right to redeem a foreclosed Unit only applies if the Unit is used for residential purposes and only if the Condominium Association purchases such Unit at the foreclosure sale.¹⁴⁹ In other words, if a Unit is used for non-residential purposes or is purchased at the foreclosure sale by a person or entity other than the Condominium Association, no right of redemption exists.¹⁵⁰ In addition, the right of redemption of a foreclosed Unit may only be exercised by the former Unit Owner, not lienholders.¹⁵¹ Moreover, a Condominium Association is not required to send a Unit Owner a post-foreclosure notice advising such Unit Owner of his or her redemption rights.¹⁵²

If a Unit that is used for residential purposes is purchased by a Condominium Association at a foreclosure sale of the Condominium Association's Assessment Lien, the former Unit Owner may redeem the foreclosed Unit from the Condominium Association anytime before the expiration of ninety (90) days after the date of the foreclosure sale.¹⁵³ During this ninety-day Redemption Period, the Condominium Association may not transfer ownership of the foreclosed Unit to any person other than a redeeming owner of such Unit.¹⁵⁴ The exercise of the right of redemption, however, is not effective against a subsequent purchaser or lender for value without notice

of a redemption of such foreclosed Unit after the ninety-day Redemption Period expires, unless the redeeming Unit Owner records a redemption deed from the Condominium Association or an affidavit stating that the former Unit Owner has exercised his or her right of redemption of the foreclosed Unit in the local Official Public Records.¹⁵⁵

To redeem a foreclosed Unit, the former Unit Owner must pay to the Condominium Association: (1) all amounts due the Condominium Association at the time of the foreclosure sale; (2) interest from the date of the foreclosure sale to the date of redemption at the rate provided by the Condominium Declaration for delinquent Assessments; (3) reasonable attorneys fees and costs incurred by the Condominium Association in foreclosing its Assessment Lien; (4) any Assessments levied against the foreclosed Unit by the Condominium Association after the foreclosure sale; and (5) any reasonable cost incurred by the Condominium Association as owner of the foreclosed Unit, including costs of maintenance and leasing.¹⁵⁶ All rents and other income collected from the foreclosed Unit by the Condominium Association from the date of the foreclosure sale until the date of redemption belong to the Condominium Association, but the amount of such rents and income must be credited against the amounts owed by the former Unit Owner in order to redeem the foreclosed Unit.¹⁵⁷ Upon payment of such required amounts, the Condominium Association is required to execute a deed conveying ownership of the foreclosed Unit back to the redeeming Unit Owner.¹⁵⁸

XVI. PAYMENT OF DELINQUENT ASSESSMENTS AFTER RECORDING OF NOTICE OF ASSESSMENT LIEN

Often after recording a Notice of Assessment Lien in the Official Public Records, a delinquent Homeowner will pay the delinquent amounts owed to the Homeowners Association and demand that the Homeowners Association "release its lien." This is particularly true if the payoff of the delinquent assessments is done in conjunction with a closing on the sale of the subject Lot or Unit. Homeowners Associations, however, cannot simply "release" their lien. This is because an Assessment Lien is created by the recording of the Declaration and remains attached to the subject Lot or Unit whether assessments are outstanding or not. In fact, it would require an amendment of the Declaration to actually release the

¹⁴⁷ Tex. Prop. Code § 209.011(h).

¹⁴⁸ Tex. Prop. Code § 209.011(g).

¹⁴⁹ Tex. Prop. Code § 82.113(g).

¹⁵⁰ Tex. Prop. Code § 82.113(g).

¹⁵¹ Tex. Prop. Code § 82.113(g).

¹⁵² Tex. Prop. Code § 82.113(g).

¹⁵³ Tex. Prop. Code § 82.113(g).

¹⁵⁴ Tex. Prop. Code § 82.113(g).

¹⁵⁵ Tex. Prop. Code § 82.113(g).

¹⁵⁶ Tex. Prop. Code § 82.113(g).

¹⁵⁷ Tex. Prop. Code § 82.113(g).

¹⁵⁸ Tex. Prop. Code § 82.113(g).

Assessment Lien attached to a Lot or Unit. Instead, Homeowners Associations should record a “Notice of Payment” which states in so many words that the outstanding amounts owed by the owner of the Lot or Unit to the Homeowners Association, as evidenced by the Notice of Assessment Lien previously recorded have now been paid. A sample Notice of Payment can be found in the appendix.

XVII. LOOKING BEYOND THE LEGAL ASPECTS OF ASSESSMENT LIEN FORECLOSURE

While it is certainly important to understand the law governing the establishment and foreclosure of Assessment Liens, as attorneys representing Homeowners Associations it is equally important to understand the practical ramifications of Assessment Lien foreclosure and the advisability of proceeding with foreclosure.

A. Portrait of the typical Assessment Lien Foreclosure Scenario

In most cases of delinquent Assessment matters, Assessments are not the only debts that have gone unpaid by the Homeowner and he or she is typically in default under their mortgage as well. As a Homeowners’ outstanding debts continue to mount, it is not unusual for the Homeowner to stick his or her proverbial head “in the sand.” By the time a Homeowners Association has exhausted all pre-foreclosure collection efforts, the amount of delinquent Assessments and collection costs secured by the Assessment Lien have risen to a level that is typically viewed as insurmountable by the delinquent Homeowner. As a result, the percentage of delinquent Homeowners who pay the outstanding amounts owed to the Homeowners Association once it has initiated foreclosure proceedings is less than 50% in the author’s experience. Once a Lot or Unit is foreclosed by a Homeowners Association, the likelihood that the Lot or Unit will be redeemed is even less probable because if such Homeowner could not afford to cure the default before the foreclosure, he or she is almost never in a financial position to redeem the Lot or Unit after foreclosure when the cost to do so is significantly higher.

Whether an Assessment Lien is foreclosed by judicial or non-judicial procedures, the most common purchaser of the Lot or Unit is the Homeowners Association itself. This is because very few investors or prospective homeowners are willing to purchase real property foreclosed by a junior lien holder that remains subject to senior liens following the foreclosure. Homeowners Associations, on the other hand, can purchase such Lot or Unit by application of credit

against the amount owed the Homeowners Association that is secured by the Assessment Lien.

Even though a Homeowners Association is authorized to lease an acquired foreclosed Lot or Unit during the Redemption Period, in reality this rarely occurs because of the expense of evicting the former Homeowner and/or making the Lot or Unit ready for tenants. Nor is a Homeowners Association likely to be able to sell the Lot or Unit following expiration of the Redemption Period. In order to sell an acquired foreclosed Lot or Unit, the Homeowners Association must either satisfy the underlying mortgage lien on the Lot or Unit, or must sell the Lot or Unit to a purchaser still subject to the underlying mortgage lien, both of which may prove exceptionally difficult to do. In order to satisfy the underlying mortgage lien, the current holder of the secured note must be identified. Unless the current holder of the secured note has recorded an assignment of the Deed of Trust lien, it can be difficult to actually identify the current note holder. Moreover, even if the Homeowners Association does identify the current note holder, the note holder is unlikely to confide any information concerning the amount owed on the note without the consent of the borrower. If the Homeowners Association instead chooses to sell the Lot or Unit without satisfying the underlying mortgage lien, it will invariably discover that its pool of potential purchasers is limited to purchasers who are able to pay cash for the Lot or Unit. This is because a lender is generally unwilling to finance the purchase of real property unless all prior liens attached to the Lot or Unit are satisfied and its lien is in a first lien position.

If a Homeowner is not already in default of his or her mortgage when a Homeowners Association forecloses its Assessment Lien, he or she will assuredly cease all mortgage payments thereafter. In almost all cases where a Lot or Unit is foreclosed by a Homeowners Association and not subsequently redeemed, the holder of the mortgage note will foreclose its senior Deed of Trust Lien against such Lot or Unit. As a result, when a Lot or Unit is foreclosed and acquired by a Homeowners Association, the Homeowners Association will normally not recoup its delinquent Assessments and attorneys fees.

B. When should a Homeowners Association Foreclose an Assessment Lien?

So if a Homeowners Association generally does not recover its delinquent Assessments and attorneys fees, why do Homeowners Associations even foreclose their Assessment Lien in the first place. Well there are two reasons generally. First, foreclosure is the final step in the collection process utilized by most Homeowners Association and the act of foreclosure is often the stick Homeowners are threatened with in the

collections letters sent by the Homeowners Association, and its property managers and attorneys. If a Homeowners Association had a known policy of not following through on its threat of foreclosure, it would most likely see its delinquencies soar and its collection rate plummet. This is because a real risk of foreclosure serves as an incentive to all Homeowners to keep current in the payment of their Assessments and to try to work out a payment plan when they fall behind.

The second reason Homeowners Associations will foreclose their Assessments Liens is purely an economic one. Although foreclosure of its Assessment Lien is not likely to result in recovery of past-due Assessments owed to the Homeowners Association, it will stop the bleeding by causing the Lot or Unit to be acquired by a new owner who will presumably begin paying Assessments. In order to illustrate this point, assume hypothetically that condominium association A levies monthly Assessments of \$150 and has a policy of not foreclosing its Assessment Lien, and condominium association B also levies monthly Assessments of \$150, but has a policy of foreclosing its Assessment Lien if a Unit owner is \$750 (or five months) or more in arrears. Assuming that condominium association B will foreclose its Assessment Lien non-judicially at a cost of \$2,000.00 in attorneys fees by the end of the 6th month, at such six-month mark, the delinquent Unit owner in condominium association A will have an unpaid balance of \$900 in unpaid assessments and a delinquent Unit owner in condominium association B will have an unpaid balance of \$2,900 in unpaid assessments and collection costs (ie., attorneys fees). Under such short-term scenario, there is an obvious financial downside to condominium association B foreclosing its Assessment Lien. As time goes on, however, the financial downside lessens and eventually becomes a financial benefit to condominium association B.

Continuing with the same hypothetical, assume that the mortgage holder does not foreclose its Deed of Trust Lien on the foreclosed Unit purchased by condominium association B for another six months. At the one-year mark, the Unit owner in condominium association A will owe \$1,800 in unpaid assessments and the Unit owner in condominium association B will still only owe \$2,900, but condominium association B will have absorbed another \$900 in lost assessments while it was the owner of the foreclosed Unit. Thus, at the one-year mark, condominium association A is now out \$1,800 and condominium association B is out \$3,800.

However, assuming that the lender or a subsequent purchaser begins paying Assessments to

condominium association B following the foreclosure by the mortgage holder, at the two-year mark, condominium association A will now be out \$3,600 in unpaid assessments, while condominium association B will have stopped its bleeding at \$3,800 and is now receiving assessments from the new owner of the foreclosed Unit. At the three-year mark, condominium association A will be out \$5,400 that it may have to ultimately absorb, while condominium association B capped its losses at \$3,800 and continues to benefit positively from the payment of Assessments by the new owner of the foreclosed Unit.

Although Assessment Lien foreclosure is a viable tool in Assessment collection, it may not be appropriate or in the Homeowners Association's best interest in all circumstances. The advisability of foreclosing an Assessment Lien should be made on a case-by-case basis with due consideration given to the amount of unpaid Assessments owed by the Homeowner and amount of time such Assessments have been in arrearage; the existence and amounts of any senior liens attached to the delinquent Homeowner's Lot or Unit; the percentage of Homeowners Association-wide in arrearage; whether the Homeowners Association is authorized to conduct non-judicial foreclosure of the Assessment Lien; the cost of foreclosing the Assessment Lien; and the ability of the Homeowners Association's ability to currently satisfy its operating costs, among other factors. For instance, the ability of a Homeowners Association to foreclose its Assessment Lien to collect unpaid Assessments is subject to a four-year statute of limitations, and a Homeowner's liability for any particular unpaid Assessment expires upon the fourth anniversary of the date such Assessment was due and payable by such Homeowner. For such reason, a Homeowners Association should generally consider initiating foreclosure no later than four years from the date of the oldest outstanding unpaid Assessment.

C. Good Business or Poor Politics: the Case of Wenonah Blevins

While there are certainly good reasons for a Homeowners Association to pursue foreclosure of its Assessment Lien, Homeowners Associations nationwide, and in Texas, have taken fire for doing so; especially when the amount of delinquent Assessments owed by the Homeowner at the time of foreclosure is very small. And, no case has caused more fallout in Texas than the foreclosure of a home owned by Wenonah Blevins in 2001.

In the Spring of 2001, every major newspaper in the state of Texas publicized the story of Wenonah Blevins, an 82-year-old widow in Harris County, who owned a home valued at \$150,000 free and clear of any

mortgage and was foreclosed on by her Homeowners Association. According to the published articles, Ms. Blevins owed \$814.50 in past-due Assessments to the Champions Community Improvement Association, along with more than \$3,700 in legal fees and penalties associated with collection of such past-due Assessments, when Champions Community Improvement Association foreclosed its Assessment Lien and sold Ms. Blevins home for \$5,000 to satisfy such unpaid assessments and attorney fees.

The public outcry following publication of Ms. Blevins' story was immediate and strong. As a result thereof, the Texas legislature immediately enacted Chapter 209 of the Texas Property Code to provide for certain due process procedures required by Subdivision Associations and redemption procedures for Lot owners who lose their home due to foreclosure of an Assessment Lien. In fact, the legislative history of Chapter 209 notes that Chapter 209 was "enacted in honor of Wenonah Blevins and may be unofficially referred to as the Wenonah Blevins Residential Property Owners Protection Act."¹⁵⁹ The perceived egregiousness of the Wenonah Blevins foreclosure has continued to have an affect on the legislation filed during each legislative session since 2001. In fact, during the 2009 legislative session, one bill that nearly became law would have barred all non-judicial foreclosures of Assessment Liens altogether.

D. A Reading of the Chicken Bones for What to Expect in the 2011 Legislative Session

Although it is still too early to start handicapping the 2011 legislative session, bills similar to those proposed in the most recent prior sessions that would have restricted the power and authority of Homeowners Associations to foreclose Assessments Liens are likely to be re-proposed and to have strong support. As one indication of the growing concern over the powers and authority of Texas Homeowners Associations, following the 2009 legislative session, the Lieutenant Governor of Texas and the Texas House Committee on Business and Industry issued directives requesting that Title 11 of the Texas Property Code be studied in advance of the 2011 legislative session to determine if it is sufficient to protect the interests of Texas Homeowners and Homeowners Associations and whether Title 11 should be consolidated with other laws.

In addition, in the last few months the press has been reporting on two more highly polarizing cases of Assessment Lien foreclosures. On May 12, 2010, WFAA-TV in Dallas/Fort Worth reported on the foreclosure of a home in Burleson, Texas owned by

Sherre Mueller.¹⁶⁰ Ms. Mueller owned a home appraised at \$150,000 that she owned free and clear after paying off the mortgage with money she received from a life insurance company after her husband died. Thereafter, Ms. Mueller lost her job and sold her jewelry and tapped her 401K account to help pay bills while she wasn't working. Ms. Mueller also ceased paying her annual \$300 assessment to her Homeowners Association for four years. In January 2010, the Homeowners Association foreclosed its Assessment Lien, selling the home to a Dallas company for \$3,100 in order to satisfy the \$1,200 in unpaid assessments and its attorneys fees. Ms. Mueller had until July 6, 2010 to redeem her home from foreclosure and thanks to the publicizing of her plight, WFAA-TV's viewers donated enough money to Ms. Mueller to make it possible for her to afford to do so.

The second and more polarizing of the two cases involves the foreclosure of a home in Frisco, Texas, owned by Captain Michael Clauer and his wife, while Captain Clauer was deployed as an active-duty soldier to Iraq. According to a May 14, 2010 report by WFAA-TV in Dallas/Fort Worth¹⁶¹, Captain Clauer and his wife owned their home, valued at \$300,000, free and clear as a result of his wife's parents giving the couple the home as a gift. However, while Captain Clauer was away in Iraq, his wife fell into a depression. As a result of her depression, Captain Clauer's wife allowed the mail to pile up unopened and she failed to pay the assessments or even be aware of the collection letters from the Homeowners Association. By the time Captain Clauer returned from his deployment in Iraq, the Homeowners Association had already foreclosed its Assessment Lien against Captain Clauer's home for unpaid assessments in the amount of \$800, plus attorneys fees, and sold it to a third-party for only \$3,500. In addition, the six-month redemption period under Chapter 209 had already expired before Captain Clauer returned from Iraq; thus, preventing Captain Clauer from being able to simply redeem their home.

The comments posted on WFAA-TV's website in response to these two reports are very telling of the bad public image of Homeowners Associations created by foreclosure of Assessment Liens. Taking into consideration the bills filed in the last several legislative sessions, the directive of the Lieutenant Governor and the Texas House Committee on Business and Industry and these two recent publicized foreclosures, you should expect to see significant

¹⁶⁰ <http://www.wfaa.com/news/local/HOA-forecloses-on-Burleson-woman-for--93650764.html>

¹⁶¹ <http://www.wfaa.com/news/local/Frisco-soldier-comes-home-to-find-home-sold-by-HOA-93829194.html>

¹⁵⁹ Tex. S.B. 507, 77th Leg., R.S. (2001).

changes in the law concerning the foreclosure of
Assessment Liens proposed and most likely passed in
the next legislative session.

**NOTICE OF LIEN AGAINST PROPERTY
FOR SUMS NOT PAID TO PROPERTY OWNERS ASSOCIATION**

THE STATE OF TEXAS §
COUNTY OF TRAVIS §

WHEREAS, [Name of Owner(s)] (the "Owner") is the owner of the real property locally known as [Property Address], Austin, Texas _____ and legally known as [Legal Description], according to the [Full Name of Applicable Declaration and recording info] (the "Property");

WHEREAS, the Property is subject to the [Full Name of Applicable Declaration, any amendments and all recording info] (the "Declaration");

WHEREAS, under the Declaration, the [Name of HOA] Homeowners Association, Inc. (the "Association") has a contractual lien on the Property for unpaid assessments and other sums owed by such Owner to the Association (the "Lien");

WHEREAS, of the date of this Notice of Lien, the Owner has failed to pay to the Association sums totaling \$ _____;

NOW THEREFORE, the Association hereby files its Notice of Lien against the Property, as authorized under the Declaration.

Total Indebtedness. As of the date of this Notice of Lien, the amount due and owing to the Association for unpaid assessments and other sums is \$ _____, together with attorney's fees of \$ _____, plus \$ _____ in costs associated with filing this Notice, for a total unpaid amount of \$ _____ (the "Indebtedness"). Such amount will accrue interest and costs of collection as provided in the Declaration until paid. Additional amounts assessed against the Property which accrue after the date of this Notice of Lien and which are not paid shall be automatically added to the Lien. Moreover, the Association shall not rescind this Notice of Lien without full payment of the Indebtedness and attorney's fees and recording costs incurred to date, plus any additional delinquent sums and attorney's fees incurred hereafter and reimbursement of recording costs and attorney's fees incurred in preparing and reviewing any necessary documents to effectively rescind this Notice of Lien, as authorized by the Declaration.

_____ **HOMEOWNERS ASSOCIATION,
INC.**, a Texas non-profit corporation

BY: _____
ITS: President

THE STATE OF TEXAS §
COUNTY OF TRAVIS §

This instrument was acknowledged before me on the ___ day of _____, 2008, by _____, President of the _____ Homeowners Association, Inc., a Texas non-profit corporation.

NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

AFTER RECORDING PLEASE RETURN TO:

Gregory S. Cagle
Armbrust & Brown, L.L.P.
100 Congress Avenue, Suite 1300
Austin, TX 78701

SAMPLE

NOTICE OF PAYMENT TO PROPERTY OWNERS ASSOCIATION

THE STATE OF TEXAS §
COUNTY OF TRAVIS §

WHEREAS, [Name of Owner(s)] (the "Owner") is the owner of the real property locally known as [Address], Austin, Texas _____ and legally known as [Legal Description] (the "Property");

WHEREAS, the Property is subject to the [Declaration, any amendments, and recording information] (the "Declaration");

WHEREAS, under the Declaration, the [Name of HOA] Homeowners Association, Inc. (the "Association") has a contractual lien on the Property for unpaid assessments and other sums owed by such Owner to the Association (the "Lien");

WHEREAS, the Owner had failed to pay to the Association sums totaling \$ _____ and on [Date of Recording of Lien], the Association recorded that certain Notice of Lien Against Property for Sums Not Paid to Property Owners Association, recorded as Document No. _____, Official Public Records, Travis County, Texas (the "Notice of Lien").

WHEREAS, the Owner has now paid all outstanding sums identified in the Notice of Lien.

NOW THEREFORE, the Association hereby files its Notice of Payment and hereby gives notice that, as of the date of this Notice, Owner has paid all sums due and owing to the Association.

Executed this the _____ day of _____, 2007.

By: _____
Gregory S. Cagle

THE STATE OF TEXAS §
COUNTY OF TRAVIS §

This instrument was acknowledged before me on _____ day of _____, 2007, by Gregory S. Cagle, attorney for [Name of HOA] Homeowners Association, Inc..

Notary Public Signature (seal)

AFTER RECORDING RETURN TO:

Gregory S. Cagle
Armbrust & Brown, L.L.P.
100 Congress Avenue, #1300
Austin, Texas 78701

