

TexasBarCLE Presents:

**Expedited Foreclosure for
Property Owners'
Associations**

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- Articles for the State Bar of Texas Professional Development Program:
 - Established Subdivisions Without Mandatory HOAs – Adding HOAs “After the Fact”: Advanced Real Estate Law Course, 2011
 - Dispute Resolution and Litigation in POA Context: Advanced Real Estate Law Course, 2004
 - Property Code Chapter 209 - Implementing the New Law: Advanced Real Estate Law Course, 2002
 - A Primer for Representing Condominium and Property Owners Association (v.2): Advanced Real Estate Law Course, 2001
 - Premises Liability Issues: Advanced Real Estate Law Course, 2000
 - Drafting for Premises Security: Advanced Real Estate Drafting Course, 1999
 - A Primer for Representing Condominium and Property Owners Associations: Advanced Real Estate Drafting Course, 1998
 - Master Restrictive Covenants and Homeowners Associations: Advanced Real Estate Drafting Course, 1997
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INTRODUCTION

The proliferation of property owners' association foreclosures and litigation has captured the attention of many Texas legislators who have, all too often, perceived associations' powers as fraught with a propensity for abuse. Owners, regardless of how irresponsible or ill-informed they were about their obligations when purchasing a home within a property owners' association, came to be perceived as vulnerable consumers in need of protection. When unwittingly placed into a confrontation with their association (whose role they previously understood little more of than as a glorified welcoming committee), disgruntled homeowners took up their complaints with their elected representatives and made a public cause.

Comprehensive property owners' association law overhaul had been on the legislative calendar for many years. Historically, at each session a flurry of bills was introduced in piecemeal fashion, creating a minefield of redundancies and inconsistencies in Texas' association law. Meanwhile, the press has reported on so many abuses by associations (many of which can be debunked upon closer scrutiny), that property owners' association folklore has achieved almost a cult following. It was only a matter of time before the legislature would make sweeping changes to Texas' association law.

Of the estimated 300,000 associations in the United States, more than 50% now face "serious financial problems," according to a September 2010 survey by the Community Association Institute. An October 2011 survey found that 65% of associations in the nation have delinquency rates higher than 5%, an increase from 19% of Associations in 2005.¹

The government does not keep statistics on how often homeowners' associations initiate foreclosures, but a non-profit research group reported that association-initiated foreclosures in the Houston area jumped from 500 in 1995 to 2,200 in 2007, and to approximately 2,500 in 2010.² Until now, many Association foreclosures in Texas were extra-judicial, so this analysis most likely represents only a fraction of the foreclosures that associations have initiated.

And it is not just the associations themselves that have drawn the ire of journalists, lawmakers, and the public. Some seamy practices in the area of association law have attracted unflattering focus on certain members of the Bar. Association attorneys are routinely employed to collect relatively small amounts of money for assessments which are secured by a lien on a homestead. Some have become so creative in their billing practices that many owners, who may

¹ Tamara Lush, *Homeowner associations foreclose on residents*, USA TODAY, July 8, 2011, available at http://www.usatoday.com/money/economy/housing/2011-07-09-homeowner-foreclosure_n.htm (last visited Jan. 5, 2012).

² HOAdata, Houston Area Foreclosure-related Filings, <http://www.hoadata.org> (last visited Jan. 5, 2012).

have been able to come up with enough cash to stay a foreclosure for the assessment debt, were unable to pay the disproportionate amount of attorneys fees incurred, thus losing their homes.

The billing practices that drew criticism from the legislature included contingent billing arrangements where the association's collection attorneys collected only the fees that they were able to recover from the delinquent homeowner. With the association not being obligated to pay the attorneys' fees, there was little or no oversight by the board of directors on what was being charged. To curtail this practice, the legislature implemented new laws making it unlawful to collect attorneys' fees from a delinquent homeowner if the association was not obligated to pay the actual attorney's fees incurred.

BACKGROUND

Unlike purchase money security interests, *ad valorem* taxes, and home equity loans (including reverse mortgages and home equity lines of credit), there is no Texas Constitutional authority for forced sale of a person's homestead in order to satisfy a property owners' association assessment lien. These foreclosures are judicially authorized by two Texas cases – *Inwood North Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), and *Johnson v. First Southern Properties, Inc.*, 687 S.W.2d 399 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

Inwood recognized that the property owner's obligation to pay maintenance assessments mandated by a dedicatory instrument is a covenant running with the land. The decision characterized the assessment lien as a contract to be enforced if it is apparent from the language that the parties intended to create a lien. Thus, maintenance assessment obligations are simultaneously covenants running with the land, and contracts, with all that dual existence implies. If the liens for maintenance assessments are for the purpose of repairing and improving common areas and recreational facilities of a subdivision and were contracted for before the homeowner took possession of the property, the homeowner is not protected against foreclosure for failure to pay maintenance assessments by Texas homestead laws. *Inwood*, 736 S.W.2d at 633. It is critical that the lien securing the payment of assessments attached to the land before the land became homestead property. In this manner the homestead is placed on the land that is previously burdened by a lien.

In *Johnson*, the court held that a right, such as a lien, may prevail over a homestead claim if such right exists before the land becomes a homestead. *Johnson*, 687 S.W.2d at 402.

Unlike a condominium,³ in Texas there has never been a statutory power of sale in connection with a property owners' association assessment lien. An association's ability to conduct a non-judicial foreclosure proceeding could only be created by appropriate language in the association's declaration, and there was no specific guidance on the sufficiency of language to support such a remedy in case law or commentary. The experience of the authors is that generally, an allusion to the requisites of Chapter 51 of the Texas Property Code, and language identifying the lien as pursuant to a power of sale was the minimum verbiage to support the remedy, with some documents drafted more artfully than others. Otherwise, assessment lien foreclosures were sought by filing suit for a judgment and order of sale. In some circumstances, even if non-judicial foreclosure was obtainable, it was more prudent to file a judicial foreclosure action (e.g., if there were issues other than amounts owed).

Effective January 1, 2012, Texas Property Code § 209.0092 requires that a property owners' association may not foreclose its lien "unless the association first obtains a court order in an application for expedited foreclosure under the rules adopted by the supreme court under subsection (b)." Hence, the Texas Supreme Court was directed, in an exercise of their authority under section 74.024 of the Government Code, to adopt rules establishing expedited foreclosure proceedings to be used by a property owners' association in foreclosing its assessment lien.

Texas Government Code § 74.024(a) states: "The supreme court may adopt rules of administration setting policies and guidelines necessary or desirable for the operation and management of the court system and for the efficient administration of justice."

Texas Government Code § 74.024(d) states that: "Any rules adopted under this section remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or any amendments to the rules adopted by the supreme court under this section and shall mail a copy of the rules and any amendments to each registered member of the State Bar not later than the 120th day before the date on which they become effective. The supreme court shall allow a period of 60 days for review and comment on the rules and any amendments. The clerk of the supreme court shall report the rules or amendments to the rules to the next regular session of the legislature by mailing a copy of the rules or amendments to the rules to each elected member of the legislature on or before December 1 immediately preceding the session."

Texas Property Code § 209.0092(b) requires that the rules adopted by the Supreme Court be substantially similar to those adopted under section 50(r), Article XVI of the Texas Constitution. That section states that the Supreme Court shall promulgate rules of civil

³ See Tex. Prop. Code §82.113.

procedure for expedited foreclosure proceedings related to the foreclosure of liens under subsection (a)(6) (home equity loans) and to foreclosure of a reverse mortgage lien that requires a court order. The required court order procedures are established in Texas Rules of Civil Procedure 735 and 736.

On October 17, 2011, the Supreme Court published proposed amendments to Rules 735 and 736 and invited public comment. On December 12, 2011, the Supreme Court approved a revised version, but later made additional revisions as a result of public comment received after that date. On December 30, 2011, under Misc. Docket No. 11-9260, the Court incorporated all revisions and superseded the earlier Orders, amending Rules 735 and 736 to apply to all proceedings filed on or after January 1, 2012. Proceedings filed before that date are to be governed “by the rules prior to these amendments.”

The title of section 1 was changed from “Procedures Related to Home Equity & Certain Reverse Mortgage Foreclosure” to “Procedures Related to Foreclosures of Certain Liens.” Rule 735 was re-named “Foreclosures Requiring a Court Order.”

In addition to property owners’ association assessment lien under section 209.0092 of the Property Code, a transferred or property tax loan under sections 32.06 and 32.065 of the Tax Code was included under Rules 735 and 736.

OVERVIEW

TEXAS RULES OF CIVIL PROCEDURE: RULES 735 AND 736 RELATING TO A PROPERTY OWNERS' ASSESSMENT LIEN UNDER SECTION 209.0092 OF THE TEXAS PROPERTY CODE

RULE 735 FORECLOSURES REQUIRING A COURT ORDER

735.1 – Liens Affected

In addition to identifying the types of liens included in a Rule 736 proceeding as discussed above, this section limits allowable foreclosures to liens containing a power of sale in a dedicatory instrument or declaration of a property owners association.

The Texas Property Code has two virtually identical definitions of a “dedicatory instrument.” Section 202.001(1) defines the term as follows:

“Dedicatory instrument” means each governing instrument covering the establishment, maintenance, and operation of a residential subdivision. The term includes restrictions or similar instruments subjecting property to restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners’ association to properly adopted rules and regulations of the property owners’ association, and to all lawful amendments to the covenants, bylaws, rules, or regulations.

Similarly, section 202.001(1) provides:

“Dedicatory instrument” means each document governing the establishment, maintenance, or operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to:

- (A) restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association;
- (B) properly adopted rules and regulations of the property owners' association; or
- (C) all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

The Property Code defines “declaration” as “an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision.” Tex. Prop. Code § 209.002(3).

It should be noted that the term “dedicatory instrument” was added to Rule 735.1 after the last round of public comment.

It appears that the power of sale requirement conflicts with Texas Property Code §§ 209.0092(a) (“A property owners’ association may use the procedure described by this subsection to foreclose any lien described by the association’s dedicatory instruments.”) and 209.0092(b) (“The supreme court, as an exercise of the court’s authority under Section 74.024, Government Code, shall adopt rules establishing expedited foreclosure proceedings for use by a property owners’ association in foreclosing an assessment lien of the association.”).

The commentary expressly states that the expedited procedures of Rule 736 are only available when a lienholder has a power of sale and that now the law requires a court order to foreclose the lien.

735.2 – Other Statutory and Contractual Foreclosure Provisions Unaltered

An order under Rule 736 does not alter any foreclosure requirement or duty imposed by applicable law or the assessment lien sought to be foreclosed. The only issue determined in a Rule 736 procedure is whether a property owners’ association may obtain an order to foreclose under applicable law and its dedicatory instruments.

The commentary states that Rule 736 is procedural only and does not affect other contractual or legal rights and duties. Any lien that can be foreclosed under Rule 736 may also be foreclosed by a suit for judicial foreclosure.

735.3 – Judicial Foreclosure Unaffected

A Rule 736 order is not a substitute for a judgment for judicial foreclosure, and any loan agreement, contract, or lien that may be foreclosed under Rule 736 procedures may also be foreclosed in a judicial foreclosure action. The commentary states that a lienholder is not required to obtain both.

As in the past, a property owners’ association lien which was coupled with a power of sale can be foreclosed judicially as well a non-judicially. But it appears that property owners’ associations can no longer enforce their liens by proceeding directly to the courthouse to conduct a sale under Texas Property Code § 51.002 without first obtaining an order under this process.

RULE 736 EXPEDITED ORDER PROCEEDING

This Rule establishes the requisite procedures for obtaining an order of foreclosure of a home equity loan, reverse mortgage, home equity line of credit, tax lien transfer, property tax loan, or property owners’ association lien.

736.1 – Application

736.1(a) – Where Filed

This subsection requires an application for expedited relief to be filed in the county in which all or part of the real property sought to be foreclosed is located or in a probate court with jurisdiction over proceedings involving the property.

736.1(b) – Style

This subsection requires the application to be styled as an *ex parte* proceeding with the property address and the Rule.

736.1(c) – When Filed

This subsection mandates that all applicable opportunities to cure must have expired before the application is made.

736.1(d) – Contents

This subsection governs the contents of the petition.

- The petition must identify the parties to the foreclosure proceeding.
 - The Petitioner is any person legally authorized to prosecute the foreclosure.
 - The Respondent, for a property owners association assessment lien, is each person obligated to pay “the loan agreement, contract, or lien sought to be foreclosed who has a current ownership interest in the property.”
- The petition must identify the property sought to be foreclosed by its street address and legal description.
- The petition must describe or state:
 - The type of lien sought to be foreclosed and, for a property owners association lien, its statutory reference;
 - The authority of the party seeking the foreclosure (i.e., the property owners association);
 - Each person obligated to pay the lien;
 - Each mortgagor of the loan agreement, contract, or lien sought to be foreclosed who is not a maker or assumer of the underlying debt;

- For a monetary default: the number of unpaid scheduled payments and the amount required to cure the default as of a date that is not more than 60 days prior to the date the application is filed;
 - For a non-monetary default: the facts creating the default; and
 - The total amount to pay off the loan agreement, contract, or lien, if applicable.
- The petition must state that any requisite notices to cure the default have been mailed to the persons required under applicable law and that the opportunity to cure has expired.
 - The petition must also state that any other action required under applicable law and the loan agreement, contract, or lien sought to be foreclosed was performed.
 - The petition must conspicuously state that:
 - The legal action is not being sought against an occupant of the property who is not a named respondent; and
 - If the petitioner obtains a court order, it will proceed with a foreclosure of the property in accordance with applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed.
 - “Conspicuous” has reference to § 1.201(b)(10) of the Business and Commerce Code where it is defined to mean “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.” Whether a term is ‘conspicuous’ or not is a decision for the court. Conspicuous terms include:
 - A heading in capitals equal to or greater size than the surrounding text, or in a contrasting type, font, or color to the surrounding text of the same or lesser size; and
 - Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.
 - Finally, the petition must include an affidavit of material facts signed by the petitioner or servicer describing the basis of the foreclosure and attached with:

- A legible copy of the pertinent part of the declaration or dedicatory instrument; and
- Each notice required to be mailed to any person under applicable law and the lien sought to be foreclosed and proof of mailing of each notice.

The affidavit must comply with Rule 166a(f). Thus, the affidavit must:

- Be made with personal knowledge;
- Set forth such facts as would be admissible as evidence;
- Show affirmatively that the affiant is competent to testify to the matters stated; and
- Be attached to, and served with, sworn or certified copies of all papers or parts referred to within the affidavit.

736.2 – Costs

This section requires the petition to pay all court costs and fees when it files the application.

736.3 – Citation

736.3(a) – Issuance

This subsection requires the clerk to issue a separate citation for each respondent named and an additional one for the occupant of the property sought to be foreclosed. Citations directed to respondents must state that any response is due on the first Monday after the expiration of 38 days from the date it was mailed, and state the date it was placed in the mail.

736.3(b) – Service and Return

This subsection requires the clerk to serve each citation by certified (return receipt not required) and first class mail to:

- Respondent’s last known address; and
- An occupant at the address of the property sought to be foreclosed.

Concurrently with this service, the clerk must complete a return of service of citation stating the date and time placed in the U.S. mail, in accordance with Rule 107. The clerk can only charge one fee per respondent or occupant.

736.4 – Discovery

No discovery is permitted in these proceedings.

736.5 – Response

Subsections (a) and (b) allow the respondent to file a response contesting the application by the first Monday after the expiration of 38 days from the date the citation was placed in the U.S. mail under Rule 736.3(b)(1).

Subsection (c) requires a response to be signed under Rule 57, meaning that:

- If the respondent is represented by an attorney, the response must be signed by at least one attorney of record and state the attorney's State Bar of Texas identification number, address, telephone number, and facsimile number; and
- If the respondent is not represented, he or she must sign the response and state his or her address, telephone number, and facsimile number, if available.

Under this subsection, the response may be in the form of a general denial under Rule 92, but it must affirmatively plead:

- Why respondent is not obligated to pay the lien;
- Why the number of months of alleged default or the reinstatement and pay-off amounts are not correct;
- That any document attached to the application is not a true and correct copy of the original; or
- Proof of payment by an account stating distinctively the nature of such payment, and the several items thereof, in accordance with Rule 95.

Subsection (d) forbids the response from stating an independent claim for relief. The Court must, *sua sponte*, strike and dismiss any counterclaim, cross claim, third party claim, intervention, or cause of action.

736.6 – Hearing Required When Response Filed

Under this Rule, if no response is filed, the Court may not hold a hearing. But if a response is filed, the Court must hold a hearing not earlier than 20 days or later than 30 days after a request for a hearing is made by any party. At the hearing, the Petitioner has burden of proof by affidavits on file or evidence presented the grounds for granting the order sought in the application.

736.7 – Default When No Response Filed

If the respondent does not file a response, subsection (a) allows the petitioner to file a motion and proposed order of default. For this purpose, all facts alleged in the application and supported by affidavit of material facts are *prima facie* evidence of the truth of the matters alleged.

Subsection (b) requires the Court to grant the application for default order no later than 30 days after the motion is filed, and if the application complies with the requirements under Rule 736.1, and was properly served, petitioner need not appear in court to obtain the default order.

Subsection (c) requires the return of citation to be on file with the clerk for at least 10 days before a court may grant an application by default.

736.8 – Order

Subsection (a) requires a Court to grant an order if the petitioner establishes a basis for the foreclosure. Otherwise, the application must be denied.

Subsection (b) requires an order granting an application to describe:

- The material facts establishing the basis for foreclosure;
- The property to be foreclosed by mailing address and legal description;
- The name and last known address of each respondent subject to the order; and
- The recording and indexing information of each lien foreclosed.

Subsection (c) provides that these orders are not subject to a motion for rehearing, new trial, bill of review, or appeal. Any challenge must be made in a suit filed in a separate, independent, original proceeding in a court of competent jurisdiction.

736.9 – Effect of the Order

This section states that orders granting foreclosure under Rules 735 and 736 are without prejudice and have no effect of *res judicata*, collateral estoppel, estoppel by judgment, or any other effect on any other judicial proceeding. Such an order merely allows a successful petitioner to proceed with the foreclosure process under applicable law and the terms of the lien.

736.10 – Bankruptcy

This section requires the respondent to provide proof to the clerk that he or she has filed bankruptcy before an order is signed. This proof then abates the proceeding so long as the automatic stay is in effect.

736.11 – Automatic Stay and Dismissal if Independent Suit Filed

Subsection (a) automatically stays any proceeding or order if a respondent files a separate suit that puts into issue any matter related to the origination, servicing or lien sought to be foreclosed, prior to 5:00 p.m. on the Monday before the scheduled foreclosure sale.

Subsection (b) requires prompt notice of the suit to petitioner or his or her attorney, trustee or substitute trustee, by any means necessary to stop the sale.

Subsections (c) and (d) require the respondent to file a motion and proposed order to dismiss or vacate the Rule 736 proceedings within 10 days of filing suit. If no order has been signed, the Court must dismiss the Rule 736 proceeding. And any signed orders must be vacated by the Court. Moreover, any foreclosure sale is void, and the Trustee or substitute trustee must return proceeds of sale within 10 business days of notice that the foreclosure sale was void.

Subsection (e) states that Courts may enforce Rule 736 process under Texas Civil Practices and Remedies Code Chapter 9 (F frivolous Pleadings and Claims) and Chapter 10 (Sanctions for Frivolous Pleadings and Motions).

736.12 – Attachment of Order to Trustee’s Deed

This section requires that a conformed (signed) copy of the 736 order to be attached to the trustee or substitute-trustee’s foreclosure deed.

736.13 – Promulgated Forms

This section provides that the Supreme Court may promulgate forms conforming to Rule 736. To date the Supreme Court has not promulgated forms for use in this expedited judicial foreclosure procedure. Attached in the appendix are forms drafted by the authors which are attached for educational purposes only. These forms should not be utilized without strict compliance with the Rules of Civil Procedure, the Texas Property Code and additional requirements of an association's governing documents.

Commentary to Rules 735 and 736

- The Rules have been rewritten and expanded to include property owner's associations' assessment liens, pursuant to Texas Property Code ch. 209.
- The expedited procedures under Rule 736 are only available when the lienholder has a power of sale, but a court order is necessary to foreclose the lien.
- Rule 736 is only procedural and does not affect other contractual or legal rights or duties.
- Any lien which can be foreclosed under Rule 736 may also be foreclosed by means of a judicial foreclosure action, and no lienholder is required to obtain both a Rule 736 order and a judgment for judicial foreclosure.
- "Conspicuousness" in Rule 736.1(d)(5) refers to the definition contained in section 1.201(b)(10) of the Texas Business and Commerce Code.

ASSESSMENT COLLECTION

ASSESSMENT COLLECTION: NEW PREREQUISITES TO FORECLOSURE

Changes to collection procedures for property owners' associations are sweeping, as demonstrated in the following sections. Alternative payment options and application of payments which were previously elective are now mandatory. All of these sections are new to the Texas Property Code.

- A. Alternative Payment Schedule for Certain Assessments - Texas Property Code § 209.0062 (there were two of these sections past which are nearly identical except for the order of the provisions)

Property owners' associations composed of more than 14 lots are now required to adopt reasonable guidelines to establish an alternative payment schedule by which an owner may make partial payments for delinquent regular or special assessments or any other amount owing to the association without incurring additional monetary penalties. The association shall record these guidelines in the real property records of each county in which the subdivision is located. This required guideline was to be recorded by January 1, 2012.

1. Minimum/Maximum Term: No payment plan may be for a period shorter than 3 months or extend for more than 18 months.
2. Repeat Offenders: A property owners' association is not required to enter into a payment plan with an owner who failed to honor a previous payment plan during the two years following default under the previous plan.
3. Guidelines: Failure of a property owners' association to record the guidelines to establish an alternate payment schedule does not preclude it from receiving payment plans.
4. Penalties: Owners making payments under an approved plan cannot be charged monetary penalties, but can be charged for reasonable costs associated with administering the plan or for interest. So no additional late fees or collection costs can be added during the term of the payment plan.

- B. Priority of Payments – Texas Property Code § 209.0063

Payments received by a property owners' association from a delinquent owner must be applied in the following order:

1. delinquent assessments;

2. current assessments;
3. any third-party collection costs or attorney's fees associated with the collection;
4. other attorney's fees;
5. fines assessed;
6. other amounts owed to the association.

Property owners' associations are not required to apply payments in this order if the owner becomes delinquent under an alternative payment schedule; however, fines can never be given priority.

C. Third Party Collections – Texas Property Code § 209.0064

1. Collection agent: means a debt collector, as defined by section 803 of the federal Fair Debt Collections Practices Act.*
2. Notice: Prior to referring an account to a collection agent, a property owners' association is first required to provide written notice, by certified mail, return receipt requested, that:
 - Specifies each delinquent amount and the total amount of the payment required to make the account current;
 - Describes the options the owner has to avoid the referral, including payment plan options; and
 - Provides at least 30 days to cure the delinquency before further action is taken.
3. Collection Fees: Owners are not liable for costs that are dependent or contingent on amounts recovered, or under an agreement that does not require the property owners' association to pay all fees for the action taken by the collection agent.

* Under this Act, a "debt collector" means "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . [T]he term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. . . . [S]uch term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6).

4. Contact: An agreement between a property owners' association and a collection agent may not prohibit an owner from contacting the association's board or managing agent regarding their delinquency.
5. Non-transferable: A property owners' association may not sell or transfer its interest in accounts receivable except for the purpose of collateral for a loan.

D. Foreclosure Sale Prohibited in Certain Circumstances – Texas Property Code § 209.009

Since 2002, property owners' associations could not foreclose an assessment lien for debts consisting solely of fines or attorneys' fees associated with the fines assessed. It has now been added that the lien also cannot be foreclosed for copy charges under the open records policy of Texas Property Code § 209.005(i).

E. Prerequisites to Foreclosure: Notice and Opportunity to Cure for Certain Other Lienholders – Texas Property Code § 209.0091

A property owners' association may not foreclose its assessment lien non-judicially or judicially unless it has:

- Provided written notice by certified mail, return receipt requested, of the total amount of the delinquency to any other holder of a lien that is inferior or subordinate to the association's lien and is evidenced by a deed of trust; and
- Provided the recipient of the notice an opportunity to cure within 61 days from the receipt of the notice.

F. Assessment Lien Filing – Texas Property Code § 209.0093 and Government Code § 83.001(a) and (b)(1)

Section 209.0093 provides that a lien, a lien affidavit, or any other instrument evidencing the non-payment of assessments is a legal instrument affecting title to real property. This has been a long-standing controversy in the industry as property owners' associations do not want to pay attorneys to file these instruments, and either do it themselves or enlist their managing agent to prepare and record lien affidavits. Now that issue had been settled, these documents may only be prepared by licensed attorneys.

**SELECTED ISSUES REGARDING AMBIGUITIES CREATED BY TEXAS
PROPERTY CODE 209.0092 AND RULES 735 & 736
(OR OUR TOP PICK STICKY WICKETS)**

1. Rule 735.1 states that Rule 736 provides a procedure for foreclosure of a property owners' association's lien containing a power of sale in a dedicatory instrument or declaration, but Texas Property Code § 209.0092(a) and (b) seem to state that a property owners' association must use this procedure to foreclose any lien described by the association's dedicatory instruments.

The comment to Rule 736 attempts to resolve this issue by stating that Rule 735.1 makes the expedited procedures of Rule 736 available only when the lienholder has a power of sale.

The rationale behind section 209.0092 was to standardize foreclosures of property owners' association liens to make sure that no home was sold without judicial review. The process of using Rule 736's expedited foreclosure proceedings was to minimize cost, as they generally are less expensive than a judicial foreclosure action. This seemed important for when an owner exercises their six month right of redemption and is required to reimburse an association for all attorney fees and costs associated with the foreclosure process.

It seems that the Supreme Court did not wish to go so far as to treat all assessment liens alike. Rule 735.2 suggests that a Rule 736 order, by not altering any foreclosure requirement or duty imposed under applicable law or the terms of the contract or lien sought to be foreclosed, that if a dedicatory instrument contains an assessment lien which would otherwise be required to be foreclosed judicially, than the Court will not judicially create a power of sale. The Comment to the 2011 changes to Rule 736 seems to bolster this interpretation by adding that Rule 736 is procedural only.

Although it could have been made much clearer, we interpret Rule 735.3 to mean that any property owners' association lien which is coupled with a power of sale may use either the Rule 736 process or file a suit for judicial foreclosure; however, the converse is not true for assessment liens without a power of sale.

Additionally, any rules adopted under Texas Government Code § 74.024 "remain in effect unless and until disapproved by the legislature". Tex. Gov't Code § 74.024(d). Rule 735.3 was adopted by the Texas Supreme Court pursuant to its authority under section 74.024. And the Texas legislature has not disapproved of Rule 735.3. The Rule therefore remains in effect unless and until the legislature disapproves.

2. Rules 736.1(c) and (d)(3)(F) state that an application may not be filed until any opportunity to cure has expired under applicable law, and the loan agreement, contract, or lien sought to be foreclosed. The Rules do not clarify which party this applies to. In the property owners' association context, there are multiple notice to cure periods, and other parties with a statutory opportunity to cure.

In addition to the notices required by applicable federal and state laws (e.g., the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*; the Texas Debt Collection Act, Tex. Fin. Code ch. 392; Texas Property Code §§ 51.002, 209.0064, and 209.008, etc.), junior lienholders of a property sought to be foreclosed by a property owners' association have a 61-day notice period which provides them an opportunity to cure the delinquency, pursuant to Texas Property Code § 209.0091.

Requiring this 61-day cure period to expire prior to the filing of an expedited order proceeding causes additional delay and cost on the debtor, who typically cures his or her delinquency by paying all posted charges prior to the property owners' association reaching the foreclosure and sale stage.

3. Rule 736.3(a)(1) requires the clerk to issue a separate citation for each respondent named in the application and one additional citation for the occupant of the property sought to be foreclosed.

If the respondent is the occupant of the property sought to be foreclosed, the property owners' association need only serve citation at the property's address. If service of citation on the occupant is not the same as a respondent, occupants may believe that they must hire an attorney and file a response; however, they have no standing in the suit. This may cause unnecessary delay, confusion, and paperwork for the courts, their clerks, and the parties.

Further, citation by the court is an additional expense for which the property owners' association, and ultimately the debtor, will be responsible when it comes to exercising the right of redemption before or after the foreclosure sale.

4. Texas Property Code § 290.008(f)(1) and (2) provide that if a dedicatory instrument allows for non-judicial foreclosure, the amount of the attorneys' fees that a property owners' association may include in a non-judicial sale for the indebtedness is limited to the greater of one-third of the amount of actual costs and assessments, excluding attorneys' fees, plus interest and court costs, if those amounts are permitted to be included by law or by restrictive covenants governing the property or \$2,500.00. Acknowledging that few non-judicial sales support attorneys' fee charges in excess of these amounts, these caps seem reasonable. But, if the cost of an expedited foreclosure proceeding under Rule 736, must also be included, it is doubtful that statutory limit would come close to covering the attorneys' fees for the entire foreclosure process. Rosemary I would rather not include this language – I would have no objection to adding

a number 6 which provides what happens to the past fee agreements that provided a contingent billing methodology – are those obligation no longer due by anyone?

5. Texas Property Code § 209.0092(c) provides that an expedited foreclosure is not required if the owner of the property that is subject to the foreclosure agrees in writing *at the time the foreclosure is sought* to waive expedited foreclosure. This section further provides that the waiver may not be required as a condition of the transfer of title to real property.

Of course, this means that a purchaser of property in a subdivision with a property owners' association cannot be required to sign the waiver at the time of closing or as a condition to the right of redemption. But can an owner effectively agree to waive expedited foreclosure as a condition to an alternative payment schedule, under Texas Property Code § 209.0062, or as part of a settlement of a dispute under Texas Property Code § 209.007?

6. Texas Property Code § 209.0064(c)(1) and (2) provides that an owner is not liable for fees of a collection agent retained by a property owners' association if the obligation for payment is in any way dependant or contingent on amounts recovered, or the payment agreement does not require payment by the association of all fees to the collection agent for actions undertaken to collect the debt.

This statute is effective January 1, 2012 and clearly applies to agreements entered into after that time. But what about collection activities undertaken in 2011 or earlier that have yet to be collected under contracts that contain these provisions? The effective date does not specify whether it applies to the date the obligation is incurred or the date fees are requested.

As we read this, even if the contract contains a “savings clause” indicating that other portions of the contract are valid and in force and effect, collectability of the contingent attorneys' or agents' fees may be in dispute.

7. Texas Property Code § 209.0093 provides that a provision granting a right to foreclose a lien on real property for unpaid amounts due to a property owners' association may be adopted in a dedicatory instrument by a vote of at least 67 percent of the total votes allocated in the association. But what about the enforceability of this lien in an amended governing document as it relates to a homestead? As the lien is not prior in time as discussed in *Inwood* and *Johnson*, the lien would not be foreclosable against any property designated as homestead until a second generation of owners took title. It is analogous to a property owners' association being organized “after the fact,” except for those created by virtue of Texas Property Code chapter 204.

CONCLUSION

Just when it seemed that property owners' associations could not become more unpopular, the legislature heaped upon them significantly increased rigors and accountability. Attorneys representing associations should tread carefully through the minefield of the new statutes, especially as applied to Rules 735 and 736.

As the dust has settled over the legislative session and the new laws have been put into print, the effects of these changes now loom ahead. Those of us who practice largely in the area of association law are in for a wild ride in the next few months or longer, as attempts to bridge the gaps and iron out the snags wind their way through the court system.

Patience will be key and, one should be reminded of the Government Code § 312.005 rule of legislative intent and construction: "In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy."

Whatever happens will be interesting, and we predict that the next session will either be about making further sweeping changes, or vigilant attempts to fix the problems created.

APPENDIX

DISCLAIMER

The attached forms are for educational purpose only and should not be relied upon or used without thorough consideration by each association's governing documents. Each attorney's personal interpretations are of the newly enacted laws. The newly enacted laws do not eliminate any additional requirements in the governing document. Use extreme caution. These like any other forms, are just a starting point.

APPENDIX A – RULE 166a(f) Affidavit

CAUSE NO. _____

IN RE: ORDER OF FORECLOSURE
CONCERNING

[TX: PROPERTY ADDRESS]

UNDER TEX. R. CIV. P. 736

IN THE DISTRICT COURT OF

_____ COUNTY, TEXAS

_____ JUDICIAL DISTRICT

RULE 166a(f) AFFIDAVIT OF MATERIAL FACTS

STATE OF TEXAS §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, personally appeared [ASSOCIATION MANAGER], who, being by me duly sworn, deposed as follows:

My name is [Association Manager], I am of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of [ASSOCIATION] (the ‘‘Association’’). Attached hereto is/are ___ page/s of records from [ASSOCIATION]. This said ___ page/s of records are kept by [ASSOCIATION] in the regular course of business, and it was the regular course of business of [ASSOCIATION] for an employee or representative of [ASSOCIATION], with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached here are the original or exact duplicates of the original.

At the time of the filing of this affidavit, [PROPERTY OWNER] is record owner of the property at [PROPERTY] (the ‘‘Property’’). A certified copy of the vesting deed recorded under _____ County Clerk’s Document No. _____, evidencing said ownership is attached hereto as **Exhibit ‘‘A’’** and incorporated herein by reference for all purposes.

The [ASSOCIATION DECLARATION] recorded under Clerk’s File Number [DOCUMENT NUMBER] of the Official Property Records of _____ County, Texas, requires the Respondent to pay to the Association certain assessments and related charges. The assessments, together with interest, late fees, costs, and reasonable attorney’s fees, are secured by a lien in favor of the Association against the Property. A

certified copy of the Declaration is attached hereto as **Exhibit “B”** and incorporated herein by reference for all purposes.

At the time of the execution of this affidavit, [PROPERTY OWNER] owes \$_____ to Association, representing the following amounts:

- a. \$_____ unpaid assessments
- b. \$_____ interest
- c. \$_____ late fees
- d. \$_____ attorney’s fees and expenses

The total amount is due and payable to Association by [PROPERTY OWNER] and all just and lawful offsets, payments and credits have been allowed.

Demand for payment of the just amount owed to Association by [PROPERTY OWNER] has been made on Respondent more than thirty (30) days prior hereto and payment for the just amount owed has not been tendered.

Attached hereto within **Exhibit “C”** are true and correct copies of the statutorily required notices under Section 209.0064 and Section 209.0091 of the Texas Property Code.

[ASSOCIATION MANAGER], AFFIANT

SIGNED AND SWORN to before me on this _____ day of _____, 20____.

Notary Public, State of Texas
Notary’s printed name:

My commission expires:

**APPENDIX B – ORDER GRANTING APPLICATION FOR
EXPEDITED FORECLOSURE**

CAUSE NO. _____

IN RE: ORDER OF FORECLOSURE
CONCERNING

[TX: PROPERTY ADDRESS]

UNDER TEX. R. CIV. P. 736

[RESPONDENT]

IN THE DISTRICT COURT OF

_____ COUNTY, TEXAS

_____ JUDICIAL DISTRICT

**ORDER TO PROCEED WITH
NOTICE OF FORECLOSURE SALE AND FORECLOSURE SALE**

On this day, the ____ of _____, 20____, came on to be considered the Application of [ASSOCIATION] (the “Petitioner”) for Expedited Foreclosure Proceeding pursuant to Rule 736 of the Texas Rules of Civil Procedure relative to [PROPERTY OWNER], (the “Respondent”) and that certain real property more particularly described as follows:

[LEGAL DESCRIPTION]

Which has a mailing address of [PROPERTY ADDRESS], (the, “Property”).

Whereas, a debt exists and is secured by a lien created under the [ASSOCIATION DECLARATION] recorded under Clerk’s File Number [DOCUMENT NUMBER] of the Official Property Records of _____ County, Texas (the, Declaration”). A default under the Declaration exists; Petitioner has given Respondent the requisite notices to cure the default under the Section 209.0064 of the Texas Property Code and applicable law. Respondent’s last known address is _____. Petitioner has given

Respondent the requisite notice of this proceeding under Rule 736 of the Texas Rules of Civil Procedure. It is hereby

ORDERED that Petitioner, [ASSOCIATION], is authorized to proceed with foreclosure of the Petitioner's lien under the [ASSOCIATION DECLARATION] pursuant to Section 209.0092 of the Texas Property Code. It is further

ORDERED that Petitioner, [ASSOCIATION] may communicate with the Respondent and all third parties reasonably necessary to conduct the foreclosure sale of the property, and, if Respondent is represented by legal counsel, notice of the foreclosure sale date shall also be mailed to legal counsel by certified mail.

Dated this ____ day of _____, 20__

JUDGE PRESIDING

Approved:

[PETITIONER'S ATTORNEY]

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Order to Proceed with Notice of Foreclosure Sale and Foreclosure Sale has been duly forwarded by certified and regular mail, to all parties, on this _____ day of _____, 20__.

Via Certified Mail with Return Receipt
CMRR# _____

PROPERTY OWNER
PROPERTY ADDRESS

[PETITIONER'S ATTORNEY]

APPENDIX C – CITATION FORM FOR EXPEDITED FORECLOSURES

CAUSE NO. _____

IN RE: ORDER OF FORECLOSURE
CONCERNING

IN THE DISTRICT COURT OF

[TX: PROPERTY ADDRESS]

UNDER TEX. R. CIV. P. 736

_____ COUNTY, TEXAS

[RESPONDENT]

_____ JUDICIAL DISTRICT

NOTICE TO [RESPONDENT: NAME AND ADDRESS]

An application has been filed by [ASSOCIATION] (the “Association”), as Petitioner, on _____, in a proceeding described as: "In re: Order for Foreclosure Concerning [TX: Property Address] Under Tex. R. Civ. P. 736." The attached application alleges that you, the Respondent, are in default under the [ASSOCIATION DECLARATION] creating a lien on your real property. This application is now pending in this court. Petitioner seeks a court order, as required by Texas Property Code Section 209.0092 to allow it to sell at public auction the property described in the attached application under the [ASSOCIATION DECLARATION] and Texas Property Code Section 209.0092. You may employ an attorney. If you or your attorney do not file a written response with the clerk of the court at _____ on or before 10:00 a.m. on _____ an order authorizing a foreclosure sale may be signed. If the court grants the application, the foreclosure sale will be conducted under the [ASSOCIATION DECLARATION] and Texas Property Code Section 209.0092. You may file a response setting out as many matters, whether of law or fact, as you consider may be necessary and pertinent to contest the application. If a response is filed, the court will hold a hearing at the request of the Petitioner or respondent.

In your response to this application, you must provide your mailing address.
In addition, you must send a copy of your response to [PETITIONER’S ATTORNEY].

ISSUED

By: _____
[PETITIONER’S ATTORNEY]

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this notice with a copy of the application was sent certified mail return receipt requested and regular mail to [RESPONDENT: NAME AND ADDRESS] on the _____ day of _____, 20__.

**APPENDIX D – APPLICATION FOR EXPEDITED
FORECLOSURE**

CAUSE NO. _____

IN RE: ORDER OF FORECLOSURE
CONCERNING

[TX: PROPERTY ADDRESS]

UNDER TEX. R. CIV. P. 736

[RESPONDENT]

IN THE DISTRICT COURT OF

_____ COUNTY, TEXAS

_____ JUDICIAL DISTRICT

**APPLICATION FOR EXPEDITED FORECLOSURE PROCEEDING
PURSUANT TO RULE 736 OF THE TEXAS RULES OF CIVIL PROCEDURE**

To the Honorable Judge of Said Court:

Comes now, [ASSOCIATION], its successors and/or assigns (“Petitioner”), and files this, its verified Application for Expedited Foreclosure Proceeding Pursuant to Rule 736 of the Texas Rules of Civil Procedure. In support of this Application, Petitioner would show as follows:

1. [PROPERTY OWNER’S NAME] (“Respondent”) is the party who, according to the records of Petitioner, has a current ownership interest in the Property (as hereinafter defined) and is obligated to pay the debt secured by the Property (as hereinafter defined). **Legal action is not being sought against the occupant of the Property (as hereinafter defined).**

2. **If the Petitioner obtains a court order, the Petitioner will proceed with foreclosure of the Property in accordance with applicable law and the terms of the lien sought to be foreclosed.**

3. The property which is the subject of this Application is described as follows:

[LEGAL DESCRIPTION]

Which has a mailing address of _____ (the “Property”).

4. At the time of the filing of this affidavit, [RESPONDENT] is record owner of the Property. A certified copy of the vesting deed recorded under _____ County Clerk's Document No. _____, evidencing said ownership is attached hereto as **Exhibit "A"** and incorporated herein by reference for all purposes.

5. The [ASSOCIATION DECLARATION] recorded under Clerk's File Number [DOCUMENT NUMBER] of the Official Property Records of _____ County, Texas, requires the Respondent to pay to the Petitioner certain property owners' association assessments and related charges. The assessments, together with interest, late fees, costs, and reasonable attorney's fees, are secured by a lien in favor of the Petitioner against the Property. A certified copy of the Declaration is attached hereto as **Exhibit "B"** and incorporated herein by reference for all purposes. Texas Property Code Section 209.0092 provides the authority for Petitioner to foreclose its property owners' association assessment lien.

6. In further support of this Application, Petitioner's representative swears by the sworn Verification under Rule 166a(f) attached as **Exhibit "C"** to this Application that upon the representative's information and belief, which is based upon the review of Petitioner's business records, would show the following facts as would be admissible in evidence.

a. A balance still exists on this debt. The outstanding principal balance owing is \$_____. Additionally, late charges and interest have been accruing on the debt because of the default by Respondent. Respondent is delinquent in _____ unpaid payments. The amount required to cure Respondent's default and the amount required to pay off the lien is \$_____.

b. The debt on which this Application is based is secured by a lien created under [ASSOCIATION DECLARATION] which encumbers the Property.

c. A default has occurred in the payment of the above-referenced debt and said default still exists. A default exists under the [ASSOCIATION DECLARATION] in that Respondent failed to pay the payment which became due on _____, and every installment that has become due since that date.

d. Petitioner and/or its attorney have provided the requisite notice of default to Respondent under Section 209.0064 of the Texas Property Code. Said notice was given by letter dated _____, and mailed to Respondent at the last known mailing address of Respondent as reflected in the records of Petitioner. The notice of default/right to cure was given in accordance with Texas Property Code Section 209.0064, [ASSOCIATION DECLARATION] and applicable Texas law. A true and correct copy of the notice of default/right to cure is attached hereto as **Exhibit “D”**, and is incorporated herein by reference.

e. Petitioner and/or its attorney have provided the requisite notice of default to certain other lienholders under Section 209.0091 of the Texas Property Code. Said notice was given by certified mail return receipt requested on _____, and mailed to said lienholder at the mailing address as reflected in the deed records of _____ County, Texas. The notice of default/right to cure was given in accordance with Texas Property Code Section 209.0091. A true and correct copy of the notice of default/right to cure is attached hereto as **Exhibit “E”**, and is incorporated herein by reference.

7. Although not statutorily required, Petitioner and/or its attorney provided additional notices of default to Respondent. Said notices were given by letter dated _____, and _____, respectively, and mailed to Respondent at the last known mailing address of Respondent as reflected in the records of Petitioner. True and correct copies of the additional notices of default are attached hereto as **Exhibit “F”**, and are incorporated herein by reference.

8. Petitioner is informed and believes that last known mailing address for Respondent is at his/her place of residence: _____. Petitioner’s Certificate of Last Known Address is attached hereto as **Exhibit “G”** and is incorporated herein by reference.

9. Petitioner is informed and believes that Respondent is not in the military. Petitioner’s Service members’ Affidavit is attached as **Exhibit “H”** and is incorporated herein by reference.

WHEREFORE, PREMISES CONSIDERED, Petitioner _____,
its successors and/or assigns, prays that upon final hearing, the Court enter an order
pursuant to Texas Property Code Section 209.0092, allowing Petitioner to proceed with
foreclosure and sell the Property described herein in accordance with the
[ASSOCIATION DECLARATION] and Texas Property Code Section 209.0064, and for
all such other and further relief as may be justly entitled.

Respectfully submitted,

By: _____

APPENDIX E – MOTION FOR ENTRY OF DEFAULT WITHOUT HEARING

CAUSE NO. _____

IN RE: ORDER OF FORECLOSURE
CONCERNING

[TX: PROPERTY ADDRESS]

UNDER TEX. R. CIV. P. 736

[RESPONDENT]

IN THE DISTRICT COURT OF

_____ COUNTY, TEXAS

_____ JUDICIAL DISTRICT

MOTION FOR ENTRY OF DEFAULT ORDER WITHOUT HEARING UNDER TRCP 736.7

TO HONORABLE JUDGE OF SAID COURT:

COMES NOW, [ASSOCIATION] (the “Petitioner”), files this Motion for Entry of Order for Foreclosure Due to Default. In support of this Motion, movant would show as follows:

1. Petitioner filed its Application for Expedited Foreclosure Proceeding Pursuant to Rule 736 of the Texas Rules of Civil Procedure on _____, 20__.
2. [PROPERTY OWNER] (the “Respondent/s”), owner of [PROPERTY ADDRESS] was given notice as required by Rule 736.3 of the Texas Rules of Civil Procedures and were duly served with the copy of the Application for Expedited Foreclosure Proceeding Pursuant to Rule 736 of the Texas Rules of Civil Procedure and Notice via certified and regular mail on _____, 20__, pursuant to Rule 736.3 of the Texas Rules of Civil Procedure. A true and correct copy of the Notice and proof of mailing are attached hereto as **Exhibit “A” and Exhibit “B”**, respectively.

3. Respondent was advised in said Notice that the due date of the response was the first Monday following the expiration of thirty-eight (38) days after the date of the mailing of the notice, as specified in Rule 736 (3) of the Texas Rules of Civil Procedure.
4. Respondent has not filed a response with the Court and Petitioner has complied with Rule 736 (1) of the Texas Rules of Civil Procedure, and a copy of the Notice and Certificate of Service have been on file with the court for more than ten (10) days. Therefore, pursuant to Rule 736.7 of the Texas Rules of Civil Procedure, entry of the Order for Foreclosure is warranted without further notice or hearing.

WHEREFORE, premises considered, Movant, [ASSOCIATION], respectfully requests and prays that an Order for Foreclosure be entered, together with such other and further relief, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

By: _____

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Motion for Entry of Order without Hearing has under TRCP 736.7 been duly forwarded by certified and regular mail, to all parties, on this _____ day of _____, 20____.

Via Certified Mail with Return Receipt
CMRR# _____

PROPERTY OWNER
PROPERTY ADDRESS

[ATTORNEY]

**APPENDIX F – DEFAULT ORDER TO PROCEED WITH NOTICE
OF FORECLOSURE SALE AND FORECLOSURE SALE**

CAUSE NO. _____

IN RE: ORDER OF FORECLOSURE
CONCERNING

[TX: PROPERTY ADDRESS]

UNDER TEX. R. CIV. P. 736

[RESPONDENT]

IN THE DISTRICT COURT OF

_____ COUNTY, TEXAS

_____ JUDICIAL DISTRICT

**DEFAULT ORDER TO PROCEED WITH NOTICE OF FORECLOSURE SALE
AND FORECLOSURE SALE**

Came on to be considered the Application of [ASSOCIATION] (“the Applicant”) for Expedited Foreclosure Proceeding pursuant to Rule 736 of the Texas Rules of Civil Procedure relative to [PROPERTY OWNER], (the “Respondent”) and that certain real property more particularly described as follows:

[LEGAL DESCRIPTION]

Which has a mailing address of [PROPERTY ADDRESS], (the, “Property”).

Whereas, a debt exists and is secured by a lien created under the [ASSOCIATION DECLARATION] recorded under Clerk’s File Number [DOCUMENT NUMBER] of the Official Property Records of _____ County, Texas (the, Declaration”). A default under the Declaration exists; Petitioner has given Respondent the requisite notices to cure the default under the Section 209.0064 of the Texas Property Code and applicable law. Respondent’s last known address is _____. Petitioner has given Respondent the requisite notice of this proceeding under Rule 736 of the Texas Rules of Civil Procedure. It is hereby

ORDERED that Petitioner, [ASSOCIATION], is authorized to proceed with foreclosure of the Petitioner's lien under the [ASSOCIATION DECLARATION] pursuant to Section 209.0092 of the Texas Property Code. It is further

ORDERED that Petitioner, [ASSOCIATION] may communicate with the Respondent and all third parties reasonably necessary to conduct the foreclosure sale of the property, and, if Respondent is represented by legal counsel, notice of the foreclosure sale date shall also be mailed to legal counsel by certified mail.

Dated this ____ day of _____, 20__

JUDGE PRESIDING

Approved:

[PETITIONER'S ATTORNEY]

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Default Order to Proceed with Notice of Foreclosure Sale and Foreclosure Sale has been duly forwarded by certified and regular mail, to all parties, on this _____ day of _____, 20__.

Via Certified Mail with Return Receipt
CMRR# _____

PROPERTY OWNER
PROPERTY ADDRESS

[PETITIONER'S ATTORNEY]