

A GROSSLY INADEQUATE PROCEDURE: NON-JUDICIAL FORECLOSURE IN TEXAS

Anna Kalinina*

On September 24, 2010, GMAC Mortgage announced that it had identified irregularities in its foreclosure document procedures “that raised questions about the validity of foreclosures on mortgages that it serviced.”¹ Similar admissions soon followed from Bank of America and other prominent mortgage servicers.² “Employees of these companies or their contractors have testified that they signed, and in some cases backdated, thousands of documents attesting to personal knowledge of facts about the mortgage and the property that they did not actually know to be true.”³ In one case arising out of California, the Vice President of Loan Documentation for Wells Fargo Home Mortgage stated that she spent about two hours a day signing between 300 to 500 documents.⁴ However, she neither reviewed nor had personal knowledge of the facts in any of those documents.⁵ In another foreclosure case from Florida, the Operations

*Anna Kalinina, Baylor Law School class of May 2014. Many thanks to Bridget Fuselier for her help and contributions in advising the research of this article. Also thank you to my family for endless love and support.

¹CONGRESSIONAL OVERSIGHT PANEL, NOVEMBER OVERSIGHT REPORT EXAMINING THE CONSEQUENCES OF MORTGAGE IRREGULARITIES FOR FINANCIAL STABILITY AND FORECLOSURE MITIGATION 7 (Nov. 16, 2010), *available at* <http://cybercemetery.unt.edu/archive/cop/20110402010313/http://cop.senate.gov/documents/cop-111610-report.pdf> [hereinafter, “NOVEMBER OVERSIGHT REPORT”] at 7.

²*Id.*

³*Id.*

⁴Dep. of Xee Moua, at 29–31, Wells Fargo Bank, NA v. Stipek, No. 50-2009-CA-012434XXXXMBAW (Fla. Cir. Ct. Mar. 9, 2010), *available at* <http://www.lsnj.org/NewsAnnouncements/Foreclosure/materials/EXHIBITGWellsFargoDepositionMoua.pdf>.

⁵*Id.* at 31, 45–48. The deposition of H. John Kennerty, Loan Administration Manager and Vice-President of Loan Documentation at Wells Fargo Mortgage reveals the same thing:

Q. So how do you know when you’re signing this document that it’s true and correct?

A. There are people that are responsible for the . . . for maintaining that foreclosure matrix. . . .

Supervisor for Chase Home Finance was unable to name any individuals who had personal knowledge of books, records, and documents relevant to current foreclosure proceedings.⁶ Similarly, the deposition of Jeffrey Stephan, an officer for GMAC Mortgage, revealed that Mr. Stephan signed approximately 400 foreclosure-related documents each day.⁷ “In at least some cases, he signed affidavits without reading them and without a notary present.”⁸ But in doing so, Mr. Stephan testified that he was nonetheless fully complying with GMAC standard operating procedures.⁹

As the number of foreclosures across the United States steadily increased with the onset of the housing crisis,¹⁰ it makes sense that banks and mortgage servicers contrived more “efficient” ways for processing a growing number of foreclosures.¹¹ The problem is that efficiency often comes at a price, and the price in the foreclosure context is being paid by

Q. Who puts the information into the matrix?

A. It’s generated from our foreclosure departments. Specifically, I don’t know who. . . .

Q. And so when you sign [these documents], you don’t have any independent knowledge about whether or not the information is truthful, you’re relying on other people in the process to make sure that the information is correct on the document that you’re signing?

A. Yes.

Dep. of John Kennerty, at 62–64, *Geline v. Nw. Tr. Servs., Inc.*, No. 09-2-46576-2 SEA (Wash. Super. Ct. May 20, 2010), *available at* <http://www.lsnj.org/NewsAnnouncements/Foreclosure/materials/EXHIBITGWellsFargoDepositionKennerty.pdf>.

⁶Dep. of Beth Ann Cotrell, at 33–36, *Chase Home Fin., LLC v. Koren*, No. 50-2008-CA-016857 (Fla. Cir. Ct. May 17, 2010), *available at* <http://www.lsnj.org/NewsAnnouncements/Foreclosure/materials/EXHIBITGChaseDepositionCottrell.pdf>.

⁷NOVEMBER OVERSIGHT REPORT, *supra* note 1, at 11.

⁸*Id.*

⁹*Id.* at 11–12.

¹⁰*Id.* at 55.

¹¹*See id.* at 7. “After the housing market started to collapse in 2006, the effects rippled through the financial sector and led to disruptions in the credit markets in 2008 and 2009. In an economy that had been hit hard by the financial crisis and soon settled into a deep recession, the housing market declined, dragging down housing prices and increasing the likelihood of default. This put pressure on a variety of parties involved in the mortgage market.” *Id.* at 10. As a result, mortgage servicers began cutting corners, largely due to their employees’ inabilities keeping up with “the crush of foreclosures.” *Id.* at 7.

debtors, their neighbors, and the community.¹² The product is a sloppy foreclosure process ripe for misuse by mortgagees replete with unethical conduct and faulty documents.¹³

Although the mortgage foreclosure boom has garnered the attention of media outlets, the legal community, and the general public, one of the more unanticipated results has been a growing pervasiveness of unethical conduct by lawyers, mortgage servicers, and trustees during the foreclosure process.¹⁴ As noted above, some of these unethical practices include lawyers: (1) permitting staff to sign the client's or the trustee's name to affidavits and legal documents; (2) instructing staff to sign the lawyer's name to affidavits and pleadings; (3) signing the names of other lawyers and trustees on deeds and other instruments recorded in land records; and (4) permitting or instructing staff to notarize affidavits and documents.¹⁵ Taken together, these practices have been referred to as "robo-signing," a term coined for the seemingly robotic process in which legal documents related to the foreclosure process are processed by employees of mortgage servicers who lack direct knowledge of the facts regarding each particular foreclosure.¹⁶ Unfortunately, the situation is far too common.

¹²"In addition to lowering the value of the home itself, a foreclosure affects the surrounding neighborhood, especially if the home is clearly marked with a sale sign that says 'foreclosure.' A reduction in price from a foreclosed property can affect the values of surrounding homes if the low price is used as a comparable sale for valuation purposes. Even if foreclosure sales are excluded as comparable sales from appraisals, as is often the case, these sale prices are readily accessible public information. For example, considering the popularity of real estate sites such as Zillow and Trulia that show home sale prices, buyers can easily see these low foreclosure sale prices and are likely to reduce their offers accordingly. Furthermore, as Julia Gordon of the Center for Responsible Lending and several academic studies observe, minority communities are disproportionately affected by foreclosures and their consequences. These negative externalities from foreclosures are borne not by any of the parties to the mortgage, but by the neighbors and the community, who are innocent bystanders." *Id.* at 75.

¹³"Thus, as the boom in the housing market mutated into a boom in foreclosures, banks rushed to move delinquent borrowers out of their homes as quickly as possible, leading, apparently, to procedures of which the best that can be said is that they were sloppy and cursory." *Id.* at 11.

¹⁴See Louis S. Pettey, *Ethics in Foreclosure*, PROBATE & PROPERTY, at 47 (Nov. & Dec. 2012).

¹⁵*Id.* at 48.

¹⁶*Id.* at 47. "The details of 'robo-signers' actions surfaced on the Internet in September 2010, including video and

In 2010, the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision conducted on-site reviews of foreclosure processing at 14 notable mortgage servicers.¹⁷ Their combined report reveals the magnitude of the problem:

Individuals who signed foreclosure affidavits often did not personally check the documents for accuracy or possess the level of knowledge of the information that they attested to in those affidavits. In addition, some foreclosure documents indicated they were executed under oath, when no oath was administered. Examiners also found that the majority of the servicers had improper notary practices which failed to conform to state legal requirements.¹⁸

The Congressional Oversight Panel also released an in-depth report analyzing allegations of robo-signing, which exposed similar problems.¹⁹ In 2010, the Texas Attorney General's office addressed the issue of robo-signing by demanding that Bank of America and other banks immediately suspend all foreclosure proceedings until the situation was remedied.²⁰ In

transcriptions of depositions filed by robo-signers.” NOVEMBER OVERSIGHT REPORT, *supra* note 1, at 11, n.12 (referencing the Florida Foreclosure Fraud Weblog, *Jeffrey Stephan Affidavits 'Withdrawn' by Florida Default Law Group* (Sept. 15, 2010), available at <http://www.floridaforeclosurefraud.com/2010/09/jeffrey-stephan-affidavits-withdrawn-by-florida-default-law-group/>).

¹⁷Federal Reserve System, Office of the Comptroller of the Currency, & Office of Thrift Supervision, INTERAGENCY REVIEW OF FORECLOSURE POLICIES AND PRACTICES (2011), at 1, available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>. These servicers, representing more than two-thirds of the servicing market, include: Ally Bank/GMAC, Aurora Bank, Bank of America, Citibank, EverBank, HSBC, JPMorgan Chase, MetLife, OneWest, PNC, Sovereign Bank, Sun Trust, U.S. Bank, and Wells Fargo, representing more than two-thirds of the servicing market. *Id.* at 1, 5.

¹⁸*Id.* at 3. “These determinations were based primarily on servicers’ self-assessments of their foreclosure processes and examiners’ interviews of servicer staff involved in the preparation of foreclosure documents.” *Id.*

¹⁹NOVEMBER OVERSIGHT REPORT, *supra* note 1, at 4.<http://cybercemetery.unt.edu/archive/cop/20110402010313/http://cop.senate.gov/documents/cop-111610-report.pdf>.

²⁰Letter from Paul D. Carmona, Chief, Consumer Protection and Public Health Division, Texas Attorney General's Office, to Janis Allen, Senior Vice President & Assistant General Counsel, Bank of America (Oct. 4, 2010), available at <http://www.scribd.com/doc/102466577/CASE-FILE-Texas-Declaratory-and-Injunctive-Relief-Based-on-Wrongful-Foreclosure-Trespass-to-Try-Title-and-Quiet-Title-Miller-et-al-v-Homecomings-Fin>.

fact, in October 2010 attorneys general of all 50 states announced a bipartisan effort to look into the possibility that documents or affidavits were improperly submitted in their jurisdictions.²¹

Clearly, robo-signing has garnered significant media, congressional, and legal attention. But abuse comes in many forms, and unethical foreclosure practices exist at a more individual level too. However, these practices often fly below the radar, especially in states like Texas where non-judicial foreclosure has become the norm.²² And, a procedure with no oversight lends itself to a situation ripe for abuse and deceitful conduct, especially when the remedy is, practically speaking, non-existent.²³

The purpose of this Article is to draw attention to the potential for abuse that exists in the non-judicial foreclosure process, particularly in Texas where lack of judicial oversight is coupled with rapidly-moving proceedings and a common law wrongful foreclosure action that targets only the most egregious of offenses.²⁴ In Texas, a plaintiff asserting a wrongful-foreclosure claim must show: (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price.²⁵ However, what happens when there are defects in the proceedings, or even some unscrupulous conduct on the part of the foreclosure trustee, but the selling price is not *grossly* inadequate? In Texas, such a foreclosure is usually upheld, if even challenged to begin with. But the problem is that

²¹NOVEMBER OVERSIGHT REPORT, *supra* note 1, at 13–14.

²²See Shari Olefson & Ronald Scott Kaniuk, *Florida Foreclosure Defense Strategies: An Immediate Look at the Best Practices for Assisting Distressed Homeowners in Florida*, 2009 ASPATORE SPECIAL REP. 11, 4–6 (May, 2009). See *infra* Table 1.

²³*Supra* note 13.

²⁴See Elizabeth Renuart, *Toward A More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 LOY. CONSUMER L. REV. 562, 567 (2012) (“Typically, non-judicial foreclosure is a quicker, easier, and less costly method to repossess a borrower’s home than accomplishing the same result through the judicial procedure.”); see also Abigail Field, *The Foreclosure Mess: It’s Even Worse in ‘Nonjudicial’ States*, DailyFinance (Oct. 30, 2010), available at <http://www.dailyfinance.com/2010/10/30/the-foreclosure-mess-its-even-worse-in-nonjudicial-states/> (“As we’ve seen, even with judicial review that process has still been shot through with problems. But for a troubled homeowner in California, Texas and 25 other ‘nonjudicial’ states, the robo-signing scandal and foreclosure mess are even more dangerous because the lender doesn’t have to go to court to foreclose.”).

²⁵*Motten v. Chase Home Fin.*, 831 F. Supp. 2d 988, 994 (S.D. Tex. 2011) (applying Texas law); *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.) (citing *Charter Nat’l Bank–Hous. v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied)).

these sales are usually not challenged, and homes are frequently sold on the courthouse steps without the debtors present and no one to keep trustees accountable. In a procedure lacking judicial oversight, the potential for abuse is much too high,²⁶ the potential consequences are too severe,²⁷ and under most circumstances, relief is too difficult to obtain.

Part I of this Article outlines the non-judicial foreclosure process in Texas, and Part II examines the courts' application of the common law wrongful foreclosure claim. Part III contemplates the necessity of the grossly inadequate price requirement of the wrongful foreclosure claim in situations where there is evidence of some bad faith or unscrupulous action on the part of the trustee or party conducting the foreclosure sale. Finally, this Article emphasizes the need for increased judicial oversight in conducting non-judicial foreclosures.

PART I: THE STATUTORY FORECLOSURE PROCESS IN TEXAS

In Texas, if an individual becomes delinquent in his or her payments under a deed of trust or other contract lien on real property, the property may become subject to repossession by the lender.²⁸ This may be pursued

²⁶ See Renuart, *supra* note 24, at 567 (explaining that non-judicial foreclosure sales are "much liable to abuse").

Although foreclosure rates are down from their peak in the fall of 2010, they are still much higher than they would be in a normal housing market. See Tim Devaney, *Foreclosure Rates Up from January, Down from Last Year*, The Washington Times (March 14, 2013), available at <http://www.washingtontimes.com/news/2013/mar/14/foreclosure-rates-up-from-january-down-from-last-y/#ixzz2RuEvU1Ay>. As of March, 2013 an estimated 1,413,377 homes around the United States were in foreclosure proceedings. RealtyTrac, *National Real Estate Trends & Market Info*, available at <http://www.realtytrac.com/trendcenter/trend.html>.

²⁷ See Renuart, *supra* note 24, at 564 ("Many types of deficiencies or fraudulent behavior can occur in the foreclosure process. These include: the failure to provide contractually or legally required notices; lack of authority to foreclose; fraud in the process; rigging the sale; grossly inadequate sale price; and other irregularity or unfairness."); Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 122 (2008) ("Misbehavior or mistake by mortgage servicers can have grave consequences. Undocumented or bloated claims jeopardize a family's ability to save its home. Beyond bankruptcy, poor or abusive mortgage servicing undermines the United States' home-ownership policies by exposing families to the risks of overpaying or suffering unjustified foreclosure.").

With respect to robo-signing allegations, David Stevens, commissioner of the Federal Housing Administration, recently noted that the mortgage industry now faces an "enormous trust deficit" that risks "scaring" off an entire generation of young people from homeownership. NOVEMBER OVERSIGHT REPORT, *supra* note 1, at 78.

²⁸ See TEX. PROP. CODE ANN. § 51.002 (West Supp. 2012).

through either a judicial or non-judicial foreclosure,²⁹ the process of which is governed by Chapter 51 of the Texas Property Code.³⁰

In Texas, speed is the name of the game. The non-judicial foreclosure process provides a quick and inexpensive way of settling defaulting mortgage issues without the formality of court involvement, and therefore has become Texas's preferred method.³¹ A trustee's authority to conduct a non-judicial foreclosure sale is derived from the deed of trust or other applicable security instrument.³² A lender or servicer of the debt will initiate the foreclosure process by serving the debtor with a written notice of default.³³ Texas law requires that this notice be sent by certified mail to the debtor's last known address, and the debtor must be given at least 20 days to cure the default.³⁴ Once the notice is deposited in the mail, service of notice is deemed complete as long as all of the requirements of section 51.002 have been satisfied; whether the debtor actually *received* the notice is immaterial at this point.³⁵

Provided that the debtor is unable to cure the default, the sale process itself is instituted "either by a judgment of the court establishing the debt and fixing the lien, or by a valid exercise of a power contained in a deed of trust."³⁶ Section 51.002 mandates that, at least 21 days before the sale, a notice of the sale be posted at the courthouse door, filed in the office of the county clerk, and sent by written, certified mail to the debtor.³⁷ The notice must state the earliest time at which the sale will begin, as well as the date and location of the sale.³⁸ Texas law mandates that foreclosure sales occur on the first Tuesday of every month between 10:00 am and 4:00 pm at the

²⁹ At the national level, Congress authorized the U.S. Department of Housing and Urban Development (HUD) to conduct non-judicial foreclosures when it enacted the Multifamily Mortgage Foreclosure Act of 1981 (Multifamily Act) and the Single Family Mortgage Foreclosure Act of 1994 (Single Family Act). *See* 12 U.S.C.A. §§ 3701–17, 3751–68 (West 2013).

³⁰ *See* PROP. § 51.002.

³¹ A swift foreclosure procedure gives debtors very little time to discover irregularities in the foreclosure process, including document fraud. Field, *supra* note 24.

³² PROP. § 51.0074.

³³ *Id.* § 51.002(d).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ).

³⁷ PROP. § 51.002(b).

³⁸ *Id.*; *see also* *Clark v. FDIC*, 849 F. Supp. 2d 736, 742 (S.D. Tex. 2011) (applying Texas law) (explaining the foreclosure process in Texas according to section 51.002 of the Property Code).

county courthouse in the county where the property is located.³⁹ There is no requirement that the debtor actually is present at the sale⁴⁰ or that the property be sold for its fair market value.⁴¹ In fact, unless stipulated within the deed of trust or other binding document, a mortgagee is under no duty to take any steps beyond those required by section 51.002 to ensure a fair sale.⁴²

While the non-judicial process is expedient, it places its own set of requirements and duties upon the trustee. But, these are not too onerous. Namely, the trustee is required to strictly comply with the terms of the deed of trust and applicable Property Code provisions.⁴³ The trustee has a duty to conduct the foreclosure sale fairly and to not discourage or “chill” the bidding.⁴⁴ However, the trustee has no affirmative duty to take any additional actions to ensure a fair sale.⁴⁵ The trustee does not assume any fiduciary obligations;⁴⁶ rather, the trustee fulfills his or her duties by simply complying with the terms of the deed of trust.⁴⁷ So, as long as all the “T’s” are crossed and the “I’s” dotted, the foreclosure is valid and the debtor is out of luck.⁴⁸ At least, this is the case in most circumstances.

³⁹ *Id.*

⁴⁰ See *First State Bank v. Keilman*, 851 S.W.2d 914, 924 (Tex. App.—Austin 1993, writ denied) (finding that debtor’s absence from the auction did not invalidate the foreclosure process); see also *Zeiss v. First State Bank*, 189 S.W. 524, 524–28 (Tex. Civ. App.—Beaumont 1916, writ ref’d) (holding that the mere fact that the trustee refused to postpone the sale until the debtor could arrive by train at 10:30 a.m. on the day of sale was not an irregularity that could warrant setting aside the sale).

⁴¹ See *Resolution Trust Corp. v. Westridge Court Joint Venture*, 815 S.W.2d 327, 332 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (upholding the validity of foreclosure sale despite a gross disparity between the fair market value of the property and amount the property was sold for).

⁴² *Keilman*, 851 S.W.2d at 924.

⁴³ *Durkay v. Madco Oil Co., Inc.*, 862 S.W.2d 14, 17 (Tex. App.—Corpus Christi 1993, writ denied) (“A trustee’s strict compliance with the terms of the deed of trust includes his following statutory prerequisites for the sale.”).

⁴⁴ See *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.); *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ).

⁴⁵ *Peterson*, 980 S.W.2d at 822; *Pentad Joint Venture v. First Nat’l Bank of La Grange*, 797 S.W.2d 92, 96 (Tex. App.—Austin 1990, writ denied).

⁴⁶ TEX. PROP. CODE ANN. § 51.0074 (West Supp. 2012); *FDIC v. Myers*, 955 F.2d 348, 350 (5th Cir. 1992) (applying Texas law).

⁴⁷ See, e.g., *Clark v. FDIC*, 849 F. Supp. 2d 736, 759–60 (S.D. Tex. 2011) (applying Texas law); *Peterson*, 980 S.W.2d at 822; *Keilman*, 851 S.W.2d at 925.

⁴⁸ *Keilman*, 851 S.W.2d at 924.

PART II: TEXAS'S COMMON LAW CLAIM FOR WRONGFUL
FORECLOSURE

Despite the detailed statutory procedure for conducting a foreclosure, an action for wrongful foreclosure remains a common law claim in Texas.⁴⁹ A plaintiff asserting wrongful foreclosure must show: (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price.⁵⁰ A plaintiff who is successful in his or her wrongful foreclosure claim may seek one of two alternative remedies: (1) rescission of the sale; or (2) damages in the amount of the value of the property less indebtedness.⁵¹

The sale proceedings are defective when the trustee fails to follow or deviates from the requirements of the deed of trust and section 51.002.⁵² To demonstrate the defect, the plaintiff must specifically plead and prove “any irregularities that rendered the sale invalid.”⁵³ However, the trend in Texas case law reveals that it is not easy to prove such a defect.⁵⁴

In *First State Bank v. Keilman*, the debtors asserted four defects as part of their wrongful foreclosure claim: (1) failure to properly advertise the foreclosure sale as required by the deed of trust; (2) failure to sufficiently inform prospective bidders of the foreclosure sale; (3) trustee's failure to delay the sale until the debtor was present; and (4) the inclusion of statements disclaiming UCC warranties in the notice of sale conflicted with the terms of the deed of trust and misled prospective bidders.⁵⁵ As to the first alleged defect, the debtors pointed to language in the deed of trust that required the trustee to “advertise” the time, place, and terms of the sale.⁵⁶

⁴⁹ See *id.* at 921.

⁵⁰ *Motten v. Chase Home Fin.*, 831 F. Supp. 2d 988, 994 (S.D. Tex. 2011) (applying Texas law); *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.) (citing *Charter Nat'l Bank—Hous. v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied)).

⁵¹ *Diversified, Inc. v. Gibraltar Sav. Ass'n*, 762 S.W.2d 620, 623 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

⁵² *Keilman*, 851 S.W.2d at 922.

⁵³ *Clark v. FDIC*, 849 F. Supp. 2d 736, 742 (S.D. Tex. 2011).

⁵⁴ See, e.g., *FDIC v. Myers*, 955 F.2d 348, 350 (5th Cir. 1992); *Keilman*, 851 S.W.2d at 922-924; *Pentad Joint Venture v. First Nat'l Bank of La Grange*, 797 S.W.2d 92, 96-97 (Tex. App.—Austin 1990, writ denied).

⁵⁵ *Keilman*, 851 S.W.2d at 922.

⁵⁶ *Id.*

Specifically, the debtors alleged that the statutory requirement of noticing the sale at the county courthouse announcing the time, place, and terms of the upcoming public auction was insufficient to satisfy the deed of trust's requirement that the sale be "advertised."⁵⁷ Rather, they interpreted "advertise" as requiring the trustee to go beyond the requirements of section 51.002, such as publishing notice in a local newspaper.⁵⁸ The court disagreed, finding that posting notice at the county courthouse as required by statute was enough to comply with the advertising requirement in the deed of trust.⁵⁹ The court broadly construed the advertising requirement because the deed of trust neither prescribed the manner of advertising nor indicated that the term "advertise" ought to be narrowly construed.⁶⁰

The debtors' second argument for defect was that the notice failed to sufficiently inform prospective bidders because it did not contain a street address, did not indicate that First State Bank was the proper seller, and it did not disclose contact information of the bank or the trustee.⁶¹ Additionally, the debtors complained that the notice was tacked on to a cluttered bulletin board where it was unlikely to be seen.⁶² However, the court determined that both the content and location of the notice were sufficient under Texas law.⁶³ The court similarly disposed of the other two "defects."⁶⁴

A more extreme example of debtors seeking to set aside a foreclosure for insufficient notice came from the Fifth Circuit in *FDIC v. Myers*.⁶⁵ In that case, the debtor claimed that the trustee "chilled the bidding" by failing to advertise the specific time of sale, the nature of the property, the minimum bid requested, the identity of the lender, the contact information the trustee, or other information which could have enabled potential buyers

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 923.

⁶² *Id.*

⁶³ *Id.* (citing *Chambers v. Lee*, 566 S.W.2d 69, 73 (Tex. Civ. App.—Texarkana 1978, no writ) (“[i]f the notices are actually posted the required number of days prior to the sale, it is not essential that they remain intact and visible during every one of the intervening days.”)).

⁶⁴ *Id.* at 923–24.

⁶⁵ 955 F.2d 348, 349 (5th Cir. 1992).

to learn more about the property.⁶⁶ Nevertheless, the court held the notice to be sufficient under Texas law.⁶⁷

In *Pentad Joint Venture v. First National Bank of La Grange*, the court affirmed the lower court's grant of summary judgment for the bank on its deficiency claim because the debtors failed to prove an irregularity in the sale process.⁶⁸ In that case, the court quickly rejected the debtors' first argument that when property is sold for a grossly inadequate price, no showing of irregularity is necessary to defend against a deficiency action.⁶⁹ The debtors also argued that "unfairness" in the foreclosure process constituted an irregularity that contributed to the property being sold at an inadequate price.⁷⁰ Specifically, they pointed to evidence that, in the event of foreclosure, the bank only planned to bid 70% of the fair market value but failed to disclose its intention to the debtors.⁷¹ Debtors assert that had they known of the bank's intentions, they could have taken steps to prevent the property from being sold at an inadequate price.⁷² However, recognizing that a mortgagee is under no duty to ensure a fair sale, the court decided that this "unfairness" did not constitute an irregularity sufficient to invalidate the sale and require the mortgagee to credit the property's fair-market value against the indebtedness.⁷³

What *Keilman*, *Myers*, and *Pentad Joint Venture* illustrate is that courts are not apt to find defects or irregularities sufficient to invalidate a foreclosure.⁷⁴ In most cases, the defect must be so obvious that the court has no choice but to invalidate the sale.⁷⁵ The clearest example of a sufficient defect is where the debtors are not actually in default.⁷⁶ When a debtor is

⁶⁶ *Id.* at 350.

⁶⁷ *Id.*

⁶⁸ 797 S.W.2d 92, 97 (Tex. App.—Austin 1990, writ denied).

⁶⁹ *Id.* at 96.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 96–97.

⁷⁴ *Id.* at 97; *First State Bank v. Keilman*, 851 S.W.2d 914, 924 (Tex. App.—Austin 1993, writ denied); *FDIC v. Myers*, 955 F.2d 348, 350 (5th Cir. 1992).

⁷⁵ *See, e.g., Farrell v. Hunt*, 714 S.W.2d 298, 299 (Tex. 1986) (invalidating sale because the debtors were not in default); *League City State Bank v. Mares*, 427 S.W.2d 336, 340 (Tex. Civ. App.—Houston [14th Dist.] 1968).

⁷⁶ *See Farrell*, 714 S.W.2d at 299; *Mares*, 427 S.W.2d at 340.

not in default at the time of foreclosure, Texas courts have consistently held foreclosure sales to be void.⁷⁷

Moreover, a trustee's failure to follow statutory requirements in conducting a foreclosure sale has also been common ground for courts finding sufficient defects.⁷⁸ For instance, in *Durkay v. Madco Oil Co., Inc.*, appellant asserted that a foreclosure sale was void as a matter of law because the promissory note was not in default and the sale was not held on the first Tuesday of the month.⁷⁹ Noting that either of these grounds would render a foreclosure void, the court affirmed the trial court's finding of wrongful foreclosure.⁸⁰ In *Houston Omni USA Co., Inc. v. Southtrust Bank Corp.*, Omni brought a wrongful foreclosure claim, asserting that the notice of foreclosure was defective because it was sent to the wrong address and as a result did not provide the requisite notice.⁸¹ Specifically, Omni complained that the notice of sale was mailed to "1909 Scott Street, Houston, TX, 77045" instead of "1909 Scott Street, Houston, TX, 77003," the proper address.⁸² The bank responded by filing a no-evidence summary-judgment motion, contending that notice was sent to the address provided in the deed of trust, and that the Omni never gave proper notice of an address change.⁸³ The trial court granted the motion and the court of appeals affirmed because Omni produced no evidence indicating that the bank had Omni's most recent address on record.⁸⁴ However, the language of the court indicates that had Omni attached evidence to its motion demonstrating that the bank knew Omni's most recent address, the court would have recognized a defect.⁸⁵

⁷⁷ *Bradford v. Thompson*, 470 S.W.2d 633, 635 (Tex. 1971); *Teachout v. Kitchen*, No. 14-03-00215-CV, 2004 WL 794383, at *4 (Tex. App.—Houston [14th Dist.] Apr. 15, 2004, no pet.) (mem. op.).

⁷⁸ *See, e.g., Durkay v. Madco Oil Co., Inc.*, 862 S.W.2d 14, 17 (Tex. App.—Corpus Christi 1993, writ denied) (plaintiffs were not in default); *Mares*, 427 S.W.2d at 340 (plaintiffs were current in their mortgage payments at the time of attempted acceleration and foreclosure).

⁷⁹ *See Durkay*, 862 S.W.2d at 17; *Mares*, 427 S.W.2d at 340.

⁸⁰ *Durkay*, 862 S.W.2d at 16–18.

⁸¹ No. 01-07-00433-CV, 2009 WL 1161860, at *3 (Tex. App.—Houston [1st Dist.] Apr. 30, 2009, no pet.) (mem. op.).

⁸² *Id.*

⁸³ *Id.* at *7.

⁸⁴ *Id.* at *8.

⁸⁵ *See id.*

In some cases, courts sitting in equity will also avoid the sale where an inadequate sales price is due to misconduct, fraud, or serious unfairness on the part of the trustee or mortgagee.⁸⁶ For instance, in *Jenkins v. Chambers*, the mortgagee accepted late payments from the debtors while simultaneously pursuing foreclosure.⁸⁷ The court explained that the mortgagee's conduct led the debtors to believe that he would not pursue foreclosure, which lulled them into a sense of false security and induced them not to protect their interest.⁸⁸ It was even possible that the mortgagee deliberately misled the debtors so as to prevent them from learning of the trustee's sale.⁸⁹ After all, the evidence presented in the case demonstrated that the debtors had sufficient funds to redeem the property had they known of the impending foreclosure.⁹⁰ Finding that the property was sold at an inadequate price, the court held that the sale should be set aside.⁹¹ However, the court clearly stated that mere inadequacy of consideration is not enough to invalidate a sale.⁹²

In addition to proving a defect, the plaintiff in a wrongful foreclosure action must also show that the defect caused the property to be sold at a grossly inadequate sales price.⁹³ Texas courts have long adhered to the principle set forth in *Tarrant Savings Association v. Lucky Homes, Inc.* that "[m]ere inadequacy of consideration alone does not render a foreclosure sale void if the sale was legally and fairly made."⁹⁴ The Court's language indicates that a grossly inadequate sales price is not enough to invalidate a foreclosure sale; defect in the sale proceedings and grossly inadequate sales price are dual requirements.⁹⁵

To demonstrate that the selling price at a foreclosure sale was grossly inadequate, the plaintiff must: (1) establish the fair market value of the land

⁸⁶ *Jenkins v. Chambers*, 622 S.W.2d 614, 615 (Tex. App.—Tyler 1981, no writ).

⁸⁷ *Id.* at 617.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 615.

⁹³ *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.).

⁹⁴ 390 S.W.2d 473, 475 (Tex. 1965).

⁹⁵ *See, e.g., Sanders v. Shelton*, 970 S.W.2d 721, 726–27 (Tex. App.—Austin 1998, pet. denied). In that case, property worth \$59,000 was sold for a mere \$9,000. *Id.* at 726. Nevertheless, the sale was upheld because the court found no evidence of an irregularity. *Id.* at 727.

at the time of sale; and (2) compare that amount to the consideration actually paid at the sale.⁹⁶ In analyzing wrongful foreclosure claims, courts have typically weighed the severity of the defect against the selling price.⁹⁷ Referencing the Texas Supreme Court's decision in *McKennon v. McGown*, the court of appeals in *Rio Delta Land Co. v. Johnson* explained the rule as follows:

The rule in this state upon the question of inadequacy of price is that mere inadequacy of consideration will not, of itself, warrant the setting aside of the sale; yet if, in addition thereto, there be the appearance of unfairness, or any circumstance, accident, or occurrence in relation to the sale of a character tending to cause such inadequate price, the sale will be set aside; and if the disproportion between the price paid and the real value at the time of the property is enormous, but slight circumstances will justify vacating the sale, and the greater such inadequacy of price the slighter need be the circumstances of fraud, accident, or mistake⁹⁸

In other words, a plaintiff who is able to show a great disparity between the selling price and the fair market value of the property would have a lesser need to show severe defects in the sales proceeding, and vice-versa.⁹⁹

Accordingly, there is no bright-line rule or percentage of fair market value that courts have determined to be grossly inadequate as a matter of law.¹⁰⁰ Each foreclosure sale is judged on the merits and circumstances of that particular case.¹⁰¹ For example, in *Collum v. DeLoughter*, the court found that multiple minor irregularities together with an inadequate selling

⁹⁶*Gainesville Oil & Gas Co., Inc. v. Farm Credit Bank of Tex.*, 847 S.W.2d 655, 663 (Tex. App.—Texarkana 1993, no writ).

⁹⁷*McKennon v. McGown*, 11 S.W. 532, 533 (Tex. 1889).

⁹⁸566 S.W.2d 710, 712 (Tex. Civ. App.—Corpus Christi 1978) (quoting *McKennon*, 11 S.W. at 533).

⁹⁹*Id.*; see, e.g., *Collum v. DeLoughter*, 535 S.W.2d 390, 393 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (finding that a foreclosure was wrongful based on minor irregularities coupled with a selling price less than 15% of the fair market value of the property).

¹⁰⁰See, e.g., *Collum*, 535 S.W.2d at 393; *Crow v. Heath*, 516 S.W.2d 225, 226–27 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

¹⁰¹See, e.g., *Collum*, 535 S.W.2d at 393; *Crow* 516 S.W.2d at 227.

price were sufficient to avoid a foreclosure sale.¹⁰² In that case, the property was sold for \$2,000, which was less than 15% of the total market value of the property, stipulated to be \$13,500.¹⁰³ In *Crow v. Heath*, the trustee failed to give notice of intent to accelerate the debt and property valued at \$28,675 was sold for \$5,000.¹⁰⁴ The court found that this irregularity, coupled with the grossly inadequate price, was sufficient to set aside the sale.¹⁰⁵ In *Jenkins v. Chambers*, a mortgagee accepted late payments prior to the scheduled foreclosure sale, of which the debtors did not have actual notice due to a family emergency.¹⁰⁶ This caused the property, worth \$52,000, to be sold for \$23,000.¹⁰⁷ In view of the facts, the court set aside the sale.¹⁰⁸ Additionally, in *Intertex, Inc. v. Walton*, the court held that notice sent by regular mail as opposed to certified mail with return receipt requested, bearing an incorrect zip code, together with a selling price that was \$41,200 less than fair market value, justified setting aside the sale.¹⁰⁹

In all of these cases, the plaintiffs were able to prove that an irregularity in each of the sales proceedings contributed to a grossly inadequate sales price.¹¹⁰ Texas courts have long reiterated that inadequacy of consideration *alone* does not render a foreclosure sale void if the sale was “legally and fairly made.”¹¹¹ But what Texas law does not appear to address is a situation where property is *not* sold for a grossly inadequate sales price, but there is evidence of unfairness or “chilled bidding” on the part of the trustee or mortgagee. The Texas Supreme Court has yet to address whether a plaintiff in this scenario would prevail in a wrongful foreclosure action.

¹⁰² 535 S.W.2d at 392–93. However, the court noted that “standing alone, none of these irregularities would be sufficient to justify setting aside the sale.” *Id.* at 393.

¹⁰³ *Id.*

¹⁰⁴ 516 S.W.2d at 226–27.

¹⁰⁵ *Id.* at 228.

¹⁰⁶ 622 S.W.2d 614, 616 (Tex. App.—Tyler 1981, no writ).

¹⁰⁷ *Id.* at 616–17.

¹⁰⁸ *Id.* at 617.

¹⁰⁹ 698 S.W.2d 707, 710 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).

¹¹⁰ *Id.* at 708–710; *Jenkins*, 622 S.W.2d at 616–617; *Collum v. DeLougher*, 535 S.W.2d 390, 393 (Tex. Civ. App.—Texarkana 1976, writ ref’d n.r.e.); *Crow v. Heath*, 516 S.W.2d 225, 221–228 (Tex. Civ. App.—Corpus Christi 1974, writ ref’d n.r.e.).

¹¹¹ *See, e.g., Am. Sav. & Loan Ass’n of Hous. v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975); *Tarrant Sav. Ass’n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965); *Sanders v. Shelton*, 970 S.W.2d 721, 726 (Tex. App.—Austin 1998, pet. denied); *First State Bank v. Keilman*, 851 S.W.2d 914, 921 (Tex. App.—Austin 1993, writ denied); *Castle v. Appliance Buyers Credit Corp.*, 410 S.W.2d 485, 487 (Tex. Civ. App.—Dallas 1966, no writ).

PART III: CHILLED BIDDING—SHOULD PROOF OF A GROSSLY
INADEQUATE SALES PRICE STILL BE REQUIRED?

Although the Texas Supreme Court has not addressed a situation where there is evidence of chilled bidding despite a “fair” selling price, *Charter National Bank—Houston v. Stevens* suggests that evidence of deliberate chilled bidding should alleviate a plaintiff’s need to prove grossly inadequate selling price.¹¹² In *Charter Bank*, property was sold at a non-judicial foreclosure sale for \$355,000, which was approximately 84% of the property’s \$430,000 fair market value.¹¹³ However, in conducting the sale, the bank deliberately failed to inform a prospective buyer of the sale after the buyer had contacted the bank several times, alleging that he was ready, willing, and able to bid up to \$400,000 for the property.¹¹⁴ Consequently, the bank’s actions had a “chilling” effect on the ultimate sale of the property.¹¹⁵ In analyzing whether the plaintiff should have to prove grossly inadequate selling price as part of his wrongful foreclosure claim, the court explained:

In the development of Texas law, however, a universal need for the plaintiff to prove a *grossly inadequate selling price* may have inadvertently crept into the picture as to *all* lawsuits for wrongful foreclosure. We believe this to be an erroneous portrayal. It never was intended that there should be an automatic need to prove a *grossly inadequate selling price* in a situation where the bidding at a non-judicial foreclosure sale was deliberately “chilled” by the affirmative acts of a mortgagee and the injured mortgagor seeks a recovery of damages rather than a setting aside of the sale itself.¹¹⁶

The court then proceeded to distinguish “chilled bidding” cases from those seeking to set aside a sale simply for technical irregularities.¹¹⁷ Namely, the wrongdoer who deliberately chills the bidding should be held accountable for his actions, even if the wrongdoing does not result in a grossly inadequate price.¹¹⁸ The policy reasons for doing so include providing restitution to the mortgagor and deterring future wrongful acts calculated to injure a helpless mortgagor and unjustly enrich the

¹¹² See 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

¹¹³ *Id.* at 370.

¹¹⁴ *Id.* at 369–70.

¹¹⁵ *Id.* at 374.

¹¹⁶ *Id.* at 371 (emphasis in original).

¹¹⁷ *Id.* at 374.

¹¹⁸ *Id.*

mortgagee.¹¹⁹ Accordingly, the court reasoned that the interests of society and the injured mortgagor can both be properly served through money damages.¹²⁰ Where the deliberate acts of the mortgagee have a chilling effect on the bidding, “there seems to be no rational ground for requiring a finding that the foreclosure selling price was ‘grossly inadequate.’ Given proof of proximate cause, the damages should be recoverable.”¹²¹

Though the court’s reasoning in *Charter Bank* is sound, Texas courts have maintained a variety of approaches when faced with allegations of deliberate chilled bidding.¹²² Some courts have referred to chilled bidding cases as an action for damages resembling that of conversion.¹²³ Others have maintained that a plaintiff may recover damages for wrongful foreclosure if the mortgagee complies with statutory or contractual terms, but takes affirmative action that detrimentally affects the fairness of the foreclosure process.¹²⁴ While most courts have retained the need to show inadequate selling price, some cases have not emphasized that the price must be *grossly* inadequate.¹²⁵ Others still have treated chilled-bidding cases as regular wrongful foreclosure claims.¹²⁶ This assortment of

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *First State Bank v. Keilman*, 851 S.W.2d 914, 921–22 (Tex. App.—Austin 1993, writ denied) (noting that common law wrongful foreclosure can be maintained when wrongdoer takes affirmative action); *Pentad Joint Venture v. First Nat’l Bank of La Grange*, 797 S.W.2d 92, 96 (Tex. App.—Austin 1990, writ denied) (noting that deliberate chilled bidding should lie under a theory that the wrong committed resembles conversion).

¹²³ See, e.g., *Pentad Joint Venture*, 797 S.W.2d at 96.

¹²⁴ *Keilman*, 851 S.W.2d at 921–22; see also *Jenkins v. Chambers*, 622 S.W.2d 614, 617 (Tex. App.—Tyler 1981, no writ).

¹²⁵ See, e.g., *Am. Sav. & Loan Ass’n of Hous. v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975) (analyzing whether the consideration was “inadequate” but using the phrase “grossly inadequate” only in setting forth the elements of a wrongful foreclosure claim); *Mitchell v. Tex. Commerce Bank Irving*, 680 S.W.2d 681, 682 (Tex. App.—Fort Worth 1984, writ ref’d n.r.e.) (placing little to no emphasis on the adequacy of the selling price).

¹²⁶ See, e.g., *Myrad Properties, Inc. v. LaSalle Bank Nat’l Ass’n*, 252 S.W.3d 605, 618 (Tex. App.—Austin 2008) *rev’d on other grounds*, 300 S.W.3d 746 (Tex. 2009) (explaining that for a sale to be invalidated under a “chilled bidding” theory, Plaintiff had to prove that (1) the price or consideration received in the sale was grossly inadequate, and (2) such inadequacy was caused by the complained-of irregularity).

approaches taken by the courts of appeals demonstrates a glaring inconsistency in the law.¹²⁷

The courts are no clearer in outlining what conduct is considered “chilling.” Defined broadly, any pre-sale conduct motivated by bad faith or general unfairness on the part of the mortgagee or trustee that discourages bidding by disinterested parties may qualify as “chilling.”¹²⁸ However, the relevant body of case law mostly reveals what *does not* constitute chilling conduct, leaving us with only a glimpse of what courts have actually deemed to constitute conduct resulting in chilled bidding. For example, in *Pentad Joint Venture*, the court found that the bank’s failure to disclose its intention to bid less than the market value of the property did not chill the bidding because there was no evidence that the bank made any statement or committed any act that discouraged third parties from bidding, or that the sale was otherwise unfair.¹²⁹ Similarly, in *First State Bank v. Keilman*, the court found that the trustee’s alleged failure to sufficiently inform prospective bidders of the impending sale did not chill the bidding because the notice of sale complied with the deed of trust and was sufficient under Texas law.¹³⁰ In *Sanders v. Shelton*, the court likewise concluded that a trustee’s failure: (1) to advise debtors of the time of sale; (2) to conduct of the sale in a manner in which debtors could not locate the sale on the courthouse steps; and (3) be instructed by the mortgagee to be the highest bidder at the sale, among other alleged irregularities, did not result in chilled bidding.¹³¹

In fact, *Charter Bank* presents the clearest case of a mortgagee’s deliberate actions resulting in chilled bidding.¹³² A not-so-close second is arguably *King v. Hill*, where the trustee failed to conduct the sale at the

¹²⁷ See, *Myrad Properties, Inc.*, 252 S.W.3d at 618; *Keilman*, 851 S.W.2d at 921; *Pentad Joint Venture*, 797 S.W.2d at 96.

¹²⁸ See *GWX Corp. v. Sw. Sav. Ass’n*, 01-88-00571-CV, 1989 WL 37515, at *5 (Tex. App.—Houston [1st Dist.] Apr. 20, 1989, no writ) (mem. op., not designated for publication).

¹²⁹ *Pentad Joint Venture*, 797 S.W.2d at 96–97.

¹³⁰ 851 S.W.2d at 923.

¹³¹ 970 S.W.2d 721, 726–27 (Tex. App.—Austin 1998, pet. denied). Plaintiffs alleged the following irregularities: “(1) that the trustee refused to disclose to appellants the pay-off required to satisfy Shelton’s debt; (2) the substitution of trustees was not disclosed; (3) the trustee failed to advise appellants of the time of sale; (4) the Trustee conducted the sale in such a manner that the appellants could not locate the sale on the courthouse steps at the appointed hour; and (5) the Trustee was instructed by Shelton to insure that she was the highest bidder.” *Id.* at 726. However, the court discredited all five. *Id.*

¹³² See 781 S.W.2d 368, 369–70 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

designated location.¹³³ Seeing as no one showed up to bid for the property other than the trustee, the mortgagor contended that conducting the sale in the wrong place chilled the bidding.¹³⁴ Acknowledging that this might indeed be true based on summary judgment evidence, the court reversed the trial court's grant of summary judgment in favor of the mortgagee and remanded the case for further proceedings.¹³⁵

What the scarcity in case law reveals is not necessarily that cases where a trustee or mortgagee commits a bad act are few and far between, but perhaps that the grossly inadequate price requirement keeps at least *some* of these cases from ever being filed. Although the dual requirements of an irregularity and a grossly inadequate selling price are engrained in Texas common law,¹³⁶ there does not appear to be much justification for proving grossly inadequate selling price where the sale was conducted unfairly to begin with.

However, grossly inadequate sales price is not a requirement that exists in all states.¹³⁷ For instance, in Florida, surprise, accident, or mistake imposed on a complainant, or irregularity in the conduct of the sale, are independent grounds supporting the setting aside of a foreclosure sale, even where there is not a grossly inadequate sale price.¹³⁸ In Maryland, *grossly*

¹³³07-10-0198-CV, 2012 WL 967351, at *3 (Tex. App.—Amarillo Mar. 22, 2012, no pet.) (mem. op.). Pursuant to section 51.002 of the Texas Property Code, the Lubbock County Commissioners had designated areas for foreclosure sales to be the Gazebo located on the front lawn of the County Courthouse, with the first alternate location being the second floor auditorium at 916 Main and the second alternate location being the Commissioners' Court located on the fifth floor of the Courthouse. *Id.* However, the foreclosure sale in question occurred at the "west door entrance area of the Lubbock County Courthouse at 904 Broadway." *Id.* at *2.

¹³⁴*Id.* at *3.

¹³⁵*Id.*

¹³⁶*See, e.g.,* Am. Sav. & Loan Ass'n of Hous. v. Musick, 531 S.W.2d 581, 587 (Tex. 1975); Pentad Joint Venture v. First Nat'l Bank of La Grange, 797 S.W.2d 92, 95–96 (Tex. App.—Austin 1990, writ denied); Jinkins v. Chambers, 622 S.W.2d 614, 615 (Tex. App.—Tyler 1981, no writ).

¹³⁷However, multiple states are in accord with Texas. *See, e.g.,* *In re Krohn*, 52 P.3d 774, 783 (Ariz. 2002) (a foreclosure sale in Arizona may only be set aside if the bid price was grossly inadequate); *Racette v. Bank of Am., N.A.*, 733 S.E.2d 457, 462 (Ga. Ct. App. 2012) (explaining that defects in the foreclosure procedure will only support a wrongful foreclosure claim "if the debtor can come forward with evidence that the defects chilled the bidding at the foreclosure sale, causing a grossly inadequate sale price"); *Alpha Imperial Bldg., LLC v. Schnitzer Family Inv., LLC, II*, 126 Wash. App. 1031, at *5 (2005) (unpublished op.) ("Washington case law suggests that the price the property is sold for must be 'grossly inadequate' for a trustee's sale to be set aside").

¹³⁸*Arsali v. Chase Home Fin., LLC*, 79 So. 3d 845, 847–48 (Fla. Dist. Ct. App. 2012).

inadequate price may alone indicate partiality or unfairness to set aside a sale.¹³⁹ But, a merely inadequate price coupled with a defect in the proceedings also supports setting aside a sale.¹⁴⁰ Similarly, Alaskan courts will void a sale where there is a low price along with an irregularity in the foreclosure proceeding; gross inadequacy of price is not required.¹⁴¹

Moreover, while Texas merely requires the trustee to comply with statutory prerequisites and the terms of the deed of trust,¹⁴² other jurisdictions require the mortgagee or trustee to conduct the sale in good faith.¹⁴³ For instance, Georgia recognizes wrongful foreclosure as a tort, which involves the breach of a statutory duty of the mortgagee “to exercise fairly and in good faith the power of sale in a deed to secure debt.”¹⁴⁴ In Mississippi, a trustee has a duty to act in good faith and protect the rights of all parties equally.¹⁴⁵ While the trustee is not required to generate bidders, “it is the trustee’s duty to sell the land in such a manner as will be most beneficial to the debtor.”¹⁴⁶ New Hampshire courts require a mortgagee conducting a foreclosure sale to comply with statutory procedural requirements and to abide by a “duty to protect the interests of the mortgagor through the exercise of good faith and due diligence.”¹⁴⁷

Similarly, California courts require that in executing the power of sale under a deed of trust, “the trustee must act in good faith and strictly follow the requirements of the deed with respect to the manner of sale. The sale will be scrutinized by courts with great care and will not be sustained unless conducted with all fairness, regularity and scrupulous integrity.”¹⁴⁸ In Massachusetts, a mortgagee exercising a power of sale is bound to exercise good faith and must put forth reasonable diligence in ensuring a fair sale.¹⁴⁹ “Failure in these particulars will invalidate the sale even though there be

¹³⁹ *PAS Realty, Inc. v. Rayne*, 418 A.2d 1222, 1225 (Md. Ct. Spec. App. 1980).

¹⁴⁰ *Id.*

¹⁴¹ *See Baskurt v. Beal*, 101 P.3d 1041, 1045 (Alaska 2004).

¹⁴² *See Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.).

¹⁴³ *See, e.g., Clark v. West*, 395 S.E.2d 884, 886 (Ga. Ct. App. 1990) (mortgagee has a statutory duty to exercise the power of sale in good faith).

¹⁴⁴ *Id.*

¹⁴⁵ *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So. 2d 461, 465 (Miss. 1985).

¹⁴⁶ *Id.*

¹⁴⁷ *Murphy v. Fin. Dev. Corp.*, 495 A.2d 1245, 1249 (N.H. 1985).

¹⁴⁸ *Id.*

¹⁴⁹ *Lo v. Fed. Home Loan Mortg. Corp.*, Civ. A. 08-0822, 2011 WL 8008118, at *4 (Mass. Super. May 29, 2012).

literal compliance with the terms of the power.”¹⁵⁰ Washington law likewise states that a trustee under a deed of trust has a duty of good faith to the borrower, beneficiary, and grantor.¹⁵¹ The list goes on.¹⁵² So, not only is non-judicial foreclosure the norm in Texas, but the wrongful foreclosure claim leaves much room for unethical conduct and little is expected of trustees other than compliance with the Property Code. As noted previously, this generates fertile ground for abuse.¹⁵³

CONCLUSION

In light of the recent economic downturn and the boom in foreclosures, coupled with the potential for abuse, Texas’s non-judicial foreclosure process requires more oversight. A potential solution would be amending the Property Code to require mandatory mediation prior to foreclosures.¹⁵⁴ Mediation is pro-active in that it occurs before the sale ever takes place.¹⁵⁵ Mediation also helps ensure propriety of the sale because the foreclosing party’s authority to foreclose can be verified when and if the mediator certifies foreclosure.¹⁵⁶ “If the parties agree to a loan modification, the homeowner makes payments and losses are reduced or eliminated.”¹⁵⁷

¹⁵⁰ *Id.* (citing *Sandler v. Silk*, 198 N.E. 749, 751 (Mass. Sup. 1935)).

¹⁵¹ WASH. REV. CODE ANN. § 61.24.010 (West 2010).

¹⁵² *See, e.g.*, FLA. STAT. ANN. § 721.855 (West 2012) (“A trustee shall use good faith, skill, care, and diligence in discharging all of the trustee duties under this section and shall deal honestly and fairly with all parties.”); *In re Vogler Realty, Inc.*, 722 S.E.2d 459, 465 (N.C. 2012) (“The trustee for sale . . . is bound to use not only good faith but also *every requisite degree of diligence* in conducting the sale and to attend equally to the interest of the debtor and the creditor alike . . .”) (emphasis added).

¹⁵³ *See supra* notes 12, 27.

¹⁵⁴ Such changes have been implemented in Hawaii and Nevada. *See* Marcia Johnson & Luckett Anthony Johnson, *Defending Foreclosure Actions*, 40 REAL EST. L.J. 439, 459 (2012) (“In the summer of 2011, Hawaii’s governor signed Senate Bill 651 which is one of the most comprehensive foreclosure bills in the country to date. The bill does not eliminate foreclosures but it does mandate mediation prior to foreclosures at the borrower’s request. In the event of mediation the law requires that mortgage services submit to the mediation board proof that the chain of title is intact at least fourteen days before the mediation. The bill also provides the ability to change from non-judicial to judicial foreclosures in certain circumstances, as well as voiding of foreclosures by certain mortgage providers altogether.”); *see also* Renuart, *supra* note 24, at 581–82.

¹⁵⁵ Renuart, *supra* note 24, at 581.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 581–82 (In Nevada, the cost of the mediation is split between the homeowner and the foreclosing party, making the burden on the parties small “given the opportunities the process

Additionally, Texas could subject all non-judicial foreclosures to post-sale confirmation hearings to address any post-sale challenges and to verify that the sale was properly conducted.¹⁵⁸ Although this may threaten the expediency of the non-judicial process, it would certainly add a level of judicial oversight that is woefully lacking.

Alternatively, the Texas legislature could impose a statutory duty of good faith on the trustee or mortgagee similar to that imposed by other states.¹⁵⁹ But, at the very least, when faced with the opportunity, Texas courts should adopt the rationale in *Charter Bank* that a plaintiff in a wrongful foreclosure suit does not need to establish grossly inadequate selling price upon proof of deliberate chilled bidding.¹⁶⁰ As the court recognized in *Pentad Joint Venture* only a year after *Charter Bank*: “[A] mortgagor, even though in default, has a right to an orderly disposition of the property, and if a defect or irregularity deters third parties from bidding, then an action for damages should lie under a theory that the wrong committed resembles that of conversion.”¹⁶¹ There is little policy rationale for requiring a mortgagor to establish a grossly inadequate selling price despite evidence of intentional misconduct by the trustee or mortgagee.¹⁶²

provides for saving homes and reducing lender losses. The cost to the state, though, will rise because it likely will hire additional staff to oversee the increase in cases. Nevada covers program costs by collecting a \$200 fee when the foreclosing party files a notice of default. Non-judicial foreclosure states that presently do not require pre-sale mediation will bear higher costs related to creating the program and the infrastructure to support it but, like Nevada, can generate income to offset these expenses. Nonetheless, the benefits outweigh the costs by reducing foreclosures and post-sale title challenges.”).

¹⁵⁸ See *id.* at 582 (“[A] post-sale confirmation hearing occur following every residential foreclosure sale in non-judicial states. The scope of the hearing should be broad: to review whether the foreclosing party possessed the authority to foreclose (particularly where the state has not implemented a mandatory pre-sale mediation program like that in Nevada); to determine whether all legal and contractual prerequisites to the sale were properly performed; to assess whether there were other irregularities that should reverse the sale; to confirm any deficiency and distribute any surplus; and, to ratify the sale deed. The parties must produce documents relevant to these issues. All parties have the right to appear, including the purchaser.”).

¹⁵⁹ See *supra* notes 143–152.

¹⁶⁰ See 781 S.W.2d 368, 374 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

¹⁶¹ *Pentad Joint Venture v. First Nat. Bank of La Grange*, 797 S.W.2d 92, 96 (Tex. App.—Austin 1990, writ denied).

¹⁶² See *Charter Nat'l Bank*, 781 S.W.2d at 374.

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Simply stated, debtors facing foreclosure deserve more protection than what is currently required under Texas law.¹⁶³ This is especially true when they are at risk of losing their homes through an expedient process with little-to-no judicial oversight. Although Texas courts will sometimes state that the trustee must act impartially and conduct the sale fairly, the statement is frequently qualified with something to the effect of: “A trustee’s duties are fulfilled by complying with the deed of trust.”¹⁶⁴ However, this is simply not enough. Either the process needs to change, or at least relief must be more accessible, or both.

¹⁶³ See *Peterson v. Black*, 980 S.W.2d 818, 822 (Tex. App.—San Antonio 1998, no pet.) (noting that a trustee effecting a sale under a deed of trust is required to comply with statutory prerequisites and the terms of the deed of trust).

¹⁶⁴ *Id.*

TABLE 1¹⁶⁵

Judicial v. Trustee or Non-Judicial By State

State	Security Instrument	Foreclosure Type	Initial Step	Length in Months	Redemption	Deficiency
Alabama	Mortgage	Non-judicial	Publication	1	12 MM	Allowed
Alaska	Trust Deed	Non-judicial	Notice of default	3	None	Allowed
Arizona	Trust Deed	Non-judicial	Notice of sale	3	None	Allowed
Arkansas	Mortgage	Judicial	Complaint	4	None	Allowed
California	Trust Deed	Non-judicial	Notice of default	4	None	Prohibited
Colorado	Trust Deed	Non-judicial	Notice of default	2	75 DD	Allowed
Connecticut	Mortgage	Strict	Complaint	5	None	Allowed
Delaware	Mortgage	Judicial	Complaint	3	None	Allowed
Dist. Of Col.	Trust Deed	Non-judicial	Notice of default	2	None	Allowed
Florida	Mortgage	Judicial	Complaint	5	None	Allowed
Georgia	Security Deed	Non-judicial	Publication	2	None	Allowed
Hawaii	Mortgage	Mortgage	Publication	3	None	Allowed
Idaho	Trust Deed	Non-judicial	Notice of default	5	None	Allowed
Illinois	Mortgage	Judicial	Complaint	7	None	Allowed
Indiana	Mortgage	Judicial	Complaint	5	3 MM	Allowed
Iowa	Mortgage	Judicial	Petition	5	6MM	Allowed
Kansas	Mortgage	Judicial	Complaint	4	6-12 MM	Allowed
Kentucky	Mortgage	Judicial	Complaint	6	None	Allowed
Louisiana	Mortgage	Exec. Process	Petition	2	None	Allowed
Maine	Mortgage	Judicial	Complaint	6	None	Allowed
Maryland	Trust deed	Non-judicial	Notice	2	None	Allowed
Massachusetts	Mortgage	Judicial	Complaint	3	None	Allowed
Michigan	Mortgage	Non-judicial	Publication	2	6 MM	Allowed
Minnesota	Mortgage	Non-judicial	Publication	2	6 MM	Prohibited
Mississippi	Trust deed	Non-judicial	Publication	2	None	Prohibited
Missouri	Trust deed	Non-judicial	Publication	2	None	Allowed
Montana	Trust deed	Non-judicial	Notice	5	None	Prohibited
Nebraska	Mortgage	Judicial	Petition	5	None	Allowed
Nevada	Trust deed	Non-judicial	Notice of default	4	None	Allowed
New Hampshire	Mortgage	Non-judicial	Notice of sale	2	None	Allowed
New Jersey	Mortgage	Judicial	Complaint	3	10 DD	Allowed
New Mexico	Mortgage	Judicial	Complaint	4	None	Allowed
New York	Mortgage	Judicial	Complaint	4	None	Allowed

¹⁶⁵ See Shari Olefson & Ronald Scott Kaniuk, *Florida Foreclosure Defense Strategies: An Immediate Look at the Best Practices for Assisting Distressed Homeowners in Florida*, 2009 ASPATORE SPECIAL REP. 11, 4-6 (May, 2009).

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North Carolina	Trust deed	Trust deed	Notice hearing	2	None	Allowed
North Dakota	Mortgage	Judicial	Complaint	3	60 DD	Prohibited
Ohio	Mortgage	Judicial	Complaint	5	None	Allowed
Oklahoma	Mortgage	Judicial	Complaint	4	None	Allowed
Oregon	Trust deed	Both	Publication	6	365	Allowed
Pennsylvania	Mortgage	Judicial	Complaint	3	None	Allowed
Rhode Island	Mortgage	Non-judicial	Publication	2	None	Allowed
South Carolina	Mortgage	Judicial	Complaint	6	None	Allowed
South Dakota	Mortgage	Judicial	Complaint	3	180 DD	Allowed
Tennessee	Trust deed	Non-judicial	Publication	2	None	Allowed
Texas	Trust deed	Non-judicial	Publication	2	None	Allowed
Utah	Trust deed	Non-judicial	Notice of default	4	None	Allowed
Vermont	Mortgage	Judicial	Complaint	7	None	Allowed
Virginia	Trust deed	Non-judicial	Publication	2	None	Allowed
Washington	Trust deed	Non-judicial	Notice of default	4	None	Allowed
West Virginia	Trust deed	Non-judicial	Publication	2	None	Prohibited
Wisconsin	Mortgage	Judicial	Complaint	Varies	None	Allowed
Wyoming	Mortgage	Non-judicial	Publication	2	3 MM	Allowed