REAL ESTATE AND UCC FORECLOSURE LITIGATION

Texas is, by comparison, a very lender-friendly state. See B. Dunaway, The Law of Distressed Real Estate, § l3.0l et seq (l986). The ease with which a lender may gain title to a borrower's real estate through non-judicial foreclosure in Texas is unrivaled by any other state. Id. Notwithstanding the rather expeditious means available to gain title, a lender still must comply strictly with certain statutory and judicially imposed requirements. Failure to do so can result in the borrower successfully challenging the attempted foreclosure. This paper explores the major area of attack and alternatives available to the borrower to retain title or regain it from the lender and correspondingly analyzes the actions a lender must take to successfully conclude the foreclosure. While the primary focus of the paper is on challenges to a posted foreclosure prior to actual foreclosure, consideration is also given to appeal from denial of a temporary injunction and post-sale challenges for rescission or wrongful foreclosure.

UCC Article 9, security interests in personal property, is also discussed in this paper. Specifically, security interest attachment, perfection repossession and liquidation are addressed.

I. POSTED FORECLOSURE OF REAL PROPERTY

This section of the paper assumes your involvement in the case begins when your client reveals to you that he or she has received a letter declaring the loan in default and a notice that the property securing the loan has been posted for non-judicial foreclosure on the first Tuesday of the following month. Of critical importance is to accurately calculate the time remaining before the declared sale date so that you may realistically evaluate your options.

A. Document Review

Request from your client all documents relating to the property and your client's dealings with the lender. Each of these documents must be evaluated to determine first, the pattern of dealing between the parties and second, any deficiencies, or violations by the lender which may support a cause of action for damages and/or form the basis to enjoin the proposed sale. The original loan documents including the promissory note, deed of trust, any construction loan agreement, net profits agreements, joint venture agreements, extension agreements, security agreements, financing statements and correspondence between the parties must be reviewed. Often these documents are combined; therefore, complete scrutiny of all documents is necessary. Your client may have a closing binder in which most of these documents are located.

During your document review, particular attention should be paid to the following issues. First, are there any waiver provisions that might affect (a) the notice the lender is required to provide and (b) the borrower's opportunity to cure? Second, examine the stated interest rate, the extent of the usury savings clause, if any, and calculate the amount of interest that was in fact charged on the promissory note. As will be discussed in more detail infra. usury can be a strong basis for not only injunctive relief but for a later claim of damages as well. Next, check the maturity date on the note to see whether it is due by its terms or has been accelerated by the lender. The notice provisions required may vary depending on that date. You should also review other documents in the closing binder as well as correspondence between the parties from the date of execution of the note through the date of default and thereafter to the date of posting. Pay particular attention to any written or oral agreements to renew or extend the loan and scrutinize the lender's conduct for acts that could be construed as a waiver of their right to accelerate without giving prior notice. See e.g.,, Dhanani Invs. v. Second Master Built Homes, Inc., 650 S.W.2d 220 (Tex. App. -- Fort Worth, l983, no writ). Also be mindful of actions by the lender which may be construed as direct involvement in the borrower's business as forbidden by State Nat'l Bank v. Farah Mfg. Co. , 678 S.W.2d 66l (Tex. App. -- El Paso l984, writ dism'd by agr.). These topics are addressed in more detail infra.

1. Notice Requirements. It is important to determine what the statute and documents require the lender to do before it asserts its right to foreclose. The statute permitting non-judicial foreclosure was amended effective January 1, 1988, but these changes, discussed infra. did not affect the notice requirements. Section 51.002 of the Property Code sets out the following minimum notice requirements: (a) the notice of foreclosure must be posted at the Courthouse, (b) personal notice to the mortgagor and all debtors obligated

to pay the debt according to the records of the holder must be given, and (c) the notice of foreclosure sale must be filed with the county clerk in the county where the sale must be filed with the county clerk in the county where the sale is to be conducted. The Courthouse posting must occur for at least twenty-one (21) days before the sale and the day of posting itself is included as day one. Hutson v. Sadler, 50l S.W.2d 728, 730-3l (Tex. Civl App. -- Tyler l973, no writ). The statute requires the borrower to be given twenty-one (2l) days' notice of the non-judicial foreclosure yet the deed of trust may require the lender provide more than twenty-one (21) days' notice. See e.g., Redell v. Jasper Sav. & Loan Ass'n., 722 S.W.2d 55l (Tex. App. -- Beaumont) rev'd on other grounds, 30 Tex. Sup. Ct. J. 46l (May 27, l987) (deed of trust provided a 30-day notice period).

The deed of trust, security agreement and other documents may impose other notice requirements not found in the statute. For example, an older deed of trust may recite the notice requirements of article 38l0 (Tex. Rev. Civ. Stat. Ann. art. 38l0 (Vernon Supp. l982-83), repealed and replaced by Texas Property Code § 5l.002 (l984)) and require posting the notice of foreclosure at three public places. Also check the Deed of Trust Records in the county where the land is located to be sure it is recorded. Whether there has been strict compliance with both the statutory notice requirements and the deed of trust (at least as to material terms) should be determined.

Notwithstanding language in the deed of trust requiring strict compliance, a court may find that a creditor has complied with those terms which exceed statutory requirements if the borrower gets actual notice of them. Reddell, supra 30 Tex. S. Ct. J. at 463. A borrower could argue, however, that the notice requirements of the deed of trust are material terms of the contract which, when breached, would allow the borrower to rescind the contract. Such as approach was not taken in *Reddell*.

Required notices must be sent to each debtor at the most recent address in the lender's files. See Lido Int'l, Inc. v. Lambeth, 611 S.W.2d 622 (Tex. l98l); Mitchell v. Texas Commerce Bank, 680 S.W.2d 68l (Tex. App. -- Fort Worth l984, writ ref'd n.r.e) (although mortgagors had actual notice and attended sale, notice was found to be insufficient having been sent to incorrect address); *Krueger v. Swann*, 604 S.W.2d 454, 457 (Tex. Civ. App. -- Tyler l980, writ ref'd n.r.e.) (to establish a statutory violation, debtor must show lender had in its records the most recent address of the debtor and failed to mail a notice by certified mail to that address); cf. Mercer v. Bludwoorth, 715 S.W.2d 693 (Tex. App. -- Houston (1st Dist.) 1986, no writ) (finding constructive notice given to corporation through actual notice to corporate President was enough). There is still a question of whether all parties to a wrap-around mortgage must be given notice.

Notice must be separately sent to each co-maker and guarantor. Indeed, even if co-makers are husband and wife, the prudent lender will send separate notices to each, sending one to an office address and one to a home address. Also note the law requires notice be sent too the borrower by certified mail and service on the borrower's attorney is not effective. Tamplen v. Bryeans, 640 S.W. 2d 42l (Tex. App. -- Waco 1982, writ ref'd n.r.e.). Further, care should be given to see that your client or a representative executed all the documents upon which the lender relies to foreclose.

If one or more of the notice requirements outlined supra have not been followed, the borrower may have grounds to seek an injunction to prevent the sale or bring an action to set aside the sale. If the notice is defective and the sale is enjoined, the lender must correct the defect and repost. Future foreclosure sales cannot be predicated on earlier notices. See Stone v. Watt, 81 S.W.2d 552, 555 (Tex. Civ. App. -- Eastland 1935, writ ref'd). The borrower must be aware, however, that just because a lender was unsuccessful at attempting to foreclose, it is not barred from seeking a later foreclosure and a subsequent foreclosure proceeding, if otherwise valid, will be upheld. Slusky v. Coley, 668 S.W.2d 930, 933 (Tex. App. -- Houston [14th Dist.] 1984, no writ).

2. Trustee and Substitute Trustee. The deed of trust will have named a trustee. That individual may not be available to actually conduct the foreclosure, however, and the lender must appoint a substitute trustee. Such appointment must be made in strict compliance with the deed of trust terms. Failure to do so will make the attempted appointment invalid. Johnson v. Koenig, 353 S.W.2d 478 (Tex. Civ. App. -- Austin 1962, writ ref'd n.r.e.). The deed of trust may also require that any substitute trustee appointment be recorded. Check for such requirements in the deed of trust and whether the lender has complied therewith. All such requirements regarding the substitute trustee must be met before posting. If the sale is conducted

by anyone other than the trustee named in the deed of trust or a properly appointed substitute trustee, the sale is void. Burnett v. Manufacturer's Hanover Trust Co., 593 S.W.2d 755, 757 (Tex. Civ. App. -- Dallas 1979, writ ref'd n.r.e.); Sullivan v. Hardin, 102 S.W.2d 1110 (Tex. Civ. App. -- Amarillo 1937, no writ). If the sale is not enjoined and you attend on behalf of your client, be certain to verify that the individual listed as the substitute trustee is the one actually conducting the sale. The trustee or substitute trustee may not appoint an agent or representative to conduct the sale in their place unless the requirements of the deed of trust have been satisfied. For an analysis of the requirements of appointments, see generally Wilson v. Armstrong, 236 S.W. 755, 757 (Tex. Civ. App. -- Beaumont 1922, no writ).

3. Tax Liens. It is also important to check whether any IRS tax liens have been recorded. A tax lien filed even several days before the first Tuesday will automatically cause the postponement of the scheduled sale and require the lender to repost. Also note that the lender must give the IRS twenty-five (25) days notice prior to the sale instead of the statutory twenty-one (21) days given to the debtor and that, in this regard, the IRS has a right of redemption (unlike the borrower) for 120 days following the sale of the property. See Tex. Tax Code § 32.05 (Vernon 1982). You should also check for the existence of a state tax lien but no change in the notice requirement results. As will be discussed infra in the context of the sale procedure, the trustee or substitute trustee should advise potential bidders of the existence of a tax lien and the impact such a lien has on title to the property. While the right of redemption may depress activity by independent bidders, it may be used by the borrower as a bargaining chip in an attempt to work out a payment plan with the lender without suffering a foreclosure sale. Should the property be sold at foreclosure, however, the purchaser will be required to pay any federal tax liens to protect his or her title. See Sandel v. Burney, 714 S.W.2d 40 (Tex. App. -- San Antonio 1986, no writ). So in your initial review of the documents, be sure to review an updated title report on the property which reveals any federal or state tax liens, lawsuits, judgment liens, or mechanic's liens (see University Sav. & Loan Ass'n. v. Security Lumber Co., 423 S.W. 2d 287, 292 (Tex. 1967) (as a general rule, mechanic's liens are extinguished by foreclosure)) which may survive the foreclosure.

4. Legal Description. Compare the deed of trust with the notice of sale and determine that the legal description is exact. Dropping a line from the description can be deemed an irregularity sufficient to challenge the attempted foreclosure as providing an inadequate or defective notice under § 51.002 of the Property Code. Note that the Court in Alkas v. United Sav. Ass'n, 672 S.W.2d 852 (Tex. App. -- Corpus Christi 1984, writ ref'd n.r.e.) refused to allow third parties to the deed of trust rely on an erroneous property description and instead reformed the renewal deed of trust, foreclosure notices and substitute trustee's deed post-sale. It is doubtful the same result would have issued had it been a party to the deed of trust who complained. Also, should you be attending a foreclosure sale, follow the legal description from the deed of trust as the trustee reads it. Any error or omission may provide the basis of a wrongful foreclosure claim for failure to give adequate and proper notice of the property being sold. To document such defects, an audio tape or video recording is invaluable. Such a procedure is discussed in more detail infra under "sale".

5. Amount of Debt. If the note secured by the property is an installment note payable in periodic payments, acceleration of an installment debt requires demand be made and an opportunity to cure the default be given. If the notice does not inform prospective bidders of the terms, conditions and amounts of the outstanding indebtedness, it can be argued the notice is ipso facto invalid. Even strong supporters of creditor's rights suggest the better practice is to detail the default to the extent necessary to provide the mortgagor an opportunity to cure the default in the notice of sale. See Baggett, Texas Foreclosure Law and Practice, § 2.27 (1984).

6. Assignment of Rents. A review of the deed of trust and loan documents should include an examination of any assignment of rents provision. Because of the potential consequences of such an agreement, it is important the lender be held to a strict compliance therewith. Compliance and enforcement will vary depending on the type of clause involved.

There are two types of assignments of rents under Texas law. Because Texas adheres to the lien theory of mortgages (under which the mortgagee does not own the collateral and is not entitled to possession, rental or profits of the collateral), an assignment of rents usually does not become operative until the beneficiary obtains possession of the property or impounds the rents or takes some other affirmative action. See Simon

v. State Mut. Assurance Co., 126 S.W.2d 682 (Tex. Civ. App. -- Dallas 1939, writ ref'd). Therefore in most cases, the assignment of rents is a pledge creating only a security interest requiring the mortgagee to take affirmative steps to activate the pledge. See In re Village Props., Ltd., 723 F.2d 441 (5th Cir.) cert. denied sub nom. Wolters Village, Ltd., 104 U.S. 97 (1984). Be aware, however, Texas jurisprudence also allows for absolute assignment of rents. Taylor v. Brennan, 621 S.W.2d 592 (Tex. 1981). An absolute assignment of rentals automatically, upon the happening of a specified condition (such as default), transfers title to the rents. In this situation, no action whatsoever is necessary to activate the beneficiary's title interest in the rents upon the occurrence of the specified event. An absolute assignment could have a devastating effect on the borrower's cash flow if promptly enforced. Therefore, carefully review the assignment of rents provision, if any, to determine if it is merely a security interest or an absolute assignment.

7. Special Situations. There are certain fact situations that might present special problems, an in-depth analysis of which are beyond the scope of this paper. For example, if a homestead is involved and/or the parties are embroiled in a divorce, particular problems may arise. See e.g., Johnson v. Cherry, 726 S.W.2d 4 (Tex. 1987) (purported "sale" of a homestead that is really a loan could be set aside as a mortgage; however, the creditor may be entitled to an equitable lien on other assets); Fajkus v. Firt Nat'l Bank, 735 S.W.2d 882 (Tex. App. -- Austin 1987, no writ) (bank lost right to levy on acreage in excess of homestead by failing to plead it); Villarreal v. Laredo Nat'l Bank, 677 S.W.2d 600 (Tex. App. -- San Antonio 1984, writ ref'd n.r.e.) (title to the property is in the name of one spouse while the other occupies the property, creating special problems).

The creditor encounters another difficult situation when a receiver has been put in possession of the property. Even if the receiver was appointed by a Family Law Court, the creditor cannot foreclose on its security interest without court approval. Texas Am. Bank v. Haven, No. 2-87-003-CV (Tex. App. -- Fort Worth, March 18, 1987, no writ), citing First Southern Properties, Inc. v. Vallone, 533 S.W.2d 339 (Tex. 1976); Cushing v. B. C. Evans Co., 33 S.W. 703 (Tex. Civ. App. 1895, writ ref'd); 49 Tex. Jur. 2d Receivers, § 123 (1963).

Another special situation deserving mention is that involving inferior lienholders. It seems clear under Texas law that there is no duty upon a superior lienholder to notify junior lienholders. "There is no requirement that personal notice be given to persons who were not parties to the deed of trust." American Sav. & Loan Ass'n. v. Musick, 531 S.W.2d 581, 588 (Tex. 1975); Chandler v. Orgain, 302 S.W.2d 953 (Tex. Civ. App. -- Fort Worth 1957, no writ). The Chandler court said,

> [t]he prior lienholder owes a general obligation to refrain from conduct which operates to prevent a fair sale of the property upon which he forecloses his lien, but when the sale is conducted according to law and provisions of the trust instrument, his obligation is prima facie discharged.

Id. at 956. Therefore, should you be representing a junior lienholder, check the requirements of the deed of trust under which foreclosure is attempted or a subsequent document which may place additional obligations on the lender to determine if the lender was required to notify the junior lienholder of the foreclosure. The junior lienholder who does not receive notice may argue collusion between the mortgagor and the senior lienholder and if successful, the junior may redeem the property by satisfaction of the indebtedness secured by the senior lien. Reisenberg v. Hankins, 258 S.W. 904 (Tex. Civ. App. -- Amarillo 1924, writ dism'd). Therefore, as a practical matter, the lender would be well-advised to provide notice to junior lienholders. Such notice may generate bids at the foreclosure sale by the junior in order to prevent their lien from being extinguished. And, even without notice, if there is a surplus from the foreclosure sale, the junior lienholder(s) may be entitled to such monies.

The conveyance of a portion of the property's mineral interest to a third party and then later deeding the property back to the holder of the note and deed of trust raises difficult title issues. For a discussion of such a situation and an analysis of the difference between legal and equitable title in Texas and junior lienholders see Flag-Redfern Oil Co. v. Humble Exploration, Inc., 31 Tex. Sup. Ct. J. 119 (Dec. 12, 1987).

Also instructive is Mercer v. Daoran Corp., 676 S.W.2d 580 (Tex. 1984), involving the effect of renewal and extension agreements on lien priorities and the ability of a junior lienholder to gain priority if a senior lienholder fails to properly renew and extend the lien. Id. at 581. The case also details the relationship between articles 5520 and 5522, Tex. Rev. Civ. Stat. (repealed in 1985 and now found in Tex. Civ. Prac. and Rem. Code Ann. §§ 16.035-.037 (Vernon Supp. 1986)). If you encounter a junior lienholder situation, these authorities should be studied.

8. Type of Default. When the default is non-monetary in nature and arises because a lender deems itself "insecure" or relies on a "waste" clause in the loan documents, the lender is required to exercise good faith in declaring the default. Frio Invs., Inc. v. 4M-IRC/Rohde, 705 S.W.2d 784 (Tex. App. -- San Antonio 1986, writ ref'd n.r.e.); see also State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661 (Tex. App. -- El Paso 1984, writ dism'd by agr.). Defaults caused by violation of a due-on-sale-clause discussed infra are also non-monetary. Courts and juries are wary of circumstances where the lender has accelerated and demanded a note based on a non-monetary default. Because acceleration and foreclosure is such a harsh remedy, the courts will scrutinize such situations closely. Davis v. Pletcher, 727 S.W.2d 29, 35 (Tex. App. -- San Antonio 1987, no writ).

Having analyzed the loan documents, correspondence and other papers and having gathered information regarding the nature of the relationship between the lender and borrower, you are ready to determine what procedural and substantive grounds might support an application for injunction.

B. Procedural Bases for Seeking TRO

1. Notice of Default and Acceleration. One of the most frequent bases for challenging a posted foreclosure (or completed sale) is the method by which the lender made demand and accelerated the note. Successful challenges to those methods require familiarity with the loan documents and lender relationship as well as an understanding of the demand and acceleration requirements. The need to accumulate and analyze the loan documents was discussed supra. This section focuses on the notice and acceleration requirements.

a. Ogden Notice Requirements. Because the lender failed to give unequivocal notice of its intent to accelerate, the Texas Supreme Court set aside a foreclosure and reiterated a standard of minimum notice requirements in Ogden v. Gibralter Sav. Ass'n, 640 S.W.2d 232 (Tex. 1982). See also Allen Sales and Servicenter, Inc. v. Ryan, 525 S.W.2d 863 (Tex. 1975). (Allen Sales is a critically important case setting out the notice requirements that Ogden adopted.) Specifically, the Ogden Court demanded that a lender, in order to exercise its optional acceleration clause, must, in the absence of waiver, give two separate notices. First, notice of intent to accelerate affording the borrower an opportunity to cure; and second, if not cured, there must be notice that the debt has been accelerated. Id. at 233. The Court insisted that the notice of intent to accelerate be clear and unequivocal and "bring home to the mortgagor" that failure to cure will result in acceleration and foreclosure. Id. The Court explained that notice of intent to accelerate was necessary in order to afford the debtor an opportunity to cure before suffering the "harsh consequences of acceleration and foreclosure." Id. at 234. If a court finds the notice was not clear and unequivocal, it must conclude that any attempted acceleration was ineffective. Id.

How much opportunity to cure is "reasonable" must depend on the facts of your particular case. Prudent lenders allow at least ten (10) days, yet a Beaumont court found, on its record, that only four (4) days was a reasonable opportunity to cure. Hammond v. All Wheel Drive Co., 707 S.W.2d 734 (Tex. App. -- Beaumont 1986, no writ). The new property code, effective January 1, 1988, requires a lender give a debtor of a residential loan twenty (20) days to cure a default. Moreover, that 20-day cure period is required notwithstanding any agreement to the contrary.

Lenders must meet explicit notice requirements before the courts will tolerate the drastic consequences of a non-judicial foreclosure. In fact, years of Texas jurisprudence have firmly established that because acceleration is such an extreme remedy, it deserves close scrutiny and should not be easily accomplished. See Davis v. Pletcher supra, 727 S.W.2d at 35; Dhanani Invs., Inc. v. Second Master Bilt Homes, Inc., 650 S.W.2d 220, 223 (Tex. App. -- Fort Worth 1983, no writ) (en banc), citing Crow v. Heath, 516 S.W.2d 225 (Tex. Civ. App. -- Corpus Christi 1974, writ ref'd n.r.e.); Parker v. Mazur, 13 S.W.2d 174, 175 (Tex. Civ. App. -- San Antonio 1928, writ dism'd by agr.). And, in fact, whenever it appears acceleration is attempted

not to protect or preserve security but for some other purpose, courts will not hesitate to exercise their equity powers to avoid such a result. See, e.g., Davis v. Pletcher, 727 S.W.2d 29 (Tex. App. -- San Antonio 1987, no writ) (acceleration attempted to coerce debt payoff); Trickery v. Gumm, 632 S.W.2d 167 (Tex. App. -- Waco 1982, no writ) (lender attempted foreclosure hoping to use the money realized to purchase other real estate); McGowan v. Pasol, 605 S.W.2d 728, 732 (Tex. Civ. App. -- Corpus Christi 1980, no writ) (attempt to exercise right to accelerate for late payment found inconsistent with lender's prior acceptance of such payments); and Bischoff v. Rearick, 232 S.W.2d 174 (Tex. Civ. App. -- El Paso 1950, writ ref'd n.r.e.) (acceleration without notice and opportunity to cure was unjust and oppressive action by noteholder). Indeed, because of the ease with which Texas law allows lenders to quickly gain title to borrower's real estate, any situation that involves acceleration and non-judicial foreclosure deserves particular attention from the courts. Counsel for the borrower should outline for the court any action by the lender which indicates it is flexing its monetary muscle and declaring a default and accelerating not because it feels insecure but because it has a hidden agenda. A pattern of the lender's conduct in the past (e.g., continual acceptance of late payments), coupled with a current appraisal indicating the property securing the debt far exceeds the remaining balance are powerful factors in support of a claim for equitable relief. See Dhanani, supra.

b. Attacking boilerplate waivers. Despite the fact that Ogden did not concern a waiver situation, lenders have seized upon the waiver dicta in Ogden and managed in a number of cases to eviscerate the notice requirements. See, e.g., Mercer v. Bludworth, 715 S.W.2d 693 (Tex. App. -- Houston [1st Dist.] 1986, no writ), Cruce v. Eureka Life Ins. Co., 696 S.W.2d 656 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.), Emfinger v. Pumpco, Inc., 690 S.W.2d 88 (Tex. App. -- Beaumont 1985, no writ), and Real Estate Exchange, Inc. v. Bacci, 676 S.W.2d 440 (Tex. App. -- Houston [1st Dist.] 1984, no writ). Such a result is achieved by reliance on the boilerplate waiver language contained in the loan documents. A literal application of the waiver dicta, however, is subject to justified criticism. See, Krahmer Commercial Transactions, 440 S.W. L.J. 187, 189 (1986). See also, Dysart, Basics of Negotiating and Drafting Deeds of Trust and Other Real Estate Security Documents, Advanced Real Estate Law Course for the State Bar of Texas (1987). A vigorous dissent in one such recent case (Cruce v. Eureka Life, supra, 696 S.W.2d at 657 Howell J., dissenting) criticizes the literalists for relying solely upon the waiver dicta to so quickly excise such important property rights and interests. Instead, it is argued that the rights set out in Ogden and its predecessors were equitable in origina and therefore are not subject to contractual waiver. Clearly, Ogden and its predecessors were bas ed on the strong policy considerations of providing unequivocal notice to the debtor and a reasonable opportunity to cure an alleged default before rendering the debtor's property forfeited in a private sale. Such considerations, based on equity principals, should not be ridden roughshod on the basis of contractual boilerplate. Alternatively, Justice Howell suggests if lenders are going to be allowed to rely on a contractual waiver, the waiver itself should meet the Ogden standard and must be clear and unequivocal bringing home to the debtor effective knowledge of the rights he or she has waived. Id. at 662-64. Be prepared to neutralize any attempt by the lender to rely on contractual waiver provisions by utilizing and stressing the equitable nature of the relief sought, the true policy basis of the Ogden decision and the well-reasoned analysis of Justice Howell.

c. Waiver of Acceleration. Oftentimes, even when the holder has the right of optional acceleration, he or she may waive the right to exercise it by acting inconsistently therewith. Greater Houston Bank v. Conte, 641 S.W.2d 407, 411 (Tex. App. -- Houston [14th Dist.] 1982, no writ), citing Diamond v. Hodges, 58 S.W.2d 187 (Tex. Civ. App. -- Dallas 1933, no writ). For example, if a lender accepts late payments notwithstanding a typical acceleration clause and then chooses, for whatever reason, to refuse to accept another such payment and attempts to accelerate, courts have found the lender waived its acceleration rights. Bodiford v. Parker, 651 S.W.2d 338, 339 (Tex. App. -- Fort Worth, 1983, no writ); Dhanani Invs., Inc. v. Second Master Bilt Homes, Inc., 650 S.W.2d 220 (Tex. App. -- Fort Worth 1983, no writ); Highpoint of Montgomery Corp. v. Vail, 638 S.W.2d 624, 626-27 (Tex. App. -- Houston [1st Dist.] 1982, no writ); and McGowan v. Pasol, 605 S.W.2d 728, 732 (Tex. Civ. App. -- Corpus Christi 1980, no writ). The requirement that has evolved is simply this: if a lender intends to accelerate after having accepted numerous late payments, it must give the borrower clear notice that it will no longer accept late payments. Such notice must be given before tender of the payment upon which default is alleged. McGowan v. Pasol, supra 605 S.W.2d at 732. If such notice is given by the creditor to the debtor both orally and in writing as in

Slivka v. Swiss Ave. Bank, 653 S.W.2d 939 (Tex. App. -- Dallas, 1983, no writ), the Court will likely find that the right of acceleration has not been waived.

Because the requirements of Ogden demand that notice of intent to accelerate and acceleration be clear and unequivocal, any action by the lender that is inconsistent with the terms of the note may be characterized as failure to give unequivocal notice. For example, granting extensions for payment of installments then failing to notify the borrower unequivocally that it would permit no further extensions was found to be a waiver of the right to accelerate in Dhanani Invs., Inc., supra, 650 S.W.2d 220. If the lender's counsel sends a letter declaring its intent to accelerate, yet a loan officer writes the borrower proposing different work-out terms or the billing department sends the borrower a notice indicating, for example, there are funds remaining, the borrower has grounds to argue the lending institution has not give clear and unequivocal notice to which he or she is entitled. See Allen Sales and Service Center v. Ryan, 525 S.W.2d 863 (Tex. 1975). Such situations provide grounds for seeking a temporary injunction for a violation of the procedural notice requirements.

2. Violation of the Due-On-Sale Clause. Frequently the lender will include a due-on-sale clause in its loan documents which generally means if the borrower attempts to sell or further encumber the property, the entire amount of the debt becomes due. No matter how secure the lender may remain or how current the loan is, breach of this clause is a non-monetary default that may give rise to acceleration and foreclosure. Not suprisingly, there has been brisk litigation challenging the constitutionality of the clause and its enforcement. In Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 633 S.W.2d 811 (Tex. 1982), the Texas Supreme Court upheld the enforceability of a due-on-sale clause stating a deed of trust could require a lender's consent to a sale and such consent could be contingent upon an increased rate of interest. Id. at 815. The Court found such a provision did not constitute a restraint on alienation. The concurring opinion found the clause did constitute a restraint on alientation but found in this instance it was enforceable based upon its reasonable application under the facts.

Despite the Supreme Court's holding in Sonny Arnold, there are instances where appellate courts have refused to uphold the validity of due-on-sale clauses and/or their methods of enforcement. See, e.g., North Point Patio Offices Venture v. United Benefit Life Ins. Co., 672 S.W.2d 35 (Tex. App. -- Houston [14th Dist.] 1984, writ ref'd n.r.e.) (imposition of 5% penalty made enforcement unlawful); Metropolitan Sav. & Loan Assoc. v. Nabours, 652 S.W.2d 820 (Tex. App. -- Tyler 1983, writ dism'd) (clause coupled with imposition of prepayment penalty constituted an unenforceable restraint). See also Longview Sav. & Loan Assoc. v. Nabours, 673 S.W.2d 901 (Tex. 1985) (lender waived its right to consent to a subsequent transfer because it represented it would not foreclose, had established a policy of not foreclosing when sale made without its consent, and had accepted several payments from the new purchaser and created a misunderstanding as to whether its consent should be obtained). Therefore, if violation of a due-on-sale clause is the basis for the lender's declaration of default and/or foreclosure, particular attention should be paid to be past relationship between the lender and borrower and any act that might constitute the lender's waiver of its rights under such clause. Include an allegation of such violation in the petition seeking injunctive relief.

C. Substantive Bases for TRO

1. Fraud and Duress. A decision that strikes fear in the hearts of lenders is State Nat'l Bank v. Farah Mfg. Co., Inc., 678 S.W.2d 661 (Tex. App. -- El Paso 1984, writ dism'd by agr.). The Court in Farah imposed liability on the financial institutions to the tune of eighteen million dollars on the grounds of misrepresentational fraud, duress and interference with the business. Farah resulted in litigation and damages prior to any monetary default on the notes. Farah also imposed the duty of dealing in good faith required by the Texas Uniform Commercial Code notwithstanding an earlier decision by the Texas Supreme Court that not every contract contains an implied covenant of good faith and fair dealing. See English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983). But see Arnold v. Nat'l Union County Mutual Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987) (insurer owes duty of good faith and fair dealing to insured); Manges v. Guerra, 673 S.W.2d 180 (Tex. 1984) (dominant tenant owes a duty of good faith and fair dealing to a non-participating royalty interest holder). Representatives of lenders and borrowers alike should become familiar with the Farah case and its various implications. See also, Melamed v. Lake County Nat'l Bank, 727 F.2d 1399 (6th Cir. 1984) (Court finding the lender tortiously interfered with the borrower's business).

As the Farah court set out, a successful claim of fraud requires the borrower to show:

(a) the representation that the loan would be called was a material representation; (b) It was false; (c) when the lenders made the representation, they knew it was false; (d) they made the representation with the intention that Farah and the other FMC board members [plaintiffs] would act upon the representation; (e) Farah and other FMC board members [plaintiffs] did in fact act in reliance upon the representation; and (f) the company thereby suffered injury.

678 S.W.2d at 680-81, citing Custom Leasing, Inc. v. Texas Bank & Trust Co., 516 S.W. 1974).

A successful claim for duress must include the following elements:

(a) the lenders had threatened to do an act that they had no legal right to do; (b) the threat was of such character as to destroy the free-agency of the people to whom it was directed, in that it overcame their will and caused them to do something that they would not otherwise have done, and that they were not legally bound to do; (c) the restraint caused by the lender's threat was imminent; and (d) the persons to whom the threat was directed had no present means of protection against the restraint caused by the threat.

678 S.W.2d at 684 citing Dale v. Simon, 267 S.W. 467-470 (Tex. Comm'n App. 1924, judgment adopted). See also 13 S. Williston, A Treatise on the Law of Contracts, § 1601, 3d ed. 1970). The existence of alternatives, for example acceptance of bankruptcy instead of bowing to the threat of duress, does not abrogate a cause of action for duress. Id. at § 1617. Note however, that a claim of duress must be based upon the conduct of the threatening party and not on the pre-existing vulnerability of the threatened party. First Texas Sav. Assn. v. Dicker Center, Inc., 631 S.W.2d 179, 186 (Tex. App. -- Tyler 1982, no writ) (stress of business conditions insufficient to constitute duress unless defendant caused the stressed condition). One must also note, the mere exercise or threatened exercise of a valid legal right, cannot form the basis of a claim of duress. Sanders v. Republic Nat'l Bank, 389 S.W.2d 551, 554 (Tex. Civ. App. -- Tyler 1965, no writ). See also 25 Am. Jur. 2d, Duress and Undue Influence § 18 (1966). If either fraud or duress are involved, it most likely will also constitute tortious interference with the business. Therefore analyze the lender's involvement, if any, in the borrower's business to determine if the lender unnecessarily interfered with the borrower's business relations or the borrower's choice of management. Actions that the lender may characterize as attempts to bolster its security position may be viewed by the Court as tortious interference, fraud or duress. For a review of the Farah causes of action and emerging theories of lender's liability, see Ebke and Griffin, Lender Liability to Debtors: Toward a Conceptual Framework, 40 S.W. L. J. 775, 782 (1986).

The lender's conduct may not rise to the level of control discussed in Farah, yet it may still support a fraud claim. Consider whether the facts in your case would support the inclusion of one or more of the following causes of action:

(a) fraud in the inducement (where the lender induced the borrower to enter into the loan agreement by misrepresenting, for example, its intention to loan additional funds); (b) fraud in the sale of real estate; or (c) common law fraud.

2. Detrimental Reliance. Despite an attempt to accelerate, a lender may have provided the borrower with certain opportunities and overtures to renegotiate the loan or secure alternate financing. Seldom is an acceleration notice given in a vacuum. Therefore, depending on the acts or overtures made, the borrower may consider arguing that such action constitutes failure to give clear and unequivocal notice and further that the borrower relied thereon to his or her detriment. See Gulbenkain v. Penn, 151 Tex. 412, 252 S.W.2d 929 (1952); Airline Commerce Bank v. Wilburn, 609 S.W.2d 813 (Tex. Civ. App. -- Houston [14th Dist.] 1980, no writ).

3. Breach of Fiduciary Duty. This is a somewhat related concept to the control issues discussed in Farah but may oftentimes support an independent basis for urging imposition of an injunction. A lender who assumes a controlling position over its borrower may be considered to occupy a fiduciary position. The foundation for such a cause of action springs from Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939), also known as the "Deep Rock" case. It examines creditor control in the context of a creditor/parent controlling the affairs of the debtor/subsidiary and finds in favor of the debtor due to the creditor's domination and misuse of the debtor and the creditor's lack of impartiality toward the debtor. Once the borrower establishes the lender owes a fiduciary duty, misuse of that relationship may result in lender liability. As the Fifth Circuit held, if a lender assumes "actual, participatory, total control of the debtor" and if the lender misuses that control, the lender may be liable as a fiduciary. Krivo Indus. Supply Co. v. National Distillers and Chem. Corp., 483 F.2d 916 (5th Cir. 1974). The Court, however, refused to hold the lender liable under a control theory notwithstanding the active part in the management of the debtor corporation taken by the creditor. Id. at 1105. Such actions by lenders must certainly, in the wake of Farah, be subject to close scrutiny. Any time lender involvement plays a part in the borrower's business, a fruitful basis for injunctive relief exists.

4. Breach of Duty to Deal in Good Faith. "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement." Tex. Bus. & Com. Code Ann. § 1.203 (Tex. U.C.C.) (Vernon 1987). La Sara Grain v. First Nat'l Bank, 673 S.W.2d 558, 563 (Tex. 1984). Promissory notes are governed by the Texas Uniform Commercial Code. Southview Corp. v. Kelberg First Nat'l Bank, 512 S.W.2d 817 (Tex. Civ. App. -- Corpus Christi 1974, no writ); Carter v. South Texas Lumber Co., 422 S.W.2d 951 (Tex. Civ. App. -- Eastland 1967, no writ); see also Williams v. Stansbury, 649 S.W.2d 293 (Tex. 1983). Thus, every promissory note has an implied covenant of good faith and fair dealing by virtue of § 1.203 of the Texas U.C.C. The obligation of good faith pursuant to the Texas U.C.C., requires not only that good faith be evidenced but that a standard of commercial reasonableness be observed. Such obligation permeates all of the dealings between lender and borrower because the promissory note in issue is the primary agreement between the parties. The other documents merely elaborate on the obligation of the promissory note. Furthermore, the related agreements should be governed by a good faith and fair dealing standard pursuant to § 205 of the Restatement (Second) of Contracts which provides, "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." In K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 759 (6th Cir. 1985) the lender was found to have breached an implied covenant of good faith by failing to give notice to the borrower that no further discretionary advances under a line of credit would be made. See also First Texas Sav. Ass'n v. Dicker Center, Inc., 631 S.W.2d 179, 182-83 (Tex. App. -- Tyler 1982, no writ) (good faith refusal to honor loan commitment). A review of the expanding implied duty of good faith and other lender liability theories is contained in Tyler, Emerging Theories of Lender Liability in Texas, 24 Houston L. Rev. 411 (1987).

Quite obviously, lenders attempt to avoid the good faith requirement by reliance on English v. Fischer, 660 S.W.2d 521 (Tex. 1983), wherein the Texas Supreme Court refused to recognize an implied covenant of good faith and fair dealing in every contract. See also Cluck v. Frost Nat'l Bank, 714 S.W.2d 408, 410 (Tex. App. -- San Antonio 1986, writ ref'd n.r.e.) (no breach of good faith/fair dealing duty by bank refusing to accept payee's tender or full payment and selling delinquent note to third party instead). It must be noted, however, that the duty of good faith and fair dealing arises out of the relationship between the parties. The Court in Fischer merely held that no such duty would be implied in that particular fact situation (determining right to insurance proceeds under mortgage terms) or across the board in all contracts. Of particular note is Justice Spears' finding that,

Texas courts have read a duty of good faith and fair dealing into many types of contractually-based transactions. The common thread among the cases in which courts have done so, is the special relationship between the parties to the contract. The special relationship either arises from the element of trust necessary to accomplish the goals of the undertaking, or has been imposed by the courts because of an imbalance of bargaining power.

Fischer, 660 S.W.2d at 524 (Spears, J., concurring). Justice Spears then noted some of the more familiar areas where an imbalance in the relationship resulted in the imposition of a good faith/fair dealing duty. Two more recent decisions by the Texas Supreme Court make it clear that the grounds for imposing such a duty are indeed more broad then those set out by Justice Spears in Fischer. In Manges v. Guerra, the Texas Supreme Court held the holder of executive rights and certain oil and gas interests to owe a duty of utmost good faith to the holder of the corresponding non-participating royalty interests. 673 S.W.2d 180, 183 (Tex. 1984) (citing Spears' concurrence in Fischer). Because the duty does not arise from contract, the aggrieved party is entitled to punitive damages for breach. Contract Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981) (punitive damages not available for breach of contract).

More recently, the Texas Supreme Court found a duty of good faith and fair dealing to exist between an insured and his insurer. Arnold v. National County Mutual Ins. Co., 725 S.W.2d 165 (Tex. 1987). The Arnold court found that the relationship between the parties arose "out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of clams." Id. at 176. The Court went on to find that the inadequacy of the remedy available to an aggrieved insured necessitated the imposition of such a duty. "[W]ithout such a cause of action, insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed." Id. at 167. Additionally, the Court noted that the insurance company had control over the evaluation, processing and denial of claims. Id.

The relationship between an insured and insurer is analogous to the relationship between a borrower and lender. Both relationships begin as arms-length commercial transactions. The insurer and lender have superior bargaining power at this point, although competition acts as a limiting factor to some extent. (In view of the fact that many recent loan agreements read like adhesion contracts, one wonders if there is any parity, even at this point, between lender and borrower). Each party has an interest in the success of the other. The insurer is more successful if its insured does not make any claims or if it can avoid paying claims. A lender is more likely to receive prompt payment if the project it is underwriting is successful, but even if the project is not successful, the lender is secure because it may foreclose on the underlying collateral. Thus, the lender transaction has even less risk involved than the insurance transaction. Once the initial transaction is completed, the insurer and lender assume vastly superior positions in the relationship. As noted by the Texas Supreme Court, the insurer has almost absolute control over the claims process. Likewise, the lender assumes near absolute control over the success or failure of the borrower. Oftentimes, the loan documents allow the lender absolute discretion to approve or disapprove of changes in a project cost breakdown. That discretion, in view of the unpredictable nature of land development and construction, can virtually ensure a technical default and ultimately, the failure of a project.

The unequal bargaining positions of the parties coupled with the inadequacy of remedies for bad faith breach by a lender to fully compensate the borrower support the imposition of a good faith/fair dealing duty upon lenders. Even if the borrower can recover under a wrongful foreclosure theory, he or she is limited to the monetary damage for lost equity but still suffers irreparable injury having lost the unique property and attendant business opportunities and the investment of time and effort that has been put into the project. Unless lenders are held to a duty of good faith and fair dealing, borrowers will not have an adequate remedy and there will not be sufficient deterrent to wrongful acts on the part of lenders. Borrowers, therefore, should strongly consider alleging breach of the duty to deal in good faith when drafting an injunction or damage petition. The imbalance of the lender-borrower relationship fits easily into the good faith duty framework described by Justice Spears in Fischer. Moreover, such a position is enhanced by the Supreme Court's holding in Arnold, where the Court imposed the good faith duty on the basis of the parties' relationship, not the contract. Because the borrower-lender relationship is even more disparate than the insurer-insured, arguably the same result would follow.

5. Breach of Commitment to Loan. Your particular fact situation may reveal the lender led the borrower to believe it would lend additional monies when, in fact, it did not do so. For example, the borrower may have entered into a development loan with a particular lender with the understanding that at the conclusion of the development loan the lender would provide permanent financing for the project. The borrower may have obtained that impression form the lender's conduct, oral declarations or even writings. Obviously, a written commitment is easier to prove up than an oral one. However, counsel should not hesitate to raise in the

context of an injunction or a wrongful foreclosure suit that the lender, through various representatives, committed to loan funds to the borrower and later breached that commitment. See e.g., First Texas Sav. Ass'n v. Dicker Center Inc., supra, 631 S.W.2d at 182.

6. Breach of Contract. Anytime the lender committed to do an act, such as loaning money to the borrower and then failed to so perform, the borrower may raise a breach of contract claim. Breach of the note terms, the deed of trust or other loan documents as is appropriate should be alleged. Also consider any oral contracts the lender may have made. For example, an oral agreement to reinstate if the loan is brought current before the foreclosure sale, and failure to honor such agreement is actionable. Tarter v. Metropolitan Sav. & Loan Ass'n, 31 Tex. Sup. Ct. J. 195 (Feb. 6, 1988). The breach of contract claim should always be alleged separately from other causes of action.

7. Usury. Usury seems to be one of the lesser used bases for enjoining a foreclosure, at least as reflected by the case law. This is probably due to two factors. First, most attorneys don't like usury because it is confusing and the statute is complicated at best. Second, the legal basis for usury as a ground to enjoin a foreclosure may be difficult to present in Court. Notwithstanding the foregoing, claims of usury can be successfully used to enjoin foreclosures.

The key case in this area is Irving Bank & Trust Co. v. Second Land Corp., 544 S.W.2d 684 (Tex. Civ. App. -- Dallas 1976, writ ref'd n.r.e.). In Irving Bank & Trust, the borrowers had defaulted on interest payments on a series of notes. Irving Bank posted the property for foreclosure based on the default. The Dallas Court of Appeals affirmed its granting of a temporary injunction pending trial on the merits.

The baseline premise from which the Court of Appeals began its analysis was the venerable and well established principle of Texas injunction law: "The existence of a remedy at law is not ground for denial of injunctive relief unless the legal remedy is as practical and efficient to the ends of justice as the equitable remedy." Irving Bank, supra, 544 S.W.2d at 688. From this principle, it was a small and reasonable step to the holding that a post-foreclosure, monetary recovery for usury was not as "efficient to the ends of justice" as the granting of an injunction to enjoin the foreclosure pending final determination of the usury claims. This finding meshes well with the court's conclusion that the disruption of Second Land's business caused by the foreclosure would not be adequately compensated by a recovery for usury. Id. See E.I. DuPont de Nemours & Co. v. Zale Corp., 462 S.W.2d 355 (Tex. Civ. App. -- Dallas 1970, writ ref'd n.r.e.). Thus, operating from well established Texas law, the Dallas Court of Appeals concluded: "We hold that there where a substantial claim of usury is involved the trial judge has discretion to preserve the status quo until the next amount of the indebtedness can be determined at a trial on the merits." Irving Bank, supra, 544 S.W.2d at 688. A similar result was reached by the Corpus Christi Court of Appeals in El Paso Dev. Co. v. Berryman, 729 S.W.2d 883 (Tex. App. -- Corpus Christi 1987, no writ).

In Berryman, the mortgagor alleged that the interest being charged was in excess of two times the lawful legal rate. Under these allegations, pursuant to Tex. Rev. Civ. Stat. Ann. Art. 5069-1.06 § 2, not only would interest be forfeited, the principal would also be forfeited. Berryman's cause of action went to the validity of the underlying obligation not whether he was entitled to a set off. Thus, Berryman is clearly distinguished from Irving Bank & Trust.

Notwithstanding the difficulties of presenting a usury case, usury is still a fertile ground for enjoining a foreclosure. This is due largely to the vagaries of Texas usury laws. Simply put, the Texas usury statutes are not a model of clarity and judicial interpretation has been somewhat hesitant. See Tex. Rev. Civ. Stat. Ann. Art. 5069 et seq. For example, there are legitimate disputes as to what constitutes interest. See Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486 (Tex. 1979) (commitment fee is not interest); Gonzales County Sav. & Loan Ass'n. v. Freeman, 534 S.W.2d 903 (Tex. 1976) (bona fide commitment fee is not interest); Laid Rite, Inc. v. Texas Industries, Inc., 512 S.W.2d 384 (Tex. Civ. App. -- Fort Worth 1974, no writ) (commitment fee is interest); Watson v. Cargill, Inc., 573 S.W.2d 35 (Tex. Civ. App. -- Waco 1978, writ ref'd n.r.e.) (late fee is interest); Maloney v. Andrews, 483 S.W.2d 703 (Tex. Civ. App. -- Eastland 1972, writ ref'd n.r.e.) (late fee is not interest); Ross v. Walker, 554 S.W.2d 189 (Tex. 1977) (issue as to whether fee was service charge or interest); Flato Electric Supply Co. v. Grant, 620 S.W.2d 915 (Tex. Civ. App. -- Corpus Christi 1981, writ ref'd n.r.e.) (service charge is interest); Moss v. Metropolitan Nat'l Bank, 533 S.W.2d 397 (Tex. Civ. App. -- Houston [1st Dist.] 1976, no writ) (service charge is not interest).

The complexities and vagaries of the law regarding wrap-around mortgages also present numerous usury issues. In sum, the potential for using usury as a basis for enjoining a foreclosure is limited by the fertility of the attorney's imagination and his or her ability to communicate the inevitable complexities of the arguments to the court.

D. Seeking a Temporary Restraining Order

1. The TRO Petition. Assuming you have evaluated the documents and analyzed the facts and concluded that you want to attempt to stop the posted foreclosure, the following check list will be helpful in properly filing and obtaining your temporary restraining order and injunction.

a. Caption. Obviously your client(s) is/are listed as plaintiff and the lending institution is listed as defendant. You should also list as defendant the trustee or substitute trustee whose name appears on the notice of foreclosure. Indicate that person is being sued in their professional capacity only.

In most instances, the petition will seek not only a temporary restraining order but an application for temporary and permanent injunction and damages. Therefore, the petition should be entitled as such.

b. Venue. Following the caption and your description of the parties, you must allege venue. Mandatory venue for a cause of action involving land is the county where the land is situated. Tex. Civ. Prac. and Rem. Code § 15.011. The borrower may consider arguing the suit is on the promissory note, however, and has only a tangential connection to the land securing the note and therefore need not be brought in the county where the land is located. In that situation, the borrower may chose to apply the venue statute regarding where all defendants reside. There is no clear cut rule on the issue. The Amarillo Court of Appeals held that a suit on a note seeking judgment and foreclosure is not subject to the mandatory venue provision of § 15.011. Scarth v. First Bank & Trust Co., 711 S.W.2d 140 (Tex. App. -- Amarillo 1986, no writ) citing in reliance Bennett v. Landeau, 362 S.W.2d 952 (Tex. 1962). cf. Dorfman Dev. Co. v. American Commonwealth Dev. Co., 523 S.W.2d 268 (Tex. Civ. App. -- Houston [1st Dist.] 1975, no writ) (removal of deed of trust lien is subject to mandatory venue provisions). While a venue allegation is a necessary part of the petition, which venue statute you select may vary.

c. Facts. It is helpful to recount the facts chronologically attaching as exhibits the promissory note(s), deed of trust, notices of default and notice of trustee's sale as well as any other loan documents or pertinent correspondence.

d. Procedural Bases. The next section of the petition should outline, after including the facts by reference, each of the procedural bases for granting a temporary restraining order and temporary injunction. For example, your fact situation may support separate claims for any or all of the following: the lender's failure to provide a reasonable opportunity to cure, no unequivocal notice of acceleration, inadequate notice as to terms, failure to disclose outstanding liens, failure to provide adequate due process, failure to properly substitute the trustee any additional grounds that may apply.

f. Temporary Restraining Order Requirements. Because of the equitable nature of injunctive relief, petitioner must show why it has no adequate remedy at law thereby justifying extraordinary relief. Rule 682 of the Texas Rules of Civil Procedure require the application set forth the grounds for relief and what irreparable injury would occur if the injunction is not issued. "Irreparable injury" is injury for which money damages cannot adequately compensate. Wilson v. Whitaker, 353 S.W.2d 945 (Tex. Civ. App. -- Houston 1962, no writ). Threats of foreclosure do not constitute irreparable injury but threats to one's credit rating is irreparable. ICM Mortgage v. Powell, No. 01-85-00399-CV (Tex. Civ. App. -- Houston [1st Dist.] August 29, 1985). The test for determining if an existing remedy is adequate (i.e., in damages) is whether it is complete and as efficient as is equitable relief. Greater Houston Bank v. Conte, 641 S.W.2d 407, 410 (Tex. App. -- Houston [14th Dist.] 1982, no writ). Note that every piece of real estate is unique and when ownership of real estate is at issue, existence of a cause of action for damages is no basis for denying equitable relief. El Paso Dev. Co. v. Berryman, 729 S.W.2d 883 (Tex. App. -- Corpus Christi 1987, no writ). See also Irving Bank & Trust Co. v. Second Land Corp., 544 S.W.2d 684, 688 (Tex. Civ. App. -- Dallas, 1976, writ ref'd n.r.e.). You must not only allege uniqueness, but explain how that is so. Otherwise, the Court may determine the property is fungible. See Ginther-Davis v. Houston Nat'l Bank, 600 S.W.2d

856 (Tex. Civ. App. -- Houston [1st Dist.] 1980, writ ref'd n.r.e.). But see Guardian Sav. & Loan Ass'n v. Williams, 731 S.W.2d 107 (Tex. App. -- Houston [1st Dist.] 1987, no writ). Include in your petition, therefore, the equitable grounds upon which you seek injunctive relief by describing the rights and equities Plaintiff will lose and any other damage or injury which may cause Plaintiff irreparable harm.

Also note that Plaintiff is not required to prove it will prevail at the final trial but need only show evidence tending to prove a probable right to recovery and a probable injury if the injunction is not granted. Sun Oil Co. v. Whitaker, 424 S.W.2d 216, 218 (Tex. 1968); Transport Co. of Texas v. Robertson Transports, Inc., 261 S.W.2d 549, 552 (Tex. 1953).

g. Request for Temporary Restraining Order. After including by reference all preceding allegations including facts, a specific request for a temporary restraining order without notice to Defendants (if the circumstances require), restraining and enjoining Defendants, their attorneys, agents, assigns, and all others acting on their behalf from proceeding with the foreclosure should be requested. Also under this heading, a separate paragraph should request the court to issue an order directing Defendants to appear at a date and time certain to show cause, if any, why the temporary restraining order should not be continued in effect as a temporary injunction pending a trial on the merits. Thereafter, include a request that the court enter, after a trial on the merits, a permanent injunction restraining and enjoining Defendants as aforesaid.

h. Attorneys' Fees. The petition should also include Plaintiff's request for attorneys' fees. The typical section cited is § 38.001 of Civil Practice and Remedies Code permitting recovery of attorneys' fees for an action on an oral or written contract. If a claim is made under § 38.001, Plaintiff must meet each of the prerequisites of § 38.002, which are, a statement that the claimant is represented by an attorney, that the claim has been presented to Defendants for payment within thirty days and no payment has been made.

Also consider article 5069-8.01 and 8.02 of the Texas Civil Statutes regarding usury penalties which allow the assessment of attorneys' fees.

i. Prayer for Relief. Include in your prayer a request that the court issue, without notice (if necessary), a temporary restraining order, restraining and enjoining Defendants from proceeding at the scheduled foreclosure sale referencing both the date of the scheduled foreclosure and the real property affected referencing also the exhibits attached to your petition that includes a legal description. Next, pray that the court order Defendants to appear and show cause why the temporary restraining order should not be continued as a temporary injunction. Then pray that the court issue, after such hearing, an order continuing the temporary restraining order in effect as a temporary injunction pending a trial on the merits. Request further that the court issue, after a trial on the merits, a permanent injunction restraining and enjoining Defendants permanently from taking any action whatsoever with regard to the posting of notice or otherwise exercising any of the remedies regarding sale or other disposition of the property or in any manner interfering with the Plaintiff's ownership possession and/or property rights in said property pending further order of the court. Also include a prayer for the award of judgment for actual damages, punitive damages, if applicable, attorneys' fees, interest, costs and such other and further relief as is just and proper.

j. Verification. In addition to the certificate of service, it is imperative that the injunction petition be verified by your client. See Rule 682, Tex. R. Civ. P. (Hereinafter, all references to Rules are to the Texas Rules of Civil Procedure unless noted otherwise). Note, however, that the lender must except to a lack of verification in its response to the petition or such exception is waived. ICM Mortgage v. Powell, No. 01-85-00399-CV (Tex. App. -- Houston [1st Dist.] August 29, 1985).

2. Proposed Order. Your petition for a temporary restraining order and temporary injunction should include a proposed temporary restraining order. The form of the order should comply with the requirements set out in Rule 683, Tex. R. Civ. P. Set out, in specific terms, the reasons for the issuance of the order, describe in detail the act or acts sought to be restrained, indicate who will be restrained by the order and be certain to include a blank to fill in when a temporary injunction is set for trial. Failure to strictly follow the requirements of Rule 683 voids the injunction. InterFirst v. Paz Constr., 715 S.W.2d 640 (Tex. 1986). The order, even though signed, will not become effective until a bond, set by the court, has been filed with the clerk.

Pursuant to Rule 680, Tex. R. Civ. P., an ex parte temporary restraining order expires in fourteen (14) days, unless within that period, good cause is shown for its extension or the other party consents to an extension. At the expiration of that fourteen-day period, the Court shall proceed to hear Plaintiff's application for a temporary injunction. (Note that the time period was extended from 10 to 14 days effective January 1, 1988).

3. The bond. Pursuant to Rule 684, Tex. R. Civ. P., a bond must be filed with the clerk before the issuance of the temporary restraining order or temporary injunction. You should have your bond prepared except for the amount and present it to the judge with the petition for injunctive relief so that it may be considered at that time. The amount of the bond is within the trial court's discretion. El Paso Dev. Co. v. Berryman, 729 S.W.2d 883 (Tex. App. -- Corpus Christi 1987, no writ); Coastal Bend Milk Prod. Ass'n v. Garcia, 368 S.W.2d 260, 264 (Tex. Civ. App. -- San Antonio 1963, no writ). Once the court sets the bond, you must proceed to the clerk's office to file the bond and the order granting the injunction. A temporary injunction issued without a bond is void. El Paso Deve. Co., supra; Whitlow v. Polley, 670 S.W.2d 318, 319 (Tex. App. -- Tyler, 1984, no writ).

Unless the lender files a motion to increase the bond or dissolve the injunction, any challenge it has to the amount of the bond is waived. ICM Mortgage, supra; Speedman Oil Co. v. Duvall County Ranch Co., 504 S.W.2d 923, 931 (Tex. Civ. App. -- Waco 1973, writ ref'd n.r.e.). The amount of the bond need not equal the amount in controversy. Coastal Bend Milk Prod., supra. In Greater Houston Bank v. Conte, 641 S.W.2d 407, 410 (Tex. App. -- Houston [14th Dist.] 1982, no writ), the Court required a bond equaling two year's interest on the note. Should a lender seek to increase the bond in reliance on Conte, you should point out to the Court that the sufficiency of the bond was not an issue in that case. Moreover, because interest continues to accrue on the note during the injunction period, and when the value of the collateral exceeds the outstanding balance on the note, the lender is secure and is not harmed as long as there is some bond in place. See El Paso Dev. Co., supra; Kasper v. Keller, 466 S.W.2d 326 (Tex. Civ. App. -- Waco 1971, writ ref'd n.r.e.). Even a thousand dollar bond is sufficient absent immediate challenge by the lender. ICM Mortgage, supra.

4. Certificate of Conference. Ordinarily, application for a temporary restraining order is made just days -- sometimes hours -- before the scheduled foreclosure date. However, some county local rules require consultation with opposing counsel. Because of the short time element, it is oftentimes difficult to reach the other side and confer prior to presenting the petition to the court. It is useful, therefore, to have prepared two certificates, one stating that counsel for Defendants was contacted and does or does not wish to be heard and the other stating that counsel could not be contacted and the application is therefore being presented ex parte. You may need to take counsel's phone number with you to the courthouse and call from the lobby or even the judge's chambers, to get a response and then attach the appropriate certificate of conference. If you must present your application ex parte, there may be local rules with which you must comply in addition to the civil rules. For example, in Dallas, counsel presenting an ex parte application must certify that the case is not subject to transfer.

5. Notice. Pursuant to Rule 686, Tex. R. Civ. P., the clerk shall issue citation to the Defendant as in other civil cases. In order to stop a posted foreclosure, however, the order will not be binding unless the opposing party receives actual notice of the order by personal service or otherwise. See Rule 683. Therefore, upon obtaining the TRO and filing the requisite bond, you should immediately call opposing counsel and advise them that a TRO has been obtained. Then, if practical, hand deliver a copy of same to counsel before the foreclosure date. It may be necessary to call opposing counsel from the judge's chambers upon securing the TRO and advise them that it has been signed. Then, you may have to proceed directly to the courthouse steps, with injunction in hand, and notify the trustee or substitute trustee before the sale commences that the sale has been enjoined. Note that Rule 680 provides an expedited process by which the adverse party may appear and move to dissolve or modify a TRO obtained without notice.

E. Appeal.

Should your presentation to the trial court be unsuccessful, you may appeal to the state court of appeals for an original injunction. Grant or denial of a temporary injunction, but not temporary restraining order, is appealable. Section 51.014 (4) gives a party to an injunction the right to an interlocutory appeal from the

district court's order. See ICM Mortgage v. Powell, No. 01-85-000399-CV (Tex. App. -- Houston [1st Dist.] August 29, 1985). Note that pursuant to Rule 43, Rules of Appellate Procedure, no order denying interlocutory relief shall be suspended or superseded by an appeal therefrom unless the appellant files a supersedeas bond or deposit as described in Rule 47, Rules of Appellate Procedure. If your appeal is from the trial court's denial of a temporary injunction to stop a posted foreclosure, it is imperative that you seek expedited consideration in the Court of Appeals. The filing of your interlocutory appeal or the filing of a supersedeas bond alone does not automatically result in an injunction. You must seek and obtain an original injunction order from the Court of Appeals. The successful appeal will contain the following:

1. Motion for Leave to File. In order to file a petition for original injunction, you must first file a Motion for Leave to File Petition for Original Injunction. Set ut in this motion who the parties are, the order from which you seek leave to appeal, the grounds upon which you feel there has been abuse of discretion by the district court and request the court of appeals grant you leave to file the petition for original injunction on an expedited basis on the ground that the respondent trustee or substitute trustee intends to sell the property at foreclosure on whatever date it is set.

2. The Petition for Original Injunction. Attach to your Motion for Leave to File Petition the actual Petition you seek to have filed. Therein, allege the residency of the parties and where they may be served. Next, set out the facts as background to the suit indicating the irregularities in the notice or posting or other bases that gave rise to your district court petition. Then set out how the district court acted and in what manner its actions constituted an abuse of discretion. Attach to the petition for original injunction a certificate of service and an affidavit from your client regarding the truth and correctness of the facts contained therein and that he or she fears immediate harm and loss of property if the court fails to grant a temporary restraining order enjoining the sale at foreclosure of the subject property. Also include a statement that issuance of the injunction is necessary to preserve the jurisdiction of the court of appeals. Slusky v. Coley, 668 S.W.2d 930, 932 (Tex. App. -- Houston [14th Dist.] 1984, no writ). Attach to the petition for original injunction as exhibits a certified copy of the trial court's order, all notices, correspondence and a description of the real estate that form the basis of your petition.

3. Brief in Support and Standard of Review. You must support your petition for original injunction with a brief. Set out therein case law in support of the arguments you raise regarding the trial court's abuse of discretion. The trial court has abused its discretion if it grants or denies injunctive relief by application of improper legal principles to undisputed evidence. Placemaker, Inc. v. Greer, 654 S.W.2d 830 (Tex. App. -- Tyler 1983, writ dism'd); Otten v. Town of China Grove, 660 S.W.2d 565 (Tex. App. -- San Antonio 1983, writ dism'd). Appellate review of an order granting or denying a temporary injunction is strictly limited to a determination of whether there has been a clear abuse of discretion by the trial court. Davis v. Huey, 571 S.W.2d 859, 861-62 (Tex. 1978). The trial court will be reversed only on a showing of abuse of discretion. Guardian Sav. & Loan Ass'n v. Williams, 731 S.W.2d 107 (Tex. App. -- Houston [1st Dist.] 1987, no writ). The trial court is clothed with broad discretion in determining whether or not to issue a temporary injunction to preserve the status quo pending final trial on the merits. El Paso Dev. Co. v. Berryman, 729 S.W.2d 883 (Tex. App. -- Corpus Christi 1987, no writ) citing State v. Southwestern Bell Telephone, 526 S.W.2d 526, 528 (Tex. 1975). If the trial court held you to a stiffer standard than needing only to produce evidence showing a probable right to recovery on the merits and a probably injury if the injunction is not granted, the trial court abused its discretion. Irving Bank & Trust Co. v. Second Land Corp., 544 S.W.2d 684, 687 (Tex. Civ. App. -- Dallas 1976, writ ref'd n.r.e.).

Proceedings pursuant to the issuance of a temporary restraining order or temporary injunction do not serve as a forum for the determination of the final rights of the parties. Southwest Weather Research, Inc. v. Jones, 327 S.W.2d 417, 421-22 (Tex. 1959). That is, the purpose of a hearing on a temporary injunction order is to determine whether relief for the moving party is probable. It should not be used and cannot be used to make a binding and final determination of rights. If the trial court exceeded the purpose for which a temporary injunction hearing is intended, it should be argued the trial court abused its discretion. Temporary restraining orders and injunctions are equitable remedies. Almost inevitably, their issuance results in some economic inconvenience to one party. However, when faced with a purely economic injury on one hand and immediate irreparable injury on the other, it is well established that equity favors the

prevention of immediate irreparable injury which cannot be remedied by a subsequent award of money damages. Id. at 421.

Other grounds that may constitute an abuse of discretion may include the trial court's failure to strictly comply with Rule 683. See e.g., InterFirst v. Paz Constr., 715 S.W.2d 640 (Tex. 1986); Transport Co. of Texas v. Robertson Transports, 152 Tex. 551, 261 S.W.2d 549, 552-53 (1953); Martin v. Linen Sys., 671 S.W.2d 706, 710 (Tex. App. -- Houston [1st Dist.] 1984, no writ). Further, the trial court's reasons for granting or denying the temporary injunction must be specific, legally sufficient and not merely conclusory. University Interscholastic League v. Torres, 616 S.W.2d 355, 357-58 (Tex. Civ. App. -- San Antonio 1981, no writ). Also, should there be a later modification, amendment or addition to the temporary injunction order, the latter order must also meet the temporary injunction requirements. Arrechea v. Plantowsky, 705 S.W.2d 186, 189 (Tex. App. -- Houston [14th Dist] 1985, no writ); Toby Martin Oil Field Trucking, Inc. v. Martin, 640 S.W.2d 352, 355 (Tex. App. -- Houston [1st Dist.] 1982, no writ). Failure to satisfy these requirements renders such orders void on their face and you should request the Court of Appeals so rule.

4. Bond. As with other appeals, you must file a bond along with your petition and motion for leave to file. You may file a cash bond or a surety bond and should do so with the District Clerk's office and then attach to your petition a certificate signed by the District Clerk's office evidencing either the cash deposit in lieu of appeal bond or the surety bond.

5. Procedure. The procedure for appeals from interlocutory orders is contained in Rule 42, Rules of Appellate Procedure. This information is incorporated from Old Texas Rule of Civil Procedure 385, which was repealed effective September 1, 1986. Note that Rule 42 provides a trigger of twenty days after the judgment or order is signed to file an appeal from an interlocutory order. Also note that such an appeal will be accelerated and briefs and the record are due "on a fast track." Of course, the Court of Appeals may hear the accelerated appeal on the original papers or on sworn and uncontroverted copies of such papers in lieu of a transcript. It may also decide to rule without briefs.

Once your cash bond has been filed and received by the District Clerk's office, present your motion for leave to file with the bond certificate to the clerk of the court of Appeals. Attach thereto the petition and brief in support. Only the Motion for Leave to File will be stamped at that time. If the Motion for Leave to File is granted, the Court of Appeals will so order and the petition for original injunction will be filed. Thereafter, the justices may request oral argument or other hearing or may sua sponte issue the original injunction. If, however, upon consideration of the Motion for Leave to File and the attached exhibits, the court determines it will not issue an original injunction, it will enter an order denying leave to file the petition for original injunction.

If leave is denied, you may investigate whether you have grounds to seek a writ of error in the Supreme Court. Note, however, that § 22.225(b)(6) of the Government code states that the judgment of the Court of Appeals is conclusive on the law and facts and a writ of error is not allowed from the Supreme Court for the grant or refusal of a temporary injunction. Subsection (c), however, permits the Texas Supreme Court to hear matters where there are disagreements on a question of law among the Courts of Appeals. Because of the limited availability of further appeal, your client may have to suffer either bankruptcy or foreclosure sale.

F. The Sale.

This section assumes either you did not seek a temporary restraining order or your petition for same was denied and you have decided the best alternative is to suffer a nonjudicial foreclosure sale. it is also assumed you and your client have discussed, and rejected, the possibility of filing for protection under the bankruptcy code. Frequently, the lender or trustee’s actions at the sale or the manner in which the sale is conducted will give rise to a cause of action for wrongful foreclosure or a suit to set aside the trustee's deed.

1. Tape the Proceedings. Oftentimes, it is extremely beneficial to audio tape and preferably video tape the foreclosure sale itself. In that manner, you will have preserved any potential error made by the trustee or substitute trustee during the proceedings. For example, you will be able to replay the tape and determine (1) if the trustee notified the assembled crowd audibly that he or she was conducting a sale pursuant to a posted

notice; (2) the terms of the sale; (3) any outstanding liens and encumbrances; (4) that the land was sufficiently identified so that parties present could understand which property was being proposed for sale (see e.g., In re Worcester, 811 F.2d 1224 (9th Cir. 1987) (inaccurate land description was "material irregularity" in foreclosure sale)); (5) that the trustee requested cash bids; (6) that the highest bid was accepted; and (7) that the trustee struck the property "sold." Video taping is an excellent tool to capture any irregularities in the sale process.

2. Appraisal. It is advisable to attend the sale, with your client, armed with a current appraisal of the subject property showing its fair market value at the time of the foreclosure. Once the trustee or substitute trustee concludes the land description, your client should request the opportunity to state, for the video tape (for the record), what the fair market value of the property is pursuant to your appraisal and then demand that should the mortgagee bid on the property, it bid at least the fair market value.

3. Time, Place, Manner. By statute, the time of the sale must be between 10 a.m. and 4 p.m. While new legislation requires the sale be conducted within three hours of the time the notice of sale specifies, it is still very lender oriented. Oftentimes, however, you may inquire of the trustee or substitute trustee when he or she intends to conduct the sale and the trustee will cooperate by indicating a specific time. If the trustee does so and, for example, indicates the sale will be after lunch or at 1:30, and then proceeds to sell the property at 10:00 in the morning, your reliance and the trustee's bad faith would likely given rise to a cause of action to set aside the sale. Our research has not revealed any cases on this specific issue, however. But see, Mabry v. Abbott, 471 S.W.2d 442, 445 (Tex. Civ. App. -- Waco 1971, writ ref'd n.r.e.) (implying that evidence of failure to set forth an exact time that discouraged anyone from attending the sale may have been actionable).

If you obtain a TRO on the morning of foreclosure Tuesday, it may be necessary for you to proceed directly to the courthouse steps in search of the trustee. Before leaving the judge's chambers, however, a telephone call should be made to the trustee's or substitute trustee's office advising them and noting the time, over the phone, that you obtained the TRO and asking, if you don't know, what the trustee or substitute trustee looks like and what he or she is wearing so that they may be located in the lobby. If you reach the lobby and it is not quite 10:00 or just become 10:00 and you are notified that the sale has been conducted and concluded, you have grounds to complain that the sale was not conducted between the hours of 10 a.m. and 4 p.m. and/or