

JUDICIAL FORECLOSURE OF HOA ASSESSMENT LIENS

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State Bar of Texas
**HANDLING YOUR FIRST (OR NEXT)
HOA ASSESSMENT LIEN FORECLOSURE
FOR CONDOS AND SUBDIVISIONS**

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CHAPTER 9

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JUDICIAL FORECLOSURE OF HOA ASSESSMENT LIENS

I. PREFACE

This article on judicial foreclosure of HOA Assessment Liens is part of a global series of articles being written for the State Bar of Texas' educational seminar "Handling Your First (or Next) HOA Assessment Lien Foreclosure – for Condos and Subdivisions" being presented on November 14, 2014. Each article in this series is intended to cover a particular step or procedure that forms a part of the pre-foreclosure, foreclosure, and post-foreclosure process. As such, the authors of these articles agreed to write their respective articles as if they were congruous chapters in a book, complete with a table of contents and a global glossary of terms that would be incorporated into all of the articles.

As a result, this article is narrowly focused on the sole issue of prosecuting a judicial foreclosure lawsuit, from filing the petition to conducting the sale of the property. This article, however, will not address any pre-foreclosure or post-foreclosure issues or procedures as those topics are being covered by other articles.

In addition, this article will incorporate certain terms of art by use of initial capital letters, but which will not be defined herein, unless such terms were not included in the global glossary of terms. If any of the undefined terms of art utilized in this article are unfamiliar to the reader, it is strongly advised that the reader consult the global glossary of terms that is being published in conjunction with the articles for this seminar.

II. INTRODUCTION

The fastest growing form of housing in the United States today is "Common-Interest Developments," which include planned unit developments of single-family homes and condominiums. These Common-Interest Developments are almost always governed by an association of property owners, commonly referred to as a "Homeowners Association" or simply a "HOA," which is a legal entity created by the real estate developer for the purpose of managing the development, maintaining development amenities and commonly-owned improvements, and enforcing development restrictions. In fact, the Community Associations Institute, a national organization for association-governed communities, estimates that as of 2012, there are more than 323,000 association-governed communities in the United States, which govern more than 25 million homes and 63.4 million residents, an increase of more than 3,000 percent from

the same data compiled in 1970.¹ In addition, the Foundation for Community Association Research estimates that Texas alone has more than 18,400 association-governed communities, which ranks Texas as the state with the third most number of association-governed communities in the United States.²

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

In order for a Homeowners Association to perform such obligations and provide such services, the Homeowners Association must have a source of income. The Dedicatory Instrument (which is often entitled "Declaration of Covenants, Conditions and Restrictions" or some variation thereof) that establishes an association-governed community (hereinafter referred to as a "Declaration") generally requires each member of the Homeowners Association to pay assessments that are used to cover common expenses associated with maintenance of the community's common areas or common elements and operation of the Homeowners Association (hereinafter referred to as "Assessments"). Such common expenses can include: installation and maintenance of landscaping in common areas; maintenance and upkeep of community amenities; maintenance, repair and insurance of commonly-owned structures and areas; restrictive covenant enforcement; mailing costs for newsletters and other correspondence; employment of a management company or on-site manager; security personnel and gate maintenance; and any other item delineated in the Governing Documents for the Homeowners Association or agreed to by the Board of Directors for the Homeowners Association. The Declaration also commonly vests the Homeowners Association with

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

² <http://www.cairf.org/foundationstatsbrochure.pdf>. Texas is ranked just behind Florida (estimated 46,000 association-governed communities) and California (estimated 42,500 association-governed communities).

tools to collect unpaid Assessments, and in a lot of cases, the ability to foreclose a lien against a delinquent homeowner's property for non-payment of Assessments (commonly referred to as an "Assessment Lien").

Assessments are the lifeblood of Homeowners Associations, without which they would be unable to fulfill their duties to their community. Inevitably, some lot or unit owners in every Homeowners Association will not pay levied Assessments and, by consequence, the Homeowners Association will be put in the unenviable position of having to engage in collection efforts against residents in its own community. While no Homeowners Association wants to be a debt collector, Boards of Directors have a duty to act in the best interest of their community and with due care in the management of the Homeowners Association's affairs, which in most cases means that the Board of Directors has an obligation to make efforts to collect these unpaid Assessments and, in appropriate circumstances, to foreclose its Assessment Lien against a delinquent homeowner.³

The primary purpose of this paper is to provide a basic explanation of the procedures for foreclosing an Assessment Lien by judicial foreclosure procedures. In order to fully explain such procedures, this paper will also address the creation, scope and priority of HOA Assessment Liens, as well as the regulations and procedures that govern the non-judicial foreclosure of Assessment Liens and redemption of a lot or unit by its owner following foreclosure of a Homeowners Association's Assessment Lien.

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

The authority of a Texas Homeowners Association to levy Assessments is primarily derived from its Governing Documents. If the Homeowners Association is a Condominium Association, however, the Texas Uniform Condominium Act also provides authority for a Condominium Association to levy Assessments against its Unit Owners for Common Expenses of the Condominium Development.⁴

The term "Assessment" refers to the charges that are assessed by a Homeowners Association against its Homeowners to pay for common expenses associated

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

The term "Special Assessments," on the other hand, refers to Assessments that are levied by the Homeowners Association in a uniform manner against all Lots or Units on a one-time basis due to some special circumstance. Under most Declarations, Homeowners must approve a Special Assessment before a Homeowners Association may levy a Special Assessment against the Lots or Units in the community.

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

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

IV. OBLIGATION OF HOMEOWNERS TO PAY ASSESSMENTS

The authority of the Homeowners Association to levy Assessments necessarily includes an obligation of the Homeowners to pay such Assessments. This obligation is contractual in nature and is binding upon a Homeowner who acquires title to an applicable Lot or Unit. In most cases, where the Governing Documents create the authority to levy Assessments, there will also be a provision mandating that the

³ As noted by the Texas Supreme Court in *Inwood North Homeowners' Association v. Harris*, "[t]he remedy of foreclosure is an inherent characteristic of the property right [and] is generally the only method by which other owners will not be forced to pay more than their fair share or be forced to accept reduced services." 736 S.W.2d 632, 636 (Tex. 1987).

⁴ Tex. Prop. Code § 82.102(a)(2).

obligation to pay such Assessments is a personal obligation of the Homeowner. Such a provision means that the Homeowner remains obligated to pay all Assessments levied against such Homeowner's Lot or Unit during the time of his or her ownership of such property, regardless of whether such Homeowner subsequently ceases owning such property. In other words, if Assessments levied against a Lot or Unit during the period of a person's ownership are not paid, such person continues to have a personal obligation to pay such unpaid Assessments even after his or her ownership terminates. This is because the obligation to pay the Assessments is personal to the Homeowner, not the Lot or Unit. This is certainly true for Unit Owners, whether so provided in the Condominium Association's Governing Documents or not, because the Texas Uniform Condominium Act establishes the personal liability of Unit Owners to pay Assessments levied during their ownership of their Unit.⁵

V. CREATION AND PERFECTION OF ASSESSMENT LIENS

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

An Assessment Lien is essentially a contractual lien in favor of a Homeowners Association that is created by and reserved in the Declaration establishing such Homeowners Association.⁶ If the Homeowners Association is a Subdivision Association, the creation and reservation of an Assessment Lien in favor of the Subdivision Association must be expressly specified in the Declaration. If the Homeowners Association is a Condominium Association, however, a lien securing payment of Assessments is automatically created in favor of the Condominium Association by the filing of its Declaration, whether expressly mentioned in the Declaration or not.⁷

In most situations, a Homeowners Association's Declaration will also provide that the Assessment Lien

is evidenced by the recordation of the Declaration alone, and that there is no requirement of the Homeowners Association to record additional documents or notices in the Official Public Records of the county in which the Subdivision or Condominium Development is located in order establish or perfect its lien. This is certainly true for Condominium Associations because the Texas Uniform Condominium Act expressly provides that a Condominium Association's Assessment Lien is created by the recording of its Declaration, which constitutes record notice and perfection of such lien.⁸ There is no comparable Texas law concerning establishment of an Assessment Lien in favor of a Subdivision Association and because Declarations of Texas Homeowners Association are rarely drafted in the same way, each Subdivision Association should carefully review its Declaration to ensure that an Assessment Lien in its favor has been properly established and to identify any specific procedural requirements to validly perfect its Assessment Lien, if necessary.

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

VI. SCOPE OF ASSESSMENT LIENS

In most cases, a Homeowners Association's Declaration will provide that an Assessment Lien secures not only payment of unpaid Assessments levied by the Homeowners Association, but also late charges, reasonable costs of collections (including attorneys fees), interest, and in some cases, even fines assessed by the Homeowners Association. The scope of a Condominium Association's Assessment Lien is defined by the Texas Uniform Condominium Act, which provides that such Assessment Lien secures payment for all regular and special Assessments, dues, fees, charges, interest, late fees, fines, collection costs, attorneys fees, and any other amount due to the Condominium Association by the Unit Owner or levied against the Unit by the Condominium

⁵ Tex. Prop. Code § 82.113(a).

⁶ See *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

⁷ Tex. Prop. Code § 82.113(a). There is no comparable Texas law that establishes an Assessment Lien in favor of Subdivision Associations, so the creation of an Assessment Lien in its favor must be expressly set out in the Subdivision Association's Declaration.

⁸ Tex. Prop. Code § 82.113(c). The Texas Uniform Condominium Act further provides that unless the Condominium Association's Declaration provides otherwise, no other recordation of a lien or notice of lien is required. Tex. Prop. Code § 82.113(c).

Association, unless the Condominium Association's Declaration provides otherwise.⁹ There is no similar Texas law that defines the scope of a Subdivision Association's Assessment Lien, and consequently, an Assessment Lien in favor of a Subdivision Association only secures the payment of the types of debts specifically identified in the Declaration as being secured by the Assessment Lien.

The defined scope of a Homeowners Association's Assessment Lien is important because a Homeowners Association cannot foreclose its Assessment Lien as a result of non-payment of amounts not expressly secured by the Assessment Lien under its Declaration (or under the Texas Uniform Condominium Act if it is a Condominium Association).¹⁰ In other words, a Subdivision Association may not foreclose its Assessment Lien upon a Lot for unpaid charges if the Declaration does not expressly state that the Assessment Lien secures payment of such type of charges.

VII. PRIORITY OF ASSESSMENT LIENS

The priority of a lien refers to its hierarchical relationship to other liens attached to a Lot or Unit, in which liens of greater priority are superior to liens of lesser priority. In general under Texas law, but subject to several exceptions, the priority of a lien is established by the date that the document creating the lien is recorded in the Official Public Records of the county in which the real property subject to such lien is located. Under this "the first in time, first in right" rule, liens recorded first in time are considered to be "senior," or of higher priority than all liens recorded later in time, which are considered to be "junior," or lower in priority than those liens recorded before it.¹¹ In simpler terms, every lien is junior to all liens recorded before it and senior to all liens created after it. There are some limited exceptions to this rule. A senior lienholder may agree to subordinate (make inferior) its lien to another lien that would otherwise be inferior to it. In addition, under the Texas Tax Code, liens that secure the payment of property taxes owed to ad valorem taxing entities take priority over all previously recorded liens, specifically including any Assessment Liens.¹²

⁹ Tex. Prop. Code § 82.113(a).

¹⁰ See *Brooks v. Northglen Assoc.*, 141 S.W.3d 158, 170-71 (Tex. 2004).

¹¹ See *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 668 (Tex. App.—Fort Worth 1998, pet. denied); *Windham v. Citizens Nat. Bank*, 105 S.W.2d 348, 351 (Tex. Civ. App.—Austin 1937, writ dismissed).

¹² Tex. Tax Code § 32.05.

In most cases, the Assessment Lien created by a Declaration is effective upon the recording of the Declaration, which is almost always recorded by the "Declarant" of the Declaration before any applicable property is developed or sold to Homeowners. As a result, Assessment Liens are typically created prior to and preexist a Homeowner's purchase of his or her Lot or Unit and are perfected before a mortgage lien (also called a "Deed of Trust Lien") is recorded by the lending institution that financed the Homeowner's purchase of such Lot or Unit. Notwithstanding, in almost all cases, the Declarations of Texas Homeowners Associations will provide that the Homeowners Association's Assessment Lien is subrogated in priority to purchase money mortgage liens and tax liens.¹³ As a result, there is almost always a Deed of Trust Lien that is senior to the Homeowners Association's Assessment Lien. In addition, there could be other potential liens that are given priority over the Homeowners Association's Assessment Lien by the Declaration, so a review of a particular Homeowners Association's Declaration and the local Official Public Records is required to determine the priority of its Assessment Lien.

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

- (1) a lien for real property taxes and other governmental Assessments or charges against a Unit;¹⁴
- (2) a lien or encumbrance recorded before the Condominium Association's Declaration is recorded;¹⁵
- (3) a first vendor's lien or first deed of trust lien recorded before the date on which the Assessment sought to be enforced becomes delinquent under the Condominium

¹³ This is because a lending institution will almost always require that it have the most senior lien on any real property collateralizing a mortgage loan. Since a Homeowners Association's Assessment Lien is generally created before an individual owner purchases his or her Lot or Unit, unless the Homeowners Association's Declaration subordinates the priority of its Assessment Lien under that of the lending institution's lien, most lending institutions would refuse to loan money to a Homeowner to purchase an applicable Lot or Unit for fear that foreclosure of the Homeowners Association's Assessment Lien could wipe out its lien.

¹⁴ Tex. Prop. Code § 82.113(b)(1). Foreclosure of a tax lien does not discharge the Condominium Association's Assessment Lien for amounts becoming due after the date of foreclosure of the tax lien. Tex. Prop. Code § 82.113(l).

¹⁵ Tex. Prop. Code § 82.113(b)(2).

- Association's Declaration, Bylaws, or Association Rules;¹⁶ and
- (4) unless the Declaration provides otherwise, a lien for construction of Improvements to a Unit or an assignment of the right to insurance proceeds on the Unit if the lien or assignment is recorded or duly perfected before the date on which the Assessment sought to be enforced becomes delinquent under the Condominium Association's Declaration, Bylaws, or Association Rules.¹⁷

VIII. JUDICIAL FORECLOSURE OF ASSESSMENT LIENS

There are two types of procedures for foreclosing an Assessment Lien under Texas law: judicial foreclosure and non-judicial foreclosure. All Texas Homeowners Associations are authorized to foreclose their Assessment Lien by judicial foreclosure procedures, but they may only foreclose their Assessment Liens by non-judicial foreclosure if expressly authorized to do so by their Declaration or Texas law. This article will focus exclusively on the judicial foreclosure of Assessment Liens alone.

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

A. Court of Appropriate Jurisdiction for a Judicial Foreclosure Lawsuit

Texas district courts have exclusive subject matter jurisdiction over lawsuits for the enforcement of liens against real property.¹⁸

Notwithstanding, there are a couple of Texas appellate court opinions that have concluded that a statutory county court may exercise jurisdiction over a lawsuit to enforce a lien against real property where such statutory county court has concurrent jurisdiction with a district court.¹⁹ By statute, all statutory county courts have concurrent jurisdiction with district courts in civil cases in which the matter in controversy exceeds \$500 but does not exceed \$200,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the fact of the petition.²⁰ In addition, the enabling statute for a particular county's statutory county courts may expand the concurrent jurisdiction of such court to higher amounts in controversy (for example, Travis County's statutory county courts have concurrent jurisdiction with district courts up to \$250,000 in controversy) or expressly grant such court concurrent subject matter jurisdiction over lien enforcement lawsuits (for example, Harris County's statutory county courts have express concurrent jurisdiction to hear lawsuits for the enforcement of a lien on real property).²¹ It's important to note, however, if a statutory county court's concurrent jurisdiction is based on an amount in controversy, the amount in controversy in a lawsuit for the enforcement of a lien against real property is based on the value of the property sought to be foreclosed, not the amount owed to the lienholder.²²

To determine whether a particular county's statutory county courts may have concurrent

¹⁹ See *Santana v. Tex. Workforce Comm'n*, No. 03-05-00452-CV, 2007 WL 2330714, at *2 (Tex. App.—Austin Aug. 16, 2007, pet. denied); *Clute Apartments 1 Ltd. v. Lorson*, No. 01-09-00514-CV, 2010 WL 5186913, at *4 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.) (mem.op.) (concluding both general and specific grants of jurisdiction to statutory county courts at law in Brazoria County conferred jurisdiction on court to hear enforcement of lien case, and section 26.043(2) did not restrict court's jurisdiction); *but see*, Tex. Gov't Code § 26.043 ("A county court does not have jurisdiction in . . . a suit for the enforcement of a lien on land").

²⁰ See Tex. Gov't Code § 25.0003(c)(1).

²¹ See Tex. Gov't Code §§ 25.1032 (Harris County), 25.2292 (Travis County).

²² See *Red Deer Oil Dev. Co. v. Huggins*, 155 S.W. 949, 950 (Tex. Civ. App.—Amarillo 1913, writ ref'd) (recognizing rule that "amount in controversy" in suit to foreclose lien on real property is determined by value of property covered by lien); *Eris v. Giannakopoulos*, 369 S.W.3d 618, 622 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("[w]hen a suit is for an interest in real property or to foreclose a lien on real property, rather than damages, the value of the property interest at issue determines the amount in controversy.").

¹⁶ Tex. Prop. Code § 82.113(b)(3).

¹⁷ Tex. Prop. Code § 82.113(b)(4).

¹⁸ Tex. Gov't Code § 24.007(4) ("The district court shall have original jurisdiction in civil cases of . . . [s]uits for the trial of title to land and for the enforcement of liens thereon."); *Kirkman v. Alexander*, 280 S.W.2d 365, 368-69 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.); *Matherne v. Carre*, 7 S.W.3d 903, 906 (Tex. App.—Beaumont 1999, pet. denied); 2 Tex. Prac. Guide Real Trans. § 10:225.

jurisdiction with a district court for a lawsuit to judicially foreclosure a lien, you must review the enabling statute for that particular county's statutory county courts. Such enabling statutes are codified at Chapter 25, Subchapter C, of the Texas Government Code.

B. Necessary Parties in a Judicial Foreclosure Lawsuit

The only necessary parties to a judicial foreclosure lawsuit are the owners of the applicable Lot or Unit and any known junior lienholders.²³ A junior lienholder of whom the senior lienholder has neither actual nor constructive notice, however, is not a necessary party to a judicial foreclosure lawsuit.²⁴ Thus, if there are any recorded liens attached to the applicable Lot or Unit that are inferior to the Homeowners Association's Assessment Lien, the holder of any such inferior or junior lien must be made a party to the judicial foreclosure lawsuit.

A junior lienholder is not required to include the holders of any senior liens as parties in a judicial foreclosure lawsuit.²⁵ Thus, if there is a mortgage or deed of trust lien that is superior to the Homeowners Association's Assessment Lien, the holder of such lien need not be made a party to the judicial foreclosure lawsuit.

C. Pleadings in a Judicial Foreclosure Lawsuit

There are very few unique pleading requirements in a judicial foreclosure lawsuit. The obligation to pay Assessments to a Homeowners Association is considered a contractual payment obligation that is secured by lien on real property, and the failure to pay Assessments is considered a breach of such contractual obligation. As a result, a HOA's pleadings in a judicial foreclosure lawsuit will closely resemble the pleadings in a breach of contract lawsuit.

What distinguishes the pleadings in a judicial foreclosure lawsuit from those in a breach of contract

lawsuit is the relief sought.²⁶ In a judicial foreclosure lawsuit, the pleadings must include allegations that the defendant-Homeowner's Lot or Unit is subject to an Assessment Lien that secures payment of the Assessments and a request for an order of sale ordering the foreclosure of the Assessment Lien against the applicable Lot or Unit.²⁷

Accordingly, the Homeowners Association's Original Petition should include the following factual allegations, which establish the contractual obligation, breach thereof, and amount of damages arising from such breach, as well as the existence of the Assessment Lien and the amount of said damages secured thereby:

- (1) the defendant-Homeowner's Lot or Unit is subject to the applicable Declaration;
- (2) the Declaration authorizes the Homeowners Association to levy Assessments or other charges against the defendant-Homeowner's Lot or Unit, and that it personally obligates the defendant-Homeowner to pay such Assessments or charges;
- (3) if applicable, the Declaration obligates the defendant-Homeowner to also pay late fees, interest, and/or attorneys fees or other costs of collection incurred by the Homeowners Association;
- (4) the Declaration creates an Assessment Lien in favor of the Homeowners Association that secures payment of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Association;
- (5) the defendant-Homeowner has not paid the Assessments levied against his or her Lot or Unit or other amounts owed by the defendant-Homeowner to the Homeowners Association;
- (6) the amount of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Associations;
- (7) the amount of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners

²³ *Ladner v. Reliance Corp.*, 293 S.W.2d 758, 763 (Tex. 1956) ("A junior lienholder or person in possession of or claiming an interest in the security is a necessary party to an action to foreclose a note and mortgage on either real or personal property."); *Pierson v. Pierson*, 150 S.W.2d 788, 790 (Tex. 1941); *Stephenville Production Credit Ass'n v. Drake*, 226 S.W.2d 888 (Tex. Civ. App.—Eastland 1950, no writ).

²⁴ *Masterson v. Ginners' Mut. Underwriters' Ass'n*, 235 S.W. 1081, 1083 (Tex. Comm'n App. 1922, judgment adopted); *see also*, 1 McDonald & Carlson Tex. Civ. Prac. § 5:53 (2d. ed.).

²⁵ *Parker v. Chambers*, 159 S.W.2d 945, 945 (Tex. Civ. App.—Beaumont 1942, no writ); *see also*, 66 Tex. Jur. 3d Secured Transactions § 320

²⁶ *Garza v. Allied Fin. Co.*, 566 S.W.2d 57, 62 (Tex. App.—Corpus Christi 1978, no writ) ("Judicial foreclosure is an additional remedy to that of seeking a personal judgment against a debtor.")

²⁷ *Garza v. Allied Fin. Co.*, 566 S.W.2d 57, 62 (Tex. App.—Corpus Christi 1978, no writ) ("A judgment of foreclosure of a chattel mortgage should not be granted unless it has been specifically requested; a general prayer is not sufficient."); *see also*, 66 Tex. Jur. 3d Secured Transactions § 321.

Associations that is secured by the Homeowners Association's Assessment Lien; and

- (8) if the Homeowners Association is a Subdivision Association, it has complied with all notice requirements under Chapter 209 of the Texas Property Code as a precondition to an award of attorneys fees.²⁸

The petition should also include all of the normal ancillary relief sought in a breach of contract cause of action, including attorneys fees, pre- and post-judgment interest and all taxable court costs. In addition, the Homeowners Association must include a specific request for foreclosure of its Assessment Lien in its prayer for relief. Such requirement can be satisfied by requesting an order of sale in the prayer for relief.²⁹

D. Affirmative Defenses in a Judicial Foreclosure Lawsuit

The primary affirmative defense to a judicial foreclosure lawsuit is the statute of limitations, which may preclude foreclosure of a Homeowners Association's Assessment Lien as to all or part of the outstanding Assessments owed by a delinquent Homeowner. More specifically, a four-year statute of limitations applies to a suit to foreclose on a real property lien or to recover real property under a real property lien.³⁰

When recovery is sought on a contractual obligation that is payable in installments, the statute of limitations runs against each installment from the time it becomes due.³¹ Thus, each separately levied Assessment is subject to a separate four-year statute of limitations period, and any unpaid Assessments that were due and owing by the delinquent Homeowner prior to the filing of the judicial foreclosure lawsuit may be time-barred.³²

²⁸ See Tex. Prop. Code § 209.0064. Due to the narrow focus of this article, the pre-requisite notice requirements under Section 209.0064 are not addressed herein.

²⁹ *Morris v. Biggs & Co.*, 165 S.W.2d 915, 917 (Tex. Civ. App.—Amarillo 1942, writ dismissed); see also, 66 Tex. Jur. 3d Secured Transactions § 321.

³⁰ *Goldfield v. Kassoff*, 470 S.W.2d 216, 217 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ); Tex. Civ. Prac. & Rem. Code § 16.035.

³¹ *Townwest Homeowners Ass'n, Inc. v. Warner Communication, Inc.*, 826 S.W.2d 638, 640 (Tex. App.—Houston [14th Dist.] 1992, no writ) (a new cause of action accrued each time the cable company failed to make its quarterly payment to homeowner's association).

³² *Goldfield v. Kassoff*, 470 S.W.2d 216, 217 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ);

E. Burden of Proof in a Judicial Foreclosure Lawsuit

At a trial on the merits of a judicial foreclosure lawsuit, a Homeowners Association will have to prove:

- (1) the defendant-Homeowner's Lot or Unit is subject to the applicable Declaration;
- (2) the Declaration authorizes the Homeowners Association to levy Assessments or other charges against the defendant-Homeowner's Lot or Unit, and that it personally obligates the defendant-Homeowner to pay such Assessments or charges;
- (3) if applicable, the Declaration obligates the defendant-Homeowner to also pay late fees, interest, and/or attorneys fees or other costs of collection incurred by the Homeowners Association;
- (4) the Declaration creates an Assessment Lien in favor of the Homeowners Association that secures payment of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Association;
- (5) the defendant-Homeowner has not paid the Assessments or other charges levied against his or her Lot or Unit;
- (6) the amount of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Associations;
- (7) the amount of delinquent Assessments and other amounts owed by the defendant-Homeowner to the Homeowners Associations that is secured by the Homeowners Association's Assessment Lien;
- (8) if the Homeowners Association has retained legal counsel to prosecute the judicial foreclosure lawsuit, the amount and the reasonableness and necessity of the attorneys fees incurred by the Homeowners Association to collect the amounts owed by the defendant-Homeowner and prosecute the judicial foreclosure lawsuit; and
- (9) if the Homeowners Association is a Subdivision Association, it has complied with all notice requirements under Chapter 209 of the Texas Property Code as a precondition to an award of attorneys fees.³³

³³ See Tex. Prop. Code § 209.0064. Due to the narrow focus of this article, the pre-requisite notice requirements under Section 209.0064 are not addressed herein.

Items (1) – (4) can be proven by the admission of certified copies of the governing Declaration and a copy of the deed conveying ownership of the applicable Lot or Unit to the defendant-Homeowner.³⁴

Items (5) – (7) can be proven by witness testimony from a person responsible for the Homeowners Association's billing and collection activity or who is familiar with the Homeowners Association's financial records. Such testimony should be supported by the Homeowners Association's accounting records for the defendant-Homeowner's account, which reflects all debits and credits to the Homeowner's account since such account was last in good standing.

Item (8) can be proven by witness testimony from an attorney familiar with the amounts charged the Homeowners Association for the legal services provided in conjunction with the collection of amounts owed by the defendant-Homeowner and the amounts generally charged by other attorneys local area for similar services. Such testimony should generally be supported by copies of the invoices for the legal services provided to the Homeowners Association for which the Homeowners Association seeks an award.

Item (9) can be proven by witness testimony from a person responsible for the Homeowners Association's billing and collection activity, who can testify that the requisite notices were sent to the defendant-Homeowner in compliance with the statutory requirements of Chapter 209 of the Texas Property Code. Such testimony should be supported by copies of the applicable written correspondence sent to the defendant-Homeowner and any documentary evidence confirming delivery of the same.

F. Final Judgment in a Judicial Foreclosure Lawsuit

Assuming the Homeowners Association prevails at trial, the court will enter judgment in favor of the Homeowners Association in which it awards the Homeowners Association a monetary award against the defendant-Homeowner. If only a portion of the amount awarded to the Homeowners Association is secured by the Assessment Lien, then the final judgment should specify both the total amount awarded to the Homeowners Association and the amount of such award that is secured by the Homeowners Association's Assessment Lien.

The final judgment must also include an express order that the Homeowners Association's Assessment Lien be foreclosed on the defendant-Homeowner's

Lot or Unit to pay such monetary award that is secured by the Homeowners Association's Assessment Lien.³⁵ In addition, the final judgment should include an order to the clerk of the court instructing her or him to issue an Order of Sale upon request by the Homeowners Association.

Finally, if the Homeowners Association is a Condominium Association³⁶, it should include an order that the final judgment shall have the force and effect of a writ of possession as between the parties to the judicial foreclosure lawsuit and any person claiming a right of possession under the defendant-Homeowner.³⁷ By including such a writ of possession order in the final judgment, the sheriff or other officer executing the Order of Sale is required to place the purchaser of the subject Unit in possession of such property within thirty (30) days after the day of the foreclosure sale, which precludes any need to pursue a separate forcible entry and detainer lawsuit to remove the defendant-Homeowner, and any other residents claiming a right of possession thereunder, from the subject Unit following the foreclosure of the Condominium Association's Assessment Lien.

G. Issuance of an "Order of Sale"

Assuming that the final judgment rendered by the trial includes an Order of Sale, upon the request of the judgment creditor, the clerk of the court will prepare an Order of Sale, which directs the sheriff or constable of the county in which the defendant-Homeowner's Lot or Unit is located to sell such Lot or Unit by public auction and to apply the proceeds from such sale to the secured amount awarded to the Homeowners Association under the judgment.

Before a judgment creditor can request the court clerk to issue an Order of Sale, the judgment creditor must wait thirty (30) days from the date the final

³⁴ See Tex. R. Evid. 902(4) (providing for self-authentication of certified copies of public records).

³⁵ Tex. R. C. P. 309 ("Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and" . . . "that an order of sale shall issue to any sheriff or any constable within the State of Texas, directing him to seize and sell the same as under execution, in satisfaction of the judgment.").

³⁶ Unfortunately, however, Homeowners Associations that are Subdivision Associations cannot include a writ of possession order in the final judgment because Section 209.011 of the Texas Property Code requires that a Subdivision Association or other person who purchases occupied property at a sale foreclosing the Subdivision Association's Assessment Lien "must commence and prosecute a forcible entry and detainer action under Chapter 24 [of the Texas Property Code] to recover possession of the property." The Texas Uniform Condominium Act does not impose any similar requirement.

³⁷ Tex. R. C. P. 310.

judgment is signed to see if the judgment debtor files a supersedeas bond, notice of appeal, or motion for new trial. Unless the judgment debtor has filed a supersedeas bond or notice of appeal, the clerk of the court shall issue an Order of Sale upon application of the judgment creditor or his or her attorney after the expiration of thirty days from the date the final judgment is signed.³⁸ If a timely motion for new trial is filed, the court clerk cannot issue the Order of Sale until the expiration of thirty (30) days from the date the order overruling the motion for new trial is signed or from the date the motion for new trial is overruled by operation of law.³⁹

The style of the Order of Sale shall be “The State of Texas” and it must: (1) be signed by the clerk of the court; (2) bear the seal of the court; (3) be directed to any sheriff or any constable within the State of Texas; and (4) require the officer to return it within thirty, sixty, or ninety days, as directed by the judgment creditor or his or her attorney.⁴⁰ The Order of Sale shall also describe the judgment, stating the court in which, and the time when, rendered, and the names of the parties in whose favor and against whom the judgment was rendered.⁴¹ Finally, the Order of Sale must describe the real property being foreclosed with legal sufficiency, and must direct the officer to make the sale by previously giving the public notice of the time and place of sale required by law and these rules. TRCP 631

The Order of Sale should describe the Lot or Unit to be sold with legal sufficiency and contain appropriate directions as to the time, place, terms, and conditions of the sale.⁴²

H. Conducting a Judicial Foreclosure Sale

Real property to be sold by a sheriff or constable pursuant to an Order of Sale is required to be sold by public auction, at the courthouse door of the county in which the property is located, on the first Tuesday of the month between the hours of 10 a.m. and 4 p.m.⁴³

³⁸ Tex. R. Civ. P. 627. If a timely supersedeas bond is filed by the judgment debtor after the issuance of an Order of Sale, the court clerk must immediately issue a writ of supersedeas suspending all further proceedings under any Order of Sale previously issued. Tex. R. Civ. P. 634.

³⁹ Tex. R. Civ. P. 627.

⁴⁰ Tex. R. Civ. P. 629.

⁴¹ Tex. R. Civ. P. 629.

⁴² *Allday v. Whittaker*, 1 S.W. 794, 795 (Tex. 1886).

⁴³ Tex. R. Civ. P. 646a. For purposes of a judicial foreclosure of real property, the term “courthouse door” of a county refers to either of the principal entrances to the building provided by the proper authority for the holding of the district court, or if from any cause there is no such building, then the door of the building where the district

Prior to conducting a sale of real property under an Order of Sale, the sheriff or constable is required to advertise the time and place of sale of such real property by having a notice of sale, specifying such information, published in the English language in a newspaper published in the county in which the defendant-Homeowner’s Lot or Unit is located, at least once a week for three consecutive weeks preceding the date of such sale.⁴⁴ In addition, the sheriff or constable must give the defendant-Homeowner (or his or her attorney) written notice of such sale, by either personal-delivery or mail.⁴⁵ The notice of sale that is required to be published and given to the defendant-Homeowner must contain a statement of the authority by virtue of which the sale is to be made, the time of levy, the time and place of sale, and a brief description of the property to be sold, as well as give the number of acres, original survey, locality in the county, and the name by which the land is most generally known.⁴⁶

The sheriff or constable must sell the property to the highest bidder at the sale for cash, unless the highest bidder is the judgment creditor. In such event, the judgment creditor is entitled to apply the amount awarded in the judgment against his or her bid amount.⁴⁷ The proceeds from the sale will be applied first to the amounts awarded to the judgment creditor, and if there is any remaining surplus proceeds, then to the defendant-Homeowner.

IX. ADVANTAGES AND DISADVANTAGES OF JUDICIALLY FORECLOSING AN ASSESSMENT LIEN

There are many advantages and disadvantages to foreclosing an Assessment Lien by judicial proceeding. By seeking a judgment and court-ordered foreclosure, the process is supervised by a court of law and there is less likelihood that the foreclosure

court was last held in such county shall be deemed to be the courthouse door. Tex. R. Civ. P. 648.

⁴⁴ Tex. R. Civ. P. 647. The first of said three publications is required to appear not less than twenty (20) days immediately preceding the date of sale. Tex. R. Civ. P. 647. If there is no newspaper published in the county, or none which will publish the notice of sale for the requisite compensation set by court rule, the sheriff or constable must then post such notice in writing in three public places in the county, one of which shall be at the courthouse door of such county, for at least twenty days successively next before the date of sale. Tex. R. Civ. P. 647.

⁴⁵ Tex. R. Civ. P. 647.

⁴⁶ Tex. R. Civ. P. 647.

⁴⁷ *Blum v. Rogers*, 9 S. W. 595, 597 (Tex. 1888); *Needham v. Cooney*, 173 S.W. 979, 982 (Tex. Civ. App.—El Paso 1915, writ ref’d).

could be challenged on the basis of a lack of due process or abuse by the Homeowners Association.

In addition, by obtaining a judgment for the amounts owed to the Homeowners Association by the Homeowner, the Homeowners Association can abstract the judgment, which creates a “Judgment Lien” that attaches to any non-exempt real and personal property owned by such Homeowner in each county in which the judgment is abstracted. This may give the Homeowners Association the ability to foreclose on other real or personal property owned by the delinquent-Homeowner in addition to the Lot or Unit subject to its Assessment Lien in order to satisfy the judgment.

There are additional, but different, benefits for Condominium Associations and Subdivision Associations. As noted above, Condominium Associations can include a writ of possession order within the final judgment that precludes having to file a separate forcible detainer and entry lawsuit to gain possession of the subject Unit if it is the winning bidder at the foreclosure sale. If a Condominium Association were to foreclose its Assessment Lien by non-judicial foreclosure procedures, it would still have to file a forcible entry and detainer lawsuit to gain possession of the subject Unit, if still occupied by the Homeowner following the non-judicial foreclosure sale.

Under Section 209.008 of the Texas Property Code, a Subdivision Association that forecloses its Assessment Lien by non-judicial procedures is subject to a cap on the amount of attorneys fees that may be included in the non-judicial foreclosure sale. Such statutory attorney fees cap limits the amount of attorneys fees a Subdivision Association can include in the non-judicial foreclosure sale to the greater of:

- (1) One-third of the amount of all actual costs and assessments, excluding attorneys fees, plus interest and court costs, of those amounts are permitted to be included by law or by the restrictive covenants governing the subject Lot; or
- (2) \$2,500.00.⁴⁸

A Subdivision Association that forecloses its Assessment Lien by judicial foreclosure lawsuit, however, is not subject to any statutory cap on the amount of attorneys fees that it may be awarded in a judicial foreclosure final judgment.

The disadvantages of the judicial foreclosure procedure are basically the time involved in prosecuting a lawsuit in order to obtain the judgment and the increased amount of attorneys fees that may

be incurred in such endeavor. If contested, a lawsuit can, and often does, take more than a year to go to trial. Even after the trial, a judgment could be appealed, which could potentially extend the proceedings even longer.

In addition, attorneys fees incurred in a judicial foreclosure lawsuit can be significant. Even if the court awards the Homeowners Association all of the attorneys fees it incurs, the foreclosure of the Homeowners Association’s Assessment Lien may not generate enough proceeds to cover all of the amounts awarded to the Homeowners Association, and in some cases, the sales proceeds may not even be enough to cover just the attorneys fees incurred by the Homeowners Association in conducting the judicial foreclosure.

⁴⁸ Tex. Prop. Code § 209.008(f).

APPENDIX A
SAMPLE JUDICIAL FORECLOSURE LAWSUIT PETITION
(FOR SUBDIVISION ASSOCIATIONS)

CAUSE NO. _____

TEJAS ESTATES HOMEOWNERS ASSOCIATION, INC, Plaintiff
v. ANTONIO DE SANTA ANNA, Defendant.
§ § § § § §
IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
_____ JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE:

COMES NOW Tejas Estates Homeowners Association, Inc., Plaintiff, complaining of Antonio De Santa Anna, Defendant, and for such cause of action would respectfully show:

I. DISCOVERY CONTROL PLAN

- 1. Plaintiff intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3.

II. CLAIMS FOR RELIEF

- 2. Pursuant to Texas Rule of Civil Procedure 47, Plaintiff confirms that it seeks monetary relief of \$100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney’s fees and nonmonetary relief in the form of a judicial foreclosure of Plaintiff’s lien.

III. PARTIES

3. Plaintiff Tejas Estates Homeowners Association, Inc. is a Texas non-profit corporation with its principal place of business in Travis County, Texas.
4. Defendant Antonio De Santa Anna (“Defendant”) is an individual residing in Travis County, Texas, and may be served with process at her residence at 3016 Alamo Street, Austin, Travis County, Texas 78701, or at any other place Defendant may be found.

IV. VENUE

5. Venue is proper in Travis County because this suit involves an interest in real property in Travis County, under Tex. Civ. Prac. & Rem. Code Sec. 15.011.

V. FACTS

6. Tejas Estates subdivision (the “Subdivision”) was established through a plat recorded in Cabinet I, Slide 1, of the Plat Records of Travis County, Texas.
7. The Subdivision and lots contained therein are subject to that certain Declaration of Covenants, Conditions and Restrictions of Tejas Estates, recorded at Document Number 9522324 of the Official Public Records, Travis County, Texas (the “Declaration”). A true and correct copy of the Declaration is attached hereto as Exhibit “A” and incorporated herein by reference.
8. The Declaration establishes Tejas Estates Homeowners Association, Inc. (the “Association”) as a property owners’ association for the Subdivision and vests it with the authority to levy assessments against owners of lots in the Subdivision to pay for common expenses associated with maintenance of the common areas within such Subdivision and operation of the Association. **[Author’s Note – this paragraph should be conformed to specify only the types of common expenses that are authorized**

by the applicable Declaration]

9. In addition to vesting the Association with the authority to levy assessments against lot owners, the Declaration also establishes a contractual lien against each lot in the Subdivision that secures the payment of all unpaid assessments, late fees, interest and costs of collection incurred by the Association, including attorneys fees (hereinafter referred to as the “Assessment Lien”). **[Author’s Note – this paragraph should be conformed to include only the types of charges that are secured by the assessment lien as specified by the applicable Declaration]**

10. Defendant is the owner of that certain real property legally described as:

Lot 1, Block A, Tejas Estates, a subdivision in Travis County, Texas, according to the map or plat thereof recorded in Cabinet I, Slide 1, Plat Records, Travis County, Texas.

and locally known as 3016 Alamo Street, Austin, Travis County, Texas 78701 (the “Property”), by virtue of that certain Special Warranty Deed With Vendor’s Lien, dated March 12, 2004, recorded in Document Number 2004020500 of the Official Public Records, Travis County, Texas (the “Deed”). A true and correct copy of the Deed is attached as Exhibit “B” and incorporated herein by reference. **[Author’s Note – this paragraph should be conformed to specify the legal description and local address of the applicable property and the recording citation for the deed conveying ownership of the property to Defendant]**

11. The Property was made subject to the Declaration prior to its ownership by Defendant, and the Deed expressly states that the conveyance of the Property is made subject to the easements, assessments, restrictions, covenants and covenants of record against the Property. As a result, Defendant had constructive notice of the Declaration and his duty to pay assessments levied by the Association provided for therein at the time Defendant purchased the Property.

12. Defendant has failed to timely pay assessments levied by the Association against the Property, and as a result, the Association has engaged in certain collections efforts against Defendant and has incurred costs of collection associated therewith.

13. By letter dated June 29, 2013, and sent to Defendant by certified mail, return receipt requested, Plaintiff provided written notice to Defendant of: (1) each delinquent amount and the total amount of the payment required to make the Defendant's assessment account current; (2) the options Defendant had to avoid having its assessment account turned over to a collection agent; and (3) Defendant's right to cure the delinquent assessment account within 30 days from the date of such letter before the Association would take additional collection action (the "Collection Notice"). A true and correct copy of the Collection Notice letter is attached hereto as Exhibit "C". **[Author's Note – this paragraph should be conformed to specify the date of the notice letter and any other method of delivery in addition to certified mail, return receipt requested]**

14. Despite receipt of the Collection Notice and other correspondence demanding payment of due, but unpaid, assessments, late fees, interest, and costs of collection (hereinafter referred to collectively as the "Assessment Delinquency"), Defendant has failed and refused and continues to fail and refuses to pay such Assessment Delinquency.

15. As of December June 10, 2014, the total amount of Assessment Delinquency owed to the Association by Defendant was \$3,294.41. The total amount of the Assessment Delinquency continues to increase as a result of Defendant's failure to pay additional assessments levied by the Association after such date and/or the Association incurring additional costs of collection associated with collecting the Assessment Delinquency from Defendant. It is anticipated that Defendant will continue to fail and refuse to pay additional assessments and/or related charges to be levied by the Association between the

date of filing of this Petition through and including the date of trial. Accordingly, the Association sues Defendant for all amounts owed at the time this Petition is filed, in addition to all assessments and/or related charges as may become due and payable prior to and through the trial of this cause. **[Author's Note – this paragraph should be conformed to specify the total amount owed by the Defendant and a date by which such amount was calculated]**

16. In addition, as a result of Defendant's failure to pay the Assessment Delinquency, the Association has recorded a notice of assessment lien against the Property, at Document No. 087388548, in the Official Public Records of Travis County, Texas, a copy of which is attached hereto as Exhibit "D". **[Author's Note – this paragraph should be conformed to specify the recording citation of the recorded notice of assessment lien]**

VI. BREACH OF OBLIGATION TO PAY ASSESSMENTS AND REQUEST FOR JUDGMENT ON ALL AMOUNTS DUE THE ASSOCIATION

17. Pursuant to Section 7.5 of the Declaration, Defendant has a contractual obligation to timely pay all assessments levied by the Association and such other charges authorized by the Declaration, such as late fees, interest and costs of collection incurred by the Association, and Defendant's failure to pay the Assessment Delinquency described herein constitutes a material breach of such contractual obligation. **[Author's Note – this paragraph should be conformed to specify the provision(s) of the Declaration that establishes the Defendant's obligation to pay assessments and any other related charges provided by the Declaration and to include only such types of charges provided thereby]**

18. The Association respectfully requests that it be awarded judgment against Defendant for all amounts that are legally due and owing to the Association as a result of such breach.

VII. REQUEST FOR FORECLOSURE OF THE ASSOCIATION'S ASSESSMENT LIEN ON AMOUNTS SECURED BY SUCH LIEN AGAINST THE PROPERTY

19. Pursuant to Section 7.6 of the Declaration, Defendant's obligation to pay the Assessment Delinquency is secured by the Association's Assessment Lien on the Property. **[Author's Note – this paragraph should be conformed to specify the provision(s) of the Declaration that establishes the Association's assessment lien and the types of charges secured thereby]**

20. The Association seeks to judicially foreclose its Assessment Lien against the Property in accordance with Rule 309 of the Texas Rules of Civil Procedure, which is adopted by reference herein.

21. In accordance therewith, the Association requests that this Court order the foreclosure of the Assessment Lien and sale of the Property in order to satisfy the portion of the total amount due and owing to the Association that is secured by the Association's Assessment Lien on the Property.

VIII. ATTORNEY'S FEES

22. Pursuant to Section 7.5 of the Declaration, the Association is entitled to recover its costs of collections, including reasonable and necessary attorney's fees, from a lot owner who fails to timely pay assessments levied by the Association. In addition, Section 5.006 of the Texas Property Code provides that a prevailing party who asserts an action based on a breach of a restrictive covenant shall be awarded its reasonable attorney's fees. **[Author's Note – this paragraph should be conformed to specify the provision(s) of the Declaration that establishes the Defendant's obligation to pay costs of collection to the Association]**

23. As evidenced by the attached Collection Notice, the Association has provided Defendant with the requisite notice under Section 209.0064 of the Texas Property Code to be entitled to recovery of its attorney's fees. Accordingly, the Association requests that the Court award the Association all reasonable and necessary attorney's fees incurred by it in the collection of the Assessment Delinquency

and prosecution of this lawsuit.

IX. CONDITIONS PRECEDENT

24. All conditions precedent have been performed or have occurred. Tex. R. Civ. P. 54.

WHEREFORE, Plaintiff prays that Defendant be cited to appear and answer, and that on final hearing the Court enter a final judgment:

1. Awarding the Association all unpaid assessments, late fees, interest, and costs of collection incurred by the Association, including its reasonable and necessary attorney’s fees incurred through the date of trial;
2. Awarding the Association pre- and post-judgment interest (as applicable), as well as all taxable costs of court;
3. Finding that the Association has a valid lien on the Property that secures the amounts awarded by the judgment;
4. Ordering the judicial foreclosure of the Association’s Assessment Lien and sale of the Property in accordance with Texas Rule of Civil Procedure 309; and
5. Awarding Plaintiff such further relief to which it may be entitled.

Respectfully submitted,

SAVRICK, SCHUMANN, JOHNSON, MCGARR,
KAMINSKI & SHIRLEY, L.L.P.

By: _____
Gregory S. Cagle
State Bar No. 24003678
The Overlook at Gaines Ranch
4330 Gaines Ranch Loop, Suite 150
Austin, Texas 78735
(512) 347-1604 - Telephone
(512) 347-1676 - Facsimile

**ATTORNEYS FOR PLAINTIFF
TEJAS ESTATES HOMEOWNERS
ASSOCIATION, INC.**

APPENDIX B
SAMPLE JUDICIAL FORECLOSURE LAWSUIT PETITION
(FOR CONDOMINIUM ASSOCIATIONS)

CAUSE NO. _____

TEJAS ESTATES CONDOMINIUM ASSOCIATION, INC, Plaintiff
v. ANTONIO DE SANTA ANNA, Defendant.
IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
_____ JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE:

COMES NOW Tejas Estates Condominium Association, Inc., Plaintiff, complaining of Antonio De Santa Anna, Defendant, and for such cause of action would respectfully show:

I. DISCOVERY CONTROL PLAN

- 1. Plaintiff intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3.

II. CLAIMS FOR RELIEF

- 2. Pursuant to Texas Rule of Civil Procedure 47, Plaintiff confirms that it seeks monetary relief of \$100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney’s fees and nonmonetary relief in the form of a judicial foreclosure of Plaintiff’s lien.

III. PARTIES

- 3. Plaintiff Tejas Estates Condominium Association, Inc. is a Texas non-profit corporation with its principal place of business in Travis County, Texas.
4. Defendant Antonio De Santa Anna (“Defendant”) is an individual residing in Travis County, Texas, and may be served with process at her residence at 3016 Alamo Street, Unit 300, Austin, Travis County,

Texas 78701, or at any other place Defendant may be found.

IV. VENUE

5. Venue is proper in Travis County because this suit involves an interest in real property in Travis County, under Tex. Civ. Prac. & Rem. Code Sec. 15.011.

V. FACTS

6. Tejas Estates Condominium (the “Condominium Development”) was established by the recording of that certain Declaration of Covenants, Conditions and Restrictions of Tejas Estates Condominium, recorded at Document Number 9522324 of the Official Public Records, Travis County, Texas (the “Declaration”). A true and correct copy of the Declaration is attached hereto as Exhibit “A” and incorporated herein by reference..

7. The Condominium Development and units contained therein are subject to and governed by the Declaration, which establishes Tejas Estates Condominium Association, Inc. (the “Association”) as a property owners’ association for the Condominium Development and vests it with the authority to levy assessments against owners of units in the Condominium Development to pay for common expenses associated with maintenance of the common elements within such Condominium Development and operation of the Association. **[Author’s Note – this paragraph should be conformed to specify only the types of common expenses that are authorized by the applicable Declaration]**

9. In addition to vesting the Association with the authority to levy assessments against lot owners, the Declaration and/or Section 82.013 of the Texas Property Code establishes a contractual lien against each unit in the Condominium Development that secures the payment of all unpaid assessments, late fees, interest and costs of collection incurred by the Association, including attorneys fees (hereinafter referred to as the “Assessment Lien”). **[Author’s Note – this paragraph should be conformed to include only**

the types of charges that are secured by the assessment lien as specified by the applicable Declaration]

10. Defendant is the owner of that certain real property legally described as:

Unit 300, together with the undivided interest in and to the Common Elements appurtenant thereto of Tejas Estates, a Condominium Project in Travis County, Texas, according to the Declaration of Covenants, Conditions, and Restrictions recorded under Document No. 9522324 Official Public Records, Travis County, Texas;

and locally known as 3016 Alamo Street, Unit 300, Austin, Travis County, Texas 78701 (the “Property”), by virtue of that certain Special Warranty Deed With Vendor’s Lien, dated March 12, 2004, recorded in Document Number 2004020500 of the Official Public Records, Travis County, Texas (the “Deed”). A true and correct copy of the Deed is attached as Exhibit “B” and incorporated herein by reference. **[Author’s Note – this paragraph should be conformed to specify the legal description and local address of the applicable property and the recording citation for the deed conveying ownership of the property to Defendant]**

11. The Property was made subject to the Declaration prior to its ownership by Defendant, and the Deed expressly states that the conveyance of the Property is made subject to the easements, assessments, restrictions, covenants and covenants of record against the Property. As a result, Defendant had constructive notice of the Declaration and his duty to pay assessments levied by the Association provided for therein at the time Defendant purchased the Property.

12. Defendant has failed to timely pay assessments levied by the Association against the Property, and as a result, the Association has engaged in certain collections efforts against Defendant and has incurred costs of collection associated therewith.

13. As of December June 10, 2014, the total amount of due, but unpaid, assessments, late fees, interest,

and costs of collection (hereinafter referred to collectively as the “Assessment Delinquency”) owed to the Association by Defendant was \$3,294.41. The total amount of the Assessment Delinquency continues to increase as a result of Defendant’s failure to pay additional assessments levied by the Association after such date and/or the Association incurring additional costs of collection associated with collecting the Assessment Delinquency from Defendant. It is anticipated that Defendant will continue to fail and refuse to pay additional assessments and/or related charges to be levied by the Association between the date of filing of this Petition through and including the date of trial. Accordingly, the Association sues Defendant for all amounts owed at the time this Petition is filed, in addition to all assessments and/or related charges as may become due and payable prior to and through the trial of this cause. **[Author’s Note – this paragraph should be conformed to specify the total amount owed by the Defendant and a date by which such amount was calculated]**

14. In addition, as a result of Defendant’s failure to pay the Assessment Delinquency, the Association has recorded a notice of assessment lien against the Property, at Document No. 087388548, in the Official Public Records of Travis County, Texas, a copy of which is attached hereto as Exhibit “D”. **[Author’s Note – this paragraph should be conformed to specify the recording citation of the recorded notice of assessment lien]**

**VI. BREACH OF OBLIGATION TO PAY ASSESSMENTS AND REQUEST FOR JUDGMENT
ON ALL AMOUNTS DUE THE ASSOCIATION**

15. Pursuant to Section 7.5 of the Declaration and/or Section 82.013 of the Texas Property Code, Defendant has a contractual obligation to timely pay all assessments levied by the Association and such other charges authorized by the Declaration, such as late fees, interest and costs of collection incurred by the Association, and Defendant’s failure to pay the Assessment Delinquency described herein constitutes a material breach of such contractual obligation. **[Author’s Note – this paragraph should**

be conformed to specify the provision(s) of the Declaration that establishes the Defendant's obligation to pay assessments and any other related charges provided by the Declaration and to include only such types of charges provided thereby]

16. The Association respectfully requests that it be awarded judgment against Defendant for all amounts that are legally due and owing to the Association as a result of such breach.

VII. REQUEST FOR FORECLOSURE OF THE ASSOCIATION'S ASSESSMENT LIEN ON AMOUNTS SECURED BY SUCH LIEN AGAINST THE PROPERTY

17. Pursuant to Section 7.6 of the Declaration and/or Section 82.013 of the Texas Property Code, Defendant's obligation to pay the Assessment Delinquency is secured by the Association's Assessment Lien on the Property. **[Author's Note – this paragraph should be conformed to specify the provision(s) of the Declaration that establishes the Association's assessment lien and the types of charges secured thereby]**

18. The Association seeks to judicially foreclose its Assessment Lien against the Property in accordance with Rule 309 of the Texas Rules of Civil Procedure, which is adopted by reference herein.

19. In accordance therewith, the Association requests that this Court order the foreclosure of the Assessment Lien and sale of the Property in order to satisfy the portion of the total amount due and owing to the Association that is secured by the Association's Assessment Lien on the Property.

20. In addition, in accordance with Rule 310 of the Texas Rules of Civil Procedure, after foreclosure of the Property, a writ of possession should issue and Defendant and anyone taking an interest under Defendant should be dispossessed of possession of the Property.

VIII. ATTORNEY’S FEES

21. Pursuant to Section 7.5 of the Declaration, the Association is entitled to recover its costs of collections, including reasonable and necessary attorney’s fees, from a lot owner who fails to timely pay assessments levied by the Association. In addition, Section 5.006 of the Texas Property Code provides that a prevailing party who asserts an action based on a breach of a restrictive covenant shall be awarded its reasonable attorney’s fees. **[Author’s Note – this paragraph should be conformed to specify the provision(s) of the Declaration that establishes the Defendant’s obligation to pay costs of collection to the Association]**

22. Accordingly, the Association requests that the Court award the Association all reasonable and necessary attorney’s fees incurred by it in the collection of the Assessment Delinquency and prosecution of this lawsuit.

IX. CONDITIONS PRECEDENT

23. All conditions precedent have been performed or have occurred. Tex. R. Civ. P. 54.

WHEREFORE, Plaintiff prays that Defendant be cited to appear and answer, and that on final hearing the Court enter a final judgment:

1. Awarding the Association all unpaid assessments, late fees, interest, and costs of collection incurred by the Association, including its reasonable and necessary attorney’s fees incurred through the date of trial;
2. Awarding the Association pre- and post-judgment interest (as applicable), as well as all taxable costs of court;
3. Finding that the Association has a valid lien on the Property that secures the amounts awarded by the judgment;
4. Ordering the judicial foreclosure of the Association’s Assessment Lien and sale of the Property in accordance with Texas Rule of Civil Procedure 309, and issuance of a writ of possession in accordance with Texas Rule of Civil Procedure 310; and
5. Awarding Plaintiff such further relief to which it may be entitled.

Respectfully submitted,

SAVRICK, SCHUMANN, JOHNSON, MCGARR,
KAMINSKI & SHIRLEY, L.L.P.

By: _____

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**ATTORNEYS FOR PLAINTIFF
TEJAS ESTATES CONDOMINIUM
ASSOCIATION, INC.**

APPENDIX C
SAMPLE JUDICIAL FORECLOSURE FINAL JUDGMENT BY DEFAULT

CAUSE NO. DC-201847-CV

TEJAS ESTATES HOMEOWNERS ASSOCIATION, INC, Plaintiff
v. ANTONIO DE SANTA ANNA, Defendant
IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
368TH JUDICIAL DISTRICT

FINAL JUDGMENT BY DEFAULT

BE IT REMEMBERED that on this day came on to be heard the above-entitled and numbered cause wherein Tejas Estates Homeowners' Association, Inc. is Plaintiff. Antonio De Santa Anna is the Defendant. Plaintiff appeared in person (by duly authorized representative) and by its attorney of record and announced ready for trial. Defendant, although having been duly and legally cited to appear and answer, failed to appear and answer, and wholly made default.

Citations were served according to law and returned to the clerk where it remains on file for the time required by law. Upon consideration of the pleadings and the papers on file, evidence received by the Court, and argument of counsel, the Court is of the opinion that the allegations of Plaintiff's Original Petition have been admitted and, on good and sufficient evidence presented to the Court,

FINDS that Defendant is indebted to Plaintiff in the sum of \$1,653.55;

FURTHER FINDS that Plaintiff is entitled to recover its reasonable attorney's fees, which the Court finds to be \$4,660.45;

FURTHER FINDS that Plaintiff is entitled to recover its court costs in the amount of \$381.00;

FURTHER FINDS that Plaintiff possesses a valid lien (the “Lien”) on the real property locally known as 3016 Alamo Street, Austin, Travis County, Texas 78701 (the “Property”) and legally described as:

Lot 1, Block A, Tejas Estates, a subdivision in Travis County, Texas, according to the map or plat thereof recorded in Cabinet I, Slide 1, Plat Records, Travis County, Texas.

FURTHER FINDS that such Lien secures the payment of such indebtedness and attorneys fees;

FURTHER FINDS that such Lien preexisted Defendant’s ownership of the Property and, thus, is an exception to any designation of the Property as a homestead by Defendant.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, that Plaintiff have and recover from Defendant Antonio De Santa Anna the sum of \$6,395.00, with post-judgment interest thereon at the rate established by law from the date of this Final Judgment until paid, together with all costs of court.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, that the full amount of the \$6,395.00 awarded herein is secured by the Lien (the “Secured Judgment Amount”).

IT IS FURTHER, ORDERED, ADJUDGED, AND DECREED, that the Lien attached to the Property be foreclosed to pay the Secured Judgment Amount of this Final Judgment. An order of sale shall be issued to the sheriff or constable of Travis County, Texas, directing him to seize and sell the Property in satisfaction of the Secured Judgment Amount of this Final Judgment; and, if the proceeds of such sale be insufficient to satisfy the Secured Judgment Amount, then to take the money or any balance thereof remaining unpaid, out of any other property of the Defendant, as in case of ordinary executions.

IT IS FURTHER, ORDERED, ADJUDGED, AND DECREED, in accordance with Texas Rule of Civil Procedure 310, this Final Judgment shall have all the force and effect of a writ of possession as between the parties to the above-entitled lawsuit and any person claiming under the Defendant by any right acquired pending such lawsuit. The sheriff or other officer executing the order of sale provided

herein shall proceed by virtue of such order of sale to place the purchaser of the Property in possession thereof within thirty (30) days after the date the Property is sold to such purchaser. **[Author's Note – Because of Section 209.011 of the Texas Property Code, which requires the Subdivision Association or other purchaser of the applicable property to file a forcible entry and detainer lawsuit in order to obtain possession of such property, this paragraph should not be included if the plaintiff-Homeowners Association is a Subdivision Association]**

Plaintiff is allowed such further writs and processes as may be necessary in the enforcement and collection of this Final Judgment.

SIGNED this ____ day of _____, 2014.

JUDGE PRESIDING