FORECLOSURE

Tex. R. Civ. Proc. §735 and 736
effective January 1, 2012

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I. TEXAS RULES OF CIVIL PROCEDURE 735 AND 736

A. INTRODUCTION

Beginning January 1, 2012, a new version of Tex. R. Civ. Proc. §735 and 736 will change the procedures that have been in place since May 15, 1998 for obtaining the court order necessary to proceed with certain non-judicial foreclosures. The purpose of this presentation is to discuss how to obtain the court order necessary to proceed with a regular foreclosure under applicable law.

Rule 735 and 736 ("Rules") do not interfere with or change existing Texas real or personal property[1] foreclosure law except to the extent that a court order is required to proceed with a normal foreclosure under the terms of the loan agreement, contract or, in the case of property owner's association assessment liens, the declaration or dedicatory instrument that created the lien.[2] As the Official Comment to former Rule 735 states: "*Rules 735 and 736 do not change duties of a lender seeking foreclosure.*"

Foreclosure of a home equity,[3] home equity line of credit[4] and reverse mortgage loan[5] requires a Rule 735 or 736 court order pursuant to provisions in the Texas Constitution.[6] A tax lien transfer or property tax loan lien or contract created under Tex. Tax Code § 32.06 and 32.065 requires a Rule 735 and 736 court order pursuant to Tex. Prop. Code §32.06(c)(2) and (c-1). Likewise, an assessment lien created under the declaration or dedicatory instrument of a property owners' association – more commonly known as homeowners' association – cannot proceed without a court order as provided in Tex. Prop. Code §209.0091 and 209.0092.

B. BACKGROUND

1. Home Equity and Reverse Mortgages

As the last state in the nation to adopt home equity lending, Texas had to amend its constitution in 1997 to allow the homestead to serve as security for a home equity or reverse mortgage loan.[7] The constitutional amendment creating home equity lending added 15 pages, 19 paragraphs, and 40 subsections to TEX. CONST. art XVI §50. One of the new constitutional amendments required the Texas Supreme Court to "*promulgate rules of civil procedure for expedited foreclosures proceedings related to the foreclosure of these liens.*"[8]

Because there was no precedent for an "expedited foreclosure rule" in Texas law or practice, the Texas Supreme Court appointed a Task Force of experienced lawyers with expertise in most areas of the law that would be affected by a new foreclosure rule to assist in drafting a unique and unprecedented rule that would produce the "court order" required by the Constitution.[9] On January 20, 1998, the Texas Supreme Court unanimously approved the Task Force's work product and, after publication in the *Texas Bar Journal* for comment, Rule 735 and 736 – created under RULES RELATED TO SPECIAL PROCEEDINGS PART VII in the

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[1] Personal property foreclosures are governed by a security instrument and Article Nine of the Tex. Bus. & Com. Code, and are a separate body of law from real property foreclosures. See *Texas Practice (15): Texas Foreclosure: Law and Practice* by W. Mike Baggett (West Group 2001), chapters 1 and 2.

[2] See *Texas Practice (15): Texas Foreclosure: Law and Practice* by W. Mike Baggett (West Group 2001), chapter 3.

[3] TEX. CONST. art. XVI §50a(6)(D)

[4] TEX. CONST. art. XVI §50a(6)(D)

[5] TEX. CONST. art. XVI §50k(11)

[6] TEX. CONST. art. XVI §50r

[7] 75th Legislative Session, HJR 31 1997

[8] TEX. CONST. art. XVI §50r

[9] HELOCs were added as permitted loans by the 78th Legislative Session SJR 42 2003 and TEX. CONST. art. XVI §50t

Texas Rules of Civil Procedure – became law effective May 15, 1998.[10]

Due to a conflict between Texas law and federal law, the reverse mortgage provisions of TEX. CONST. art. XVI §50(k)(p) and (r) were amended in 1999.[11] As a consequence, the Texas Supreme Court called on a new Task Force – made up of most of the old Task Force members – to amend Rules 735 and 736 to accommodate reverse mortgages. The Task Force's reverse mortgage recommendations for changes to Rule 735 and 736 were adopted by the Supreme Court and became law March 15, 2000.

2. Property Tax Loans or Transferred Tax Liens

Because Rule 735 and 736 seemed to be working so well, in 2007 the Texas Legislature decided that transferred tax liens created under Tex. Tax Code §32.06 and 32.065 should require a court order under Rule 736 before the lender could foreclose.[12] The Office of Consumer Credit Commission was given regulatory authority over transferred tax liens, which resulted in numerous amendments to the Finance Code, one of which defined these unique loans more accurately in Tex. Fin. Code §351.002 as "property tax loans." But the legislature left out an important element in the statute in that no direction or drop-dead date was given on *how* or *who* should be responsible for amending the Rules to accommodate property tax loan liens. Nevertheless, the Texas Supreme Court appointed a new Task Force, generally composed of veteran members and tax loan experts, to amend Rule 735 and 736.

At the time this new Task Force went to work in August 2007, foreclosures were the subject of intense media and legal scrutiny. Foreclosure law and business practices were still rooted in the era when a local savings and loan or bank originated a person's home loan, serviced the loan and foreclosed if the loan went bad. But securitization radically changed everything. The secondary market created new business operations that required new legal practices but the foreclosure bar was slow to adapt to how securitization affected foreclosure principles.

Over the next two years, the 2007-2009 Task Force labored over a new version of Rule 735 and 736 that would take into consideration the fact that most residential loans were securitized and that the foreclosure process involved new players and new business practices and concepts – until the housing bubble burst – to which no one paid much attention. One of the principle additions was a subsection that contained 25 definitions that described who did *what* and *how* if a securitized loan went into default.

In addition, at the suggestion of the judges on the Task Force, the 2007-2009 Task Force drafted a set of standard, promulgated forms based on loan types, beginning with the original application to the court order, as part of a new set of Rules.

On two occasions, the Texas Supreme Court Advisory Committee and a Subcommittee of the Committee vetted the 2009 version of the rules and forms proposed by the Task Force. The Committee and Subcommittee recommended only a few substantive changes to the proposed Rules; however, a universal comment was that the 2009 version was too long. The original 1999 version of the Rules contained 1,875 words, but the rules portion of the November 2009 draft contained 6,430 words and the promulgated forms contained another 7,017 words.

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[10] The former rule that was number 735 was renumbered as Rule 733 because Rule 735 and 736 were deemed "Special Proceedings."

[11] Reverse mortgages were added as permitted loans by the 76th Legislative Session, SJR 12, 1999.

[12] 80th Legislative Session, 2007 SB 1520.

Rumors that the 82nd Legislature would add property owner's association assessment liens to the list of liens that would require a court order to foreclose caused the Supreme Court to shelve the November 2009 proposed Rules. The rumors were correct.

3. Property Owner's Association Assessment Liens

In a major redo of laws relating to property owners' associations – more commonly known as homeowners' associations or "HOAs" – the 2011 82nd Legislature added Tex. Prop. Code §209.0091 and 209.0092 pertaining to POA foreclosure. Not making the same mistake made with property tax loan foreclosures as to *who*, *what* and *when* a court order rule was to be drafted, the Texas Supreme Court was directed "*as an exercise of the court's authority under Section 74.024 Government Code*[13] *to adopt rules establishing expedited foreclosure proceedings… substantially similar to the rules adopted by the supreme court under Section 50(r), Article XVI, Texas Constitution.*"[14]

Again, the Supreme Court created a Task Force composed of old members and representatives of the property owner's association legal community. Given a drop-dead date of January 1, 2012 and with the mandate to make the new Rules short, the Task Force went to work and presented a 2,168 word version of Rule 735 and 736 that included property tax lien loans and property owners' associations to the Supreme Court Advisory Committee for review and comment. Based on the recommendation of several trial and appellate court judges on the Advisory Committee, the Task Force tweaked the Rules and presented a proposed version of the Rules to the Supreme Court in September 2011.

The Supreme Court issued its version of Rule 735 and 736 in Misc. Docket No. 11-9215, dated October 17, 2011, that was substantially similar to the Task Force proposal. The new Rules were published in the *Texas Bar Journal* for comment and, based on comments received, the Supreme Court issued a new version of the Rules in Misc. Docket No. 11-9256 dated December 12, 2011. Between December 12 and December 29, 2011, the Supreme Court received additional comments to the proposed Rules, primarily from the POA legal community, and on December 30, 2011, the final Rules were issued in Misc. Docket No. 11-9260.

C. ASSUMPTIONS UNDERLYING NEW RULES

The Task Forces which drafted Rule 735 and 736 did so with the following principles or assumptions in mind:

- Expedited foreclosure rules should not change traditional foreclosure law and rules under the terms of the instrument creating the lien and Tex. Prop. Code Chapter 51.

- Based on the assumption that most expedited foreclosure proceedings would be by default, the administrative burden on the clerks, court coordinators, judges, and the legal system in general should be kept to a minimum.

- The Rules would be drafted pursuant to the Pareto principle – more commonly known as the 80/20 rule – in that the Rules would seek to efficiently handle the typical foreclosure situations that occur 80% [95%][15] of the time. The onus was then put on the

[13] The reference to Tex. Gov't. Code §74.024 giving the Supreme Court the authority to draft a rule may have been erroneous – it should have been Tex. Gov't. Code §22.004(b).
[14] Tex. Prop. Code §209.0092(b)

[15] An educated guess is that 95% of all foreclosures are typical – except to the borrower.

parties and their attorneys to resolve the 20% [5%] foreclosure aberrations or difficulties caused by omissions, ambiguities, or unintended consequences in the construction of the Rules.

- The only issue to be determined in a Rule 736 proceeding would be whether an order could be obtained so that the mortgagee could continue with a nonjudicial foreclosure under the law creating the lien sought to be foreclosed. In practical terms, this meant that once a Rule 736 order was obtained, the foreclosure would not occur for at least 21 days after an order was signed because the mortgagee or mortgage servicer had to comply with the notice rules of Tex. Prop. Code §51.002(b).

- There is a reason Rule 735 and 736 are located in RULES PERTAINING TO SPECIAL PROCEEDINGS in the Texas Rues of Civil Procedure. The reason was to provide flexibility in creating a rule of "*civil procedure for expedited foreclosure proceedings that require a court order*,"[16] when there was no precedence for such a rule.[17] Recognizing the media's focus on foreclosures and the well-publicized issues related to foreclosure in the legal community, the Rules process should be self-enforcing and transparent. Therefore, under a "trust but verify"[18] philosophy, all foreclosure notices, note, security instrument, current assignment and any other lien specific documents required by statute or applicable law to initiate foreclosure must be attached to a Rule 736 application for the court's review.

- Any person entitled to a notice of default must be given an opportunity to cure the default before a Rule 736 application should be filed.

- For record title purposes, the property sought to be foreclosed should be specifically identified in the application, and a conformed copy of the Rule 736 order attached to a trustee or substitute trustee's deed to prove that a Rule 736 order was in fact obtained.

- The testimony by affidavit required to establish the basis of obtaining the expedited order must conform to Rule 166a(f) that governs testimony by affidavit attached to a motion for summary judgment.

- As is the case under current law, a respondent should challenge any alleged foreclosure defect in an independent lawsuit. Filing an independent lawsuit would operate as an automatic stay and the parties could wrangle over whether a foreclosure should proceed in the new lawsuit. This assumption was colored by the Texas version of the federal 12(b)(6) Motion to Dismiss that is being drafted by the Supreme Court pursuant to Tex. Gov't Code §22.004.[19] The new Rules specifically signal judges to impose sanctions if these Rules are abused.[20]

- Standard Rule 736 forms should be promulgated by the Supreme Court after the Rules have had a chance to season and be tested.

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[16] TEX. CONST. art. XVI §50r.

[17] When the 1997 Task Force first began its work, the Colorado foreclosure model was initially considered, but the final version of Rule 735 and 736 was completely unique.

[18] "Trust but verify" was a phrase made famous by President Ronald Reagan.

[19] 82nd Legislative Session HB274 2011.

[20] Rule 736.11(e).

II. SECTION BY SECTION COMMENTARY OF THE NEW RULES

CAVEAT: The following commentary of the new Rules is strictly the opinion of the authors as to the meaning or interpretation of each subsection. However, after spending innumerable hours working on the Rules, the authors believe they have an educated sense of the spirit and intent of each provision even though there might be a difference in opinion as to the meaning of a particular subsection caused by the vagaries of the language used. It should be noted that in several subsections, the Supreme Court did not follow the Task Force's recommendations and re-drafted several provisions based on comments received after the proposed Rules were published in the *Texas Bar Journal*.

NOTE: FOR CLARITY'S SAKE, EACH SECTION OR SUBSECTION DISCUSSED IS QUOTED BEFORE THE AUTHORS' COMMENTS.

A. 735.1 LIENS AFFECTED

Rule 736 provides the procedure for obtaining a court order, when required, to allow foreclosure of a lien containing a power of sale in the security instrument, dedicatory instrument, or declaration creating the lien, including a lien securing any of the following:

(a) a home equity loan, reverse mortgage, or home equity line of credit under article XVI, sections 50(a)(6), 50(k), and 50(t) of the Texas Constitution;

(b) a tax lien transfer or property tax loan under sections 32.06 and 32.065 of the Tax Code; or

(c) a property owners' association assessment under section 209.0092 of the Property Code.

The first portion of Rule 735.1 is a preamble stating that the Rule 736 procedures that follow will apply to liens in which the power of sale that is necessary for a nonjudicial foreclosure is contained in the instrument creating the lien, i.e., the loan agreement,[21] contract,[22] or – for POA assessment liens – the declaration[23] or dedicatory instrument.

Many POA foreclosure practitioners are of the opinion that a sentence in Tex. Prop. Code §209.0092(a) allows all POA liens to be foreclosed nonjudicially without the need of having power of sale or appointment of trustee language in the dedicatory instrument creating the lien sought to be foreclosed.

The sentence is in stark contrast to the condominium foreclosure language in Tex. Prop. Code §82.113(d) where the Legislature provided by statute that a condominium assessment lien could be nonjudicially foreclosed regardless of whether a power of sale was contained in the condominium declaration. Tex. Prop. Code §82.113(d) states:

"By acquiring a unit, a unit owner grants to the association a ***power of sale in connection with the association's lien****. By written resolution, a board may appoint, from time to time, an officer, agent, trustee, or attorney of the association* ***to exercise the power of sale on behalf of the association****. Except as provided by the declaration, an*

[21] The term "loan agreement" refers to Tex. Bus. & Com. Code §26.02(d)(2), where a loan agreement is generally defined as the note, security instrument, and all ancillary documents evidencing the loan transaction.

[22] The term "contract" is included in the Rules based on the belief of some of the property tax lien loan practitioners that a property tax lien loan is a contract obligation and the debt is secured by a lien created under a contract instead of a deed of trust.

[23] POA dedicatory instruments are commonly referred to as "declarations."

association shall exercise its power of sale pursuant to Section 51.002."

The specificity of the language used in §82.113(d) eliminates any doubt that condo liens can be nonjudicially foreclosed pursuant to a statutorily created "power of sale."

Compare the condominium foreclosure statute with the POA foreclosure provision in Tex. Prop. Code §209.0092(a) which states:

"A property owner's association may use the procedure described by this subsection to foreclose any lien described by the association's dedicatory instruments."

The "*procedure described by this section*" referenced above refers to Tex. Prop. Code §209.002(b) that directs the Supreme Court to create an expedited foreclosure process similar to TEX. CONST. art. XVI §50r.[24] As stated in the Official Comment to former Rule 735, the expedited order procedure in Rule 736 simply creates the means to obtain a court order to proceed with a foreclosure under applicable law. Neither Rule 736 nor Tex. Prop. Code §51.002 creates the power of sale to foreclose nonjudicially. Rule 736 only creates the vehicle to obtain an expedited court order.

It also should be noted that Tex. Prop. Code §209.002(a) does not contain the language "*notwithstanding any agreement to the contrary*" to indicate §209.002(a) would supersede contractual terms and conditions found in the loan agreement, contract, lien or dedicatory instrument.

These words are used in two separate instances in the foreclosure chapter of the Property Code[25] to indicate the statute supersedes contractual provisions in the security instrument. For example, Tex. Prop. Code §51.002(d) provides:

"Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default…"

Tex. Prop. Code §51.0075(c) states:

"Notwithstanding any agreement to the contrary, a mortgagee may appoint…"

In addition, Tex. Tax Code §32.065(b) that deals with property tax loan liens states:

"Notwithstanding any agreement to the contrary, a contract entered into under subsection (a)…shall provide for a power of sale and foreclosure in the manner provided by Section 32.06(c)(2)."[26]

As the Official Comment to new Rule 735 and 736 state:

"Rules 735 and 736 have been rewritten and expanded to cover property owners' associations' assessment liens, in accordance with amendments to chapter 209 of the Property Code. ***Rule 735.1 makes the expedited procedures of Rule 736 available only when the lienholder has a power of sale but a court order is nevertheless required by law to foreclose the lien.*** *Rule 735.2 makes clear that Rule 736 is procedural only and does not affect other contractual or legal rights or duties."*

As a practical matter, it would seem the Supreme Court may have artfully avoided having to decide whether Tex. Prop. Code §209.0092 obviates the need to have a power of sale reserved in the dedicatory instruments to nonjudicially foreclose since both a judicial foreclosure action and a Rule 736 proceeding require filing a pleading in court and the Supreme Court states in Rule 735.3 that a judicial foreclosure judgment serves as a Rule 736 order. The Official Comment to Rule 735 and 736 says it better:

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[24] TEX. CONST. art. §50r is the genesis of Rule 735 and 736.

[25] Tex. Prop. Code Chapter 51.

[26] Also see the same language used in Tex. Tax Code §32.065(c) and Tex. Tax Code §32.06(f-3).

"No lienholder is required to obtain both a Rule 736 order and a judgment for judicial foreclosure."

A best practice suggestion is that if there is no express power of sale language contained in the POA declaration, the judicial foreclosure pleadings should contain an allegation or cause of action requesting the Court to simultaneously issue a judgment of foreclosure and a Rule 736 order that contains the specific provisions mandated by Rule 736.8.

B. 735.2 OTHER STATUTORY AND CONSTITUTIONAL FORECLOSURE PROVISIONS UNALTERED

A Rule 736 order does not alter any foreclosure requirement or duty imposed under applicable law or the terms of the loan agreement, contract, or lien sought to be foreclosed. The only issue to be determined in a Rule 736 proceeding is whether a party may obtain an order under Rule 736 to proceed with foreclosure under applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed.

The 2007-2009 Task Force members were surprised that many court personnel were under the impression that a Rule 736 order foreclosed the property – instead of being a condition precedent for foreclosure on the first Tuesday of the month after complying with the notice provisions of Tex. Prop. Code §51.002(b). The Official Comment under former Rule 736 sought to eliminate this notion by stating "*Rule 735 and 736 do not change the duties of a lender seeking foreclosure*."

As indicated in 736.2, once an application is filed, the only issue to be determined is whether a party may obtain a Rule 736 order so that the party can proceed with a foreclosure under the loan agreement, contract or lien sought to be foreclosed. Once a Rule 736 order is obtained, the petitioner can then proceed to file, post and send notice of date, time and place of the nonjudicial foreclosure sale under applicable law.[27]

In essence, Rule 736.2 states a Rule 736 proceeding is merely the method to obtain an expedited order, but the foreclosure process remains unchanged under applicable law for the lien sought to be foreclosed.

C. 735.3 JUDICIAL FORECLOSURE UNAFFECTED

A Rule 736 order is not a substitute for a judgment for judicial foreclosure, but any loan agreement, contract, or lien that may be foreclosed using Rule 736 procedures may also be foreclosed by judgment in an action for judicial foreclosure.

This subsection was two parts. Part one asserts that a Rule 736 order cannot be substituted for a judicial foreclosure judgment – or said another way – if there is no power of sale in the base document creating the lien, then a Rule 736 order does not create the right to nonjudicially foreclose. Part two is just the reverse. Even though the loan agreement documents may provide the power of sale for a nonjudicial foreclosure, the petitioner can also choose to judicially foreclose, which typically arises when the petitioner has title issues or other legal issues that need to be resolved in a regular lawsuit, e.g. reform the deed of trust because of a bad or missing property description.

Though some POA foreclosure practitioners are of the opinion that "*A property owner's association may use the procedures described by this subsection to*

[27] Pursuant to Rule 736.1(d)(3)(F), an application cannot be filed until the requisite notice to cure the default has been mailed. POA practitioners are advised to review Tex. Prop. Code §209.0092(a)(2) as to the timing of the notice to any holder of a lien of record.

foreclose any lien described by the association's dedicatory instrument"[28] means all POA liens can be nonjudicially foreclosed. The Official Comment to the Rules states otherwise:

"Rule 735.1 makes the expedited procedures of Rule 736 available only when the lienholder has a power of sale but a court order is nevertheless required by law to foreclose the lien…but no lienholder is required to obtain both a Rule 736 order and a judgment for judicial foreclosure."

D. 736.1 APPLICATION

1. 736.1(a) *Where Filed.*

An application for an expedited order allowing the foreclosure of a lien listed in Rule 735 to proceed must[29] *be filed in a county where all or part of the real property encumbered by the loan agreement, contract, or lien sought to be foreclosed is located or in a probate court with jurisdiction over proceedings involving the property.*

Former Rule 736 required the application be filed in district court. Under the new Rules, the application can be filed in any court with appropriate jurisdiction in the county where all of part of the real property sought to be foreclosed is located, to include probate courts. If a probate court has jurisdiction over the property in a decedent's estate, the application should be filed in the county where the probate is pending, not where the property is located.

2. 736.1(b) *Style.*

An application must be styled "In re: Order for Foreclosure Concerning [state: property's mailing address] under Tex. R. Civ. P. 736."

The name of each respondent is no longer stated in the style of the case. However, the address of the property continues to be included in the style, which is the mailing address of the property, not the last known mailing address of the obligor of the debt or the property owner.

3. 736.1(c) *When Filed.*

An application may not be filed until the opportunity to cure has expired under applicable law and the loan agreement, contract, or lien sought to be foreclosed.

Depending on the type of lien sought to be foreclosed, the petitioner or mortgage servicer must give notice and the opportunity to cure the default to all persons with the right to cure under applicable law. For a home equity or home equity line of credit loan, the obligor of the debt must be given 20 days to cure the default under Tex. Prop. Code §51.002(b); for a reverse mortgage, 20 or 30 days as provided in TEX. CONST. art XVI §50k(10); for a property tax loan obligor, 20 days to the property owner and six months for "*each holder of a recorded first lien on the property*" under Tex. Tax Code §32.06(f);[30] and for a POA lien, a 61-day notice to cure must be sent to all holders of an inferior or subordinate lien before an application is filed under Tex. Prop Code §209.0091(a)(2).

4. 736.1(d) *Contents.*

a. 736.1(d)(1)

Identify by name and last known address each of the following parties:

The parties to a Rule 736 application must be identified by name and their last known address. "Last known address" is

[28] Tex. Prop. Code §209.0092(a).

[29] The Supreme Court has substituted the word "must" for the proverbial "shall" in the new Rules.

[30] A notice must be sent to the mortgage servicer and each holder of a recorded first lien no later than 10 days after a property tax loan lien is originated. Tex. Tax Code §32.06(b-1).

determined by Tex. Prop. Code §51.0001(2) and §51.0021.

i. 736.1(d)(1)(A)

> *(A) "Petitioner" — any person legally authorized to prosecute the foreclosure;*

Under the new Rules, the person filing an application is described as the "petitioner" instead of the "applicant." In the 1999 version of the Rules, "applicant" was used to get the attention of court personnel as a signal that a Rule 736 application was a very different kind of pleading. After almost twelve years, a Rule 736 application is no longer unique, so to conform to the nomenclature used in the Civil Case Information Sheet that must be attached to original petitions, the person filing the application is called "petitioner" instead of "applicant."[31]

The petitioner is determined in conjunction with 736.1(d)(3)(B), which means petitioner is "*any person legally authorized to prosecute the foreclosure,*" which can be the mortgage servicer under Tex. Prop. Code §1.0025, the mortgagee under Tex. Prop. Code §51.0001(4), a property owners' association, or any other person with authority to prosecute the foreclosure.

ii. 736.1(d)(1)(B)

> *(B) "Respondent" — according to the records of the holder or servicer of the loan agreement, contract, or lien sought to be foreclosed:*
>
> *(i) for a home equity loan, reverse mortgage, or home equity line of credit, each person obligated to pay the loan agreement, contract, or lien sought to be foreclosed and each mortgagor, if any, of the loan agreement, contract, or lien sought to be foreclosed;*
>
> *(ii) for a tax lien transfer or property tax loan, each person obligated to pay the loan agreement, contract, or lien sought to be foreclosed, each mortgagor, if any, of the loan agreement, contract, or lien sought to be foreclosed, each owner of the property, and the holder of any recorded preexisting first lien secured by the property;*
>
> *(iii) for a property owners' association assessment, each person obligated to pay the loan agreement, contract, or lien sought to be foreclosed who has a current ownership interest in the property.*

For clarity's sake, for each type of loan sought to be foreclosed, this subsection describes who must be named as a respondent. For a property owners' association assessment lien, only the current owner of the property is named as a respondent even though prior owners may be obligated for some portion of the delinquent lien assessment.

b. 736.1(d)(2)

> *Identify the property encumbered by the loan agreement, contract, or lien sought to be foreclosed by its commonly known street address and legal description.*

Each application must contain the commonly known street address and legal description of the property sought to be foreclosed. The street address should be

[31] On the Civil Case Information Sheet, "Home Equity–Expedited" is one of the categories listed under the Contract subheading. Accurate completion of this form should give the Texas Judicial Council a better sense of the number of Rule 736 foreclosures filed – instead of depending on guess and extrapolation.

the same as the "mailing address" required in the style of the application in accordance with Rule 736.1(b).

c. 736.1(d)(3)(A)

> *(A) the type of lien listed in Rule 735 sought to be foreclosed and its constitutional or statutory reference;*

The purpose of this subsection is to advise the court what type of lien is sought to be foreclosed and its constitutional or statutory reference:

- Home equity – Tex. Const. art. XVI §50a(6)
- Reverse mortgage – Tex. Const. art. XVI §50a(7)
- Home equity line of credit – Tex. Const. art. XVI §50t
- Transferred tax lien or property tax loan – Tex. Tax Code §32.06(c-1)
- Property owner's association – Tex. Prop. Code §209.0091 and 209.0092.

i. 736.1(d)(3)(B)

> *(B) the authority of the party seeking foreclosure, whether as the servicer, beneficiary, lender, investor, property owners' association, or other person with authority to prosecute the foreclosure;*

If a mortgage servicer[32] is administering the foreclosure under Tex. Prop. Code §51.0025 and the loan sought to be foreclosed has been securitized, for transparency and full disclosure's sake, the "investor" – i.e., generally Fannie Mae or Freddie Mac for agency loans and the trustee for the special purpose entity for private label securitizations – should be named as the mortgage servicer's principal and the mortgagee of the loan agreement.

ii. 736.1(d)(3)(C) and (D)

> *(C) each person obligated to pay the loan agreement, contract, or lien sought to be foreclosed;*
>
> *(D) each mortgagor, if any, of the loan agreement, contract, or lien sought to be foreclosed who is not a maker or assumer of the underlying debt;*

Determining the identity of each respondent should be read in conjunction with Rule 736.1(d)(1)(A) and (B). The "if any" phrase contained in 736.1(d)(3)(D) seems obtuse, but for a POA lien there is no security instrument to be signed by a mortgagor. A property owner assessment lien arises from the POA declaration which runs with the land.

iii. 736.1(d)(3)(E)

> *(E) as of a date that is not more than sixty days prior to the date the application is filed:*
>
> *(i) if the default is monetary, the number of unpaid scheduled payments,*
>
> *(ii) if the default is monetary, the amount required to cure the default,*
>
> *(iii) if the default is non-monetary, the facts creating the default, and*
>
> *(iv) if applicable, the total amount required to pay off the loan agreement, contract, or lien;*

To ensure stale default figures are not used when the application is filed, the amount to cure the default, the number of scheduled payments that have not been

[32] For an excellent discussion of the business of mortgage servicing that has been cited in several federal appellate court opinions, see Adam J. Levitin and Tara Twomey, *Mortgage Servicing*, 28 Yale Journal on Regulations I (Winter 2011).

made, and the payoff amount must be calculated within 60 days before the application is filed. If the default is a non-monetary default – which will often be the case with reverse mortgages – the facts surrounding the default must be described.[33] No payoff is required for a POA lien because there is no loan agreement and the lien runs with the land.

iv. 736.1(d)(3)(F)

> *(F) that the requisite notice or notices to cure the default has or have been mailed to each person as required under applicable law and the loan agreement, contract, or lien sought to be foreclosed and that the opportunity to cure has expired; and*

The subsection requires the petitioner or mortgage servicer to affirmatively state that notice of default was mailed to any person required to receive foreclosure notices under the terms of the loan agreement, contract or lien and that the person failed to cure the default within the time provided by applicable law. As provided in Rule 736.1(d)(6), a copy of the pertinent notice must be attached to the application, which is an example of the "trust but verify" oversight of the mortgage servicer's legal responsibility.

v. 736.1(d)(3)(G)

> *(G) that before the application was filed, any other action required under applicable law and the loan agreement, contract, or lien sought to be foreclosed was performed.*

This broad catch-all subsection requires the petitioner or mortgage servicer to aver that all other applicable foreclosure mandates were met before the application was filed. This section could be a trap for the unwary practitioner not paying attention to details in that there could be an unusual pre-foreclosure requirement in a non-standard deed of trust or a property owner's association declaration or bylaws that must be performed. However, some of the ambiguity created by the broad language used in this subsection is removed by Rule 736.1(6) that expressly states what foreclosure documents and notices are required for each type of lien sought to be foreclosed.

d. 736.1(d)(4)

> *For a tax lien transfer or property tax loan, state all allegations required to be contained in the application in accordance with section 32.06(c-l)(l) of the Tax Code.*

For a transferred tax lien or property tax loan foreclosure, Tex. Tax Code §32.06(c-1) requires very specific allegations be contained in a Rule 736 application, which include:

(a) Allege the lien is an ad valorem tax lien instead of a lien created under Tex. Const. art. XVI §50 – Tex. Tax Code §32.06(c-1)(1)(A);

(b) State the "applicant" [*sic*] petitioner does not seek a court order required by Tex. Const. art. XVI §50r – Tex. Tax Code §32.06(c-1)(1)(B);

(c) State that a notice of default was given in accordance with Tex. Prop. Code §51.002 and a notice of acceleration was given to the property owner and the holder of a recorded first lien – Tex. Tax Code §32.06(c-1)(1)(C); and

(d) Allege the property owner has not requested a tax deferment under Tex. Tax Code §33.06 – Tex. Tax Code §32.06(c-1)(1)(D).

PRACTICE POINT: This subsection requires that the respondent be given the opportunity to cure the default before an application is filed. However, no mention

[33] Tex. Const. art. XVI §50k and specifically §50k(10) and (11).

is made whether an installment debt must be accelerated prior to filing that application, except for a property tax lien loan in accordance with Tex. Tax Code §32.06(c-1)(1)(8). A careful practitioner should consider accelerating the maturity of the debt before filing a Rule 736 application in accordance with *Sonny Arnold, Inc. v. Sentry Savings Ass'n*, 633 S.W.2d 811 (Tex. 1982); *Williamson v. Dunlap*, 693 S.W.2d 373, 374 (Tex. 1985); and *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991). A careful practitioner might also consider adding to their application a formal notice and statement that the maturity of the debt has been accelerated – assuming that a proper unequivocal notice of intent to accelerate was previously given.

e. 736.1(d)(5)

Conspicuously state:

(A) that legal action is not being sought against the occupant of the property unless the occupant is also named as a respondent in the application; and

(B) that if the petitioner obtains a court order, the petitioner will proceed with a foreclosure of the property in accordance with applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed.

To ensure a respondent is aware that a 736 order could result in a foreclosure of the secured property, the application must contain a conspicuous disclosure that:

(a) "Legal action is not being sought against the occupant of the property unless the Occupant is also named as a respondent in the application;" and

(b) "If the petitioner obtains a court order, the petitioner will proceed with a foreclosure of the property in accordance with applicable law and the terms of the lien sought to be foreclosed."

f. 736.1(d)(6)

Include an affidavit of material facts in accordance with Rule 166a(f) signed by the petitioner or the servicer describing the basis for foreclosure and, depending on the type of lien sought to be foreclosed, attach a legible copy of:

Under this subsection, the petitioner or its servicer must set forth the "material" facts describing the basis of the foreclosure in accordance with Tex. R. Civ. Proc. §*166a(f)*, which is the rule that relates to testimony by affidavit attached to a motion for summary judgment.

To prepare an affidavit to withstand a "robo-signing" challenge, a practitioner might review the following legal opinions for ideas on how to prepare the Rule *166a(f)* affidavit: *Bell v. State*, 176 S.W.3d 90 (Tex.App.—Houston [1st Dist.] 2004, no pet.); *Simien v. Unifund CCR Partners*, 321 S.W.3d 235 (Tex.App.—Houston [1st Dist.] 2010, no pet.); *In re: E.A.K.* 192 S.W.3d 133 (Tex.App.—Houston [14th Dist.] pet. den.); *Old Republic Ins Co v. Edwards*, 2011 WL 2623994 (Tex.App.—Houston [1st Dist.] June 30, 2011, no pet.).

i. 736.1(d)(6)(A) - (C)

(A) the note, original recorded lien, or pertinent part of a property owners' association declaration or dedicatory instrument establishing the lien, and current assignment of the lien, if assigned;

(B) each notice required to be mailed to any person under applicable law and the loan agreement, contract, or lien sought to be foreclosed before the application was filed

and proof of mailing of each notice; and

(C) for a tax lien transfer or property tax loan:

(i) the property owner's sworn document required under section 32.06(a-1) of the Tax Code; and

(ii) the taxing authority's certified statement attesting to the transfer of the lien, required under section 32.06(b) of the Tax Code.

Inflammatory foreclosure headlines, media scrutiny, and OCC Consent Orders for Unsafe and Unsound Residential Mortgage Loan Servicing Practices against 14 of the largest servicers which service 68% of all residential mortgages[34] have created a legal environment in which trial judges no longer assume or accept affidavits that the petitioner complied with applicable law.

Under the new Rules, legible copies of all notices and other documents necessary to initiate foreclosure must be attached to the application. For property tax loan liens, the petitioner must attach copies of the documents set forth in 736.1(6)(A) and (B) but also under (C), the property owner's sworn document required under Tex. Tax Code §32.06(a-1) and the certified statement required under Tex. Tax Code §32.06(b).

For a property owner's association assessment lien, the complete POA declaration does not have to be attached to the application, only the pertinent portion that authorizes the creation of the assessment lien sought to be foreclosed.

[34] FDIC Interagency Review of Foreclosure Process and Practices" – April 2011.

E. 736.2 COSTS

All filing, citation, mailing, service, and other court costs and fees are costs of court and must be paid by petitioner at the time of filing an application with the clerk of the court.

The district clerk and court administrator representatives on the 2007-2009 Task Force recommended this subsection because it is unsettled whether a clerk is legally obligated and must file a petition even though all the filing and citation fees have not been paid. This subsection makes clear all "*filing, citation, mailing, service, and other court costs and fees must be paid by the petitioner at the time the application is filed*." All such fees are deemed "costs of court" so that a mortgage servicer can collect these costs from its investor.

F. 736.3 CITATION

1. 736.3(a) *Issuance.*

(1) When the application is filed, the clerk must issue a separate citation for each respondent named in the application and one additional citation for the occupant of the property sought to be foreclosed.

(2) Each citation that is directed to a respondent must state that any response to the application is due the first Monday after the expiration of 38 days from the date the citation was placed in the custody of the U.S. Postal Service in accordance with the clerk's standard mailing procedures and state the date that the citation was placed in the custody of the U.S. Postal Service by the clerk.

The process for serving Rule 736 applications is radically changed under new Rule 736. Under the former Rule 736 procedure, the applicant's attorney mailed the application to the obligor and obligor's attorney, if the name and address of the

attorney was known to the applicant. Based on concerns of "sewer service" under the old Rules, the new Rules require the clerk of the court to serve the citation – instead of the petitioner's attorney – by both certified and regular mail. The date of service is the date the clerk puts the citation into the custody of the U.S. Postal Service in accordance with the clerk's internal mailing procedures.

Under the new Rules, the clerk of the court also prepares a citation for each respondent named in the application and one citation addressed to "Occupant at the property address." Each citation directed to a respondent must state: (a) the date the citation was put into the custody of the U.S. Postal Service; and (b) except for the citation addressed to the Occupant, that a response is due after the expiration of 38 days from the date the citation was placed in the custody of the U.S. Postal Service by the clerk's office. The clerk notates on the citation the date the citation was delivered into the custody of the U.S. Postal Service, in accordance with the clerk's customary mailing practices. The intent of this Rule seeks to ensure that the clerk's normal citation and standard mailing procedures are not disrupted.

2. 736.3(b) *Service and Return.*

(1) The clerk of the court must serve each citation, with a copy of the application attached, by both first class mail and certified mail. A citation directed to a respondent must be mailed to the respondent's last known address that is stated in the application. A citation directed to the occupant of the property sought to be foreclosed must be mailed to Occupant of [state: property's mailing address] at the address of the property sought to be foreclosed that is stated in the application.

(2) Concurrently with service, the clerk must complete a return of service in accordance with Rule 107, except that the return of service need not contain a return receipt. For a citation mailed by the clerk in accordance with (b)(1), the date of service is the date and time the citation was placed in the custody of the U.S. Postal Service in a properly addressed, postage prepaid envelope in accordance with the clerk's standard mailing procedures.

(3) The clerk must only charge one fee per respondent or occupant served under this rule.

Concurrently with service of the citation, the clerk completes the return of service in accordance with Rule 107. However, contrary to Rule 107, no return mail receipt has to be attached to the return. So that an "Occupant" who receives a citation and who is not otherwise named as a respondent is not lead to the mistaken belief that the Occupant must file a response, Rule 736.1(d)(5)(A) requires a conspicuous disclosure in the application advising the Occupant that no legal action is being sought against an Occupant who is not otherwise named as a respondent. Since service and return are done concurrently, the date of service and return are the same date.

The mailing address for all citations is the last known address for each respondent and the property street address as contained in the application.

G. 736.4 DISCOVERY

No discovery is permitted in a Rule 736 proceeding.

No discovery is permitted under Rule 736, which is consistent with the "expedited" nature of Rule 736. If a respondent wishes to obtain discovery to contest some aspect of the foreclosure process, the respondent must file a normal lawsuit.

H. 736.5 RESPONSE

1. 736.5(a) *Generally.*

A respondent may file a response contesting the application.

Any respondent may file a response.

2. 736.5(b) *Due Date.*

Any response to the application is due the first Monday after the expiration of 38 days from the date the citation was placed in the custody of the U.S. Postal Service in accordance with the clerk's standard mailing procedures, as stated on the citation.

Except for the citation served on the "Occupant at the property address", the due date for any response is the first Monday after the expiration of 38 days from the date the clerk served the citation by certified and regular mail. The date of mailing must be stated in each citation because the response date is calculated from the date of service.

3. 736.5(c) *Form.*

A response must be signed in accordance with Rule 57 and may be in the form of a general denial under Rule 92, except that a respondent must affirmatively plead:

A response can be in the form of a general denial under Tex. R. Civ. Proc. §92; however, the person signing a response must include the signor's contact information – whether as an attorney or *pro se* respondent – in accordance with Tex. R. Civ. Proc. §57.

i. 736.5(c)(1) – (5)

(1) why the respondent believes a respondent did not sign a loan agreement document, if applicable, that is specifically identified by the respondent;

(2) why the respondent is not obligated for payment of the lien;

(3) why the number of months of alleged default or the reinstatement or pay off amounts are materially incorrect;

(4) why any document attached to the application is not a true and correct copy of the original; or

(5) proof of payment in accordance with Rule 95.

Unlike the former Rule, the response under the new Rule has an affirmative defense requirement in that the respondent must affirmatively plead:

- WHY (emphasis added) the respondent believes the respondent did not sign a loan agreement document that the respondent must specifically identify;
- WHY the respondent is not obligated for payment of the lien;

NOTE: it has been suggested that "payment of the lien" is incorrect and should be "payment of the loan agreement obligation" if the lien relates to a home equity, HELOC, reverse mortgage or property tax loan. However, Blacks Law Dictionary's definition of lien is "*a legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied*", so it would seem the intent of this provision is clear. The same comment could apply to 736.1(d)(3)(E)(iv) that requires the application must state "the amount required to pay off the lien."

- WHY the number of "months" [*sic*][35] the loan is alleged to have

[35] The word "months" probably should have been replaced with "unpaid scheduled payments" to coincide with Rule 736.1(d)(3)(E)(i) which was changed in the final version of the Rules because POA

been in default, or the reinstatement or payoff amount alleged in the application, are materially incorrect;

- WHY a document attached to the application is not a true and correct copy of the original; and
- Proof of payment as required under Tex. R. Civ. Proc. §95, which states "*the respondent must file an accounting that states distinctly the nature of payment and when payments were made.*" Rule 95 further provides the defendant [respondent] is not allowed to prove payment "*unless it be so plainly and particularly described in the plea as to give the plaintiff* [petitioner] *full notice of the character thereof.*"

4. 736.5(d) *Other Claims.*

A response may not state an independent claim for relief. The court must, without a hearing, strike and dismiss any counterclaim, cross claim, third party claim, intervention, or cause of action filed by any person in a Rule 736 proceeding.

This subsection enforces the principle that Rule 736 is an expedited proceeding in that the court must strike and dismiss any counterclaim, crossclaim, third party claim, intervention or other cause of action filed by any person. If a person wants to file any of these type claims, the person must file an independent lawsuit as provided in Rule 736.8(c) which states any challenge to a Rule 736 order must be "*made in a suit filed in a separate, independent, original proceeding in a court of competent jurisdiction.*"

I. 736.6 HEARING REQUIRED WHEN RESPONSE FILED

The court must not conduct a hearing under this rule unless a response is filed.

practitioners pointed out that POA liens don't require monthly payments.

If a response is filed, the court must hold a hearing after reasonable notice to the parties. The hearing on the application must not be held earlier than 20 days or later than 30 days after a request for a hearing is made by any party. At the hearing, the petitioner has the burden to prove by affidavits on file or evidence presented the grounds for granting the order sought in the application.

"The court must not conduct a hearing under this Rule unless a response is filed."

Can the last provision be stated any clearer – the court is not authorized to conduct a hearing unless a respondent files a response.

If a response is filed, however, the court must hold a hearing "after reasonable notice to the parties." A condition precedent for a hearing is that a party must request a hearing and once requested, the hearing date must be set within 20-30 days after the hearing was requested.

J. 736.7 DEFAULT WHEN NO RESPONSE FILED

(a) If no response to the application is filed by the due date, the petitioner may file a motion and proposed order to obtain a default order. For the purposes of obtaining a default order, all facts alleged in the application and supported by the affidavit of material facts constitute prima facie evidence of the truth of the matters alleged.

(b) The court must grant the application by default order no later than 30 days after a motion is filed under (a) if the application complies with the requirements of Rule 736.1 and was properly served in accordance with Rule 736.3. The petitioner need not appear in court to obtain a default order.

> *(c) The return of service must be on file with the clerk of the court for at least 10 days before the court may grant the application by default.*

If no response is filed, the onus is put on the petitioner to prepare and file a motion and proposed Rule 736 default order because in many counties, the clerk's case management or docket control systems do not handle the unique logistical and administrative particularities of Rule 736 proceedings very well. However, once a motion for default and order are filed, most clerks' docket control systems can easily schedule the motion and order for review by the presiding judge.

Under the new Rules, the court must sign a Rule 736 default order within 30 days of receipt of the motion and order so long as the application contains all the elements required by Rule 736.1 and citation was properly served in accordance with Rule 736.4. Though this Rule requires that the return of service be on file for 10 days before the hearing, there should be no concern over when the citation was returned because the return date and service date are the same.[36]

A new addition to the Rules is that a petitioner does not need to appear in court to obtain a default order.

K. 736.8 ORDER

> *(a) The court must issue an order granting the application if the petitioner establishes the basis for the foreclosure. Otherwise, the court must deny the application.*
>
> *(b) An order granting the application must describe:*
>
> *(1) the material facts establishing the basis for foreclosure;*
>
> *(2) the property to be foreclosed by commonly known mailing address and legal description;*
>
> *(3) the name and last known address of each respondent subject to the order; and*
>
> *(4) the recording or indexing information of each lien to be foreclosed.*
>
> *(c) An order granting or denying the application is not subject to a motion for rehearing, new trial, bill of review, or appeal. Any challenge to a Rule 736 order must be made in a suit filed in a separate, independent, original proceeding in a court of competent jurisdiction.*

Except for a default, the court can either grant or deny a Rule 736 application and the order is not subject to a motion for rehearing, new trial, bill of review, or appeal. Any challenge to a Rule 736 order must be made "*in a suit filed in a separate, independent, original proceeding in a court of competent jurisdiction.*"[37]

If the petitioner's application is denied, it is assumed a new original Rule 736 application could be filed instead of a full-blown lawsuit because a new original Rule 736 application would be a separate, original proceeding filed in a court of competent jurisdiction. Since a Rule 736 application cannot be amended or supplemented, this Rule may eliminate sloppy pleading practices because a petitioner will be forced to file a Rule 736 application correctly the first time or otherwise suffer the consequences.

A Rule 736 order must contain four elements:

[36] Rule 736.3(b)(2).

[37] Rule 736.8(c).

- A description of the material facts establishing the basis for foreclosure;
- The commonly known mailing address and legal description of the property sought to be foreclosed;
- Name and last known address of each respondent; and
- The real property recording or indexing information of the lien sought to be foreclosed.

NOTE: If the Rule 736 order is an order by default, the petitioner must comply with Servicemembers Civil Relief Act affidavit requirements and the order must recite the respondent(s) are not in the military. Otherwise, the petitioner and the court must comply with 50 U.S.C. app. §521(b)(1). See *Hawkins v. Hawkins*, 999 S.W.2d 171, 174 (Tex. App.—Austin 1999, no pet.).

L. 736.9 EFFECT OF ORDER

An order is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding. After an order is obtained, a person may proceed with the foreclosure process under applicable law and the terms of the lien sought to be foreclosed.

A Rule 736 order is without prejudice and has no res judicata, collateral estoppel, or estoppel by judgment effect in any other judicial proceeding. Once a Rule 736 order is obtained, the petitioner may continue with the normal foreclosure process required by applicable law and the terms of the instrument creating the lien sought to be foreclosed.

M. 736.10 BANKRUPTCY

If a respondent provides proof to the clerk of the court that respondent filed bankruptcy before an order is signed, the proceeding under this rule must be abated so long as the automatic stay is effective.

If a respondent files bankruptcy before a Rule 736 order is entered, the 736 proceeding is abated so long as the automatic stay in the bankruptcy proceeding is in effect. Once the stay is lifted, the petitioner can proceed with its quest to obtain an order. The respondent must provide the clerk of the court with proof that bankruptcy was filed before the order is entered.

N. 736.11 AUTOMATIC STAY AND DISMISSAL IF INDEPENDENT SUIT IS FILED

(a) A proceeding or order under this rule is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter related to the origination, servicing, or enforcement of the loan agreement, contract, or lien sought to be foreclosed prior to 5:00 p.m. on the Monday before the scheduled foreclosure sale.

(b) Respondent must give prompt notice of the filing of the suit to petitioner or petitioner's attorney and the foreclosure trustee or substitute trustee by any reasonable means necessary to stop the scheduled foreclosure sale.

(c) Within ten days of filing suit, the respondent must file a motion and proposed order to dismiss or vacate with the clerk of the court in which the application was filed giving notice that respondent has filed an original proceeding contesting the right to foreclose in a court of competent jurisdiction. If no order has been signed, the court must dismiss a pending proceeding. If an order has been signed, the court must vacate the Rule 736 order.

(d) If the automatic stay under this rule is in effect, any foreclosure sale of the property is void. Within 10 business days of notice that the foreclosure sale was void, the trustee or substitute trustee must return to the buyer of the foreclosed property the purchase price paid by the buyer.

(e) The court may enforce the Rule 736 process under chapters 9 and 10 of the Civil Practices and Remedies Code.

So long as the respondent files "*a separate, original proceeding in a court of competent jurisdiction that puts at issue any matter related to the origination of the loan agreement, contract or lien sought to be foreclosed prior to 5:00 p.m. on the Monday before the scheduled foreclosure sale,*"[38] a Rule 736 proceeding or order is abated. The choice of the words "automatic stay" in this subsection is intended to mirror the "automatic stay" concept found in the bankruptcy code. This automatic stay applies whether: (a) the application is pending; or (b) a Rule 736 order has been entered but the property has not been foreclosed.

To prevent an unnecessary foreclosure sale, the respondent is tasked with using any reasonable means necessary to stop a scheduled foreclosure sale by giving notice of filing the suit to the petitioner or petitioner's attorney **and** the foreclosure trustee or substitute trustee.[39] Since the address of the trustee or substitute trustee must be contained in the notice of sale as required by Tex. Prop. Code §51.0075(e), the respondent has a street address for use in contacting the substitute trustee(s).

The respondent has 10 days after filing an independent suit to file a motion and proposed order to: (a) "dismiss" a Rule 736 proceeding if no order is signed; or (b) "vacate" a Rule 736 order if an order has been signed.[40]

If the "automatic stay" provision was in effect, a foreclosure requiring a Rule 736 order is void and the trustee or substitute trustee must return the purchase price paid by a foreclosure sale buyer within 10 days on receiving notice the sale was void.[41]

NOTE: The new Rules send a not so subtle warning that "gaming" the stay rule and the Rule 736 process in general may make a party subject to sanctions under Tex. Civ. Prac. & Rem. Code Chapters 9 and 10.[42]

O. 736.12 ATTACHMENT OF ORDER TO TRUSTEE'S DEED

A conformed copy of the order must be attached to the trustee or substitute trustee's foreclosure deed.

For purposes of record title and to confirm a Rule 736 order was actually obtained, a copy of the applicable Rule 736 order must be attached to the trustee or substitute trustee's foreclosure deed.

P. 736.13 PROMULGATED FORMS

The Supreme Court of Texas may promulgate forms that conform to this rule.

After the new Rules have had a chance to season and be tested in practice, the Supreme Court may issue a set of promulgated forms that conform to Rule 736.

[38] Rule 736.11(a).
[39] Rule 736.11(b).
[40] Rule 736.11(c).
[41] Rule 736.11(d).
[42] Rule 736.11(e)