

2011 TASK FORCE DRAFT

Formatted: Not Highlight

DRAFT 23

POST 8/23/2011 CONFERENCE CALL VERSION

Part VII. RULES RELATING TO SPECIAL PROCEEDINGS

**SECTION 1. PROCEDURES RELATEDING TO HOME EQUITY,
REVERSE MORTGAGE, HOME EQUITY LINE OF CREDIT,
TRANSFERRED OR PROPERTY TAX-LOAN, AND PROPERTY
OWNERS' ASSOCIATION LIEN FORECLOSURES**

Rule 735. Court Order Required Foreclosures

735.1. Liens Requiring A Court Order

A party seeking to foreclose a lien requiring a court order for: (a) a home equity, reverse mortgage, or home equity line of credit - Article XVI, Section 50(a)(6)¹, Section 50(k)², and Section 50(t)³, Texas Constitution; (b) transferred or property tax loan - Section 32.06 and Section 32.065, Tax Code; or (c) property owners' association assessment lien - Section 209.0092, Property Code⁴ may shall obtain: (a) a judgment for judicial foreclosure; or (b) an expedited order under Rule 736 from a district court in a county where all or part of the real property encumbered by the lien sought to be foreclosed is located or from a court with equivalent jurisdiction.

**735.2. Other Statutory and Contractual Foreclosure
Provisions⁵ —Unchanged**

¹ Bluebook says cite as Article XVI § 50a(6) Black Statutes Article 16 §50a(6)

² 50(k) is the general cite for a reverse mortgage

³ 50(t) is general reference to HELOC

⁴ Redrafted so that could follow citation format of 311.004 Gov Code

⁵ Or should the word be "Requirements", "Mandates", "Provisions", "Prerequisites", or "Conditions"???

(a) Obtaining an expedited order under Rule 736 does not change any foreclosure requirement or duty imposed under applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed.

(b) The only issue to be determined in a Rule 736 proceeding is whether a person the petitioner may proceed with foreclosure under applicable law and the terms of because of a breach of the loan agreement, contract, or lien sought to be foreclosed.^{6, 7}

Rule 736. Expedited Foreclosure Proceeding

736.1. Application

(a) A party seeking an expedited order allowing a foreclosure to proceed must file an application styled “In re: Order for Foreclosure Concerning [state: property’s mailing address] under Tex. R. Civ. Proc. 736” and identify each person described in subsection (b)(1). An application may not be filed until the opportunity to cure under applicable law and the loan agreement, contract, or lien sought to be foreclosed has expired.^{8, 9}

(b) The application shall:

(1) Identify by name and last known address each party as follows: (A) “Petitioner” – the person legally authorized to prosecute the foreclosure; (B) “Respondent” – each person who, according to the records of the servicer of the lien sought to be foreclosed: (i) breached an

⁶ Moved this provision from the Response and Order sections so that it is clear from the very beginning what a Rule 736 proceeding is all about.

^{7, 7} I believe this is a more precise statement of what the court has to do

⁸ The original Rule 736 rule [736.(1)(E)(4)] required the applicant state the debt was accelerated, which effectively meant that the application could not be filed until the borrower had failed to cure the default in the appropriate time frame. A borrower must be given an opportunity to cure before an application is filed; otherwise, because of time-line pressures, most servicers will require their attorneys to file the application at the same time the demand to cure is sent to the borrower because there is no prohibition on when an application can be filed. A POA lien does not need to be accelerated but the borrower and inferior lien holder are given the opportunity to cure.

⁹ Karen argues that “loan agreement, contract, or lien sought to be foreclosed” should be specifically stated and the rule should not depend on the simple phrase “applicable law”. Note: later in the draft these words are reduced to “lien sought to be foreclosed.”

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Underline

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

obligation secured by the lien; (ii) except for a property owners' association lien, is each a mortgagor of the lien sought to be foreclosed;¹⁰ and (iii) for a transferred or property tax ~~loan~~ lien or contract sought to be foreclosed, each owner of the property and the holder of any recorded preexisting first lien secured by the property.

(2) Identify the property encumbered by the lien sought to be foreclosed by its commonly known street address and legal description.

(3) Describe or state: (A) the type of lien in Rule 735.1 sought to be foreclosed and its constitutional or statutory reference;; (B) the authority of the party seeking foreclosure; (C) each person obligated to pay the maker or assumer of the note secured by the lien sought to be foreclosed; (D) except for a property owners' association lien, each mortgagor of the lien sought to be foreclosed ~~grantor of the lien sought to be foreclosed~~ who is not a maker or assumer of the underlying debt; (E) as of a date that is not more than sixty days prior the date the application is filed;¹¹ (i) the number of months the obligation secured by the lien sought to be foreclosed is in default, (ii) the amount required to cure the default, (iii) and the amount required to pay off the lien; ~~and~~ (F) that the requisite notice to cure the default has been mailed to each person as required by applicable law and the loan agreement, contract, or lien sought to be foreclosed; and (G) that any other action required to cure a breach of the lien by under applicable law and the loan agreement, contract, or lien sought to be foreclosed was performed before the application was filed.

(4) For a transferred or property tax ~~loan~~ lien or contract, state all allegations required to be contained in the application in accordance with Section 32.06(c-1)(1) Tax Code¹².

(5) Conspicuously state that if the petitioner obtains a court order, the petitioner will proceed with a foreclosure of the property in

¹⁰ Ensures a non-obligated mortgagor will get notice of foreclosure

¹¹ Switched position of "date certain" clause to ensure that there is NO question that the date certain requirement applies to (i) (ii) and (iii) – not just (iii)

¹² Citation format from 311.001 Gov. Code

75 accordance with applicable law and the terms of the lien sought to be
76 foreclosed.¹³

77 (6) Include an affidavit¹⁴ of material facts s in accordance with
78 Rule 166a(f) signed by petitioner or the servicer of the petitioner
79 ¹⁵establishing the basis for foreclosure in accordance with Rule 166a(f)
80 and, depending on the type of lien sought to be foreclosed, attach a
81 legible copy of: (A1) the note, original recorded lien or pertinent part of
82 a property owners' association declaration establishing the lien, and
83 current assignment of the lien, if assigned; (B2) each ¹⁶notice required
84 to be mailed to any person under applicable law and the loan
85 agreement, contract or lien sought to be foreclosed required to be mailed
86 before the application was filed and proof of mailing of each notice; (C3)
87 for a transferred or property tax loan lien or contract, the sworn
88 document and certified statement attesting to the transfer of the lien¹⁷.

Formatted: Not Highlight

Formatted: Highlight

89 **736.2. Costs**

90 All filing, citation, mailing, service, and other court costs and¹⁸ fees
91 shall be taxed as costs of court and paid by petitioner at the time of
92 filing an application with the clerk of the court.

93 **736.3. Service of Citation by Mail**

¹³ Mary thought this provision was struck in our first meeting; Fred argues this MUST be in the application because it tells the respondent what the application is all about.

¹⁴ According to the Supreme Court's Rules attorney, in the near future the Rules of Civil will substitute the word "affidavit" with the word "declaration".

¹⁵ TPC 51.0025 allows a mortgage servicer to administer foreclosure on behalf of the mortgagee. If done properly the petitioner should be the "investor" but the investor delegates all loan level servicing activities to the servicer. It would be next to impossible to get the investor to sign an affidavit because that is the job of its agent - the mortgage servicer.

¹⁶ Could be argue that some of the notices required to be sent to person other than the obligor are not *per se* "foreclosure" notices

¹⁷ 32.06(a-4) Tax Code, requires the Finance Commission to promulgate the sworn statement and certified statement form and 32.06(d) requires the certified statement to be filed in the land title records

¹⁸ To ensure all fees and costs are covered

(a) The clerk of the court shall mail by first class mail a citation, with the application attached, to each respondent and to "Occupant of [state: property's mailing address] at the address provided¹⁹ in the application." To compensate for the costs of mailing a citation, the clerk of the court may collect a reasonable fee not to exceed \$10.00 for each citation mailed.

(b) The response date for any citation mailed to a respondent is 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 of the court's standard mailing procedures. A response date is not applicable for a citation mailed or served on the "Occupant" of the property sought to be foreclosed; however, the citation shall state that the recipient of the citation is not required to²⁰ file a response unless the recipient is otherwise named as a respondent in the application²¹.

(c) Service of the citation by mail is complete when it is deposited into the custody of the U.S. Postal Service in a properly addressed, postage prepaid envelope. For a citation mailed by the clerk, the return of service is the date and time the citation was placed in the custody of the U.S. Postal Service in accordance with the clerk's standard mailing procedures.

736.31. Service of Citation on the Property

(a) The clerk shall prepare a second citation addressed to "Occupant of [state: property's mailing address]" for service on the property by an authorized person under Rule 103. The citation shall be placed in an envelope without any other markings except the conspicuous notation "To the Occupant of [state: property's mailing address] - Important Legal Document Inside" and served on any person over the age of sixteen (16) years occupying the property. If service on a person is unsuccessful, the citation shall be served by securely affixing the envelope to the front door or main entry of the property.

¹⁹ Should the word be "provided" or "contained" or does it make a difference.

²⁰ 311.016 Gov't Code language

²¹ Hopefully this instruction will prevent phone calls to the clerk or petitioner on what to do with a citation served on an Occupant.

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

(b) If the property cannot be accessed or is located in a gated community, within 24 hours of the attempted delivery of citation on the property, the process server shall place the citation into a prepaid wrapper or envelope addressed to "Occupant of [state: property's mailing address]" with the conspicuous notation "DO NOT RETURN TO SENDER" into the custody of the U.S. Postal Service's express mail service or a commercial delivery service that provides proof of delivery as a customary business practice.

(e) The return of service shall be in accordance with Rule 107. If service is by express mail or commercial delivery service, the deliverer and its tracking number ²²shall be stated on the return of service.

736.32. Service on the Holder of a Recorded Preexisting First Lien

If the lien sought to be foreclosed is a transferred or property tax lien or contract. The current mortgagee or the mortgage servicer of a recorded preexisting first lien shall be served with citation under Rule 106, ~~if the lien sought to be foreclosed is a transferred or property tax loan lien or contract.~~

736.4. Discovery²³

No discovery is permitted in a Rule 736 proceeding.

736.5. Response

(a) A response shall 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: (1) why the respondent believes a respondent did not sign a loan agreement document 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

²² Requiring the original receipt would prevent electronic filing

²³ Move placement of discovery rule form 736.6

document attached to the application is not a true and correct copy of the original; or (5) ~~provide~~ proof of payment in accordance with Rule 95.

(b) The court shall ²⁴, 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. ²⁵

736.6 Hearing Required When Response Filed

The court shall not conduct a hearing under this rule unless a response is filed. The hearing must be held not earlier than 20 days and not more than 30 days after a request for a hearing is made.

(

(b)²⁶ . ²⁷

²⁸.

736.7. If No Response Filed²⁹

³⁰(a) If a respondent does not file a response, to obtain a default order the petitioner must file with the clerk of the court a motion and proposed order. The motion and order may not³¹ be filed until the due date for the respondent's response has expired.

(b) If a respondent does not file a response, all facts alleged in an application and supported by the affidavit of material facts shall constitute prima facie evidence of the truth of the matters alleged.

²⁴ May or shall??

²⁵ I would argue that this provision should stay in the rule so that it explains WHAT a respondent needs to do to, i.e., bring a counterclaim etc, and explains to a judge WHY the judge can dismiss the counterclaim etc.

²⁶ Moved to 735.2 to establish at the beginning of the rules what a Rule 736 proceeding is all about.

²⁷ I believe this is a more precise statement of what the court has to do

²⁸ Moved to 736.4

²⁹ Tweaked the organization so that have a separate Default provision and an Order provision

³⁰ Moved to 735.2

³¹ 311.0116 Gov. Code says "may not" is the same as shall not

(c) No hearing is required if the respondent fails to file a response. The presiding judge shall sign a default order no earlier than 10 days and no later than 30 days after a respondent's response date expires.

736.8 Order³²

(a) An order shall describe: (A) the material facts establishing the basis for foreclosure; (B) the property to be foreclosed by commonly known mailing address and legal description; (C) name and last known address of each respondent subject to the order; (D) the recording or indexing information of each lien to be foreclosed.³³

(b) An order is final and 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.

~~(c) An order is void if the property is not foreclosed within 180 days after the order is signed or if, before the scheduled date of foreclosure, the respondent files a separate, independent original proceeding in a court of competent jurisdiction that puts in issue any matter related to origination, servicing, or enforcement of the loan agreement, contract or lien sought to be foreclosed.~~

(d) The return of service must be on file with the clerk of the court for at least 10 days, ³⁴before the presiding judge may sign an order.

736.9. Effect of the 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.

736.10. Bankruptcy

³² This Order section puts all the provisions that apply to an Order in one section

³³ Can we rightfully assume that every lien sought to be foreclosed will be filed in the land title records??

³⁴ 311.014 establishes how time is computed – first day excluded and last day included.

201 If a respondent provides proof to the clerk of the court that respondent
202 filed bankruptcy before an order is signed, the proceeding under this
203 rule shall be dismissed.³⁵

204 **736.11. Automatic Stay and Dismissal If Independent**
205 **When Suit Filed**

206 (a) A proceeding or order under this rule is automatically stayed if the
207 respondent files a separate, original proceeding in a court of competent
208 jurisdiction that puts in issue any matter related to origination,
209 servicing, or enforcement of the loan agreement, contract or lien sought
210 to be foreclosed³⁶ prior to 5:00 p.m. on the Monday before the scheduled
211 foreclosure sale.

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

216 (c) Within ten days of filing suit, the respondent shall file a motion
217 and order to dismiss or vacate with the clerk of the court in which the
218 application was filed giving notice³⁷ that respondent has filed an
219 original proceeding contesting the right to foreclose in a court of
220 competent jurisdiction.³⁸³⁹ If no order has been signed, the court shall
221 dismiss a pending proceeding. If an order has been signed, the court
222 shall vacate the -Rule 736 order.⁴⁰

223 (d) If the automatic stay under this rule is in effect, any foreclosure
224 sale of the property is void. ⁴¹Within ten business days of notice that

³⁵ If an order is signed and then a bankruptcy filed, the petitioner has 180 days from the date the 736 order was signed to get the stay lifted or get the bankruptcy dismissed order; otherwise order void in 180 days 736.8(c)

³⁶ Switched the order of phrases

³⁷ Giving only notice or should it be a filed stamped copy of the pleadings.

³⁸ New suit could be filed in a probate or federal court

³⁹ Redundant – already stated where the motion and order is to be filed.

⁴⁰ Tweaked the language

⁴¹ Is this provision opening Pandora's box

Formatted: Not Highlight

225 the foreclosure sale was void, the trustee or substitute trustee shall
226 return to the buyer of the foreclosed property the purchase price paid by
227 the buyer.⁴²

228 (e) The court may enforce the Rule 736 process under Chapters 9 and
229 10, Civil Practices and Remedies Code.

230 **736.12. Attachment of Order to Trustee's Deed**

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

233 **736.13. Promulgated Forms**

234 The Texas Supreme Court may publish at
235 www.supreme.courts.state.tx.us or as an Appendix to the Texas Rules
236 of Civil Procedure promulgated forms that conform to this rule

237

238

239 **WORD COUNT** **2,187,208**

240 **ORIGINAL RULE** **1,875**

241

⁴² Tweaked language

Formatted: Not Highlight

Formatted: Not Highlight