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MEETING OF THE
TASK FORCE ON JUDICIAL FORECLOSURE RULES
November 7, 2007

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Taken before D'Lois L. Jones, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 7th day of November,
2007, between the hours of 9:36 a.m. and 11:46 a.m., at
the Winstead, Sechrest & Minick, 401 Congress, Suite 2400,
Austin, Texas 78701.

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1 *_*_*_*_*
2 MR. BAGGETT: Okay. Why don't we get
3 started? We have lunch. I have no clue whether we're
4 going to get there or not, and if we don't get there, I
5 don't care. If we get there, fine. It doesn't make any
6 difference. We'll do what we need to be doing. I first
7 of all want to thank all of you for giving of your time
8 and talent. We want both, and the billable hours and the
9 money you get out of this are zero, so don't worry about
10 that. That's not a good start, but we're doing, I think,
11 good things.
12 I will tell you that my view of what lawyers
13 have to do to make the world work better for everybody and
14 what I hope this task force does is get deals done and
15 solve problems. If we'll all bear in mind that's what we
16 need to be doing, we'll do just fine, and we had this task
17 force, some of you were in here in '97 and '99, and when
18 we got started we said we're going to do this together for
19 the benefit of the State of Texas. There's no winners or
20 losers, whatever position you come in here, just
21 contribute so we can all make an educated decision on
22 what's the best for Texas. The only winners or losers are
23 this group if we all win together, so we're not going to
24 come in here and argue points and all that.
25 We're going to figure out how we make it

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1 work for everybody, and I don't know whether this is
2 totally true, but I said it several times and nobody has
3 disagreed, so I'm going to keep on saying it. In '97 and
4 '99 when we got through with the rules and the task force,
5 we all agreed unanimously on it, and we all got along
6 great, and we had a good time doing it, went to the
7 Supreme Court and they approved it unanimously, and a
8 couple of the judges said, "This never happens like this,"
9 and I said, "Well, good. I'm glad we're going to do
10 that." So we're all going to be winners because we're
11 going to do that again. We're going to come out where
12 everybody agrees, and we're going to take it over there
13 and they're going to all agree. So that's our goal in
14 life. If we do that, we will all win. So that's kind of
15 where we are and what we're going to do.
16 I think what we're probably going to do this
17 morning is go around the room. We want each of you to say
18 who you are, where you're from, and what you bring to the
19 table in terms of expertise and experience, and we've
20 got -- we tried to when putting this committee together to
21 get all sides of most of the issues so we can know what
22 all the issues are and deal with them fairly. That is
23 what we tried hard to do, and we'll see how successful we
24 are at the end of it, but we tried to do that.
25 And then probably we'll go around after

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1 that, open it up if people have particular issues, and
2 we'll probably go around again and let you say what they
3 are, what you think about it, and what we need to be
4 doing, and then we'll go from there. Probably after the
5 meeting, we'll probably appoint some subcommittees that
6 will be -- after we see what's happening and so forth,
7 subcommittees that will deal with particular issues to
8 work between when we do and then report back and see if we
9 can't do it that way. Last time Tommy got to do a lot of
10 drafting. This time Tommy is going to get to do a lot of
11 drafting because he did a good job last time, and he did
12 not get fired, and nobody fussed at him.
13 MR. BARRETT: Well, now wait a minute.
14 MR. BAGGETT: So that's how --
15 MR. BASTIAN: I still carry scars.
16 MR. BAGGETT: Oh, now, Tommy, give these
17 people the right impression, not the wrong impression.
18 MR. TEMPLE: Mike, I think it's more
19 accurate to say last time he did all the drafting and the
20 rest of us did the second-guessing.
21 MR. BAGGETT: I think that is probably
22 accurate, so I probably didn't give him due credit. Tommy
23 is the one that came up with the idea, and in the
24 materials you've got what he did to put this together, and
25 the Court agreed, so that's how we got here. Why don't we

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1 just start going around here, who you are, where you're
2 from, and what you bring to the table.
3 HONORABLE PHIL JOHNSON: I'm Phil Johnson,
4 and I'm the Supreme Court liaison to the committee.
5 I'm --
6 MR. BAGGETT: Hold on, we've got some new
7 folks coming. Are you-all on the committee? Okay. You
8 should have nametags somewhere.
9 MS. HOBBS: Right there.
10 MR. BAGGETT: Just get one and get a seat.
11 I know Manny.
12 MR. NEWBURGER: Sorry about that. I flew in
13 late last night.
14 MR. BAGGETT: I'm sorry. You-all missed a
15 great introduction, but you better ask them if it was any
16 good or not. So we're just getting started, going around
17 the room, who you are and kind of what your experience is
18 in these areas and then we'll open it up for issues later
19 on. Judge, I apologize.
20 HONORABLE PHIL JOHNSON: That's all right.
21 I've been on the Court a couple of years. I was on the
22 Court of Appeals in Amarillo before that, and before that
23 I tried lawsuits, and all I looked forward to was someone
24 messing up the foreclosure, so I'm here to bring the
25 Court's imprimatur to this and to encourage everybody.

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1 MR. BAGGETT: Thank you for participating.
 2 Lisa.
 3 MS. HOBBS: My name is Lisa Hobbs. I'm the
 4 general counsel for the Supreme Court, and I'm here to be
 5 of staff assistance as I can be. I have no expertise in
 6 this area, and Jody Hughes is our rules attorney, and he
 7 will probably have a hand in this as well, but he is on
 8 his honeymoon right now, so he couldn't make this meeting,
 9 but you will probably be working with him as well.
 10 MR. McRAE: I'm Tock McRae. I'm from San
 11 Antonio. I am in-house with C. H. Guenther & Son, which
 12 is a privately held food manufacturer in San Antonio, and,
 13 no, we don't do any foreclosures there, but in my former
 14 life -- I've only been in-house about four years. In my
 15 former life I was a banking lending lawyer and was pretty
 16 involved in foreclosures, depending on the economic
 17 cycles.
 18 MR. BAGGETT: Okay.
 19 MR. REDDING: I'm Tim Redding. I'm with
 20 First American in Houston. I was in the mortgage business
 21 before I got in the title business, and I've been in the
 22 title business 30 years, so that tells you something. I
 23 was in the mortgage business going to law school in
 24 Houston, and obviously I'm involved in foreclosures being
 25 in the title business.

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1 MS. HOBBS: Hi, Judge Davidson, I'm sorry, I
 2 was interrupting someone here, but we have you on the line
 3 and we're doing introductions right now.
 4 HONORABLE MARK DAVIDSON: I apologize I was
 5 late.
 6 MR. BAGGETT: No problem. Thank you, Judge.
 7 And I should have said something that I forgot to say in
 8 my elaborate opening remarks, and that is that one of the
 9 things that we do need to be careful here is we've got
 10 about 200 years of title law, so whatever we do, we
 11 probably don't need to mess it up. So we do need to think
 12 about titles and how we deal with those, and one of the
 13 things I guess about titles is certainty probably helps
 14 the title business. Would you agree with that?
 15 MR. REDDING: I'm sorry?
 16 MR. BAGGETT: Certainty.
 17 MR. REDDING: Certainty, absolutely. I
 18 mean, that's our biggest problem with fighting bills every
 19 session that try to hide information, be it from public
 20 officials or things like that. We're always, you know,
 21 looking for the information.
 22 MR. BAGGETT: And since foreclosures are a
 23 part of the title we need to be careful about that, so
 24 anyway.
 25 MR. FUCHS: Fred Fuchs with Texas Rio

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1 Grande Legal Aid. We represent the homeowners who are
 2 facing foreclosures in these kind of suits, and so I'll
 3 bring that perspective to the table I hope.
 4 MR. BAGGETT: Fred was on the committee
 5 before, and what did I lie about in the opening, Fred?
 6 Was it okay?
 7 MR. FUCHS: I thought you were right on.
 8 MS. RODGERS: I'm Kelly Rodgers. I'm an
 9 attorney and a lobbyist here in Austin, and I worked on
 10 Senate Bill 1520 and the companion regulatory bill during
 11 the last session representing the interest of mortgage
 12 lenders.
 13 MR. TEMPLE: I'm Larry Temple. I'm an
 14 Austin lawyer, and I have for more than 35 years
 15 represented the Texas Mortgage Bankers Association, the
 16 association of mortgage companies in the state, and they
 17 obviously have an interest in this.
 18 MR. CULBRETH: Ken Culbreth. I'm not on the
 19 force. I'm just kind of here auditing, was involved with
 20 the legislation before, and my client had hired Kelly
 21 Rodgers to help us with this, and represent mortgage
 22 lenders and taxpayers and seen a lot of this in the courts
 23 and the litigation and just continue to be interested.
 24 MR. BAGGETT: Okay. Manny.
 25 MR. NEWBURGER: I'm Manny Newburger with

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1 Barron, Newburger, Sinsley & Weir here in Austin. In my
 2 former life I represented consumers suing banks and
 3 mortgage servicers and such. These days I represent a
 4 large portion of the collection industry. I represent
 5 lawyers, debt buyers. My law firm represents I think four
 6 trade groups that deal with the collection industry, and I
 7 still teach consumer law at UT and periodically still
 8 advocate for consumers.
 9 HONORABLE BRUCE PRIDDY: My name is Bruce
 10 Priddy, and I'm a district judge in Dallas in the 116th.
 11 I've only been on the bench for about ten months now.
 12 I've heard about -- probably about a hundred 736
 13 applications in the short time I've been there and have a
 14 strong interest in this area of the law. Before I was
 15 elected to the bench I was a consumer lawyer and had some
 16 experience in home equity litigation, representing
 17 consumers exclusively, mostly pro bono, some intentional,
 18 some nonintentional, but home equity lending is something
 19 that interests me a great deal.
 20 MR. BAGGETT: Okay. Thank you.
 21 MS. DOGGETT: I'm Mary Doggett. I'm an
 22 attorney in San Antonio. I represent the Texas Property
 23 Tax Lenders Association and several companies that do
 24 property tax lending. My background is that I worked for
 25 eleven years with Linebarger, Goggan, Blair & Sampson

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1 collecting delinquent taxes for various taxing units in
 2 Bexar County.
 3 MR. BAGGETT: Okay.
 4 HON. AMALIA RODRIGUEZ-MENDOZA: Good
 5 morning. I'm Amalia Rodriguez-Mendoza. I'm the district
 6 clerk here in Travis County, and I guess the reason I'm on
 7 this committee is to sort of give you the clerk's
 8 perspective, but in Travis County on February 28th Judge
 9 Dietz signed an order mandating that certain cases be
 10 e-filed, and one of the type of cases that is e-filed is
 11 home equity and foreclosures, and we receive a lot of
 12 e-filing foreclosures, and I don't know if you're doing
 13 that e-filing, but I guess that's one of the perspectives
 14 that I bring.
 15 MR. BAGGETT: It is. It is. It's a very
 16 important perspective, so speak up and let us know what
 17 we're doing good and bad because that's important. We
 18 need to make sure we do that right. Okay. Thank you.
 19 All right, Linda.
 20 MS. KELLUM: I'm Linda Kellum. I'm the
 21 court coordinator for the 88th Judicial District Court,
 22 which is composed of Hardin and Tyler County. I'm also a
 23 certified legal assistant. I've been in the legal
 24 profession for probably about 28 years now. I just went
 25 off of the board of directors for the Texas Association of

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1 Court Administration. I also am a faculty member for the
 2 Texas Center of the Judiciary with their PDP program, and
 3 like Mr. Redding there, I have spent some time in a -- in
 4 the title business before as well. My perspective, I
 5 suppose, is going to be how the courts deal with it.
 6 MR. BAGGETT: You have a very important
 7 perspective, what are we doing good and what are we doing
 8 bad from the real life everyday stuff, and that's very
 9 important. So both of you, if we get off into esoteric
 10 stuff and we're not paying attention to reality, you let
 11 us know. Karen.
 12 MS. NEELEY: Karen Neeley. I'm general
 13 counsel for Independent Bankers Association of Texas and
 14 of counsel with Cox Smith Matthews, and I followed and
 15 worked on this 1520 companion regulatory bills as it was
 16 going through session.
 17 MR. BARRETT: Hi, I'm Mike Barrett. I'm
 18 chairman at Barrett Burke Wilson Castle Daffin & Frappier.
 19 I'm Manny's client and Tommy's boss, so I'm just here to
 20 make sure they're doing a good job.
 21 MR. BAGGETT: Tommy says he's the boss.
 22 All right, Tommy.
 23 MR. BASTIAN: I'm Tommy Bastian, and I'm the
 24 peon at Barrett Burke Wilson Castle Daffin & Frappier.
 25 MR. BAGGETT: Okay. Now that everybody

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1 knows who everybody is, and we have done all that -- yes.
 2 MR. REDDING: On the phone.
 3 MR. BAGGETT: Oh, Judge? Judge?
 4 HONORABLE MARK DAVIDSON: Yeah, I'm here.
 5 MR. BAGGETT: Okay.
 6 HONORABLE MARK DAVIDSON: My name is Mark
 7 Davidson. I'm judge of the 11th District Court in
 8 Houston. I'm also the administrative judge in Harris
 9 County. I have been a judge for 18 years, and I have been
 10 doing these since the rule and the constitutional
 11 amendment went into effect a long time ago.
 12 MR. BAGGETT: Okay. Well, thank you very
 13 much, and we clearly need the skills of the administrative
 14 judge in Harris County. And whatever you see that's
 15 reality we need to know for sure, because we've got to
 16 deal with it at every level, so thank you very much for
 17 joining us, and what we'll probably do now is we have two
 18 major areas that we probably need to think about and deal
 19 with. One is the tax lien information and the other is
 20 what's working and isn't working in those two rules that
 21 we need to deal with, 735 and 736.
 22 I will say this, that when we had the task
 23 force before and we didn't have a rule, we started from
 24 scratch, and a little bit of the history -- and I stand
 25 for rebuttal from any of you who are in here if you think

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1 I slipped in what I say here, that's fine, because we have
 2 several that have been on all the task forces, and but
 3 what we were assigned to do because we got home equity for
 4 the first time in a constitutional amendment that said
 5 there has to be an order from a court in order to go
 6 forward with a foreclosure. So these two rules were to
 7 try to address that requirement that there be an order
 8 from the court in this area of foreclosures, and first in
 9 I guess '97 was home equity, and we talked about where do
 10 we go and what do we do, and we were starting from
 11 scratch.
 12 And I will say this, although it wasn't
 13 popular to say this in the meeting, we borrowed from
 14 Colorado, because Colorado had a process somewhat like
 15 what we ended up with, and the big concerns were if
 16 there's a lot of this we don't want to clog up all the
 17 dockets and make the administrative part of it very
 18 difficult and if, in fact, they are uncontested, proceed
 19 with it on a basis that the rule deals with, but if
 20 anybody wants to contest it in any way, they can bring
 21 another lawsuit, what I would call a full regular lawsuit
 22 in another court, file a notice of it where the
 23 application is filed, and it's automatically dismissed
 24 without prejudice, and you flip over to full litigation,
 25 and that was our thought process about how we do it.

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1 So it's a balance between full litigation if
 2 and when you need it, and if it's not disputed, so we
 3 don't clog up the courts and so forth, go forward with
 4 this process that we came up with in 735 and 736, and I
 5 think it's different than what we've had before, so
 6 administratively it caused some problems. Judges weren't
 7 familiar with it, which is very understandable, because it
 8 was different than anything we've ever done, but I think
 9 everybody tried and it worked out pretty well, and then
 10 when we got reverse mortgages two years later we just
 11 added reverse mortgages to those two rules, and now I
 12 guess the thing that probably triggers this more than
 13 anything else is we've got the tax lien issues that say
 14 you've got to comply with 736.

15 So we -- again, we need to put into these
 16 two rules how we deal with the tax lien situation. That
 17 probably is the starting point for most of this, because
 18 we've got to deal with that issue. Now, while we're at
 19 it, if there are other issues that have arisen, as much
 20 from the administrative judge and the coordinators and the
 21 clerks, mechanically on how we can improve it or if there
 22 are problems with it then we would like to hear any of
 23 that if we can.

24 I will say our goal in life is not to
 25 reinvent the Constitution. No, no, no. We need to deal

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1 with things as efficiently and as precisely as possible.
 2 We are not the Supreme Court. We are not the Legislature,
 3 and we all haven't been voted into office, so our task, we
 4 need to bear in mind, we are not kings and queens, we're
 5 just folks trying to figure out how to make this work and
 6 do it in an efficient, easy way as opposed to rewriting
 7 the Constitution. We don't need to do that, I don't
 8 think. So I'm not sure that little talk helped you very
 9 much, but that's where we are.

10 Why don't we talk first, because our primary
 11 goal is to deal with how we adapt this rule to tax liens,
 12 and I will also say this: This morning throw out
 13 everything that anybody has an issue with and we ought to
 14 talk about it as much as you want to. What we'll probably
 15 do after this, after we see what the different issues are
 16 and so forth, we'll probably get some subcommittees that
 17 will work between these meetings to come up with some
 18 proposed drafts. As Larry said, we did that to Tommy, and
 19 he did the work, and we came in and said, "Tommy did a
 20 pretty good job, that's good." So maybe that will happen
 21 again. That will be fine with me if we do that.

22 But we'll probably do that, so y'all will
 23 probably be hearing after this sometime that you might be
 24 on a committee and what we would be looking at. But what
 25 we say today as far as issues and how we approach it will

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1 impact what committees we have and who's on them. Having
 2 said that, Tommy, do you want to talk about tax liens and
 3 Karen and I guess Kelly? Yeah, go ahead.

4 MR. TEMPLE: Can I suggest something?
 5 MR. BAGGETT: Sure.

6 MR. TEMPLE: I don't want to trump what you
 7 just said, but it would be instructive to me if before we
 8 got into what additions we are going to make if the people
 9 that are dealing with this on a regular basis could tell
 10 me what problems there are with the present rule to which
 11 it's applicable anyway.

12 MR. BAGGETT: Sure.

13 MR. TEMPLE: I know there is an issue about
 14 lines of credit and there is an issue about reverse
 15 mortgages and certainly going to be an issue about the
 16 property tax liens, and we'll need to make some additions
 17 or changes probably, but without regard to that just a
 18 minute, what it was intended to work for, I would be
 19 interested in knowing are there issues, are there problems
 20 in the way it has been working over the last decade in the
 21 areas to which it was originally applicable.

22 MR. BAGGETT: I was going to go to that
 23 next, but that's fine. Let's start on that now. I don't
 24 have any problem with that. That's fine. So why don't we
 25 do that? Anybody that's dealing with it everyday or has

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1 issues with it or things that we can improve on the rules
 2 and how they work right now, you know, the floor is open
 3 and don't hold back, because we need it.

4 HONORABLE MARK DAVIDSON: Okay. Well, not
 5 one to hold back, can I get my first little shot?
 6 MR. BAGGETT: You bet.

7 HONORABLE MARK DAVIDSON: There appears to
 8 be a dispute between attorneys that represent the lenders
 9 and some -- no, and most, but not all, judges as to
 10 whether or not the papers that are filed with the Court
 11 that establish the existence of the debt and the lien must
 12 show that the movant, that is the current holder and owner
 13 of the note, is the party entitled to foreclose. In other
 14 words, whether you have to attach the assignment
 15 documents. If I get an application that shows a note paid
 16 to the ABC Lending Company and it's the XYZ Bank Company
 17 that is seeking to foreclose, some judges say that the
 18 motion should be denied, the application should be denied,
 19 because the -- unless the assignment from ABC to XYZ is
 20 contained in the file.

21 Other judges maintain that as long as it is
 22 pled under oath that the applicant is the holder and owner
 23 of the note, that the purpose and effect of the statute
 24 has been complied with.

25 MR. BAGGETT: Gotcha. That is a good start,

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1 because that's an issue we have around the state with
 2 different judges, and I think we ought to do it. Let me
 3 tell you what I think about it generally, then I want to
 4 go to Tommy who does it more. But I need to tell you,
 5 too, we do commercial litigation when it's probably big
 6 issues and big problems. We do not do volume foreclosures
 7 and so forth, so to the extent that people deal with it on
 8 a daily basis, that's not me, so you need to know that, so
 9 I'm giving you a disclaimer before I start.

10 But I think what the issue is that I've
 11 heard some is who's the owner and holder and how do you
 12 establish that and you have to establish that in order to
 13 proceed with the process. This is not -- this is just
 14 some general comments. When you have a debt you have
 15 several sources of repayment, and I'm going beyond the
 16 rules here. This is more of my foreclosure general stuff
 17 than it is the rules. You could have a source of
 18 repayment for -- from the maker of the note, or it could
 19 be nonrecourse. You could have a source or a payment from
 20 real property collateral, you could have a source or
 21 payment from personal property collateral, you could have
 22 guarantors.

23 So owner and holder of the note, the lien
 24 goes with the debt, no question about that, but does not
 25 necessarily mean who had -- what's the primary source of

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1 repayment. So, basically, owner and holder deals with the
 2 UCC provisions that have to do with enforcing a note.
 3 They don't necessarily deal with real estate foreclosures,
 4 personal property foreclosures. There are other sources
 5 of repayment on an obligation. So there is a -- I think
 6 that's an issue in Florida and some other places, so we've
 7 got to pay attention to the -- how this affects the
 8 overall body of foreclosure law, but we've got to also be
 9 realistic.

10 The original, I think, intent of those rules
 11 was that you file an application, you have to swear to
 12 that there is a debt and that it's in default. Nothing
 13 else is required to be certified, and it's really there
 14 for a situation where you have an uncontested issues to a
 15 great extent. If there's ever an issue about who's the
 16 owner and holder or anything like that, a lawsuit, I think
 17 we contemplated, could be filed in district court, notice
 18 of that filed in the application, and the application
 19 dismissed. This is not necessarily supposed to be a
 20 mini-trial in any way. It's supposed to be dealing with
 21 situations that are uncontested, because if there is a
 22 problem with it, file a regular lawsuit, do full
 23 discovery, and do whatever you want to with it.

24 Now, that's a -- that's probably not fair to
 25 a judge sitting there listening to this and having ten of

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1 those, and he doesn't want to hear all that kind of stuff,
 2 and I do understand that. I think we probably ought to
 3 talk about the practicalities of it some; and I think
 4 Tommy probably knows that more and a lot of you do, so I
 5 particularly want to hear from the court personnel about
 6 that; but I think originally when we did those two rules
 7 the application was to be verified with respect to debt
 8 and ownership of it and default; and that was what was
 9 supposed to be verified; and if there was an issue with
 10 that in any way then you would file a regular lawsuit and
 11 get into it, and you get into all these issues because now
 12 obviously you have pooling of all these mortgages, you've
 13 got entranches, you've got it sold with different levels
 14 of assets and collectability; and the one commonality of
 15 the marketplace is you have a, quote, mortgage servicer,
 16 which was added to the statute; and that's the party to
 17 whom the payments are being made.

18 And the old concept of owner and holder sort
 19 of works in the sense that if you went into Frost Bank and
 20 you got a mortgage and you paid it back to Frost Bank,
 21 then you know who the owner and holder is. Now, what
 22 happens now is you have -- this is not necessarily in just
 23 a single family. It's in the commercial, it's in all of
 24 it. All these loans are generated. They're put into a
 25 pool that satisfies these tax issues and trust issues, and

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1 then layers of that pool are sold to different investors,
 2 and they're rated by the rating agency, and you've got
 3 triple A and double A and A and all this stuff.

4 So what happens is these loans get into a
 5 pool, which now the market's having trouble with subprime
 6 pool, so I don't know what's going to happen to all that,
 7 but when they get into a pool they are in a group of a lot
 8 of assets in that pool that go into a trust and then
 9 layers of that are sold out to investors. So the only
 10 common denominator of that which would be even close to an
 11 owner and holder is the mortgage servicer, because the
 12 mortgage servicer is the one that knows where all this
 13 goes. They know where the waterfall payments go, they
 14 know where the defaults are, and none of these investors
 15 ever anticipated they're going to do anything with it,
 16 because the services are going to do it, and MERS has all
 17 this recording and all that in D.C. about where all these
 18 tranches are, and so when you get into owner and holder
 19 from our old traditional concept of it, the way the
 20 market's working on pooling these mortgages, it really
 21 doesn't apply, and that's why this is a huge issue about
 22 how you deal with it. That's why I think the statute was
 23 changed two sessions ago, so you now have the mortgage
 24 servicer, who's the one that gives the notices and deals
 25 with everything, and that's the person to who the payments

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1 -- the entity to who the payments are made.
 2 HONORABLE MARK DAVIDSON: That is who is
 3 making the application to foreclose.
 4 MR. BAGGETT: That's right, and that's the
 5 closest thing you're going to have to who the owner and
 6 holder of the debt is.
 7 HONORABLE MARK DAVIDSON: Okay. So need the
 8 application filed with the court have a copy of the
 9 assignment or whatever the agreement is that authorizes
 10 that entity to do that?
 11 MR. BAGGETT: Well --
 12 HONORABLE MARK DAVIDSON: Or can a naked
 13 stranger to the original transaction come in and seek
 14 foreclosure of the lien without proof that they have
 15 standing to do so?
 16 MR. BAGGETT: Right. And that's a good
 17 question. Manny, you want to --
 18 MR. NEWBURGER: I'm just curious, if I could
 19 ask a question, isn't lack of standing an affirmative
 20 defense that's waived if it's not pled, and if the rules
 21 simply have Rules 93 and 94 applicable to this proceeding,
 22 doesn't that answer the question?
 23 MR. BAGGETT: Did you hear that, Judge?
 24 HONORABLE MARK DAVIDSON: I did.
 25 HONORABLE PHIL JOHNSON: Let me say, I'm not

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1 sure, when you say standing, standing generally goes to
 2 jurisdiction and goes to whether something is void or not,
 3 so when you say standing you need to be a little more
 4 discriminating.
 5 MR. BAGGETT: Judge, let me butt in. What
 6 we're -- the rules are very important. I don't have any
 7 question about that, but the problem here, let's think
 8 about who would be the owner and holder in a situation
 9 where it's a mortgage that's one of 5,000 mortgages in a
 10 pool and that pool has been put together where you have
 11 triple A investors, double A investors, B, double B
 12 investors, and the only commonality of dealing with that
 13 pool of debt is the mortgage servicer to whom the payments
 14 are made, and the rule, 92 -- well, I mean, our regular
 15 rule was amended to put that in there for that reason.
 16 Now, this doesn't necessarily become a big
 17 issue if you just have a traditional situation where
 18 you've got the party who originated the loan as the holder
 19 of the debt. That's not too difficult, but when you
 20 get -- I don't know how you get proof of all that. I
 21 mean, you would have to go through all those layers of
 22 here's the trust, here's the parties who have the
 23 different layers, here's the mortgage servicer.
 24 HONORABLE MARK DAVIDSON: What they've been
 25 doing in Houston for the judges that require it is coming

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1 up with a one piece -- a single piece of paper that the,
 2 you know, ABC Mortgage Company does hereby assign the
 3 rights to collect and foreclose on any lien to the XYZ
 4 Bank, and that the XYZ Bank that is seeking the relief and
 5 that is what we require, but there are -- the rule is
 6 silent as to whether this is required, but generally --
 7 MR. BAGGETT: That's true.
 8 HONORABLE MARK DAVIDSON: -- it takes one
 9 piece of paper.
 10 MR. BASTIAN: There might be an easy
 11 solution to all of this because just about every
 12 foreclosure referral that comes from a mortgage servicer
 13 always says "The investor is," and the investor is the
 14 person that that servicer ultimately is going to be
 15 sending the principal and interest to. So it would be a
 16 very simple thing to just say "The investor is," blank,
 17 "the mortgage servicer is," blank, because that's who the
 18 borrower is making their payments to, so you kind of have
 19 the fail-safe that the borrower knows, well, this is who
 20 I've been making the payments to. Plus if it's a
 21 Federally insured mortgage, that borrower has to know, and
 22 I think it's included in your materials the definitions of
 23 servicer and what the servicer does.
 24 So if you had that "the investor is," and
 25 that kind of takes care of -- it's kind of a fail-safe in

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1 itself in that five years from now somebody comes in and
 2 says, "Okay, I paid or I think I paid that and somebody
 3 else is suing me," you go back and say, "Well, who was the
 4 investor," and then you have the mortgage servicer who is
 5 the money maid, and that's real simple for people to
 6 provide because that's what your lender's going to be
 7 sending to you when you do a foreclosure and initiate the
 8 foreclosure, and it basically just has transparency and it
 9 has full disclosure on the parties and the roles that they
 10 play. The big thing that's kind of the fly in the
 11 ointment of all of this is MERS because MERS is going to
 12 be the mortgagee of record, and that kind of changes
 13 things.
 14 MR. BAGGETT: Explain to people what MERS
 15 is.
 16 MR. BASTIAN: Well, MERS is going to be the
 17 mortgagee of record. In about 60 percent of all loans
 18 MERS is going to be the mortgagee of record, but all MERS
 19 is is a registration system. That's all it is. It really
 20 is a piggyback on what happened in the securities market
 21 back in the early Seventies when Wall Street was
 22 exploding, and back in those days whenever you bought and
 23 sold stocks or bonds you had to have a paper certificate.
 24 Well, the back rooms couldn't keep up with it, and Wall
 25 Street almost cratered, and they came up with a book entry

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1 system that everybody is familiar with today where loans
 2 are bought and sold, and that's basically what MERS is.
 3 It's just a listing of who has all the beneficial
 4 ownership interest in a mortgage, and that's going to be
 5 the investor, it's going to be the mortgage servicer, it's
 6 going to be the subservicers. It gives you four or five,
 7 six pieces of corroborating information about the borrower
 8 and that particular loan. I mean, it has the detail on
 9 their status sheet that says, "This is when the loan was
 10 made, here is the borrower, and here's the amount of the
 11 loan." I mean, all that information is right there so
 12 that if the loan is registered on MERS it's real easy to
 13 determine all the different parties in the transaction,
 14 and that's the way the world's going, so maybe that's kind
 15 of the place we need to be going.
 16 MR. BAGGETT: But MERS is in D.C. and it's
 17 national and --
 18 MR. BASTIAN: Yeah. It is the book entry
 19 that's referenced in 51.001 as the book -- the book entry
 20 system. That's what MERS is.
 21 HONORABLE MARK DAVIDSON: Well, all I'm
 22 saying is I don't -- I see reasons for the rule to be one
 23 way or the other, but I think the rule should be clearer
 24 as to whether capacity, standing, ability, power, call it
 25 what you will, has to be affirmatively proven within the

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1 four corners of the papers filed with the court or whether
 2 the verified application without any paperwork being
 3 attached is enough to require a judge to sign the request
 4 for relief.
 5 MR. BAGGETT: Right. That's fair.
 6 MR. BARRETT: Judge, I think that's a very
 7 good point. This is Mike Barrett, and I know we've had
 8 this difficulty. There really isn't such a document, and
 9 maybe, Larry, you might explain mortgage servicing rights
 10 because the servicer usually acquired their position in
 11 the file through the purchase of MSRs. There is an
 12 organized market in MSRs that really makes up maybe as
 13 much as 40 to 50 percent of any mortgage company's assets,
 14 and they acquired this -- their status of being a servicer
 15 through the purchase of an MSR most of the time, or they
 16 did it themselves, they created their own loan. So
 17 finding a document that says, "I am the owner and holder,
 18 and I hereby grant to the servicer the right to foreclose
 19 in my name" is an impossibility in 90 percent of the
 20 cases. So we're going to have to deal with that
 21 particular issue, and an understanding of who the servicer
 22 is and what an MSR is may be important to the transaction.
 23 MR. BAGGETT: Okay. Judge.
 24 HONORABLE BRUCE PRIDDY: Yeah, in Dallas
 25 we've wrestled with this issue, and I think most of the

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1 courts in Dallas require some sort of assignment of the
 2 note to the applicant so the applicant is actually the
 3 person or the entity that has the rights under the --
 4 MR. BAGGETT: Judge Davidson, can you hear
 5 that?
 6 HONORABLE MARK DAVIDSON: Most of it.
 7 MR. BAGGETT: Speak up.
 8 HONORABLE BRUCE PRIDDY: And what the --
 9 happens is they just execute a document like Mr. Barrett
 10 says doesn't exist. They just create one for the most
 11 part sometimes, and the servicer signs it themselves
 12 saying that it's been transferred to whatever entity they
 13 name as the applicant. I think we can avoid a lot of
 14 problems if we specifically allow the servicer standing
 15 under Rule 736, because I think it's -- we don't
 16 specifically allow the servicer to proceed, and I think if
 17 we tie in with the Property Code provision that the
 18 servicer can proceed with foreclosure if certain
 19 circumstances are met, if we tie into that in the rule I
 20 think we'll avoid a lot of these problems.
 21 MR. BAGGETT: Yeah, I think you might be
 22 right because whatever vehicles we have, you do have a
 23 servicer if there's multiple parties, and that is the most
 24 logical entity to go forward. We just need -- if we're
 25 going to do that, we need to figure out how we do it

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1 cleanly so that everybody understands it.
 2 Manny, did you have a comment you want to
 3 make? Larry, you want to talk?
 4 MR. TEMPLE: Mike suggested I do that and
 5 then he did it so well there's nothing for me to add.
 6 That really tells you what the servicers do, and I just
 7 wonder if you added into Rule 736 in what has to be pled
 8 just a statement that the person, the movant, is either
 9 the owner or is the servicer with the power from the owner
 10 to --
 11 MR. BAGGETT: Yeah.
 12 MR. TEMPLE: -- therefore proceed.
 13 MR. BAGGETT: And swear to that as part of
 14 the application process. Judge, would that do it?
 15 HONORABLE BRUCE PRIDDY: Perhaps.
 16 MR. BAGGETT: Okay.
 17 HONORABLE BRUCE PRIDDY: One of the other
 18 concerns I have is that most of the applications, the rule
 19 says it can be on information -- it can be on personal
 20 knowledge or information and belief, if they state the
 21 basis for information and belief. Nearly all of the
 22 applications I see are on personal knowledge, and you can
 23 tell that there's no way that one person can have personal
 24 knowledge of everything that's in there.
 25 MR. BAGGETT: That's true.

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1 MR. BARRETT: Exactly.
 2 HONORABLE BRUCE PRIDDY: It's just -- to me,
 3 I think we need to massage it a little bit and not
 4 encourage folks who do this, because it really kind of
 5 devalues the idea of personal knowledge in my court
 6 because of what they're saying they have personal
 7 knowledge to they can't possibly have personal knowledge
 8 to.
 9 MR. BAGGETT: That's probably right.
 10 HONORABLE BRUCE PRIDDY: And so I would like
 11 to have some tweaks of that.
 12 MR. BAGGETT: And we shouldn't write the
 13 rule in a way that they can't possibly comply with it.
 14 That's not very smart.
 15 HONORABLE BRUCE PRIDDY: Right. But they
 16 can do it if they do it on information and belief and just
 17 say that it's based on their records, but no one does
 18 that. They just say they have personal knowledge, and you
 19 can't have personal knowledge that a loan occurred in
 20 1978.
 21 MR. BARRETT: That is exactly right. Some
 22 of these companies are servicing six million mortgages.
 23 The records with those mortgages are spread out in cities
 24 across America. The clerk who is preparing the document
 25 the judge refers to is usually an employee for less than a

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1 year or two, and there's no way they know, so you're
 2 absolutely right, Judge.
 3 MR. BAGGETT: Yeah, but we also -- we've
 4 also got to write it in a way that they take enough time
 5 and effort to make sure that it really is the right
 6 servicer doing it. I don't want to go so far on the other
 7 side that they just say "slap it on them" once they get in
 8 the door, and that's all you've got to do. They ought to
 9 take -- it's a foreclosure. They ought to take time to
 10 make sure it's the servicer that's doing it. Whatever
 11 that means. Okay. Other comments?
 12 MR. REDDINGS: Mike?
 13 MR. BAGGETT: Yeah.
 14 MR. REDDING: Mike, I was just looking at
 15 736. You know, there is no definition of "applicant" in
 16 it.
 17 MR. BAGGETT: Well, I don't remember what it
 18 says.
 19 MR. BASTIAN: That's exactly right.
 20 MR. BAGGETT: Yeah, that's true. Maybe we
 21 just define "applicant," and the applicant really would be
 22 the mortgage servicer.
 23 MR. BASTIAN: Yeah.
 24 MR. REDDING: Or the mortgagee.
 25 MR. BAGGETT: Or owner and holder or

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1 mortgage servicer.
 2 MR. BASTIAN: And the definitions to 51.002
 3 were done after Rule 735 and 736 were drafted, and that's
 4 one of the things that we asked the Supreme Court to look
 5 to, is to marry those two ideas and make 735 and 736 now a
 6 master definition in the foreclosure statute.
 7 MR. BAGGETT: Yeah, that's right.
 8 MR. BASTIAN: And what we're talking about
 9 would probably be taken care of. I mean, it needs to be
 10 more specific, but --
 11 MR. BAGGETT: Yeah, because the mortgage
 12 servicer definition that y'all dealt with is in the
 13 probate -- I mean, in the real property law, not in the
 14 rules. So we clearly need to make the rules reflect
 15 what's in the foreclosure law, and maybe that's a way to
 16 do it. What do you say, chief?
 17 MR. BASTIAN: No, I agree. Because that's
 18 who the borrower is making their payments to, that's who
 19 they assume is the mortgage servicer. I mean, I've
 20 tried a bunch -- or had a bunch of these hearings before
 21 judges, and they think the person that they're making
 22 their own home loan payment to is the owner and holder of
 23 the note. It's always the mortgage servicer. I mean,
 24 they don't even know that, so and that's kind of the
 25 fail-safe because that's who the borrower expects to be

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1 enforcing this note, not some, you know, Bank of New York
 2 as trustee for series XYZ home equity loan --
 3 MR. BAGGETT: Pool No. 216.
 4 MR. BASTIAN: That just creates problems.
 5 MR. REDDING: Well, the other problem --
 6 Judge, this is Tim Redding. The other problem that I see
 7 -- and, Tommy, you and I talk about it regularly -- that
 8 we have a bunch of servicers that are corporations or
 9 trusts attempting to foreclose on behalf of other trusts
 10 using a power of attorney, and I don't think that's really
 11 proper. I mean, we all kind of turn a blind eye to it,
 12 but I think that's an issue that's out there that somebody
 13 could use to potentially attack a foreclosure.
 14 MR. NEWBURGER: That's what basically
 15 happened in Florida where MERS has been held as being
 16 unauthorized practice of law by a few judges when they
 17 filed foreclosures.
 18 MR. BAGGETT: Speak up. Speak up, Manny, so
 19 the judge can hear you.
 20 MR. NEWBURGER: That's what's happened in
 21 Florida where some judges have decided that MERS' attempt
 22 to conduct a foreclosure as the applicant was an
 23 unauthorized practice of law. Now, they've got some
 24 really good arguments for why they think that's wrong, but
 25 that's been a major battleground over in that state.

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1 MR. BAGGETT: But all MERS is is a recording
 2 vehicle, right?
 3 MR. NEWBURGER: Well, but they've been
 4 filing foreclosures in the name of MERS. I don't think
 5 anyone is doing it anymore since judges decided that that
 6 constituted an unauthorized practice of law, but --
 7 MR. BASTIAN: Well, part of that in Florida,
 8 their foreclosure statute says only the owner and holder
 9 of the note can bring the foreclosure, and MERS wasn't the
 10 owner and holder of the note, and yet everybody was
 11 pleading them as the owner and holder of note. All they
 12 were was the mortgagee of record in the land title
 13 records, and it got everybody confused, and like anything
 14 new, it just created problems.
 15 MR. BARRETT: Well, MERS was at great --
 16 greatly at fault for creating all of those impressions.
 17 They may be supposed to be merely a registrant, but they
 18 haven't acted as a registrant. They have acted as a
 19 for-profit business, and they have gone out and tried to
 20 get into the default servicing business. At one point in
 21 time they considered themselves a huge competitor for
 22 doing foreclosure business, and they actually went out and
 23 marketed their services to bring foreclosures.
 24 MR. BAGGETT: They've quit doing all that,
 25 right?

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1 MR. BARRETT: Well, I don't know whether
 2 they have or not.
 3 MR. BAGGETT: Okay.
 4 MR. BARRETT: It's a big company. You might
 5 ask one and they say "We quit," and you ask three others,
 6 they say, "Oh, no, we still like your business." They're
 7 competitors, Mike.
 8 MR. BAGGETT: All right. Other comments on
 9 this, because this is the issue I hear about mostly from
 10 judges, which is a fair issue?
 11 HONORABLE PHIL JOHNSON: Could I ask a
 12 question?
 13 MR. BAGGETT: Yeah.
 14 HONORABLE PHIL JOHNSON: Is this a private
 15 corporation, corporate entity?
 16 MR. BAGGETT: Tell him the history of it.
 17 MR. BASTIAN: Well, basically it is a
 18 utility of the mortgage banking industry to register
 19 loans, so that they can debunk -- so it's just like the
 20 Depository Trust Corporation for stocks and bonds. When
 21 you buy and sell stock, that's where it's registered so
 22 you can figure out who is the owner and holder of that
 23 stock when you buy and sell it.
 24 MR. McRAE: Is it cooperatively owned, I
 25 guess?

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1 MR. BARRETT: Yes.
 2 MR. BAGGETT: It was started by Fannie Mae
 3 or Freddie Mac.
 4 MR. REDDING: Consortium.
 5 MR. BASTIAN: Well, yeah, there's 270 -- I
 6 mean, 2,700 members. It's Fannie Mae/Freddie Mac, VA,
 7 HUD, Texas Mortgage Bankers, American Land Title, I mean,
 8 all the people that are involved in the mortgage banking
 9 industry, has three classes of stock, and it's basically a
 10 utility for the mortgage banking industry simply to track
 11 all the beneficial interests in loans that are registered
 12 on the system.
 13 HONORABLE PHIL JOHNSON: But it's an entity
 14 that is owned by stock, stockholders?
 15 MR. BASTIAN: Yes. It's a stockholding
 16 entity just like the Depository Trust Corp. for Wall
 17 Street.
 18 MR. BAGGETT: Owned by investors primarily.
 19 MR. BASTIAN: Yeah, the investors, the
 20 mortgage -- the people that are involved in the mortgage
 21 banking industry. It has about 80 employees. That's it.
 22 All of its work is done through the mortgage servicers.
 23 MR. BAGGETT: There's going to be a chapter
 24 in the foreclosure book added by him on MERS, what MERS
 25 is.

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1 MR. BASTIAN: I'm sure that will solve all
 2 of the world's problems.
 3 MS. NEELEY: Mike?
 4 MR. BAGGETT: Yeah.
 5 MS. NEELEY: Just sort of an observation,
 6 here's what I'm hearing, that in order to resolve these
 7 issues a couple of things need to happen, define
 8 "applicant" to include mortgage servicer, regularize the
 9 rules with the Property Code, which have been carefully
 10 thought out to deal with this issue that's developed over
 11 time, and also clarify in the rules what we mean by a
 12 verified application so that it's clearer that it can be
 13 on information and belief. That's actually in another
 14 part.
 15 MS. HOBBS: Yeah, it's pretty clear.
 16 MS. NEELEY: But it's not as clear as it
 17 could be in the first part, so we don't get people just,
 18 you know, lying in the affidavits, but they actually have
 19 a basis for the verified affidavit.
 20 MR. BAGGETT: I think you're right.
 21 MS. NEELEY: Does that make sense?
 22 MR. BAGGETT: We struggled with the issue of
 23 what needed to be sworn to in '97 and '99, and we really
 24 did not say that the applicant needed to be identified for
 25 (1) or (2) because we didn't know that was going to be an

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1 issue. I think what you said is probably right, if we can
 2 figure out how to deal with those three things it probably
 3 would help significantly, and we didn't really -- all we
 4 did -- you-all tell me when I mess this up. All we did
 5 was swear that there was a debt and it's in default. The
 6 rest of it didn't need to be sworn to, and the concept
 7 was, is that has to be served and everybody knows about
 8 it, but when you get it, go to a lawyer, and a lawyer
 9 says, "No, you're not -- there's something wrong with
 10 that," they file the lawsuit and this just gets dismissed.
 11 MS. NEELEY: And I don't think people
 12 realized that these were going to get packaged as much as
 13 they are.
 14 MR. BAGGETT: The secondary market has
 15 obviously increased, and it's going to keep increasing,
 16 and how do you deal with that because we did not attempt
 17 to deal with that in '97 and '99. We did not know it was
 18 a big issue, and so that's very appropriate to talk about
 19 now, but I also want -- I want you guys who are on the
 20 consumer side to make sure that what we're doing is fair
 21 to the consumers, too.
 22 MS. NEELEY: I was going to make an
 23 observation. Under RESPA you have to be a federally
 24 related lender, and some of these tax lien financiers are
 25 below the one million threshold, and so they are not

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1 necessarily subject to RESPA, and under RESPA you've got
 2 to give the disclosure of the transfer of servicing rights
 3 that was added in by Henry B. Gonzalez a number of years
 4 ago, but I don't recall, and I don't know if any of you
 5 guys remember, a record retention requirement as to how
 6 long that servicing right disclosure is actually retained
 7 by the lender such that that document would be available
 8 to -- I don't think it's retained.
 9 MR. BASTIAN: It's five years.
 10 MS. NEELEY: Yeah. So you don't have that
 11 necessarily when you're getting ready to foreclose to
 12 establish that as one of the pieces of evidence. So the
 13 verification process I think works and then the debtor is
 14 going to know, "I wasn't making payments to that servicer.
 15 I'm going to contest this, because that's not really the
 16 right party," I think.
 17 MR. BARRETT: Good point.
 18 MS. NEELEY: Fred, does that make sense?
 19 MR. FUCHS: Well, I was actually thinking of
 20 one other issue that we've seen from the homeowners'
 21 perspective; and if you'll look at the rule, the -- it
 22 doesn't identify or require actually that the notice or
 23 the application state the cause number in the court; and
 24 believe it or not, we see homeowners coming in who have
 25 received the application and the notice, and there is no

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1 cause number and no court, so they don't know the judicial
 2 district; and the good firms file it and then send it out
 3 with a cause number in a court, but there are some firms
 4 that aren't doing that. So the homeowner has -- and
 5 doesn't know the cause number in which to file a response
 6 if he or she wishes to file a response.
 7 MR. BAGGETT: Okay.
 8 MR. FUCHS: And, believe it or not, we've
 9 had some problems with law firms then when you call them
 10 up and ask them to provide that information, which as a
 11 courtesy you would do in any kind of litigation it seems
 12 to me, refuse to tell us over the telephone the number
 13 that's been assigned to the pending application.
 14 There's the form here, which is implicit it
 15 seems that you would state the cause number, but the way
 16 the rule is written you simply have to certify as the
 17 attorney filing the application that you served it by
 18 first class mail and certified mail and along with the
 19 notice, but there's no requirement actually in the rule
 20 that the cause number and the court actually be included
 21 in the correspondence to the consumer, and that's one of
 22 the little things that I think need to be tweaked along
 23 with the other three issues that have been discussed here.
 24 MR. BASTIAN: That's a real simple one to
 25 fix. I mean, that -- there's a lot of little tiny tweaks

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1 that need to be taken care of where it ends up being a
 2 loophole that I think can be taken care of.
 3 MR. BAGGETT: Okay. Anybody else got any
 4 comments on this?
 5 HONORABLE BRUCE PRIDDY: On that last issue
 6 that Mr. Fuchs brought up, there is one particular firm
 7 that persists in doing this, and in my court those
 8 applications get denied, and I wrote a three-page opinion
 9 which I sent off to the law firm telling them don't do it
 10 again. I likened the notice to a citation, and if the
 11 citation is missing certain information like that then
 12 that would be -- the case would be dismissed or there
 13 would be no way to get a default judgment. I kind of
 14 analogized to that, and I believe that fair notice
 15 requires them to tell the -- to not send the notice out at
 16 the same time. What they do if they're in another city,
 17 they send the -- Fed Ex the application to be filed at the
 18 same time they send the notice out, and so actually the
 19 notice is sent out the day before.
 20 MR. BAGGETT: Right. They don't know what
 21 it is.
 22 HONORABLE BRUCE PRIDDY: The day before, and
 23 I just don't think that's -- that that's allowed, that you
 24 have to file it and then have the notice so you can give
 25 the borrower the notice of the court and the case number

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1 so they know where to file the answer and what to put on
 2 the answer, because if you don't have the case number the
 3 answer is going to get lost.
 4 MR. BAGGETT: Okay. I see you shaking your
 5 head yes, and I agree.
 6 MS. KELLUM: I agree with judge, and that's
 7 -- I don't know if you would call it an issue, but it's
 8 certainly a concern in our court, the service process,
 9 period, because we have a lot of attorneys that we have to
 10 double-check and make sure that service was proper and
 11 everything, because it's -- we just are concerned with due
 12 process.
 13 HONORABLE BRUCE PRIDDY: Yeah. And I have
 14 two issues that I was going to -- wanted to bring up, and
 15 that was the one of them, and that's the outsourcing the
 16 citation in the service of process to the applicant's law
 17 firm, and that's what they do, with a notice that is
 18 instead of the citation and then the service where they
 19 have to send it by regular mail and certified mail is --
 20 stands in for the service of process. Now, the vast
 21 majority of the applications in our courts are default.
 22 Now, either that means the borrowers don't have any
 23 objection and everything is fine, we can just go forward,
 24 or it means the borrower may not be getting notice --
 25 MR. BAGGETT: Right.

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1 HONORABLE BRUCE PRIDDY: -- or may not be
 2 getting sufficient notice that they really understand
 3 what's going on. I often set a final disposition hearing
 4 on my applications unless the -- unless a default is -- I
 5 can clearly do a default. If they've proven everything
 6 they need to prove to get the default, I'll grant the
 7 default, but otherwise I will just set a final disposition
 8 hearing, and I send notice directly to the borrower, and
 9 this is a default situation where the borrower has not
 10 answered. About 30 percent of those the borrower shows
 11 up, and this is in a default situation, so I'm kind of
 12 concerned that the borrowers may not be getting notice.
 13 There is due process concerns, there is the
 14 Jones vs. Flowers case out of the U.S. Supreme Court
 15 involving the Arkansas tax debt that has some implication
 16 here about notice, and I think we need to think about -- I
 17 would like to rethink whether going back to real service
 18 of process. I think 60 bucks would be a small price to
 19 pay in this to go ahead and get -- it would solve a lot of
 20 my concerns about due process and my concerns about
 21 whether the borrower is really getting notice.
 22 One of the things that I think is the
 23 borrowers get a barrage of letters from these particular
 24 lawyers. They get all these dunning notices they may have
 25 gotten every month -- you know, every month for the last

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1 ten months and then they get this notice. They may not
 2 even open it because it's from the law firm. They just
 3 think it's another dunning notice, and they may get it,
 4 and they may not even realize it's a court document or
 5 something. If they can get notice from the court or
 6 notice from personal service or something that really hits
 7 home that there's a court proceeding that they're about to
 8 lose their house, and I just think that it would probably
 9 make sense to have some sort of more official notice than
 10 the notice solely from a law firm, and that's just one
 11 issue that I want to throw out there.
 12 MR. BARRETT: We may have gotten that one
 13 wrong, Judge. What we were primarily thinking of in the
 14 old committees and in the past is the size of the cost.
 15 \$50 is ten percent of the cost of the whole thing, so
 16 that's a significant charge when you stack it up and
 17 use -- because all of these servicers are losing 40, \$50 a
 18 day, they want you to go out and hire an expedited service
 19 processor, and now you're talking about a hundred to 150
 20 bucks.
 21 When you want to reinstate -- and Texas is
 22 the cheapest state in all the country to reinstate
 23 mortgages. We are thousands of dollars less than
 24 California, so if you lose your job, you get a job, and
 25 you need to go reinstate your mortgage, this is the best

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1 place on earth to do it, and we did it by scraping fees
 2 out of the process. Most states use substitute service
 3 providers, and in some states the fee for that goes all
 4 the way to nearly 400 bucks, so it's a significant expense
 5 which is tacked on each and every case, whereas it would
 6 be beneficial only to the few who for some reason had a
 7 justified reason for not getting the letter, and I don't
 8 think not opening your letter is a justified excuse, and
 9 then I'd be interested to know when those 30 percent show
 10 up, do they have meritorious defenses? Have they, in
 11 fact, made payments that nobody discovered until they
 12 appeared?
 13 MR. BAGGETT: Yeah, but I understand your
 14 issue. You want to make sure they get it, get it in some
 15 way that they know that it's different, and I don't -- the
 16 cost of the process, I -- you know, the market is just
 17 going to have to deal with that issue. If it costs more
 18 money, the market is going to have to figure out how to
 19 deal with that issue if it's something that we really
 20 need.
 21 MR. BARRETT: Well, it's a huge imposition
 22 of expense on the debtors. All of these expenses either
 23 are paid by the debtors when they reinstate --
 24 HONORABLE MARK DAVIDSON: Paid by the
 25 lenders up-front.

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1 MR. BARRETT: Paid when they reinstate or
 2 when they pay off or they're paid by investors, and of
 3 course, most of the investors ultimately are insured and
 4 that means the taxpayers pay it. 60 percent of the loans
 5 are HUD loans, and all the loans that don't go back, are
 6 not reinstated, wind up being paid for by Federal funds
 7 out of HUD. That's plain tax money, so the market you're
 8 describing is us, the voters, the taxpayers, the citizens.
 9 MR. BAGGETT: Ultimately we've got to pay
 10 for everything, but that doesn't mean we're not going to
 11 do anything.
 12 MR. BASTIAN: Let me ask the clerks, if
 13 you-all sent the notice, how big an imposition is that on
 14 you-all, to have the independent hand-off that Judge
 15 Priddy is talking about?
 16 HON. AMALIA RODRIGUEZ-MENDOZA: When we file
 17 the application or the -- and we have to make a copy of it
 18 because it's electronic, so that's an expense that will
 19 be -- have to be charged on the number of copies that we
 20 have to do to file the -- to submit the citation. So it's
 21 an added work to our employees, but, you know, I think
 22 we'll have to just deal with it.
 23 MR. BASTIAN: Okay. That may be kind of a
 24 philosophical thing that we have to deal with. I mean --
 25 MR. BAGGETT: Yeah, Manny.

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1 MR. NEWBURGER: We've got options elsewhere
 2 in the rules that -- or in the statutes that let us have
 3 alternate ways of service. For example, on foreign
 4 judgments you can let the clerk give notice or you can let
 5 a party give notice. What if you simply provide the
 6 option of either the clerk or service and mandate that if
 7 they're going to have the clerk do it, they've got to
 8 deliver the extra copies to the clerk's office so the
 9 clerk's office doesn't have that burden, and I don't want
 10 to step on Amalia here. It may be the solution is not to
 11 allow e-filing. I don't know if e-filing is a bad thing
 12 here, but if it's a good thing for you-all --
 13 HON. AMALIA RODRIGUEZ-MENDOZA: It's a good
 14 thing.
 15 MR. NEWBURGER: -- they have to deliver the
 16 copies, but certainly we've got a precedent for giving
 17 parties the option of service or a clerk doing a mailing.
 18 HON. AMALIA RODRIGUEZ-MENDOZA: I think the
 19 way we've solved that is we actually make the copies and
 20 then we charge the attorneys for the copies and then --
 21 MR. BASTIAN: What if the attorney had to
 22 send to you the notice and then you just put it in your
 23 envelope? I mean, because you already have the Pitney
 24 Bowes machines that just run it through, and it's going to
 25 come through from your court if the attorneys supplied

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1 that to you.
 2 HON. AMALIA RODRIGUEZ-MENDOZA: So then
 3 we'll end up with two methods, the e-filing method and the
 4 manual processing, which, I mean, it's workable. I'm not
 5 saying it's not. I'm just trying to bring that --
 6 MR. BAGGETT: It's going to cause you an
 7 expense.
 8 HON. AMALIA RODRIGUEZ-MENDOZA: -- into it.
 9 MR. REDDING: This is probably a ridiculous
 10 idea, but I always look for the simplest solution.
 11 MR. BAGGETT: Yes.
 12 MR. REDDING: Could you change up some of
 13 these rules such that when that final notice is sent to
 14 them or the document is -- or the actual order or the
 15 application for the order is sent to them, that you put it
 16 on the outside of the envelope?
 17 MR. NEWBURGER: Lawyers can't do that. The
 18 Fair Debt Collection Practices Act forbids any notices on
 19 the outside of an envelope that are sent from a debt
 20 collector, which includes any of the law firms conducting
 21 foreclosures, and the limit is the name of the addressee
 22 and the return address of the sender and their name if it
 23 doesn't reflect that they're in the debt collection
 24 business. If firms like Mike start putting stuff on the
 25 outside of envelopes, that's a guaranteed class action.

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1 MR. REDDING: Good reason not to then.
 2 MR. BASTIAN: Well, there's probably an
 3 unintended consequence with this whole service thing
 4 because, as most of you-all know, in the rules if nobody
 5 files a response you're entitled to an order, but we have
 6 a matrix of all the courts in the state, and almost ten
 7 percent of them require a hearing, and I think many times
 8 they require a hearing even if it's a default simply
 9 because they're worried about what Judge Priddy is, did
 10 somebody really have notice, and that court wants to be
 11 kind of the arbiter, a fail-safe, or whatever you want to
 12 call it that --
 13 MR. BAGGETT: They're also worried about the
 14 applicant.
 15 MR. BASTIAN: Well, you know, all of those
 16 kind of things and kind of gets back, and then really what
 17 happens is because of that and having the hearing and even
 18 judges the way they're looking at these things, is that is
 19 the burden of proof to prove up one of these Rule 736s, is
 20 it now the burden of proof for motion for summary judgment
 21 type proof or is it for a default proof? And those are
 22 two completely different things. If you had personal
 23 service on somebody, I think every judge would just go on
 24 and sign the order and you would be done, but when you
 25 have the service like we have now then judges are

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1 requiring hearings that really aren't required in the
 2 rule, and then even if they don't have a hearing, they're
 3 going to go through and look at the verification or your
 4 evidence that you have and they're going to use the motion
 5 for summary judgment standard, which many times means that
 6 you've got three or four months delay to go get all that
 7 stuff because the standard is so much different.
 8 So it has kind of an unintended consequence
 9 when you have judges that are a little bit concerned about
 10 did the borrower really get notice and then they end up
 11 vetting the files to make sure that, you know, everything
 12 is kosher.
 13 HONORABLE MARK DAVIDSON: Well, let's start
 14 with the -- I hate to back it up, but I wasn't on the
 15 committee at the time. What is the purpose of judicial
 16 review? If it is not to make sure that the -- that
 17 everything is copacetic, then why are judges even involved
 18 at all?
 19 MR. BASTIAN: Well, because that's -- the
 20 Constitution required a court order.
 21 HONORABLE BRUCE PRIDDY: But why did the
 22 Constitution require the court order is the question?
 23 MR. BASTIAN: Well, but there's kind of an
 24 answer back to that, and that was the way this -- the core
 25 principle the way Rule 736 was set up, we had the

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1 assumption that 50 percent of all the home equity
 2 applications that were going to be filed were going to be
 3 uncontested, and that was -- we figured that would be
 4 maybe a high number. In truth it's probably very, very --
 5 I mean, it's very low. I mean, a whole lot less than that
 6 have ever been challenged, and this whole idea of the rule
 7 was if nobody was going to contest that you basically have
 8 a foreclosure like you do now, and it just goes through
 9 the process. That was the whole idea that Rule 736 was
 10 set up, so that if somebody didn't contest that you didn't
 11 clog up the courts. If they did contest, you had all of
 12 these things in place so they could come in and say
 13 there's something wrong with this, the servicing, the
 14 loan, whatever it is.
 15 MR. BAGGETT: Let me get -- mechanics of how
 16 we get an order are very important, and they've got to do
 17 what we need to protect people, but don't forget what
 18 we're doing here is all we're doing is getting an order
 19 saying you can foreclose. You've still got to go through
 20 the whole process that you do anyway, so yeah, there is
 21 judicial participation because they've got to make sure
 22 that what we say is done is done, but it does not
 23 immediately take away from all the normal foreclosure
 24 issues. All you've got is an order and then you go do
 25 whatever you've got to do on top of that.

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1 HONORABLE MARK DAVIDSON: With respect, no
 2 judge wants to have Marvin Zindler in their reception room
 3 when they get to the courthouse in the morning wanting to
 4 know why you threw the Widow Jones out of the house. We
 5 had a judge who did that on a homeowners association deal
 6 down here a couple of years ago, and the judge essentially
 7 was hounded off the bench, resigned.
 8 HONORABLE BRUCE PRIDDY: I had one judge,
 9 one of my colleagues just -- we're civil judges. Harris
 10 County and Dallas I think are the only -- or I guess
 11 there's a few that are purely just civil. We just do
 12 civil cases, no criminal cases at all, so we don't sign
 13 death warrants. We can't do a capital punishment case,
 14 and one judge confessed to me that this is the closest
 15 thing that he has to a death warrant, is that we're
 16 signing an order allowing someone's house to be taken
 17 away, and --
 18 MR. BAGGETT: I'm not disagreeing that there
 19 ought to be a process for that, but we've got to balance
 20 between how much we put back on the courts to do all that
 21 versus what we -- if it's going to be the uncontested, is
 22 it going to just clog up the docket so that half your
 23 cases are these issues.
 24 HONORABLE BRUCE PRIDDY: Right. And that's
 25 the next issue that I had, is there's ambiguity on the

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1 default situation, what Mr. Bastian was pointing out, and
 2 I think we need to clarify that. In the rule (8)(a) says
 3 that you have to prove the certain elements before you can
 4 grant an order, but then sub (5) talks about default, "You
 5 shall grant if there's no answer and the notice is on file
 6 for ten days" or something like that. The question there
 7 is do they still have to prove the elements in the
 8 application? Do they have to prove everything that's -- I
 9 believe it's the elements of (1) --
 10 MS. DOGGETT: (e).
 11 HONORABLE BRUCE PRIDDY: -- (e). Does that
 12 have to be proved in the application or does the fact that
 13 they don't answer -- do you accept all allegations as
 14 true? I don't think you do that. The normal default
 15 situation doesn't seem to apply because we have this
 16 obligation to bring forward facts in the initial pleading,
 17 in the application. So there is to me an ambiguity of
 18 whether before you grant a default you have to make sure
 19 that the -- all the elements of (1)(e) are proven or not.
 20 (8)(a) seems to say that to me.
 21 MS. DOGGETT: Why do you have to have a
 22 hearing to prove it?
 23 HONORABLE BRUCE PRIDDY: Oh, you don't have
 24 to prove it, but you have to analyze the application to
 25 see if they've presented evidence. I believe it's

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1 evidence as would be admissible at trial, is I believe the
 2 standard in the rule, to see if they established evidence
 3 instead of just an allegation that these necessary
 4 elements are established, and that's -- if we can clarify
 5 that, if you want to say that if there is no answer we
 6 assume all facts as true as in the normal situation, we
 7 should make that explicit, and that will streamline a lot
 8 of -- a lot of things if we make that explicit.

9 MR. BASTIAN: Yeah, the rule says "as will
 10 be admissible in evidence" and then that's it. It doesn't
 11 really say that's the way it is, but you certainly have
 12 this two different standards of proof, motion for summary
 13 judgment proof or just plain default proof, and again,
 14 that's that philosophical difference, and it may go back
 15 to either because you don't have personal service -- I
 16 mean, I don't know all the reasons why, but you'll see
 17 those variations in lots of these courts.

18 HONORABLE MARK DAVIDSON: Well, a lot of --
 19 a number of my colleagues say, "We didn't ask for this
 20 job, but if we have it, then, you know, there must be a
 21 purpose behind us being required to be the gatekeepers to
 22 make sure all procedures have been followed," and there
 23 are other judges that take the position, "These people
 24 borrowed the money, they didn't make their loan payments,
 25 end of the road."

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1 The rules should be as explicit and clear as
 2 possible as to what has to be there in order for one of
 3 these to be granted and exactly what the procedure should
 4 be, and the current rule is in my view no as clear as it
 5 should be one way or the other.

6 MS. NEELEY: Okay, for what it's worth --
 7 and Larry and Kelly can kick in if I'm getting it wrong,
 8 but I believe if you go back to the legislative history
 9 there was a colloquy on the floor between Mr. Woolins and
 10 Harriet Earhart about the legislative intent of this
 11 particular section in the Constitution, and the concept
 12 here, there's a tension between normal foreclosure,
 13 posting at the courthouse door, no judicial action at all,
 14 judicial foreclosure, something in between, and the
 15 concept that was put in here was that there needed to be
 16 some simple mechanism whereby the debtor would have an
 17 opportunity to say, "Well, wait, there is an irregularity
 18 in this transaction and the lien is invalid," and by
 19 having this sort of intermediate process, there was an
 20 opportunity for the debtor to say, "The loan is irregular,
 21 so I really should be off the hook."
 22 It was not conceptually a judicial
 23 foreclosure or a requirement that you had to go through
 24 all of this additional proof that we wouldn't do in a
 25 courthouse steps foreclosure. So the whole underlying

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1 objective was just to create this opportunity for the
 2 debtor to come in and say, "Wait, wait, wait" --

3 MR. BAGGETT: Yeah.

4 MS. NEELEY: -- "irregularities," that's it.
 5 And if they didn't have an irregularity then, you know,
 6 they had their opportunity, and that was it.

7 MR. BAGGETT: I think you're right. We're
 8 trying to deal with the balance between these that there's
 9 no problem with and clogging up the courts with those.
 10 However, I agree with the judges that if there's something
 11 that says you've got to do it, they ought to be able to be
 12 comfortable that's what we've got to do. Now, what that's
 13 probably going to mean is we're going to put more on the
 14 courts, send out notice or this, that, and the other, and
 15 we didn't want to burden the courts, overburden the courts
 16 with this process. That's the balance we're trying to get
 17 to.

18 MS. NEELEY: Well, I think the real balance
 19 is --

20 MR. BAGGETT: Judges and the coordinators
 21 and the clerks. You have to send out extra notices.

22 MR. TEMPLE: Mike, I agree with Karen. I
 23 think the original concept of the court order that she
 24 said was somewhere in between the standard and nonjudicial
 25 foreclosure that we have on 99 percent of the cases and

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1 the provisions that are available for judicial
 2 foreclosure, and while the law doesn't quite say this, the
 3 concept was that if the application is filed and there's
 4 no response to it, what the court is effectively doing is
 5 saying "We have not been provided with any reason why the
 6 lender ought not to be able to proceed with the standard
 7 nonjudicial foreclosure." That's all that is. It's not
 8 really giving the court the responsibility of saying, yes,
 9 we think Widow Jones ought to be kicked out of her house.
 10 It's more the negative of we see no reason why, have been
 11 provided no reason why, they ought not to be able to
 12 proceed with a standard form of the foreclosure.

13 MR. BAGGETT: I don't disagree with you, but
 14 I think that we've got to make the rule have the basic
 15 elements in there that does what we hope it does, which is
 16 they actually get notice, and it actually is the right
 17 party --

18 MR. TEMPLE: Absolutely.

19 MR. BAGGETT: -- trying to get it, and
 20 there's a default, and we've got to get to a place to
 21 where we do that without overburdening the judges and the
 22 courts with it. Now, how you get to that balance, I don't
 23 know.

24 MR. FUCHS: Mike?

25 MS. KELLUM: Can I -- I'm sorry.

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1 MR. FUCHS: Go ahead.
 2 MS. KELLUM: I was just going to say in the
 3 CYA world that we live in today if you've got a judge like
 4 the judge that I work for, he's not going to sign a leaf
 5 that blows in the window, and he's going to want some
 6 substance behind it.
 7 MR. BAGGETT: I understand that.
 8 MR. FUCHS: Currently under the rule we
 9 allow for service of -- and showing that service has been
 10 completed just on these certificate of service by the
 11 attorney for the applicant. One -- and that the judge can
 12 grant the default if there's no response within time and
 13 that certificate of service has been on filed for ten
 14 days. One additional -- part of the concern is shady
 15 attorneys who are perhaps not complying, and one
 16 possibility would be some extra requirement of proof of
 17 service; i.e., because there's the i.e. that the attorney
 18 who seeks the default would have to show a copy, a copy of
 19 the green card having come back or a -- and show that if
 20 it does -- if the green card didn't come back, a copy of
 21 the envelope that's come back showing it was unclaimed and
 22 a copy of the envelope showing it was mailed by first
 23 class mail.
 24 I mean, you can still play with those, but
 25 it's harder on the certified mail, and that would give

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1 some at least additional confidence to the judiciary then
 2 that the attorney had indeed complied with the notice
 3 requirement other than taking the attorney's word. It
 4 doesn't deal completely with Judge Priddy's concern about
 5 the fact that the consumer may ignore the notice because
 6 he or she may have gotten five or six --
 7 (Sirens)
 8 MR. BAGGETT: Here's some consumers coming
 9 after us, all the sirens.
 10 MR. FUCHS: -- but sort of in keeping with
 11 the concept that we assure that there's notice yet that
 12 it's a streamlined process. I just throw that out.
 13 MR. BASTIAN: I'm going to jump in here on
 14 the green cards because that's a real pain, but now with
 15 the U.S. Post Office you can get a certified number, and
 16 there is just a printout that you ought to be able to
 17 attach that. I mean, that's coming from the post office
 18 that says, "This was delivered to the post office and
 19 there's the proof" and you attach that, so you don't have
 20 to have the green card, because to get green cards is just
 21 a royal --
 22 MR. BARRETT: Well, there was a client of
 23 ours two years ago that decided they were no longer going
 24 to keep green cards, and the reason they did it is 37,000
 25 square feet was the amount of space that they recovered

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1 from where they had been storing green cards. Again, I've
 2 got to tell you that the cost of all of this is
 3 monumental. Most of these actions are redeemed by
 4 reinstatement, so every time you add cost to the process,
 5 you add cost to the people who are trying to reinstate
 6 their mortgages, and in an era when holding onto your home
 7 is a very difficult process, raising the cost of retention
 8 is probably something that we should be very circumspect
 9 about.
 10 It's costly to do a green card process,
 11 probably as much as 20, 25 bucks a file by the time you
 12 pay for the postage and pay for the storage and pay for
 13 the clerical manipulation of it. Barrett Burke, for
 14 example, is an entirely paperless outfit. We don't keep
 15 paper. If we've got to keep green cards then we're going
 16 to have to go create a place to keep the green cards.
 17 MR. FUCHS: But do you scan the green cards
 18 after you get them back so that --
 19 MR. BARRETT: If the rule said that, but
 20 we've got a lot of judges that say, no, I want green
 21 pieces of paper.
 22 MR. BASTIAN: What I found with judges on
 23 the green card, lots of them have their computer on their
 24 desk and I say, "Judge, here is the number, type it in,
 25 U.S. Post Office, type in the number." They do it

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1 themselves and they see it pop up, and that's proof.
 2 MR. FUCHS: That's good enough.
 3 MR. BASTIAN: That's good enough.
 4 MR. BARRETT: Yeah.
 5 MR. BASTIAN: Because that's the U.S. Post
 6 Office. You have an independent source that comes in and
 7 says that was actually deposited with the U.S. Post Office
 8 and then you don't have to mess with the green cards
 9 unless somebody wants to mess with them.
 10 MR. BAGGETT: Okay, let's do this. Let's
 11 try to figure out some way we can do it that is least
 12 obtrusive to you guys and expensive, but judges are more
 13 comfortable that they're getting the durn papers that they
 14 need to get, and we'll work on that and see how we get
 15 into everything, but I don't -- and I don't -- the three
 16 that you said are fine, defining "the applicant" is
 17 important because you've got to have the right party to do
 18 that, regularize it with the Property Code is important,
 19 and verifying the application.
 20 MS. NEELEY: What does that mean.
 21 MR. BAGGETT: Yeah.
 22 MS. NEELEY: And then if we can enhance the
 23 notification process to give comfort that there is due
 24 process and that the debtor really knows that they have
 25 this opportunity, then I think maybe, Judge, some of the

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1 concerns can be allayed, the person didn't respond because
 2 they didn't have anything to say, but they really knew
 3 they had an opportunity. That's key.
 4 HONORABLE BRUCE PRIDDY: It would be almost
 5 like in terms of a show cause order, tell us a reason why
 6 I shouldn't let the lender foreclose, come up with a
 7 reason if you don't -- with the standard being if you
 8 don't come up with reasons the court's going to grant it.
 9 MR. BASTIAN: And that could be put in the
 10 rule. I mean, I think that could very easily, because
 11 that's your standard that you're looking for.
 12 MR. TEMPLE: That was the concept
 13 originally.
 14 MS. NEELEY: Yeah.
 15 MR. BASTIAN: Say this is the standard you
 16 use, because right now you have some judges saying the
 17 default standard and some judges saying a motion for
 18 summary judgment standard.
 19 HONORABLE BRUCE PRIDDY: Right, and that's
 20 something we need to clarify because I think (8)(a) to me
 21 seems to indicate that if there's no answer you still have
 22 to use, as Tommy said, the summary judgment standard, and
 23 I don't know if that was intended in a default situation.
 24 If it wasn't, that needs to be clarified that that -- that
 25 in a default situation the lender does not have to prove

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1 all the elements of (1)(a).
 2 MR. BASTIAN: To me that's just drafting. I
 3 think we can come up with the words for that. I mean, we
 4 have two judges that are very -- and Fred that's very
 5 interested in that language about what is the standard,
 6 and we ought to be able to come up with the standard
 7 that's easy to enforce.
 8 MR. BAGGETT: Okay.
 9 HONORABLE MARK DAVIDSON: I agree.
 10 MR. BAGGETT: I think those are the fair
 11 issues. Yes.
 12 MS. HOBBS: We need to give the court
 13 reporter a break.
 14 MR. BAGGETT: Need a break? We don't have
 15 coffee or anything? Okay. We're going to take about a
 16 ten-minute break.
 17 HONORABLE MARK DAVIDSON: Okay. And I have
 18 to get on an airplane to San Diego, which is why I
 19 couldn't be there today.
 20 MR. BAGGETT: Okay.
 21 HONORABLE MARK DAVIDSON: I'm speaking at a
 22 nationwide conference, and I'm sorry, but when they give
 23 me free first class airplane tickets to San Diego I go,
 24 "Yes, I'll be there."
 25 MR. BAGGETT: We understand that, and you're

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1 fine. Thank you, Judge.
 2 HONORABLE MARK DAVIDSON: I promise I'll be
 3 there live at the next meeting.
 4 MR. BAGGETT: No problem.
 5 (Recess from 10:58 a.m. to 11:09 a.m.)
 6 MR. BAGGETT: Okay. Why don't we do this,
 7 we will put that in a committee form and try to come up
 8 with something that is not swinging one way or another,
 9 kind of comes down the middle and the court people don't
 10 get killed in it and that's okay with you--all I assume,
 11 and the judges feel okay that they've done what they need
 12 to do to make sure everybody got notice and a shot and
 13 that's all fair. I don't have a problem with any of that.
 14 And then we've got to balance the cost, I understand, so
 15 we're going to figure how to do that.
 16 HON. AMALIA RODRIGUEZ-MENDOZA: All in one.
 17 MR. BAGGETT: Easy, easy. Okay. Now, why
 18 don't we do tax liens since we solved this other problem
 19 so easily, and who wants to talk about tax liens? Because
 20 I know what tax liens are. I need to pay them or I'm in
 21 trouble. That's about the beginning and ending of what I
 22 know about it.
 23 MR. BASTIAN: We need to talk about
 24 hearings.
 25 MR. BAGGETT: Hearings? What do you want to

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1 talk about on hearing?
 2 MR. BASTIAN: Well, under the rule you don't
 3 have to have a hearing if there's no response and you've
 4 got --
 5 MR. BAGGETT: On this? All right. Sorry.
 6 MR. BASTIAN: That's another one of those
 7 philosophical things we've got to kind of wrestle with.
 8 MR. BAGGETT: Okay. All right. Bring up
 9 your issue. Now, we've got to get to tax liens because
 10 that really is the reason why we're here. We do need to
 11 coordinate everything, but we've got to get to tax liens.
 12 Okay.
 13 MR. BASTIAN: Well, and again, this may be
 14 one of the philosophical things we've got to deal with,
 15 and that is lots of judges are requiring hearings even if
 16 there's no response, and part of this may be tied up with
 17 the service again. But the way the rule is written, that
 18 if there is no response filed and the judge is supposed to
 19 sign the order and you go do the rest of the things that
 20 you have to do to foreclose, and I don't know if anybody
 21 has a problem with that or rewriting the rule or something
 22 to make sure that you don't have to go have a hearing if
 23 there's no response filed, or whether we want a hearing.
 24 HONORABLE BRUCE PRIDDY: One of the things,
 25 to clarify, one of the reasons I think some judges have

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1 hearings is there's really only two ways to get documents
 2 that they can consider. One is the application in the
 3 materials and the affidavit is attached to that, and then
 4 there's also the -- I think rule (6) says at the hearing
 5 you can consider affidavits on file. To the extent that
 6 supplementation is required, if stuff is not in the
 7 application and then they file, like, as Judge Davidson
 8 pointed out a lot of times courts will require you file
 9 the assignment, wasn't in the original application, they
 10 file it later. Can a court consider that? It wasn't
 11 attached to the application. Or does the court have to
 12 have a hearing and then consider it at the hearing?
 13 To the extent that applicants try to offer
 14 documents that weren't in the original application, there
 15 is some confusion or some disagreement among the courts of
 16 whether they can consider that or whether they have to
 17 have a hearing to consider that, and that's one reason why
 18 I think you have some hearings.
 19 MR. BASTIAN: I think that can be drafted,
 20 too.
 21 HONORABLE BRUCE PRIDDY: No, we can draft
 22 around it. We just need to be clear on what we want.
 23 MR. BAGGETT: Okay. So what are we going to
 24 draft? What are we going to say about the hearings?
 25 MR. BASTIAN: Well, I think what we do is

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1 come up with some suggestions in the group and look at it
 2 after you see something work in the real world.
 3 MR. BAGGETT: If on the face of the
 4 documents it doesn't appear to comply --
 5 MR. BASTIAN: Yeah, if it's proved up and
 6 you don't have a response, then no hearing. But maybe
 7 like you're saying, give the judge the discretion if he
 8 wants -- well, see, that's the catch 22. A lot of judges
 9 are doing -- you don't know why they do it. Because I've
 10 had a lot of judges just do it, as soon as you show up,
 11 nobody shows up, they give you the order. I mean, it's
 12 kind of like an exercise in futility, but I mean, if it's
 13 like you're saying, okay, here is the particular reason
 14 why you have to have a hearing and that is you haven't
 15 supplied it to the judge's satisfaction, then the judge
 16 has a hearing and that kind of also gives the enforcement
 17 that, Mr. Attorney, if you don't do it right, then we're
 18 going to make you suffer and have a hearing on this thing.
 19 But if you do it right then there's no need for a hearing.
 20 HONORABLE BRUCE PRIDDY: Right, but --
 21 MR. BASTIAN: That would be kind of the
 22 discipline that makes sure that the attorneys do it right
 23 when they file the application and all the proof then.
 24 Maybe we can do it that way.
 25 MR. BAGGETT: Well, I guess that gets to the

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1 point, well, you need to read it and make sure they did
 2 what they did, and if they didn't or you have a question
 3 about it, then have a hearing. That's going to put it on
 4 the judge to do all that.
 5 MR. BASTIAN: Well --
 6 MR. BAGGETT: All right. We'll work on
 7 hearing, too. All right. And we've got as much time as
 8 we need. We're going to have lunch and all that stuff, so
 9 I'm not hurrying through it. I want to make sure we cover
 10 tax liens. Who wants to talk about it first? Which one
 11 of you were most active? Kelly?
 12 MS. RODGERS: Me.
 13 MS. NEELEY: Kelly.
 14 MR. BAGGETT: You're up, Kelly.
 15 MS. RODGERS: When we came into the last
 16 legislative session this issue on tax lien transfers and
 17 liens and foreclosures had been addressed in some prior --
 18 prior legislative sessions, but for whatever reason the
 19 mortgage lenders were just beginning to see some of these
 20 tax lien foreclosures come through, because there's a
 21 super priority lien with the tax lien that transfers from
 22 the taxing authority to whoever pays off the taxes, and it
 23 trumps the first lien purchase money mortgage that's out
 24 there. So sort of the impetus for all of this was that
 25 some of the mortgage companies and mortgage lenders were

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1 getting notices that a foreclosure was about to take
 2 place, you know, four days before the foreclosure was
 3 about to take place, and they were obviously interested in
 4 going in and paying off the -- paying off the tax lien
 5 transfer loan.
 6 As far as the -- do you want me to go
 7 through some of the more detail? Essentially the tax lien
 8 lenders were not regulated by any state agency of any
 9 sort, which was the only -- you know, the only lender in
 10 the state of Texas that wasn't regulated. So one of the
 11 things we did was pass House Bill 2138, which put them
 12 under the regulation of the Office of Consumer Credit
 13 Commissioner who is currently in the process of
 14 promulgating rules dealing with how those folks are
 15 licensed and what kind of fees and expenses they can
 16 charge.
 17 MR. BAGGETT: Who has to be licensed?
 18 MS. RODGERS: The tax lien lenders have to
 19 be licensed by the Consumer Credit Commissioner's office
 20 now, and so we've got the regulatory side of it and then
 21 we've got Senate Bill 1520.
 22 MR. BAGGETT: Put a mark in your mind, and
 23 I'm going to go back to you, but let me tell you my
 24 reaction to this, having never ever seen anybody buy one
 25 or sell one or whatever. From a foreclosure standpoint I

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1 never worried about ad valorem taxes being a priority
 2 because they had to be judicially foreclosed.
 3 MR. REDDING: That's right.
 4 MR. BAGGETT: So it didn't bother me, and
 5 then I found out all the sudden they don't have to be
 6 judicially foreclosed and they have a priority and you
 7 don't give notice to the first lienholder. I said, "How
 8 in the hell did we get there?" I'll just be honest with
 9 you. That was my reaction to it.
 10 MR. REDDING: Well --
 11 MS. RODGERS: That was the reaction of a lot
 12 of the industry.
 13 MR. REDDING: Yeah. Mike, if I can
 14 interpose, because this was an issue obviously for the
 15 title industry because --
 16 MR. BAGGETT: Yeah.
 17 MR. REDDING: -- what you have is you have
 18 the tax lien lender claiming priority under the tax code
 19 and yet trying to avail themselves of the nonjudicial
 20 provisions --
 21 MR. BAGGETT: Right.
 22 MR. REDDING: -- you know, in 51.002 for
 23 foreclosure.
 24 MR. BAGGETT: Right.
 25 MR. REDDING: And I don't think you can --

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1 Tommy and I talked about this. We all talked about it,
 2 because it was how do you marry those two together without
 3 giving notice? Tax code says you give notice to everybody
 4 that has an interest in the property.
 5 MR. BAGGETT: Right.
 6 MR. REDDINGS: And yet the foreclosure --
 7 MR. BAGGETT: And you got it judicially
 8 foreclosed.
 9 MR. REDDING: Yeah, and the nonjudicial
 10 foreclosure provisions say you only have to give notice to
 11 that person that is obligated on the note.
 12 MR. BAGGETT: Correct.
 13 MR. REDDING: So how do you marry those two
 14 and still protect them?
 15 MR. BAGGETT: We've been giving speeches
 16 like that for 20 years.
 17 MR. REDDING: That's right. That's right.
 18 MS. DOGGETT: Can I add something here?
 19 MS. RODGERS: Absolutely.
 20 MS. DOGGETT: This is Mary Doggett. Oh,
 21 he's off the line. In the 2005 legislative session, I
 22 represented a small tax lien lender that had been giving
 23 notice. I had always advised them that if you don't give
 24 notice to the lienholder you're not extinguishing their
 25 interest in the property so you need to give them notice,

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1 but not all the tax lien lenders and in particular one
 2 very large company was not doing so, and so they went to
 3 one of the representatives and said, "We would like to
 4 have some amendment to make sure that everybody is doing
 5 what we're doing." They kind of wanted a level playing
 6 field.
 7 So Representative Puente filed I think it
 8 was House Bill 2491, which started off as a very short
 9 one-page bill that basically said if you foreclose
 10 pursuant to your transferred tax lien and you use the
 11 Property Code nonjudicial procedures then you have to go
 12 through and make sure everybody gets notice. That turned
 13 into -- House Bill 2220 was amended into it and it turned
 14 out to be like a 40-page bill or something. We had very
 15 long coattails that session, and that resolved that
 16 problem. It didn't resolve the -- a lot of the other
 17 issues and that's why we came back this session.
 18 But one of the things that I think, just
 19 personal opinion as to address your statement, Tim, is
 20 that I think there is a way to marry those two or the idea
 21 that you got a nonjudicial proceeding with a lien that
 22 could only be foreclosed judicially if it was held by a
 23 government unit is because of who's holding the lien and
 24 because of the fact -- you know, coming from a background
 25 where I filed 5,000 suits a year to foreclose property tax

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1 liens, governments can handle that. Governments have, you
 2 know, their revenue stream set up based on those taxes,
 3 and they can predict what's going to happen, but nobody,
 4 when I started doing -- representing taxing units, nobody
 5 was doing property tax liens transfers because -- unless
 6 you had a rich uncle because there was no way to recover
 7 other than doing a judicial foreclosure, and you could
 8 only get ten percent interest.
 9 I don't know if anybody remembers Oliver
 10 Heard, but he was my boss at the time, and he, you know,
 11 saw a way to make some money and got the code amended in
 12 '95 so that you could get 18 percent interest and do
 13 nonjudicial foreclosures and all of the sudden there's
 14 this new industry, but the theory was that, you know, if
 15 you've got a lien and you're a private entity you should
 16 be able to foreclose that pursuant to the most efficient
 17 process as opposed to a governmental unit. Now, the tax
 18 code has been amended, and there are some nonjudicial
 19 foreclosures of tax liens permitted nowadays by government
 20 units as well, but the vast majority I think -- Mike, as
 21 you said when we talked on the phone, the vast majority
 22 are still foreclosed judicially. Okay. That's my speech,
 23 Kelly.
 24 MS. RODGERS: We essentially sat down with
 25 the tax lien lender representatives, including Mary. We,

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1 being the mortgage lender folks, and came up with what
 2 ended up being an agreed bill, which is 1520, and some of
 3 the uncertainties or language in it that may look very odd
 4 to anybody else made perfect sense to us when we were
 5 doing it.
 6 MR. BAGGETT: Or at least at midnight that's
 7 what came out, right, is this?
 8 MS. RODGERS: That's exactly right, and
 9 that's what leg. counsel left alone, so --
 10 MS. DOGGETT: You know what this means and I
 11 know what this means, so it's okay.
 12 MS. RODGERS: Everybody else can figure it
 13 out.
 14 MR. BAGGETT: Kind of like our great rules.
 15 We can improve them. We know that we can.
 16 MS. RODGERS: That's right. That's right.
 17 But for our purposes, though, you know, we had a model
 18 with the home equity loans and the reverse mortgages of
 19 putting the foreclosure of tax lien loans, you know,
 20 somewhere, as Karen said, between nonjudicial and judicial
 21 foreclosure, just to make sure that all the I's were
 22 dotted and the T's were crossed and that everybody --
 23 MR. BAGGETT: Everybody got notice.
 24 MS. RODGERS: -- who needed to get notice,
 25 and so that was the purpose of this, and because we had

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1 the model with the rules there, it was very easy for us to
 2 punt to a task force instead of trying to figure it out
 3 ourselves at the last minute. So that's pretty much the
 4 history.
 5 MR. BAGGETT: That's fair, and I think if
 6 you do give notice to everybody that's affected and it's
 7 effective notice and it's not too expensive, that probably
 8 does solve the problems.
 9 MS. RODGERS: Well, and --
 10 MR. BAGGETT: I would assume unless the
 11 title companies have got a different issue that I don't
 12 know about.
 13 MS. RODGERS: Right. Right.
 14 MR. BAGGETT: You get the notices?
 15 MR. REDDING: Yeah, that was our biggest --
 16 that was our big issue was making sure everybody got
 17 the --
 18 MR. BAGGETT: Then you've got to write to
 19 reinstate.
 20 MS. RODGERS: And the title industry was at
 21 the table, too. I mean, they were very active in this
 22 discussion during session.
 23 MR. REDDING: Yeah. No, we were all in
 24 favor of these changes.
 25 MS. RODGERS: Right, but everybody -- all

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1 the issues we've discussed this morning, the notice issues
 2 and those sorts of things --
 3 MR. BAGGETT: All apply.
 4 MS. RODGERS: -- are all applicable. You
 5 know, once we fix that for home equity and reverse
 6 mortgages it's going to --
 7 MR. BAGGETT: It will fit for everybody.
 8 Okay.
 9 MS. RODGERS: -- be the same for tax lien.
 10 MR. BARRETT: What form of notice would you
 11 recommend be required?
 12 MR. BAGGETT: Right.
 13 MS. RODGERS: In the sense of what the
 14 delivery mechanism is?
 15 MR. BARRETT: Yeah. If you were a tax lien
 16 lender and you wanted to foreclose the interest of Bank of
 17 America, there are 1,191 addresses for Bank of America.
 18 MS. RODGERS: That's right.
 19 MS. NEELEY: Well, that's --
 20 MR. BARRETT: What form of a notice would
 21 you have the tax lien lender give to Bank of America that
 22 would have any -- we've heard some claims here for due
 23 process.
 24 MS. RODGERS: Right, I know.
 25 MR. BARRETT: What form of notice would

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1 cover due process when there are 1,190 addresses for one
 2 client?
 3 MS. NEELEY: That's why we need to address
 4 that.
 5 MS. RODGERS: Well, and this was a
 6 discussion. This has been a big issue for the tax lien
 7 lenders on how they give effective notice even under
 8 the --
 9 MS. DOGGETT: And to whom, yeah.
 10 MS. RODGERS: And to whom, and the --
 11 MR. BARRETT: So the process is hard for
 12 them. They get served, and it's still hard to get the
 13 right piece of paper --
 14 MS. RODGERS: To the right person.
 15 MR. BARRETT: -- in the hands of someone who
 16 knows what to do and how to do it.
 17 MS. RODGERS: That's right.
 18 MR. BAGGETT: I'll give you another example,
 19 and I don't think it solves the problem, but this does --
 20 25 days notice to the internal revenue, and I say this in
 21 speeches all the time. I've never ever seen a foreclosure
 22 where they woke up in 25 days to do anything about it.
 23 MR. BARRETT: That's exactly right.
 24 MR. BAGGETT: Never. Never.
 25 MR. BARRETT: Exactly right.

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1 MS. DOGGETT: What most of the tax lien
 2 lenders that I represent have done is establish personal
 3 relationships with the mortgage servicers, and they try to
 4 pick up the phone, to tell you the truth. As the industry
 5 grows it's not going to be possible.
 6 MR. BAGGETT: That's great, but we can't
 7 rely on that.
 8 MS. DOGGETT: Right. One of the things that
 9 we realized when we were -- one of the things we talked
 10 about when we were working on this bill was at the time
 11 that a property tax transfer is closed you're
 12 communicating with the property owner and you can get the
 13 name of the mortgage servicer, but three years down the
 14 road when the guy is no longer to be found and you have no
 15 communication, that mortgage servicer might have changed
 16 three times, and so the best you can do is contact the
 17 holder of the note, and so it was written that way so that
 18 if a foreclosure occurs you contact whoever you can
 19 basically, and the holder of the notice is sufficient at
 20 that point.
 21 But then again you've got that trickle down
 22 effect. You know, if you send something to the holder of
 23 the note are they going to get it, and so we extended the
 24 notice from 38 days to 60 days. Is that even going to be
 25 sufficient?

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1 MS. RODGERS: Right.
 2 MR. FUCHS: The statute simply says the
 3 application must be served. I'm curious, was there a
 4 legislative discussion on whether that had to be personal
 5 service, certified mail, first class mail?
 6 MS. DOGGETT: There was, and --
 7 MR. FUCHS: And?
 8 MS. DOGGETT: The overriding sentiment was
 9 that because everybody who was -- had an interest in the
 10 property was going to be bearing the expense of personal
 11 service, that it was decided that 21a was sufficient.
 12 MR. CULBRETH: Which is consistent with 736,
 13 the certified mail.
 14 MR. BAGGETT: Yeah, just certified mail.
 15 MS. DOGGETT: Uh-huh.
 16 MR. BAGGETT: The way we have it now, I
 17 guess.
 18 MS. DOGGETT: Right.
 19 MS. RODGERS: Well, and the issue of, you
 20 know, to whom you send the notice, I mean, there was talk
 21 with Tommy, about, you know, a registry where you -- you
 22 know, financial institutions registered with whoever
 23 service of process was. There was talk about, you know,
 24 some of the institutions in the state now are required to
 25 appoint the secretary of state as their agent for service

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1 of process, and -- but there's not -- there's not a simple
 2 way to go about it. There's no way to maintain a registry
 3 of addresses and who the mortgage servicers are and the
 4 lenders are and --
 5 MR. BARRETT: What if we limited the tax
 6 lien lenders recovery to their financial position and
 7 required that any additional funds be returned to Fred's
 8 people? In other words, if you bought a tax lien for
 9 \$500 --
 10 MR. BAGGETT: Wait, wait, wait. We're
 11 legislating now. We're not a legislature, we're not a
 12 court.
 13 MR. BARRETT: It's just a question, Mike.
 14 MR. BAGGETT: We've got rules people can
 15 live by. I understand your issues are -- where you're
 16 coming from, but I don't think we have the power to do
 17 that.
 18 MR. BARRETT: I think that's coming, though.
 19 MR. BAGGETT: Well, that's fine. Get these
 20 two ladies to go talk for you in the next session. Okay.
 21 So your issue is, part of it is, how do we get service on
 22 the lienholders that works --
 23 MS. RODGERS: Right.
 24 MR. BAGGETT: -- and same kind of issue we
 25 have with --

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1 MS. RODGERS: Same issues.
 2 MR. BAGGETT: Yeah.
 3 MS. RODGERS: And I assume what would work
 4 on the home equity loans would probably work with us.
 5 MR. BAGGETT: Okay. Well, judges that don't
 6 want Marvin Zindler -- although, I understand he's now
 7 dead, so you-all are safe.
 8 MR. BARRETT: I've had Marvin. That's no
 9 fun.
 10 MR. BAGGETT: Marvin or his successors, you
 11 know, how are we going to deal with this one, too. Really
 12 it's the same issue, is it not?
 13 MR. BASTIAN: It is the same issue.
 14 MR. BARRETT: Yeah.
 15 MR. TEMPLE: It really is.
 16 MR. BARRETT: I'm certainly sympathetic with
 17 the position it puts them in, because obviously facts
 18 don't sell newspapers, and these reporters are rarely
 19 interested in the --
 20 MR. BAGGETT: Yeah.
 21 MR. BARRETT: -- eccentricities of the
 22 statute and truly understand the judge's role, so there is
 23 no question that the judge is being put in a bad spot.
 24 MR. BAGGETT: Right.
 25 MR. BARRETT: The Legislature did that and

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<p>1 then flicked this thing on the Court here, and we're kind 2 of the instrument of that infliction, but it's sure a bad 3 spot for the judge. 4 MR. BAGGETT: So whatever we come up with 5 that's applicable to both of these issues is what we're 6 going to get to live with, I guess, right? 7 MS. RODGERS: Mary, do you see any 8 difference between -- you know, from the standpoint of 9 whether the notice on tax lien foreclosures and those 10 sorts of things, any reason why it should be different 11 from what we're dealing with with regard to notice on the 12 home equity? 13 MS. DOGGETT: I haven't yet. 14 MS. RODGERS: Yeah. 15 MS. DOGGETT: So, no. 16 MR. BAGGETT: Okay. Is there anything else 17 that we need to be doing with respect to tax liens that 18 would be unique other than -- 19 MS. NEELEY: Yeah. There's some unique 20 requirements in the statute as to what goes into them, the 21 notice, the application, et cetera, so it spells it out in 22 some fairly significant detail. 23 MR. BAGGETT: So we're going to have a new 24 part of 736. 25 MR. BASTIAN: Make it 736a, but it's laid</p>	<p>1 Tommy. 2 MR. BAGGETT: And I clearly didn't know. 3 Don't worry about that. 4 MS. DOGGETT: And you didn't know any more 5 than I did, so -- no. It says that the liens shall be 6 foreclosed in this manner. It doesn't say that they shall 7 be foreclosed "pursuant to." It says -- it was crafted 8 very carefully so that it gives you the tax code provision 9 32.06(c)(2) says you shall foreclose in this manner, 10 except in -- as modified by these few different 11 parameters, notice shall be longer. I've got a whole list 12 of them right here. I'm trying to paraphrase, but I don't 13 see the need -- and maybe somebody else could explain to 14 me what it is in 736 and 32.06 that conflict and why we 15 need to make a change to that. 16 MS. NEELEY: Well, the content is totally 17 different in terms of the application. 18 MS. DOGGETT: But do you see what I'm 19 saying, Karen? It doesn't say -- 20 MS. NEELEY: Yeah. 21 MS. DOGGETT: -- "shall foreclose pursuant 22 to." It says "this is manner that's already set up in the 23 law." You follow that. 24 MS. NEELEY: Yeah. (c)(1) says what the 25 application has to say.</p>
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<p>1 out one, two, three, four. 2 MS. NEELEY: It's specified. 3 MR. BASTIAN: It's pretty clear. 4 MR. BAGGETT: Okay. All right. We'll just 5 make that (a). Yeah, we can just make it a whole new tax 6 lien deal. 7 MR. TEMPLE: Mike, I think all that's going 8 to be easier than maybe what it jumps out at some of you 9 initially primarily because Kelly and Mary and Tommy and 10 others negotiated a lot of this during the session. 11 MR. BAGGETT: Right. 12 MR. TEMPLE: As Tommy says, it's set out 13 pretty well in Senate Bill 1520, and to kind of pick it up 14 and put it in a rule isn't going to be as difficult as you 15 might initially think. 16 MR. BAGGETT: Okay. 17 MS. DOGGETT: I'm going to go out on a limb 18 here and go even further than that. I don't think that 19 the rule needs to be amended to reflect any of the changes 20 that are contained in Senate Bill 1520, because I spoke 21 with the legislative assistants for -- or the general 22 counsel for Wentworth and the former chief of staff for 23 Paxton when the committee -- when this task force was 24 formed and I said, you know, "I don't understand what 25 we're doing here," and that's why I called you, Mike, and</p>	<p>1 MS. DOGGETT: Right. 2 MS. NEELEY: And the application in 736 has 3 a different content. It's easy to do. 4 MR. BASTIAN: Yeah, it's easy to do. 5 MR. BAGGETT: I think you just put that all 6 into 736. 7 MS. NEELEY: It's easy. You just do a cut 8 and paste of (c)(1) into 736 as the content of the 9 application, boom, it's done. 10 MS. DOGGETT: As you said, a separate 11 provision in 736 -- 12 MS. NEELEY: Yeah. 13 MS. DOGGETT: -- as opposed to applying 14 32.06 to law. 15 MS. NEELEY: Yeah, because otherwise you've 16 got the wrong content in your application. 17 MR. BASTIAN: And I have a practical comment 18 to that, because you see it in the home equity line of 19 credit that's not in the Constitution. If you don't put 20 it in that rule, you would be amazed how many people don't 21 even know what you're talking about. You need to put it 22 in the rule, because right now a lot of people will go 23 foreclose a home equity line of credit. Because they 24 didn't see the word "home equity line of credit" in 736 25 they don't even think they have to go get a court order.</p>

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1 So it's just a practical thing, just put it
 2 there so everybody sees it because all you're going to do
 3 is just have a bunch of wrongful foreclosures on your
 4 hands because somebody didn't bother to go look at the new
 5 provision in 36.05 or 36.065. It's too easy it seems to
 6 me. Just put it there so it's there and then you don't
 7 have to --
 8 MR. BAGGETT: Take what you've agreed to,
 9 move it in there, and move on.
 10 MS. NEELEY: Yeah, it's a cut and paste.
 11 HONORABLE BRUCE PRIDDY: I mean, actually, I
 12 mean, the rule does give the option, "in the manner
 13 provided by" --
 14 MS. NEELEY: Yeah.
 15 HONORABLE BRUCE PRIDDY: -- "law for
 16 foreclosure of tax liens or in the manner" -- "or under
 17 Rule 736." We can just -- if we don't amend the rule they
 18 can't do a 736 for a tax lien, and we can just cut that
 19 out, but I think we have to amend the rule to get tax lien
 20 foreclosures under 736.
 21 MR. BAGGETT: Right, so we just use the
 22 substance that they already have and put it in there.
 23 HONORABLE PHIL JOHNSON: If I might just say
 24 something, there may be a concern about taking a statutory
 25 provision and putting it into the rule because next time

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1 they meet over there, they change the statute, and then
 2 we've got the rule, and that's the worst of all worlds.
 3 You know, they're changing, and we've got to come back,
 4 but we talk about bad foreclosures.
 5 MR. BAGGETT: Right.
 6 HONORABLE PHIL JOHNSON: That's going to be
 7 a concern that I can see instead of simply referencing in
 8 the rule, referencing whatever it is that they do over at
 9 the leg., because you just -- somebody may take a one-page
 10 bill, just a cleanup item, and all of the sudden now we've
 11 got people following the rules that won't go read the
 12 statute, so I think that may well be a concern that we
 13 ought to think about.
 14 MS. NEELEY: That's a good point, but the
 15 problem is (c)(1) says that your application for this
 16 order must allege the lien as an ad valorem tax lien,
 17 state that they don't want a home equity foreclosure,
 18 state that they provided notice, et cetera, et cetera, and
 19 confirm that the property owner has not requested deferral
 20 of taxes. So there's four elements, and they're totally
 21 different from the elements in the application, so it
 22 either needs to be --
 23 MR. BAGGETT: Yeah, take one of them.
 24 MS. NEELEY: -- something that says -- to
 25 me, I think Tommy is right. And you're both right, if you

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1 don't put it in the rule somebody is going to leave out an
 2 element. If you cross-reference the statute and the
 3 statute changes, you've taken care of the elements. It's
 4 just going to be a matter of monitoring to make sure it's
 5 fixed.
 6 HONORABLE PHIL JOHNSON: You know, we do
 7 have in the Rule of Civil Procedures, you know, an
 8 affidavit for introducing records, this will suffice, you
 9 know, and we don't have a rule. We just say if it's
 10 so-and-so, well, this is going to be good enough. Instead
 11 of saying it's got to be this way, it says if you do it
 12 this way it will be good enough, so maybe somehow,
 13 somehow. I guess I'm just a little jumpy --
 14 MR. BASTIAN: Some language that says --
 15 HONORABLE PHIL JOHNSON: Exactly. I'm just
 16 a little jumpy about having a rule and then having the
 17 Legislature change it on us.
 18 MS. NEELEY: They would never do that.
 19 MR. BAGGETT: But when they go to change it,
 20 I mean, part of it they've got to look at the rule. They
 21 can direct us again to modify the rule, because what
 22 they've done is they've told us to do it under 736.
 23 HONORABLE BRUCE PRIDDY: A clause, "except
 24 as otherwise provided by law" might --
 25 MS. NEELEY: Yeah.

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1 HONORABLE BRUCE PRIDDY: -- solve that.
 2 MR. BAGGETT: I understand your point, but
 3 they shouldn't have told us to put it in the rule to begin
 4 with if that's the case. We've got to figure out what to
 5 do.
 6 HONORABLE PHIL JOHNSON: It's just a
 7 concern.
 8 MR. BAGGETT: Yeah, that's fair.
 9 MR. REDDING: Well, could you just reference
 10 it and then say "or as may be amended from time to time"
 11 and said -- you know, "said procedure be done in
 12 accordance with then current law" or something like that,
 13 just add on a phrase to the back end of it?
 14 MR. BAGGETT: Okay. We can take a stab at
 15 that one. That one shouldn't be too hard to at least
 16 start the stab.
 17 Here's what I want you-all to do, too, those
 18 of you who are particularly interested in an area, I think
 19 you've got e-mails on there, let me know which -- we're
 20 going to have at least two subcommittees. One is going to
 21 be the cleanup of 735 and 736, and the second one will be
 22 the tax lien deal, which probably they'll kind of overlap
 23 some, but that's fine. And let me know which ones you
 24 want to be on if you want to be on one. We've got to get
 25 this done by December 31, so subcommittees, if you want to

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1 be on one, you've got to -- you've got to be flexible with
 2 time and get it done, because we've got to get it done and
 3 then have another meeting to make sure everybody is okay
 4 with it.
 5 HONORABLE PHIL JOHNSON: Let me say this,
 6 the Court wanted it December 31st because, as we
 7 understood, this needs to be done, and it needs to be done
 8 for the industry, and that's our concern, but we want to
 9 make sure it's done right.
 10 MR. BAGGETT: Yeah, because right now what
 11 do they do if we don't have the rule, and they've got to
 12 file a lawsuit, I guess, and do it judicially in the
 13 interim, but anyway, we'll see. Okay. Other issues that
 14 we may or may not have? Anybody got? Tommy, you got any
 15 other issues?
 16 MR. BASTIAN: Huh-uh.
 17 MR. BAGGETT: You've got to be kidding me.
 18 We're all love and affection. Manny.
 19 MR. NEWBURGER: I'm going to raise one, but
 20 I'm not sure we can or should deal with this, but my
 21 client base is lawyers all over the country are under
 22 attack, and one of the biggest forms of attack is upon the
 23 litigation privilege. The lawyers who follow the rules
 24 ought to get to follow the rules and not get sued for
 25 doing it. Is there any way we can put something in here

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1 to make it clear that the litigation privilege under Texas
 2 common law is intended to apply to proceedings under these
 3 rules?
 4 MR. BAGGETT: I think your first statement
 5 was right. We're probably beyond what we can do with
 6 that.
 7 MR. NEWBURGER: I had to ask, because in
 8 Florida it's foreclosure firms, and it had to go all the
 9 way to the Florida Supreme Court. There's a case, Cole
 10 vs. Echevarria, just decided earlier this year that had to
 11 go all the way up there at a cost of hundreds of thousands
 12 of dollars to get the state Supreme Court to decide
 13 whether litigation privilege applied to their proceedings
 14 to foreclose mortgages, and I would really hate to see
 15 that process clog up the Texas courts if there were a way
 16 to put it in the rule.
 17 MR. BAGGETT: Makes sense. I think that's a
 18 probably bigger issue for the overall rules committee
 19 whenever they're doing rules. If they want to get into
 20 that, they can do that. That's when Marvin is going to
 21 come in and say, "This is lawyers writing rules to protect
 22 lawyers. This is ridiculous."
 23 HONORABLE PHIL JOHNSON: Let me talk to you
 24 about that, Manny. We're working through some
 25 disciplinary rules stuff right now, so why don't you visit

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1 with me after this?
 2 MR. NEWBURGER: Thank you.
 3 MR. BAGGETT: Did you have something, Mike?
 4 MR. BARRETT: Well, I wasn't sure whether
 5 you were saying "forever hold your peace."
 6 MR. BAGGETT: No, no.
 7 MR. BARRETT: Tommy, do you want to hold
 8 forth on the judges that are ruling that the provisions in
 9 the deed of trust -- why don't you explain that? You're
 10 much more scholarly than I.
 11 MR. BASTIAN: Well, as you know, in our Rule
 12 736 proceeding it's not appealable, but there are judges
 13 that just kind of -- just like there are lawyers, just
 14 like there is borrowers that go out, you know, kind of way
 15 out there, and I think we need to put something in the
 16 rule that you have the ability to do a mandamus on these,
 17 and that would be kind of the check and balance on some
 18 judges. I mean, I've got some orders here where judges
 19 are actually reading the deed of trust and having their
 20 own interpretations and then going and denying the order,
 21 and you know, that's way out there, that I think there
 22 needs to be some -- I don't know how you -- and there's no
 23 check and balance on that. They can just --
 24 MR. BARRETT: Don't we have one judge in
 25 Houston that has declared the rules unconstitutional,

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1 these rules? The way I read this.
 2 MR. BASTIAN: Well, you could --
 3 MR. BARRETT: She's inviting a declaratory
 4 judgment action to determine whether or not she's right,
 5 but she thinks that the internal language of the Fannie
 6 Mae deed of trust and the rules are self-cancelling and
 7 that the rules themselves impose unconstitutional
 8 obligations, so --
 9 MR. BAGGETT: The rules aren't
 10 constitutional?
 11 MR. BARRETT: Yeah.
 12 HONORABLE BRUCE PRIDDY: Under a Federal
 13 like due process or under 750?
 14 MR. BARRETT: Yeah, they're due process.
 15 She says the deed of trust creates -- or the statute -- or
 16 the Constitution that provided nonrecourse status for home
 17 equity loans prevailed and that there are provisions about
 18 the rules that in her mind apply recourse and, therefore,
 19 are unconstitutional.
 20 MR. BASTIAN: The best we can figure out,
 21 what she's saying is that, as you know, a substitute
 22 trustee's deed, the warranties of title come from the
 23 borrower and because the borrower has to give warranty of
 24 titles in that substitute trustee's deed then that's a
 25 violation of the Texas Constitution that says you can't

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1 ask of anything from the borrower other than the property.
 2 I mean, that's the best we can figure out her order, what
 3 she's saying, but right now you can't do anything about
 4 it. You have a choice. You can either --
 5 MR. BARRETT: We've got 70 orders stacked up
 6 in her court that she won't sign because the rules are
 7 unconstitutional, so I think we should probably try to do
 8 something about clarifying whether the fact that the rules
 9 conflict with recourse provisions in the Constitution.
 10 MR. BAGGETT: I don't think we can do that
 11 in the rules. "This is a real rule, and you better live
 12 by it."
 13 MS. NEELEY: And we mean it.
 14 MR. BARRETT: You said raise the issue.
 15 MR. BAGGETT: I understand.
 16 MR. BARRETT: I'm raising the issue.
 17 MR. BAGGETT: I'm glad you raised it. That
 18 would be my suggestion, mandamus.
 19 MR. BASTIAN: But see, mandamus, these are
 20 unappealable, so I mean, we've gone around and around, and
 21 what we ended up doing, we just did judicial foreclosures,
 22 but now we have a record, so that then we can go do --
 23 but, you know, that's almost, wait a minute, that's a
 24 whole lot to have to go through.
 25 HONORABLE BRUCE PRIDDY: I don't think there

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1 is anything that would prevent a -- Doggett and I were
 2 talking. I don't think there is anything that would
 3 prevent a mandamus. You ought to do it. You ought to do
 4 it and see, because I've always assumed that you can
 5 mandamus these.
 6 MR. BARRETT: I agree. I don't think we
 7 need to change the rule to create --
 8 HONORABLE BRUCE PRIDDY: But if you mandamus
 9 and the court of appeals says you can't mandamus because
 10 of the nonappealability provision then we can change the
 11 rule, but let's get a court of appeals --
 12 MR. BARRETT: Yeah. All right.
 13 MR. BAGGETT: Any other issues we've got,
 14 other than lunch?
 15 MS. RODGERS: I have a question. Where did
 16 the nonappealability come from? It's not in the
 17 Constitution.
 18 MS. NEELEY: Yeah.
 19 MR. BAGGETT: No, it's not.
 20 MS. RODGERS: Where did you-all come up with
 21 that?
 22 MR. BAGGETT: How did we do it? How did we
 23 do it?
 24 MR. BASTIAN: Well, because it was either up
 25 or down.

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1 MS. RODGERS: Okay.
 2 MR. BASTIAN: And we've tried to preserve
 3 the law like it's always been, that if you had a
 4 complaint, well, then you go file your lawsuit and then
 5 that abated it.
 6 MS. RODGERS: Okay.
 7 MR. BAGGETT: See, with the rules that we
 8 have you don't have normal discovery and all that stuff,
 9 so what we did is we said here's another way that you can
 10 do everything. So you don't want to be appealing
 11 something that just gives you an order while you should be
 12 litigating it over in a court, and you have a right to do
 13 that that stops all this. I mean, you don't want them
 14 going on simultaneously.
 15 MS. RODGERS: Right.
 16 MR. BAGGETT: And you have a right to stop
 17 all that stuff and tee it up in a regular case.
 18 MR. BASTIAN: Rule 736 was designed for
 19 those cases where nobody filed a response or didn't care
 20 so it wouldn't clog up the system.
 21 MS. RODGERS: Right.
 22 MR. BASTIAN: That's its purpose.
 23 MS. NEELEY: Yeah, exactly.
 24 MR. BAGGETT: And we really were thinking
 25 about the courts and what kind of burden it would be, and

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1 if we got a whole bunch of these, if half their docket
 2 were these cases, that would not be good, so how do we
 3 balance all of that to make it work.
 4 MR. BASTIAN: What a lot of people forget is
 5 most of the pundits were saying you had to go do a
 6 judicial foreclosure on these things. Man, lordy mercy.
 7 MR. NEWBURGER: This was actually a very
 8 important trade-off because without this rule you would
 9 have to go out, as I always used to have to do, and get a
 10 restraining order to stop a foreclosure.
 11 MR. BAGGETT: Right.
 12 MR. NEWBURGER: And what this did was this
 13 gave any consumer who wanted to raise a dispute the
 14 ability to stop it merely by filing a lawsuit. So this
 15 was a win-win deal.
 16 MR. BAGGETT: Yeah.
 17 MR. NEWBURGER: Folks in Mike's business,
 18 unopposed, uncontested foreclosures were streamlined and
 19 didn't clog the courts. It was a win for consumers
 20 because we went from a cumbersome process of seeking a
 21 restraining order and a temporary injunction to simply
 22 having to file a suit and be able to accomplish the same
 23 thing.
 24 MR. BAGGETT: Yeah. Our biggest issue is we
 25 patterned it after Colorado law, and we figured that

1 somebody in Texas would say, "We don't follow anything in
 2 Colorado, we do our own thing." So anyway.
 3 Okay, I'm glad there are no other issues. I
 4 need to go get lunch for you guys and see where the heck
 5 it is, and I want to thank all of you for coming, and
 6 we'll get two committees, and let me know which one you
 7 want to be on, and we'll go down the road.
 8 (Meeting adjourned.)

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1 * * * * *
 2 REPORTER'S CERTIFICATION
 3 MEETING OF THE
 4 TASK FORCE ON JUDICIAL FORECLOSURE RULES
 5 * * * * *

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7
8 I, D'LOIS L. JONES, Certified Shorthand
 9 Reporter, State of Texas, hereby certify that I reported
 10 the above meeting of the Supreme Court Advisory Committee
 11 on the 7th day of November, 2007, and the same was
 12 thereafter reduced to computer transcription by me.
 13 I further certify that the costs for my
 14 services in the matter are \$_____
 15 Charged to: The Supreme Court of Texas.
 16 Given under my hand and seal of office on
 17 this the _____ day of _____, 2007.

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