

## Question 2 – February 2013 – Selected Answer 1

1. No, the Notice of Trustee's Sale the Bank sent to Ranger was not valid. The issue here is what constitutes valid notice in a foreclosure sale prompted by the power of sale clause included in the deed of trust. To properly give notice of a foreclosure, the party filing foreclosure as a result of the debtor's default must give 21 days notice of the foreclosure sale. A foreclosure sale in Texas is to be held on the first Tuesday of each month between the hours of 10am and 4pm at the county courthouse at the designated area for such a sale, if the courthouse has designated such an area. The notice must conform with certain requirements to be deemed proper: it must include the expected time of sale (and the sale cannot be held more than 3 hours outside of that time frame). Further, it should list the designated area at which the sale will be conducted. Moreover, the sale should take place in a county where the property is located.

Here, the Bank's notice stated that the sale would be held on Monday, January 10th at 8:00am. This is wrong for many reasons -- Monday is improper because the sale is to be conducted on the first Tuesday of the month. January 10th is too soon -- 21 days notice must be given and because the foreclosure notice was sent on Dec. 23, 21 days notice are not given. Additionally, 8:00am is an improper start time - the rules indicate that the sale can be held between 10am and 4pm, and 8am is clearly outside of that window. Further, the Bank failed to indicate where the sale would be held, which violates the requirement that the designated area be included in the notice. Finally, the notice here indicates that Travis County will be conducting the sale, which improper because the property is located in Comal and Bexar. Travis was chosen because it is convenient for the Bank, but the Bank cannot merely conduct a sale in the county where it conducts business if the property is not at least partially located in that county, which it is not under these facts. For these reasons, the Bank's Notice of Trustee's Sale sent to Ranger was invalid and did not constitute a proper notice of foreclosure.

2. No, the Notice of Trustee's Sale was not properly posted. The posting of the notice was invalid for several reasons. At issue here is what is required to constitute properly posted notice in a foreclosure sale in Texas. Texas property law requires that the foreclosing party give notice publicly by posting the properly written notice (as described above) at the county courthouse in the county in which the property is located (if it is located in more than one county, then notice must be posted at each county court house in which part of the property is situated). Additionally, notice is to be given to each creditor who has an interest in the property (such as lien holders, etc.). Here, the property is located in two counties: Bexar and Comal. While the Bank posted notice in Bexar County properly by posting the notice on the courthouse door of the County courthouse, the posting at the firehouse was unnecessary. Moreover, the Bank failed to post a notice in Comal County, which is required because a portion of the property is located in Comal. Bexar is the more appropriate place for the sale, as the property is primarily located there, but notice must be posted in both counties. While the courthouse requirement appears to be satisfied as to Bexar and incomplete as to Comal County, the facts do not indicate that the Bank attempted to contact any other creditors who have an interest in the property. If there are any other creditors (which the facts do not indicate), the Bank must give them notice as well, so that they can make an attempt to purchase the property if they wanted to do so.

For the above listed reasons, the notice was improperly posted by the Bank.

3. A lawsuit by Ranger to invalidate the sale to Jack will likely succeed. Sale of the property to a bona fide purchaser for value will not be invalidated if the party purchases it for value in good faith, unless the

party is deemed to have notice of the unclear title. Texas follows a Notice Act in regards to recording property. While Jack appears to be a bona fide purchaser who paid value in good faith, he will likely be deemed to have record notice of the fact that Ranger's loan from the Bank was recorded in Texas and Comal County. The sale was conducted in the wrong county, and Jack could have looked up the title to the land and gained notice of its location in Bexar and Comal. Because he bought the property in Travis, an improper location for the sale, the court might invalidate the sale. Jack should have known it was not subject to sale in Travis County.

4. No, a trustee deed does not carry with it any implied or express warranties. At issue is what warranties are included when a purchaser takes title under a Trustee's Deed. Warranties arise under a warranty deed, not a trustee's deed. A warranty deed will convey 6 covenants: 1) the right to seisin, 2) the right to convey, 3) the right to quiet enjoyment, 4) the right to further assurances, 5) the right against encumbrances, and 6) warranty. Unless the court deems this trustee deed to be a warranty deed, Jack will not gain any implied warranties and there are no express warranties that seems to arise in these facts.

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### **Question 2 – February 2013 – Selected Answer 2**

1. No, the "Notice of the Trustee's Sale" the Bank sent to Ranger Inc. was not valid, at all. First, the Bank did not give Ranger the correct amount of notice. The debtor whose property is about to be foreclosed upon is entitled, under the Texas Property Code, to 21 days notice before the sale is going to occur. Having sent the notice on December 23 about a foreclosure sale occurring on January 10, the Bank did not give the 21 days notice that Ranger was entitled to. Second, the contents of the Notice are basically all wrong. Under the Texas property code, foreclosure sales can only happen on the first Tuesday of the month between 10 am and 4 pm. The Notice is wrong because it says the sale is going to happen on a Monday. A valid foreclosure sale could NEVER happen on a Monday in Texas. The Texas Property Code requires foreclosure sales to happen on the first Tuesday of the month, even if that day is a holiday. Also, the time of the sale is wrong. The sale can't start any earlier than 10 am as mandated by the Texas Property Code, so 8 am is too early and therefore invalid. The location is completely wrong. The Texas Property Code requires that foreclosures take place in the county, or a county, where the property is located. Here, the bank could either foreclose in Bexar or Comal County, but definitely not Travis since that is not a county where the property is located. The location part of the notice is therefore invalid also. The location is also incorrect because a foreclosure sale could NEVER happen at a Bank's home office like this notice says. Under the Texas Property Code, foreclosures must take place at the courthouse of one of the counties in which the property is located. In this case, the foreclosure sale needs to happen at the courthouse in either Bexar or Comal County.

The Notice is also missing important parts that are required by the Texas Property Code. The Bank should have told the debtor in the notice the earliest time that the foreclosure sale would start. The Notice, if it had correctly stated that the foreclosure sale was happening at the Courthouse of either Bexar or Comal County, should also state where specifically the sale would take place. If a county's County Commissioner's County has done what the ones in Bexar or Comal have done and specifically designated where in the courthouse the foreclosure is going to take place, then the Notice to the debtor of the foreclosure has to have that information in it. If the Notice was done right it would tell the debtor that the sale was happening on the south steps of the Bexar County Courthouse or the south steps of the Comal County Courthouse, depending on which County the Bank had chosen to foreclose in.

2. No, the Bank did not properly post its "Notice of Trustee's Sale." Under the Texas Property Code, the Bank would be required to post notice on the courthouse door of all the counties in which the property is located. Here, the Bank should have posted notice on the courthouse doors of both Bexar and Comal County since the property is located in both. Posting at the fire station is completely wrong and gives no valid notice of the foreclosure sale under the Texas Property Code. Posting on the courthouse door of Bexar County was correct, but to be in full compliance with the Texas Property Code before foreclosing, the Bank had to have posted notice on the courthouse door of Comal County as well.

3. Yes, if Ranger sues to invalidate the sale to Jack it would likely be successful. Under the Texas Property Code, strict compliance with the rules and requirements of foreclosure are required. If the Notice of the Trustee's sale that the Bank sent Ranger had just one thing wrong with it that was otherwise required under the Texas Property Code, the sale could be invalidated by Ranger. In Texas, if creditors want to do a non-judicial foreclosure, they absolutely must follow all of the rules under the Texas Property Code regarding notice and other requirements before the sale or else the sale is going to be set aside. Ranger would be able to have the sale invalidated for literally a myriad of reasons here: the bank didn't give it 21 days notice before the sale, the Notice of the Trustee's Sale was all wrong; the sale took place on the wrong day at the wrong place at the wrong time under the Property Code. Any of these grounds would be sufficient for invalidating the sale to Jack if Ranger files suit to do so.

4. No, Jack takes the property as is, no warranties at all. Assuming that the foreclosure sale was valid and Jack actually took and got to keep the property, under the Texas Property Code, he is going to get the property in whatever shape it's in and with whatever title issues it has, just as the debtor left it before the sale. This can be risky for buyers at foreclosure sales, but it is a risk that they are required to take if they choose to buy property this way. The debtor may have completely trashed the property before being evicted or moving out, and even if that is the case, a buyer cannot complain to the Bank or the Trustee about it. The Bank and Trustee at the sale make no warranties whatsoever regarding the property. Furthermore, Jack would take the property subject to any liens that were superior to the Bank's lien.

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### **Question 2 – February 2013 – Selected Answer 3**

1. The "Notice of Trustee's Sale" the Bank sent to Ranger, Inc. was invalid. A notice of foreclosure must follow statutory guidelines. Specifically, the notice must reflect the appropriate time, place, and manner of sale with specificity in order to comply with due process. Under the applicable statute, foreclosure sales must take place on the first Tuesday of every month between 10:00 a.m. and 4:00 p.m. at a place designated by the local commissioners in the county. A foreclosure is proper in the county where the real property is located. Here, the property that Bank is foreclosing on is located in Bexar County, Texas and Comal County, Texas. Therefore, a foreclosure is allowed in either Bexar or Comal County. In the present case, the Bexar County Commissioner's Court had previously designated the south steps of the Bexar County Courthouse as the place where the trustee's sales are to take place. The Comal County Commissioner's Court had previously designated the south steps of the Comal County Courthouse as the place where the trustee's sales are to take place. Therefore, the foreclosure must take place at one of these two options. However, the location listed for the foreclosure on the "Notice of Trustee's Sale" is the Bank's home office in Travis County, Texas. This is an inappropriate place for the foreclosure sale to take place because it is not a public place and it is not the place that the commissioners have designated in Bexar County and Comal County for foreclosures to take place. Further, the notice does not state the appropriate time for a foreclosure to take place. Here, the notice states that the sale will take place at "8:00 a.m." This is outside the range of 10:00 a.m. to 4:00 p.m. Therefore, this does not meet the

statutory guidelines for the appropriate time. In addition, the notice states that the foreclosure sale will take place on a Monday. However, under the statutory guidelines the foreclosure must take place on a Tuesday. Thus, the Notice of Trustee's Sale is invalid.

2. The Bank did not properly post its "Notice of Trustee's Sale." A notice of trustee's sale must be posted in all counties where the property is located at the place designated by the commissioners in the county for posting notice. Here, the property that Bank is foreclosing on is located in Bexar County, Texas and Comal County, Texas. Therefore, notice must be given in both Bexar County and Comal County. In addition, the Bexar County Commissioner's Court had previously designated the south steps of the Bexar County Courthouse as the place where the trustee's sales are to take place. The Comal County commissioner's Court had previously designated the south steps of the Comal County Courthouse as the place where the trustee's sales are to take place. Therefore, these are the appropriate places for the notice of foreclosure to be posted. However, the Bank only posted notice on the courthouse door of the Bexar County Courthouse. The Bank must also post notice at the designated place for notice in the Comal County Courthouse. Notice posted at the fire station in Bexar County was not proper notice.

3. A lawsuit filed by Ranger, Inc. to invalidate the sale to Jack would be successful. Invalid notice is a proper ground to set aside a foreclosure sale because due process requires adequate notice before taking property. Since there was invalid notice in this case (see 1. above), Ranger, Inc. would be able to invalidate the sale to Jack.

4. Jack does not take title to the Property with any express or implied warranties. A Trustee deed is not a warranty deed and it does not include the 6 present and future covenants of warranty that a general warranty deed contains. Rather, it is more akin to a quitclaim deed. Since Jack has received a trustee's deed rather than a warranty deed it does not contain any warranties of title.