Mamas, Don't Let Your Babies Grow Up to Be Homeowners

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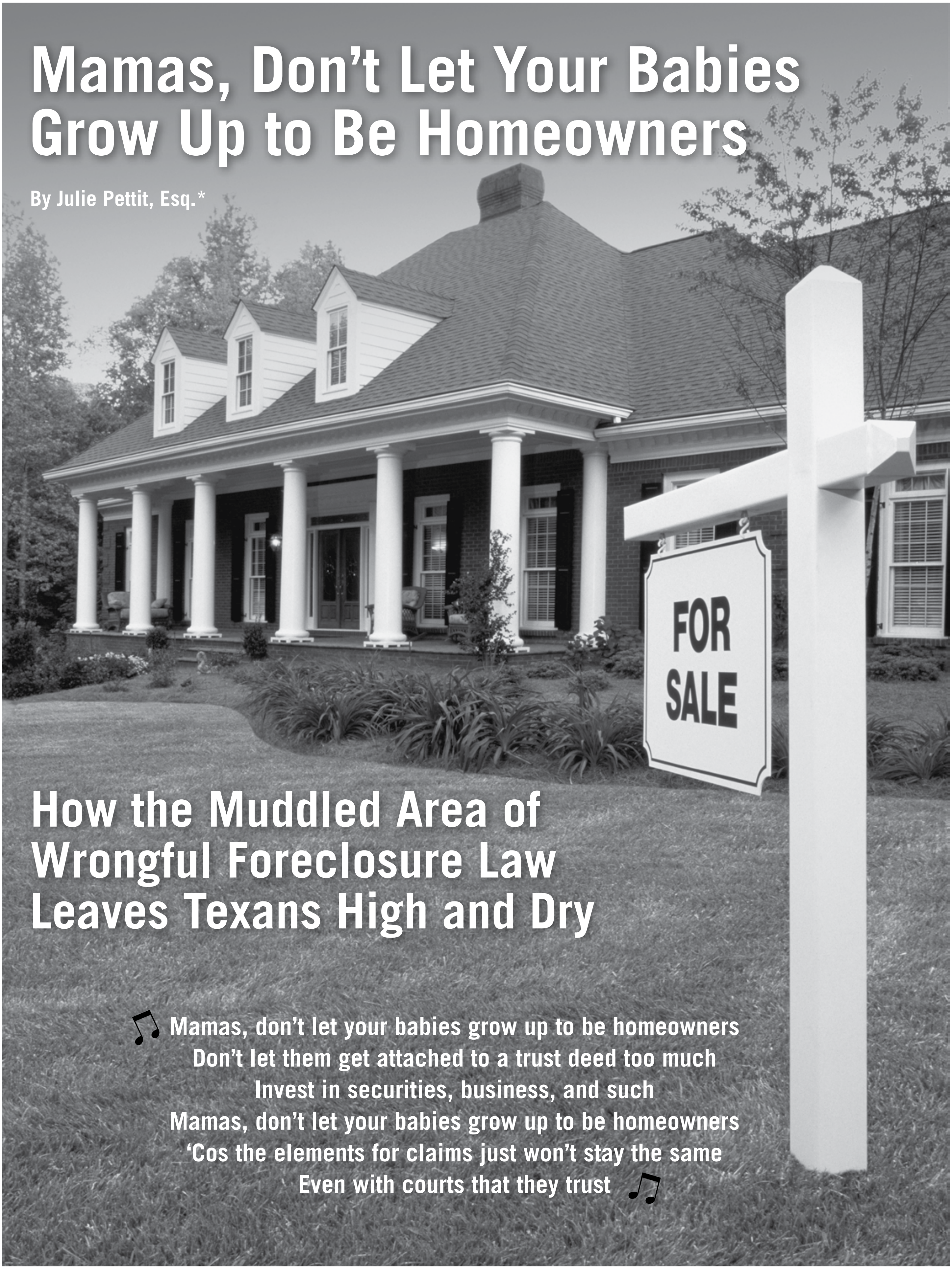

How the Muddled Area of Wrongful Foreclosure Law Leaves Texans High and Dry

♫ Mamas, don't let your babies grow up to be homeowners
Don't let them get attached to a trust deed too much
Invest in securities, business, and such
Mamas, don't let your babies grow up to be homeowners
'Cos the elements for claims just won't stay the same
Even with courts that they trust ♫

Introduction

Imagine for just a moment that you have been accused of a relatively minor crime such as shoplifting. And, surprisingly, you are not made aware of this accusation until months after your shopping trip when the sheriff arrives on your doorstep, bustles you out the door, and takes you to into custody. Wait, what is that you say? Where are my rights? Where is my due process? Am I not entitled to receive timely, actual notice of the accusation, to present my case in court, and to reap from the procedural protections of the law before my freedom is taken from me? If you shoplift, rest assured you are indeed entitled to all those things. Strangely, however, if you are a Texan losing your home in foreclosure proceedings, you can expect to receive from the legal system much less protection than someone facing petty theft charges.

> **Unless a homeowner is able to cure the default between the time that the lender gives notice and the time that foreclosure auction occurs. . . there is no redemption period for the homeowner, except in specific circumstances, such as tax liens and Home Owners Associations liens.**

This is the brutal truth: homeowners in Texas face a situation analogous to that described above, and they continue to face it every day. Our legal system is failing miserably at providing the most basic of procedural protections to vulnerable Texans facing the loss of their homes. This article will show that it is entirely possible for Texas homeowners to be foreclosed upon and lose their home, despite having received no actual notice of the impending foreclosure, judicial oversight, or chance to protest against unfair business practices by their mortgagee.

Part I of this article explains the foreclosure process in Texas, including the most common route of non-judicial foreclosure, as well as the structure and remedies relating to a claim for wrongful foreclosure. Part II focuses on the action for wrongful foreclosure, specifically the curious and unevenly applied element of a "grossly inadequate sales price," and the reasons it should be clarified or eliminated entirely from the Texas common law's requirements. Finally, Part III examines the recent Dallas Court of Appeals opinion in the *Wells Fargo Bank v. Robinson*, and questions the wisdom of adding additional burdens for homeowners seeking to recover under a wrongful foreclosure claim.

Part I: The Non-Judicial Foreclosure Preference in Texas

There are two types of foreclosure proceedings—judicial and non-judicial. Judicial foreclosure is so named because the lender must file an action in court to foreclose upon the homeowner. This type of foreclosure benefits the homeowner through the use of judicial oversight of the process, which tends to hold lenders more accountable, thereby helping to ensure that homeowners in default are aware that a foreclosure action has been taken against them. Additionally, by being called to court, a homeowner who is otherwise not legally or business-savvy can be alerted to the available, such as loan modification and mediation. In states where judicial foreclosure is the only option, homeowners in default are more likely able to save their home from foreclosure through modification or mediation.

In Texas, the vast majority of foreclosures occur through the second type of foreclosure: the species known as non-judicial foreclosure.[1] Non-judicial foreclosure has numerous benefits over judicial foreclosure. Unfortunately, those benefits advantage the lender, not the homeowners. Specifically, lenders in a non-judicial foreclosure do not have to go through the courts, and instead, exercise the power of sale written into the security instrument, which is a trust deed or deed of trust in Texas. This process makes non-judicial foreclosure much more expedient and less costly for lenders. They can acquire equitable title from homeowners through non-judicial foreclosure in a matter of weeks or months, with no court interaction.

In fact, excepting any additional procedures written into the individual trust deed itself, Texas law does not require much else of the lender. The foreclosure process has been reduced to statute and is contained within Section 51.002 of the Texas Property Code.[2] Under the law, to have a valid foreclosure, the lender must only send by certified mail a notice to the homeowner's last address on record with the lender.[3] There is no requirement of actual notice. Under Texas law, notice is served to the homeowner when, to the lender's best knowledge, the notice is addressed to the homeowner's last address on record and deposited in the mail twenty-one days before the foreclosure sale. Testimony or an affidavit from someone with knowledge of the mailing is prima facie evidence of service.[4] "The dispositive inquiry under section 51.002(e) . . . is not receipt of notice, but, rather, service of notice."[5] Thus, a homeowner who is sent the required notice but does not actually receive or see that notice might lose the small window of opportunity he or she may have had to attempt a loan modification or to halt foreclosure by acquiring a temporary restraining order.

Section 51.002 of the Property Code also requires that notice of the sale must be posted at the courthouse of the county where the property is located for at least twenty-one days prior to the foreclosure sale.[6] That notice of impending sale must also be sent to the homeowner's last address of record, but again, there is no requirement of actual receipt.[7] Section 51.002 dictates the time and place of sale but is silent on the way the auction should be handled.[8] It also fails to require the borrower to attend the sale or for the property to be sold for any particular price.[9] Indeed, Texas law fails to even include the element of fiduciary duty between the trustee who is auctioning off the property and the defaulted homeowner. Additionally, Texas' Property Code and case law also fail to imply a duty of good faith on the part of the trustee. "[A] mortgagee is under no *duty* to take affirmative action, beyond that required by statute or the deed of trust, to ensure a 'fair' sale."[10] Compliance with the limited formalities of the Property Code is normally sufficient to execute a valid foreclosure, and no extra effort on the part of the lender or trustee would be required.

Unfortunately, unless a homeowner is able to cure the default between the time that the lender gives notice and the time that foreclosure auction occurs, which can be as short as a 20-day period to cure, there is no redemption period for the homeowner, except in specific circumstances, such as tax liens and Home Owners Associations liens. Unlike many other states, in Texas, there is no period of time where a homeowner has the right to pay off the debt and regain his or her home following a normal foreclosure sale. The only option available to homeowners in this position is to attempt to have a sale set aside in equity or to obtain money damages in a suit against the lender. In order to successfully sue the lender, the homeowner must plead and prove the elements of a wrongful foreclosure claim, which are highly favorable to the lender and difficult to prove. To understand the process and remedies, it is first necessary to understand the elements that constitute a cause of action for wrongful foreclosure.

A wrongful foreclosure claim in Texas includes three elements: (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price.[11] Under

Texas law, the first two elements are unclear and unsettled. While the third element is fairly straightforward it can be difficult because it requires a cause-and-effect between the first two elements.

Understanding exactly why the three elements of a wrongful foreclosure claim inadequately protect homeowners requires an analysis of their legal limitations. Specifically, the limitations in these elements are the law's failure to (1) address situations where the property sells for a low price and (2) protect homeowners who can show defects in the foreclosure proceedings. First, the law completely fails to address situations in which the property sells for low prices at the auction but the lender and trustee nonetheless have met the minimum technical requirements for the foreclosure process. When ambiguous behavior occurs, courts have shown themselves to be quite lenient in interpreting whether lenders and trustees have met those minimum requirements.

For instance, in *First State Bank v. Keilman*, the homeowners put forth four contentions of defects in the proceedings, all of which were shut down by the appellate court.[12] In regard to the Keilmans' first contention that the trustee refused to postpone the sale for a few minutes so the homeowner could arrive back at the court, the court emphasized that Texas law does not provide for any absolute right for a homeowner to witness or participate in the auction.[13] While it can be an advantage to require the notification of a homeowner in default of the time and place of the foreclosure sale is so that the borrower has the option of being present at the sale to ensure compliance by the trustee or to bid for the property themselves, the borrower's presence is not necessary if notice was properly mailed.[14] In the Keilmans' second contention, they attested that the deed of trust specifically included a clause requiring the trustee to "advertise" the foreclosure sale, to which the court responded that it would construe the meaning of "advertise" in the broadest sense such that tacking a notice of sale onto a bulletin board at the courthouse was sufficient under Texas law.[15] In this instance, when given the opportunity to expand or contract the Keilmans' rights based on the contractual language, the court resoundingly chose to contract the homeowners' rights. The court also struck down the Keilmans' third contention that failing to include a street address of the property on the notice of sale either constituted a default in proceedings or chilled potential bidding on the property.[16] Although it seems reasonable to assume that potential bidders are less likely to bid if they are hampered from easily finding the property's location, the court decided that a legal description of the property was satisfactory. Fourth, the court wholly struck down the contention that the disclaimers of warranty on the notice conflicted with language in the deed of trust.[17] Again, the court chose to construe the language in favor of the lender.

In another case, the court noted that despite a $957,600 selling price on a property with a fair market value of at least $1,500,000, the homeowners had no claim under wrongful foreclosure law because the appellate court negated their defect claims entirely.[18] Though the appellate court upheld the trial court's decision that the selling price was grossly inadequate, it determined that absent "any finding that [the lender] committed some act of wrongdoing, misconduct, or unfairness," the property owners had no claim.[19]

Second, the law fails to protect homeowners who can show defects in the foreclosure proceedings—even when there are severe mistakes or deliberate malice on the part of lenders—as long as the property does not sell for a grossly inadequate price. "Mere inadequacy of consideration alone does not render a foreclosure sale void if the sale was [otherwise conducted] legally and fairly."[20] The element of grossly inadequate selling price is particularly problematic and, unsurprisingly, is treated differently by different courts. A line of reasoning originating from *Charter National Bank Houston v. Stevens* contends that the element of a grossly inadequate sales price has "inadvertently crept into the picture as to *all* lawsuits for wrongful foreclosure."[21] Further, the court contends that a homeowner who has shown a defect or irregularity in the proceedings should be allowed to recover for the difference in price if the defect or irregularity results a chilling effect on the sale price, whether the effect be large or small. This makes sense, in the court's reasoning, when the claim is viewed as akin to conversion.[22] The exception to the requirement of a grossly inadequate sales price is where a borrower can show that the lender or trustee deliberately "chilled" the bidding at auction, but even this recovery depends on the jurisdiction. In this situation, to chill the bidding means to take affirmative steps that adversely affect the final sale price. The requirement of a grossly inadequate sales price and the concept of bid chilling warrant further discussion in Part II of this article.

Part II: The Grossly Inadequate Requirement

Although the law requires a "grossly inadequate" sales price to establish an action for wrongful foreclosure, Texas appellate courts cannot seem to agree on how to defeine the term. .In fact, one appellate court has openly rejected including that element in a wrongful foreclosure claim where the remedy sought is money damages. Courts currently operate without guidance from either statutory materials or a Texas Supreme Court ruling as to a threshold amount. This lack of guidance has led to inconsistent application across the state of Texas regarding what is considered "grossly inadequate" for plaintiffs seeking recovery.

When precedent has been created at the appellate level, it sometimes attempts to create safe-harbor percentages that hover around half of the fair market value. When the line of cases where this reasoning is derived from is closely examined, however, it is not at all obvious that a legal safe harbor should be the logical conclusion. Somewhere along the line, it seems that a showing of a grossly inadequate sales price morphed from being a way to presumptively evidence bad behavior into a required element of proof.

A plaintiff seeking to show a grossly inadequate sales price must first establish the fair market value of the land prior to the foreclosure sale. The sale amount can then be calculated as a percentage of that fair market value, and this is the number courts use to decide whether the price was grossly inadequate. This, in turn, is determinative of whether the plaintiff can fulfill that element of the claim for wrongful foreclosure. The math is

very straightforward, but the complication arises in defining the proper interpretation. With no bright-line rule to delineate the upper and lower limits, every case requires a fresh interpretation by the court of what qualifies as a grossly inadequate sales price. Indeed, the issue of what amounts to a grossly inadequate sales price is always purported to be a question of fact for the jury.[23] However, as stated, some appellate courts have attempted to establish a safe-harbor percentage for mortgagees at fifty to sixty percent of the fair market value, sometimes setting aside jury findings of a grossly inadequate sales price to rule favorably instead for the mortgagees. Working backward through this line of cases raises questions regarding the proper presumptive role of "grossly inadequate" and why it continues to form an element of a wrongful foreclosure claim, along with causation, in cases where courts already know that fraud or other defects are present.

For instance, in *Federal Deposit Insurance Corporation v. Blanton*, the Fifth Circuit affirmed a trial judge's verdict in favor of the mortgagee, despite the jury's finding of a grossly inadequate sales price.[24] The auction price was 62.3% of the fair market value of the property in question, and the jury found both defect and causation to be present as well.[25] While not addressing or overriding the elements of defect and causation, the trial and appellate judges believed the 62.3% was sufficient as a matter of law, and thus the claim must fail.[26] "The weight of Texas authority rejects a determination of gross inadequacy where, as here, property sells for over 60% of fair market value."[27] To justify affirming the trial court's decision, the Fifth Circuit further contends that "a jury finding of 'grossly inadequate price' sometimes oversteps legal limits."[28] On the other hand, in dicta, the court conversely states, "We certainly do not promote mechanical application of a '60% test' . . . . Cases with a finding of gross inadequacy typically fall far below the 60% line."[29] In effect, while the Fifth Circuit appears to be establishing precedent for a safe-harbor threshold or legal limit on acceptability, it denies that this is what it is doing.

In *Blanton*, the court relies on a 1932 Texas case *Richardson v. Kent*,[30] wherein the court states, "The term 'grossly inadequate consideration' in a foreclosure action means, a consideration so far short of the real value of the property as to shock a correct mind, and thereby raise a presumption that fraud attended the purchase."[31] The *Richardson* court further notes that it "know[s] of no case holding that, when property at a forced sale brings 50 [percent] of its value, the consideration paid by the purchaser is decreed as a matter of law, to be grossly inadequate; hence no presumption of fraud can be indulged in respect to this sale."[32] Many court opinions refer to *Richardson* and incorporate its language into their arguments that all wrongful foreclosure claims must be accompanied by a grossly inadequate sales price in addition to defect and causation. However, this deserves a closer look to see how and why the element of a grossly inadequate sales price exists. Was the original purpose to evidence a rebuttable presumption of fraud, or has it always been a logical component of all wrongful foreclosure claims? At least one appellate court, the Fourteenth District in Houston, has spoken out in its opinion in *Charter National Bank-Houston v. Stevens*, noting that the requirement of a grossly inadequate sales price does not belong in a wrongful foreclosure where the remedy sought is simply money damages and not a setting aside of the sale.[33] The court stated:

> In the development of Texas law, however, a universal need for the plaintiff to prove a grossly inadequate selling price may have inadvertently crept into the picture as to all lawsuits for wrongful foreclosure. We believe this to be an erroneous portrayal. It was never intended that there should be an automatic need to prove a grossly inadequate selling price in a situation where the bidding at a non-judicial foreclosure sale was deliberately "chilled" by the affirmative acts of a mortgagee and the injured mortgagor seeks a recovery of damages rather than a setting aside of the sale itself.[34]

In *Stevens*, the court found ample evidence of bid chilling on the part of the appellant bank, the mortgagee.[35] In the days leading up to the auction of the property in dispute, a then-tenant of the commercial property called the substitute trustee multiple times and communicated an intent to bid for the property.[36] The tenant also made loan arrangements for a sum of $400,000 in preparation to bid on the property and was prepared to bid more than that amount, if necessary, to outbid the bank.[37] The tenant's Dallas attorney attested to making the loan arrangements and to being in Houston the day before in preparation of attending the auction.[38] The substitute trustee repeatedly told the tenant that he was not sure the property would go to auction, and the jury found that the tenant was told over the phone that he would be notified ahead of time if the property would go to auction on the scheduled day.[39] The tenant was not notified ahead of time, and relying on the substitute trustee's assurance, he did not show up to the auction.[40] The resulting sale of the property went to the bank as the only bidder and sold for $355,000, which was approximately eighty-four percent of the $430,000 fair market value as determined by the jury.[41] Based on these determinations, the trial court awarded the mortgagor damages in the amount of $54,315, which amounted to the difference between the fair market value and the auction price.[42]

The appellant bank's point of error was that the mortgagor needed to show the auction price was grossly inadequate and that the lower price was caused by the defect. It was denied by the court, on the basis that monetary damages are awardable to the mortgagor if there is misconduct on the part of the mortgagee, regardless of the resulting inadequacy in price.[43] In other words, as long as there is reasonable causation between the defect and the final price, the court rightly concluded that the mortgagor has suffered an injury and should be compensated for it.[44] The court goes on to distinguish its reasoning in the case at hand, which involved money damages, from a line of cases discussing grossly inadequate sales price when a rescission of the sale itself is sought. In short, where there is no third party involved, the public's trust in the finality of the auction process is not in jeopardy.[45] Therefore, as the court reasons, there is no need for a showing of grossly inadequate sales price to justify action.[46] "Society and the injured mortgagor are properly served through money damages, if that election has been made, where deliberate acts of the mortgagee had a 'chilling' effect on the bidding."[47] The court found "no rational grounds" for a showing of "grossly" inadequate price.[48] The plaintiff may logically recover damages, no matter the amount.[49] This exception to the three-pronged requirement for a wrongful foreclosure claim based on deliberate or negligent "chilling" of the bids has since been recognized by the Fifth Circuit and other courts of appeals.[50]

Part III: The *Robinson* Case Limits a Plaintiff's Remedies

A successful wrongful foreclosure has two possible remedies: (1) the plaintiff may have the sale rescinded or (2) the plaintiff may choose an award of money damages. If monetary damages are elected, the measure of the damages is lost equity—that is, the difference between the value of the property in question at the date of foreclosure and the remaining balance due on the indebtedness.[51] However, in 2012, the Dallas Court of Appeals changed everything in its *Wells Fargo Bank, N.A. v. Robinson* decision.[52] Specifically, it held that there is an exception to the recovery of money damages when (1) title to the property has not passed to a third party and (2) the borrower's possession of the property has not been materially disturbed.[53] Essentially, two additional elements were created in regard to a wrongful foreclosure case where the plaintiff elects monetary damages.

The underlying case at the trial level is generally representative of wrongful foreclosure cases. The borrower, Ray Robinson, defaulted under the terms of a home equity note issued by Wells Fargo Bank.[54] Despite making some payments following the initial default and after failing to find a buyer for the home, Robinson and Wells Fargo eventually reached an agreement that authorized Wells Fargo to foreclose on the home that served as collateral for the note.[55] The court overseeing and authorizing the foreclosure proceedings explicitly directed the bank to "post [the] property on or before April 14, 2008 for the May 6, foreclosure sale."[56] However, for unknown reasons, the substitute trustee did not follow the court's directives, and instead, waited until May 12, 2008, to post the property for sale, and did not conduct the foreclosure auction until June 3, 2008.[57] It is not discernible from the appellate opinion if any evidence existed as to whether other bidders attended the auction on the unauthorized date. What is known is that Wells Fargo purchased the property on that unauthorized date.[58]

By eliminating money damages as a possible remedy, plaintiffs are once again in the legal position of facing foreclosure proceedings on the same mortgagee. This is not an efficient use of money or time for either the plaintiff or the court.

Robinson's argument was simple; because the substitute trustee failed to comport with the original authorization and did not have a valid court order to foreclose on that date, this constituted a defect, and thus Robinson had a claim for wrongful foreclosure. The trial court agreed and awarded Robinson $47,007.37, which represented the difference between fair market value of the property and the remaining balance on the equity note.[59] However, the Dallas Court of Appeals reversed the trial court's ruling and rendered judgment to set aside the sale, awarding Robinson no damages. The court's reasoning was that Robinson, being still in material (if not legal) possession of the property on the date of trial, did not suffer a "compensable injury."[60] In essence, the court removed one of the two avenues of recovery for Robinson and for other homeowners in his position.

The reasoning behind this ruling is not entirely clear. Purportedly, it is because "no third party rights to the property have been created, [and therefore,] the borrower has suffered no compensable injury."[61] However, in addition to the reasoning the Dallas Court of Appeals gave in *Robinson*, there are at least two additional points of contention worth mentioning that argue in favor of greater plaintiffs' rights to recover. First, by eliminating the plaintiffs' right to damages and instead placing them back in legal possession of the property that they could not afford payments on in the first place, the court puts plaintiffs into a precarious situation. Some defect and wrongdoing by the mortgagee, either intentional or negligent, had to occur in the first place for the plaintiff to prevail and to obtain a judgment setting aside the sale. By eliminating money damages as a possible remedy, plaintiffs are once again in the legal position of facing foreclosure proceedings on the same mortgagee. This is not an efficient use of money or time for either the plaintiff or the court. Notably, it also subjects plaintiffs to another possible round of mistreatment from big banks and lenders.

Building on that, the second point concerns another important practical result of this ruling. Under *Robinson*, lenders presumably can go so far as to commit malicious or grossly negligent acts in the foreclosure process while plaintiffs are still left without an avenue to claim money damages, unless the plaintiff can also conclusively show a cause-and-effect relationship between the acts and a grossly inadequate sales price to a third-party purchaser. By requiring a third-party purchaser, lenders escape culpability for wrongdoing where, as in many cases, the purchaser at auction is the mortgagee itself. To say definitively that the mortgagor has suffered no compensable damage only because the property has not passed to a third party is to turn a blind eye to the wrongs committed by mortgagees in these cases and to the time and money invested into these cases by plaintiffs and courts. The *Robinson* court did not address this, and so the ruling is doubly unsatisfactory. Moreover, the ruling does not address the potential monetary losses to plaintiffs in cases where the defect itself, such as posting and selling on the wrong days, potentially prevented a third party from outbidding the mortgagee at auction and obtaining rights to the property. The logic is revealed to be somewhat circular. The case must involve a third-party purchaser to obtain money damages from the defect. But, the defect itself may have prevented any potential third-party purchasers from obtaining the property to begin with. Without evidence that there would have been a third-party purchaser, there is no evidence of a defect. It is win-win for the mortgagees in this situation.

Conclusion

Cases such as *Richardson* and *Robinson* exemplify the trend most courts have taken in regard to the continued narrowing of borrowers' rights. It is disturbing to contemplate the ramifications for borrowers based on these and similar cases. For instance, in keeping with the *Robinson* ruling, it is possible for lenders to escape culpability for any wrongdoing, no matter how malicious, simply by assuring that they are the highest bidder at auction so that no third-party rights are called into question. It is curious that among the concern for lenders' rights and third-party rights, the rights of everyday homeowners are being left by the wayside. Even more worrisome for borrowers is the continuing emphasis in common law on the illogical element of a grossly inadequate sales price. More courts should take an approach similar to that taken in *Stevens* and *Miller*, and they should carefully analyze and trace the creation of this element and call its continued application into doubt. One thing is certain: these decisions, and others, should act as a motivating factor for either the Texas Legislature or the Texas Supreme Court, if given the chance, to clarify the rights and limitations placed on borrowers across Texas.

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1 Anna Kalinina, Note and Comment, *A Grossly Inadequate Procedure: Non-Judicial Foreclosure in Texas*, 65 Baylor L. Rev. 1061, 1066-67 (2013).

2 *See* Tex. Prop. Code Ann. § 51.002 (West Supp. 2012).

3 *Id.* § 51.002(d)

4 *Id.* § 51.002(e)

5 Adebo v. Litton Loan Servicing, L.P., No. 01-07-00708-CV, 2008

WL 2209703, at *4 (Tex. App.—Houston [1st Dist.] May 29, 2008, no pet.)

6 *See* Tex. Prop. Code Ann. § 51.002(b)

7 *Id.* § 51.002(d)

8 *See id.* § 51.002(a)

9 *See generally id.* § 51.002

10 Pentad Joint Venture v. First Nat'l Bank of La Grange, 797 S.W.2d 92, 96 (Tex. App.—Austin 1990, writ denied) (emphasis added).

11 Sauceda v. GMAC Mortg. Corp., 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.). Additionally, the Dallas Court of Appeals recently added the burden of essentially two new elements for wrongful foreclosure cases where non-dispossessed homeowners seek monetary damages, which are discussed in further detail in Part III.

12 *See* First State Bank v. Keilman, 851 S.W.2d 914, 921-24 (Tex. App.—Austin 1993, writ denied).

13 *Id.* at 924.

14 *Id*. at 923-24.

15 *Id.* at 923.

16 *Id*.

17 *Id.*at 924.

18 Resolution Trust Corp. v. Westridge Court Joint Venture, 815 S.W.2d 327, 330 (Tex. App.—Houston [1st Dist.] 1991, writ denied)

19 *Id*. at 331.

20 Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473, 475 (Tex. 1965).

21 Charter Nat'l Bank—Houston v. Stevens, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

22 *Id*. at 374.

23 *See* F L R Corp. v. Blodgett, 541 S.W.2d 209, 215 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.), *cert. denied*, 434 U.S. 915 (1977). *Accord* Intertex, Inc. v. Walton, 698 S.W.2d 707, 710, 711 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

24 Fed. Deposit Ins. Corp. v. Blanton, 918 F.2d 524, 526 (5th Cir. 1990).

25 *Id*. at 527.

26 See *id*. at 526.

27 *Id*. at 531.

28 *Id*.

29 *Id* at 530 n.7.

30 *Id.* at 532 (citing Richardson v. Kent, 47 S.W.2d 420 (Tex.Civ. App.—Dallas 1932, no writ))

31 *Richardson* 47 S.W.2d at 425.

32 *Id.*.

33 Charter Nat'l Bank—Houston v. Stevens, 781 S.W.2d 368, 371 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

34 *Id*.

35 *Id*. at 374.

36 *Id*. at 369.

37 *Id*. at 370.

38 *Id*. at 369.

39 *Id*. at 369-70.

40 *See id.*at 370.

41 *Id.*at 370-71.

42 *Id*. at 370.

43 *Id*. at 371.

44 *Id*.

45 *See id*. at 374.

46 *See id*.

47 *Id*.

48 *Id*.

49 *See id*.

50 *See, e.g.,* Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717 (5th Cir. 2013); *Villanova v. FDIC*, No. 08-11-00361-CV, 2014 WL 2881540 (Tex. App.—El Paso June 25, 2014, no. pet. h.).

51 *See* John Hancock Mut. Life Ins. Co. v. Howard, 85 S.W.2d 986, 988-89 (Tex. Civ. App.—Waco 1935, writ ref'd).

52 *See* Wells Fargo Bank, N.A. v. Robinson, 391 S.W.3d 590 (Tex. App.—Dallas 2012, no pet.).

53 *Id.*at 594.

54 *Id* at 592.

55 *See id.* at 593

56 *Id*. (internal quotation marks omitted).

57 *Id*.

58 *See id*.

59 *Id*.

60 *Id.* at 594.

61 *Id*.