

Unless the holder of the note qualifies for holder-in-due-course status, he is subject to any claim or defense the obligor may raise to a simple contract, such as failure of consideration, waiver, estoppel, undue influence, or accord and satisfaction, as well as a claim in recoupment against the original payee of the note. *See* Tex. Bus. & Com. Code § 3.305(a), (b).

**Usury:** The real estate lien note found at form 24-6 in this manual contains a usury savings clause (the paragraph beginning "Interest on the debt evidenced by this note shall not exceed the maximum rate or amount of nonusurious interest . . ."). Texas courts have favored and enforced usury savings clauses. *See Woodcrest Associates v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 437-38 (Tex. App.—Dallas 1989, writ denied). Nonetheless, a usury savings clause will not protect the holder from a usury claim in which the interest rate stated in the note exceeds the statutory ceiling. *See* Tex. Fin. Code ch. 303 *et seq.* Finance Code chapter 303 sets the ceiling rates for loans on written contracts, including promissory notes. If a creditor contracts for, charges, or receives interest in excess of the statutory ceiling amount in connection with a transaction for personal, family, or household use, the statutory penalty is three times the amount of interest contracted for, charged, or received in excess of the allowable amount, except that the penalty cannot be less than the lesser of \$2,000 or 20 percent of the principal; if the interest charged and received is more than double the maximum amount, the creditor also forfeits all principal on which the interest is charged and received and the interest and all other amounts charged and received. Tex. Fin. Code §§ 305.001(a), 305.002. The creditor is also liable for reasonable attorney's fees. Tex. Fin. Code § 305.005.

In subsequent negotiations or proceedings to enforce the note or the underlying transaction, the attorney should take care not to demand any amount not specifically allowed in the loan documents, such as a late charge, because such a demand also might constitute usury. *See Augusta Development Co. v. Fish Oil Well Servicing Co.*, 761 S.W.2d 538, 542 (Tex. App.—Corpus Christi 1988, no writ); *Moore v. Sabine National Bank*, 527 S.W.2d 209, 213-14 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

## § 24.12 Deed of Trust

**Effect:** A deed of trust is merely a security instrument and does not convey title to land, although words of conveyance are usually used. *Fleming v. Adams*, 392 S.W.2d 491, 495 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.). The mortgagee is not the owner and is not entitled to possession, rentals, or profits. *Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981). To be effective, the deed of trust must be delivered to the

grantee. Delivery may be established by the filing of the deed of trust for record in the proper office by the grantor on the request of or with the consent of the grantee. *West v. First Baptist Church*, 71 S.W.2d 1090, 1099 (Tex. 1934).

**Description:** The deed of trust must contain "the nucleus of description" that will allow the land to be identified with reasonable certainty. *Jones v. Mid-State Homes, Inc.*, 356 S.W.2d 923, 925 (Tex. 1962); *Crow v. Davis*, 435 S.W.2d 176, 178 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.). Ambiguities in the deed of trust may be explained by parol evidence as long as the parol evidence does not contradict the language in the deed of trust. *Jasper State Bank v. Goodrich*, 107 S.W.2d 600, 603 (Tex. Civ. App.—Beaumont 1937, writ dismiss'd).

**Existence of Debt:** The existence of a debt is essential to the validity of a deed of trust or mortgage, the deed of trust or mortgage being incident to the note. *West*, 71 S.W.2d at 1098; *Rutland Savings Bank v. Seeger*, 125 S.W.2d 1113, 1115 (Tex. Civ. App.—Galveston 1939, writ dismiss'd judgment corrected).

**Priority of Liens:** Generally, different liens on the same property have priority according to the time of their creation; that is, "first in time is first in right." *Windham v. Citizens National Bank*, 105 S.W.2d 348, 351 (Tex. Civ. App.—Austin 1937, writ dismiss'd). Even though a lien may attach prior in time to a later lien, the prior lien will be void as to the subsequent lien if the prior lien instrument was not acknowledged, sworn to, or proved and recorded and the subsequent lienholder acquired his lien for a valuable consideration without notice of the prior lien. Tex. Prop. Code § 13.001(a). Moreover, when a lienholder has on the date his lien attaches actual or constructive notice of an inchoate security interest in the property, his lien will be secondary to that security interest when it ripens into an effective lien. For example, a recorded deed of trust to secure future indebtedness will be a prior and superior lien to either a sale or encumbrance occurring after the deed of trust was recorded but before the incurring of indebtedness referred to in the deed of trust. *Jolly v. Fidelity Union Trust Co.*, 15 S.W.2d 68, 70–71 (Tex. Civ. App.—Fort Worth 1929, writ ref'd).

### § 24.13 Foreclosure and Sale under Deed of Trust

**When Authorized:** The power of sale given a trustee in a deed of trust is considered a harsh remedy and may be exercised only by strictly complying with the terms and conditions of the note and those imposed on the power of sale by the maker of the trust instrument. *Purnell v. Follett*, 555 S.W.2d 761, 763 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ). A sale is authorized only on default by the debtor. *Ford v. Emer-*

*ich*, 343 S.W.2d 527, 531 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.). A tender of arrearages due on a deed of trust containing an acceleration clause, before exercise by the holder of the deed of trust of his option to declare the entire debt due, prevents the exercise of acceleration. *Hiller v. Prosper Tex, Inc.*, 437 S.W.2d 412, 415 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ).

**How Exercised:** When the power of sale is validly exercised under the deed of trust, the sale must be made at a public auction held between 10:00 A.M. and 4:00 P.M. of the first Tuesday of a month. The sale must be made at the county courthouse or other place designated by the county's commissioners court in the county in which the real estate is located. If the property is located in more than one county, the sale may be made at the courthouse or other designated place in any county in which the property is located. The commissioners court shall designate the area at the courthouse or other designated place where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by that notice is to take place, and the sale must occur in that area. Tex. Prop. Code § 51.002(a), (h).

Notice of the proposed sale, which must include a statement of the earliest time at which the sale will begin, must be given at least twenty-one days before the date of the sale. This notice must be given by a proper notice posted at the courthouse door of each county in which the property is located, designating the county in which the property will be sold; by a copy of the notice filed in the office of the county clerk in each such county; and by service of written notice of the sale by certified mail on each debtor. Tex. Prop. Code § 51.002(b). If the courthouse or the clerk's office is closed because of inclement weather, natural disaster, or other act of God, the posting or filing may be made up to forty-eight hours after the court or office reopens for business. Tex. Prop. Code § 51.002(b-1). The entire calendar day on which the notice of sale is given, regardless of the time of day at which it is given, is included in computing the twenty-one-day notice period, and the entire calendar day of the foreclosure sale is excluded. Tex. Prop. Code § 51.002(g). The sale must begin at the time stated in the notice of sale or not later than three hours after that time. Tex. Prop. Code § 51.002(c).

Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or contract lien and giving the debtor at least twenty days to cure the default before notice of sale can be given under Property Code

section 51.002(b). The entire calendar day on which the notice to the debtor is given, regardless of the time of day at which the notice is given, is included in computing the twenty-day notice period, and the entire calendar day on which notice of sale is given under section 51.002(b) is excluded. Tex. Prop. Code § 51.002(d). Service of the notice by certified mail is completed when the notice, with postage prepaid and addressed to the debtor at the last known address, is deposited with the United States Postal Service. The affidavit of a person having knowledge of the facts to the effect that service was completed is prima facie evidence of service. Tex. Prop. Code § 51.002(e). The purpose of this statute is to provide a minimum level of protection for the debtor. *Hausmann v. Texas Savings & Loan Ass'n*, 585 S.W.2d 796, 799 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

**Mortgagee's Entitlement:** After a valid trustee's sale, the mortgagee is entitled to judgment for the amount of the note, interest, and attorney's fees, less the amount received at the trustee's sale and other legitimate credits. *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965).

#### § 24.14 Recordation

**Effect of Lack of Recordation:** A conveyance of real property is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record. Tex. Prop. Code § 13.001(a). Therefore, a purchaser of land for value and without notice acquires title to the property as against a person claiming under a deed that has not been filed for record as required by law. *See Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802, 805 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.). The same rule applies to a judgment creditor as to a perfected judgment lien against the grantor of an unrecorded deed—the lien will prevail over the unrecorded deed as long as the lien creditor did not have notice of the deed. *Paris Grocer Co. v. Burks*, 105 S.W. 174, 175 (Tex. 1907). An unrecorded instrument is binding, however, on a party to the instrument, the party's heirs, and a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument. Tex. Prop. Code § 13.001(b).

Similarly, all deeds of trust and mortgages are void as to creditors and subsequent purchasers for valuable consideration without notice, unless they have been acknowledged, sworn to, or proved and filed for record as required by law. Tex. Prop. Code § 13.001(a). Accordingly, the holder of a subsequent lien who does not have actual notice of a prior unrecorded lien has priority over the prior unrecorded lien. *Gordon-*