

# Deed Restrictions, Lien Foreclosures and Distress Warrants: Oh My!

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## Deed Restriction Cases

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## What is a Deed Restriction?

- Deed restrictions are written agreements that restrict or limit the use or activities that may take place on real property in a subdivision.
  - For example:
    - No livestock, chickens or pigs
    - No mobile homes
    - No commercial or industrial use of the property
    - No outdoor storage of junk, RVs or trailers

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## What is a Deed Restriction?



Deed restrictions are private agreements among the property owners in a subdivision and are binding on each owner.



They appear in the real property records of the county in which the property is located.

If a person violates the deed restrictions on their property, a suit may be brought to enforce the restrictions.

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## May a Justice Court Hear a Deed Restriction Case?

- Yes!
- A justice court has “jurisdiction of suits relating to enforcement of a deed restriction of a residential subdivision that does not concern a structural change to a dwelling.”

-- Section 27.034(a), Government Code

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What About  
the  
Amount in  
Controversy?

- Does not matter!
- “A justice court has jurisdiction of suits under this section regardless of the amount in controversy.”

-- Section 27.034(e), Government  
Code

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## What About Areas Outside the House?

- “A ‘dwelling’ does not include an external structure such as a carport, fence, storage building, or unattached garage.”
- So a deed restriction over these things **may be enforced** because they do not concern “a structural change to a dwelling!”

-- Section 27.034(i), Government Code

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## Procedure for Hearing a Deed Restriction Case

- A deed restriction case is filed in justice court as a small claims case.
- It should be handled as any other small claims case.
- The issue for the court to decide is whether or not the defendant is complying with the deed restrictions at issue.
- Either party may request a jury!

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## May the Court Order the Defendant to Comply with the Deed Restriction?

- No! A justice court may not grant injunctive relief in a deed restriction case.
  - Section 27.034(j) states: “Nothing in this section authorizes a justice of the peace to grant a writ of injunction.”
- This means the court may not order the defendant to comply with the deed restriction.
  - For example, the court can’t order the defendant to get rid of their chickens, goats or pigs!

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## What Can the Court Order?

- If the defendant is not complying with the deed restrictions, the court may assess civil damages in an amount not to exceed \$200 for each day of each violation.
  - Property Code § 202.004(c)
- Ultimately the threat of these civil penalties could cause the defendant to comply with the deed restrictions.

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# Lien Foreclosures

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## What is a Lien Foreclosure?

- A **lien** is an interest that a creditor has in another person's property. It often secures a debt and lasts until the debt is satisfied.
  - What are some common examples of a lien?
- If the person defaults on the debt, the person holding the lien has a right to foreclose and sell the property subject to the lien to satisfy the debt.

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## What is a Lien Foreclosure?

For example, if John Smith buys a car from a car dealer and signs a loan to pay for the car, John's obligation to pay back the loan will be secured by a lien on the car.

If John defaults on the loan, the car dealer may enforce the lien and repossess and sell the car to pay the amount John owes.

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## What is a Lien Foreclosure?

- Or if John takes the car to a mechanic for repairs, the mechanic has a lien on the car for the value of the repairs performed (a mechanic's lien).
- If John doesn't pay the mechanic for the work he performed, the mechanic may foreclose on the lien and sell the car to pay for the repairs.

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## What is a Lien Foreclosure?

- If the property that is subject to the lien is sold in a foreclosure sale for more than the amount of the lien, the property owner gets the remaining money, not the lienholder (the foreclosing party).
- But if the property is sold for less than the amount owed, then the property owner is still liable for the deficiency.

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## What is a Lien Foreclosure?

- In some cases, the person holding the lien may have a statutory right to seize and sell the property without filing a suit for a judicial foreclosure of the lien.
  - Where a “repo man” comes in.
- But in other cases the person holding the lien may need to file a suit to foreclose the lien and obtain possession of the property.

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## May a Justice Court Hear a Lien Foreclosure Case?

- Yes!
- A justice court has jurisdiction to enforce a lien on **personal property** provided the amount in controversy is within the court's jurisdictional limit (\$20,000).
  - Govt. Code § 27.031(a)(3)
- The court does **not** have jurisdiction to foreclose a lien on **real property**.
- A lien foreclosure suit on personal property is filed and treated as a small claims case.

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## Amount in Controversy

- In a lien foreclosure case the amount in controversy is the value of the property subject to the lien.
- Not the amount of the debt claimed!

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## Amount in Controversy

- For example, suppose John Smith bought a car for \$22,000 two years ago and has defaulted on his loan and the car is currently worth \$18,000.
- The court has jurisdiction in a suit to foreclose the lien and recover possession of the car.
- Evidence of the current value of the car (e.g. the blue book value from Edmund's) should be submitted by the plaintiff.
- The court may take testimony if necessary.

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## Possession of the Property

- The plaintiff does not have to possess the property to file a lien foreclosure case.
- For example, a mechanic may give the car back to the owner but he still has a right to ask a court to foreclose his mechanic's lien if he does not get paid.
- A plaintiff may request a writ of sequestration to make sure the property subject to the lien is not removed during the pendency of the case.

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## Suit for Deficiency

- A lienholder may have a statutory right to sell property subject to a lien.
  - For example, a mechanic may have this right after giving notice to the car's owner.
    - Property Code § 70.006

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## Suit for Deficiency

- But if the sale does not result in enough to pay for the cost of the repairs, the mechanic could still sue for the balance (the deficiency) in justice court.
- In this case the mechanic is not asking the court to foreclose the lien but only to recover the difference between the amount owed and the amount he was able to sell the car for.

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## Title to a Vehicle

- In a lien foreclosure proceeding a justice court may issue an order related to title to a motor vehicle.
  - Transportation Code § 501.0521(a)
- Note: the only other time a justice court may issue an order related to title to a motor vehicle is in a disposition of stolen property proceeding under Chapter 47 of the CCP.

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## Knowledge Check!

- A deed restriction prohibits a homeowner from putting a car up on blocks in their front yard.
- If a neighbor files suit in justice court to enforce the deed restriction, the court could:
  - A. Order the homeowner to remove the car from their front yard.
  - B. Assess civil damages of \$200 for each day of the violation.

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## Knowledge Check!

- A deed restriction prohibits all the homeowners in a subdivision from having a storage building on their property.
- If a neighbor files suit in justice court to enforce this deed restriction, could a justice court hear the case?
  - A. No; this deed restriction concerns a structural change to the dwelling.
  - B. Yes; a storage unit does not concern a “structural change to a dwelling” so the court may hear the case (even though it may not issue an injunction).

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## Knowledge Check!

- ABC Home Repair installs aluminum siding on John Smith’s house. John fails to pay for the aluminum siding and ABC files suit in justice court to foreclose a lien they claim to have on the house.
- Can a justice court hear this case?
  - A. No; this is a suit to foreclose a lien on real property, not on personal property.
  - B. Yes; since the lien is from installing the aluminum siding and not from a mortgage on the house itself.

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## Knowledge Check!

- Billy buys a 2014 Ford Mustang from Used-Cars-R-Us. Billy signs a loan that is secured by the car. Unfortunately, Billy falls behind on his payments and Used-Cars-R-Us forecloses their lien on the car. Billy owes \$13,000 on the loan but after foreclosing Used-Cars-R-Us is only able to sell the car for \$10,000.
- Used-Cars-R-Us files suit in justice court for the \$3,000 deficiency plus costs and attorney's fees. Can a justice court hear this case?
  - A. No; they should have included this in a suit to foreclose the lien.
  - B. Yes; this is a separate small claims case for the deficiency after foreclosing on the car and selling it to pay off the loan.

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## Knowledge Check!

- An HOA files suit in justice court claiming that the defendant failed to pay their HOA dues and the HOA has a lien on their house and may foreclose and sell the house to obtain the dues they are owed.
- Can a justice court hear this case?
  - A. No; it is a suit to foreclose a lien on real property, not personal property.
  - B. Yes; the court can hear the case since it's an HOA.

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|------------------------------------------------------------------------------------|------|
| <b>PHILIPS REFERENCE NUMBER: 1</b>                                                 |      |
| Security Code:                                                                     |      |
| <b>OUTSTANDING AMOUNT:</b><br><small>(for this Distress Warrant only)</small>      | £335 |
| <b>TOTAL OUTSTANDING AMOUNT:</b><br><small>(for all accounts with Philips)</small> | £860 |

### NOTICE OF DISTRESS WARRANT

Formal notice that we are in receipt of a Distress Warrant for non-payment of rates' Fine and we have been instructed by South East London to enforce the same with immediate effect.

We are required to collect full payment from you or remove goods to sell at public auction to satisfy the outstanding amount owed to the Court plus our costs.

**If payment including costs (as shown above) is paid within 48 HOURS, we will not have to seize and remove goods without further notice.**

If you do not pay this fine in full could result in one or more of the following:-  
 - a fine of no less than £50 per account for every visit from our bailiffs (clamped (minimum £50 release fee)  
 - your car and/or vehicle can be removed and sold at auction (up to £200 + VAT)  
 - your goods can be removed and sold at auction (up to £200 + VAT)

We are available 24 hours a day by Debit / Credit card by telephoning 0844 800 4588.  
 Our opening hours are Monday to Friday: 8.00am - 8.00pm  
 Saturday: 9.00am - 2.00pm.  
 For further details on how to make payment see overleaf.

If you have any queries please contact our Customer Service Centre on 07797806918 and we will aim to call you within 3 hours.

When using the barcode, a standard £2.04 should be added to your account. The barcode should be kept and used for all future payments.

# Distress Warrants

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## What is a Distress Warrant?

A landlord who leases all or part of a building for non-residential use (i.e. a commercial landlord) has a lien on the property of the tenant for rent that is due or will become due for 12 months after the rental agreement is made.

The lien exists while the tenant occupies the building and for one month after the tenant abandons the building.

- -- Property Code §§ 54.021, 54.024, 54.025

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## What is a Distress Warrant?

- A distress warrant is a way to protect the landlord's interest in the tenant's property that is subject to the lien until the landlord is able to foreclose the lien to satisfy the tenant's obligation for the rent.
- A distress warrant gives the landlord a "simple, inexpensive, speedy and effective way" to hold the tenant's property until the landlord can foreclose the lien on that property in the court having jurisdiction over the matter.

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## Jurisdiction to Issue the Distress Warrant

- A justice court has jurisdiction to issue a distress warrant even if, after it is executed, the warrant will be returned to a different court that has jurisdiction over the lien foreclosure case.

-- Property Code § 54.025

- The justice court also has jurisdiction regardless of where the property subject to the lien is now located.

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## Application for a Distress Warrant

- The person to whom rent is payable under a building lease may apply to a justice court in the precinct where the building is located for a distress warrant if the tenant:
  - Owes rent;
  - Is about to abandon the building; or
  - Is about to remove the tenant's property from the building.
    - Property Code § 54.025

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## Issuance of the Distress Warrant

- The hearing may be ex parte.
- In an order granting an application, the court must:
  - Make specific findings to support the statutory grounds;
  - Specify the maximum value of the property that may be seized and the amount of the bond required by the plaintiff;
  - Order the property to be kept safe and preserved until further order of the court; and
  - Set the amount of a replevy bond, which must be the amount of the plaintiff's claim, one year's accrual of interest (if allowed) and estimated court costs.
    - Rule 610, TRCP

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## Plaintiff's Bond

- If the distress warrant is issued before final judgment on the lien foreclosure case, then the plaintiff must post a bond payable to the defendant in the amount set by the justice of the peace and conditioned on pursuing the case to effect and paying all costs and damages ordered against him if the warrant was wrongfully sought.

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## The Distress Warrant

- Directed to a sheriff or constable and orders them to attach and hold as much of the defendant's property in the approximate amount set by the justice of the peace, found in the officer's county, unless the property is exempt or replevied by the defendant.

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## Issuance of Citation

- When the justice of the peace issues the distress warrant, a citation must also be issued to the defendant:
  - If the justice court has jurisdiction to finally try the case (the amount owed is within the court's jurisdiction), then the defendant must answer in justice court "on the first day of the next succeeding term of court" and stating the time and place.

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## Issuance of Citation

- If the justice court does not have jurisdiction to finally try the case (the amount owed exceeds the court's jurisdiction), then the defendant must answer in the court to which the warrant is returnable before 10:00 a.m. on the Monday following the expiration of 20 days from the date of service and stating the place.  
-- Rule 619, TRCP

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## Plaintiff Must File Petition for Lien Foreclosure Case

- If the distress warrant is returnable to a district or county court, the plaintiff must file a petition seeking a lien foreclosure in that court within 10 days from the date of issuance of the distress warrant.

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## Amount in Controversy

- The amount in controversy is the amount or value of the rent sued for.
- It is not the value of the property seized because the foreclosure of the lien is only on so much of the property as is necessary to satisfy the debt.

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Who Hears  
the Case after  
the Distress  
Warrant is  
Issued?

- If the amount of rent and other items included in calculating the amount in controversy, such as attorney's fees and court costs, is more than \$20,000, then the justice court will not have jurisdiction to hear the suit to foreclose the lien – even though it does have jurisdiction to issue the distress warrant!
- The warrant is returnable to a district or county court that does have jurisdiction.

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- A replevy bond allows a defendant to get his property back by posting a bond to protect the plaintiff.
- The amount of the replevy bond is set by the justice court.  
-- Rule 614, TRCP
- For further details see the Civil Deskbook at pages 144 – 159.

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## Knowledge Check!

- Skyscraper, Inc. files an application for a distress warrant seeking to seize \$40,000 in computer equipment and furniture owned by one of its tenants, Startup-R-U's, who have not paid their rent for four months (\$10,000 per month).
- Can a justice court issue a distress warrant?
  - A. No; the amount in controversy is more than \$20,000.
  - B. Yes; the court may issue the distress warrant to seize the computer equipment and furniture but the lien foreclosure case will have to be heard by a district court.