

**No. 10-0516**

---

**IN THE SUPREME COURT OF TEXAS**

---

HOLLY PARK CONDOMINIUM HOMEOWNERS' ASSOCIATION, INC.  
*Petitioner*

v.

RENE LOWERY  
*Respondent*

---

On Petition for Review from the Fifth Court of Appeals at Dallas, Texas  
No. 05-08-01366-CV

---

**REPLY IN SUPPORT OF PETITION FOR REVIEW**

---

MARC D. MARKEL  
Texas State Bar No. 12986850  
[mmarkel@robertsmarkel.com](mailto:mmarkel@robertsmarkel.com)  
DAVID KRIEWALDT  
Texas State Bar No. 24043403  
[dkriewaldt@robertsmarkel.com](mailto:dkriewaldt@robertsmarkel.com)  
ROBERTS MARKEL PC  
2800 Post Oak Blvd., 57<sup>th</sup> Floor  
Houston, Texas 77056  
Telephone: (713) 840-1666  
Telecopier: (713) 840-9404  
*Attorneys for Petitioner*

**TABLE OF CONTENTS**

Table of Contents..... ii

Index of Authorities..... iii

Introduction and Summary ..... 1

Argument..... 1

    I. Respondent’s argument demonstrates the need for clarification on how the Uniform Condominium Act applies to condominiums established before 1994. 1

    II. The Court should exercise jurisdiction to address the Texas Constitution’s guaranty of statutory and contractual remedies for pre-1994 condominium associations attempting to collect unpaid assessments. .... 2

Prayer..... 3

Certificate of Service ..... 4

## INDEX OF AUTHORITIES

### **Texas Statutes**

Tex. Prop. Code Ann. § 82.002(a) (Vernon 2007).....	1
Tex. Prop. Code Ann. § 82.002(c) (Vernon 2007).....	1

### **Supreme Court of the United States Cases**

<i>Edwards v. Kearzey</i> , 96 U.S. 595 (1877) .....	2
<i>Ogden v. Saunders</i> , 25 U.S. (12 Wheat.) 213 (1827).....	2

### **Supreme Court of Texas Cases**

<i>Langever v. Miller</i> , 76 S.W.2d 1025 (Tex. 1934) .....	2
--	---

### **Texas Courts of Appeals Cases**

<i>Cooper v. Cochran</i> , 288 S.W.3d 522, 537-38 (Tex. App.—Dallas 2009, no pet.).....	2
<i>Kyle v. Countrywide Home Loans, Inc.</i> , 232 S.W.3d 355, 362 (Tex. App.— Dallas 2007, pet. denied).....	3

## INTRODUCTION AND SUMMARY

The Court should exercise jurisdiction in order to determine whether the Legislature intended to create a statutory lien for delinquent condominium assessments. Specifically, the Court should clarify whether the right of non-judicial foreclosure under Section 82.113(e) of the Texas Property Code could ever logically invalidate a contractual provision for judicial foreclosure in a condominium's declarations.

## ARGUMENT

### **I. Respondent's argument demonstrates the need for clarification on how the Uniform Condominium Act applies to condominiums established before 1994.**

The Uniform Condominium Act (UCA) includes the statement that the Act applies to Texas condominiums "for which the declaration is recorded on or after January 1, 1994." Tex. Prop. Code Ann. § 82.002(a) (Vernon 2007). But the owners of condominiums created before 1994 may vote to adopt the provisions of the UCA in their entirety. *See* § 82.002(a)(1). In addition, Section 82.002(c) stipulates that certain provisions of the UCA apply to pre-1994 condominiums irrespective of adoption. *See* § 82.002(c).

Respondent, however, argues that every section of the UCA, "not otherwise identified under Section 82.002(c), trumps any provision that may be contained in a pre-1994 condominium declaration or bylaws dealing with the same subject matter." Resp. at 8. Respondent's argument cannot be reconciled with the UCA's plain statement that the Act applies to condominiums created after January 1, 1994 and only applies in limited circumstances to condominiums created before enactment of the UCA. The fact that

Respondent, a party intimately familiar with the law and facts of this case, can interpret the UCA to apply generally to pre-1994 condominiums, while Petitioner interprets the UCA to have very limited application, suggests that a great deal of confusion exists in the legal community as to the application of the UCA to pre-1994 condominiums. The Court, therefore, should exercise jurisdiction to provide guidance.

**II. The Court should exercise jurisdiction to address the Texas Constitution’s guaranty of statutory and contractual remedies for pre-1994 condominium associations attempting to collect unpaid assessments.**

The court of appeals erroneously concluded that a statutory right of non-judicial foreclosure would invalidate a contractual right of judicial foreclosure. To the extent that the court of appeals attempted to apply the doctrine prohibiting the passage of laws impairing the obligations of contract, the court of appeals did so in error, and this Court should exercise jurisdiction to apply the doctrine properly. This Court has adopted the United States Supreme Court’s definition of obligation, in the context of the cited doctrine, to mean “the chain of law, by which we are necessarily bound to make some payment, according to the law of the land.” *Langever v. Miller*, 76 S.W.2d 1025, 1030 (Tex. 1934) (quoting *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 317-18 (1827)). Further, this Court has noted that “[t]he obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement.” *Langever*, 76 S.W.2d at 1031 (quoting *Edwards v. Kearzey*, 96 U.S. 595, 600 (1877)).

With respect to contracts involving the right to foreclose upon a lien, the right of foreclosure constitutes the lien holder’s right to enforcement of the contract. *See, e.g.,*

*Cooper v. Cochran*, 288 S.W.3d 522, 537-38 (Tex. App.—Dallas 2009, no pet.) (describing a lender’s right of judicial foreclosure); *see, e.g., Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 362 (Tex. App.—Dallas 2007, pet. denied) (describing a deed of trust as providing a mortgagee “the right to seek judicial foreclosure in the event of a default”). When the Legislature granted pre-1994 condominium associations a statutory right of non-judicial foreclosure under the UCA, the Legislature did not in any way impair the obligation of contract. The Legislature merely provided condominium associations with an alternative remedy for enforcement of obligations agreed to under the condominium declarations. Thus, the statutory right of non-judicial foreclosure cannot be interpreted as invalidating the contractual right of judicial foreclosure because non-judicial foreclosure simply constitutes an alternative means of enforcing already existing obligations under the declarations. Non-judicial foreclosure does not and cannot invalidate any obligations of contract.

**PRAYER**

Petitioner, Holly Park Condominium Association, prays that this Court grant the petition for review and that the Court reverse the judgment of the court of appeals. Petitioner further requests any other relief to which the Court may determine that Petitioner is entitled.

Respectfully submitted,

\_\_\_\_\_  
MARC D. MARKEL  
Texas State Bar No. 12986850  
[mmarkel@robertsmarkel.com](mailto:mmarkel@robertsmarkel.com)  
DAVID KRIEWALDT

Texas State Bar No. 24043403  
[dkriewaldt@robertsmarkel.com](mailto:dkriewaldt@robertsmarkel.com)  
ROBERTS MARKEL PC  
2800 Post Oak Blvd., 57<sup>th</sup> Floor  
Houston, Texas 77056  
Telephone: (713) 840-1666  
Telecopier: (713) 840-9404  
*Attorneys for Petitioner*  
HOLLY PARK CONDOMINIUM  
HOMEOWNERS' ASSOCIATION, INC.

#### CERTIFICATE OF SERVICE

I certify that a copy of this *Reply in Support of Petition for Review* has been served on the counsel of record listed below in accordance with the Texas Rules of Appellate Procedure on August 23, 2010.

Frank E. McLain  
FRANK E. MCLAIN LAW FIRM, P.C.  
8226 Douglas Avenue, Suite 600  
Dallas, Texas 75225  
Telephone: 214-378-8585  
Fax: 214-378-5561  
*Counsel for Appellee Rene Lowery*

---

DAVID KRIEWALDT