

## WHAT EVERY REALTOR SHOULD KNOW ABOUT FORECLOSURE

Ralph A. Cantafio, Esq.<sup>1</sup>

Mark J. Fischer, Esq.<sup>2</sup>

This paper focuses on the actual mechanics of foreclosure. It is, therefore, by definition very tedious. Do not be discouraged. This is meant for future resource and provides a technical review of the foreclosure process to assist if a Realtor is attempting to, at a future date, better comprehend the foreclosure process.

### METHODS OF FORECLOSURE

As set forth in Rule 105 of the Colorado Rules of Civil Procedure, Deeds of Trust to the Public Trustee may be foreclosed in a civil action. The preferred method of foreclosure in most cases is by advertisement and sale through the Public Trustee consistent with the terms of the Deed of Trust and the Public Trustee foreclosure statutes. This process saves time, trouble, and expense compared to a judicial foreclosure. The alternative involving Judicial Foreclosure is rarely used in Colorado.

#### **Holder of an evidence of debt—Qualified holder**

The only person allowed to commence a Public Trustee foreclosure pursuant to C.R.S.A. § 38–38–101(1) is the “holder of an evidence of debt.” The “holder of an evidence of debt” is defined by C.R.S.A. § 38–38–100.3(10) as follows:

. . .

(10) “Holder of an evidence of debt” means the person in actual possession of or otherwise entitled to enforce an evidence of debt; except that “holder of an evidence of debt” does not include a person acting as a nominee solely for the purpose of holding the evidence of debt or deed of trust as an electronic registry without an authority to enforce the evidence of debt or deed of trust. The following are presumed to be the holder of an evidence of debt:

- (a) The person who is the obligee of and who is in possession of an original evidence of debt;
- (b) The person in possession of an original evidence of debt together with the proper indorsement or assignment thereof to such person in accordance with section 38–38–101(6);

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<sup>1</sup> Ralph A. Cantafio is licensed to practice law in, among other states, Colorado, Utah and Wyoming. The Law Offices of Ralph A. Cantafio, P.C. are located in Craig and Steamboat Springs, Colorado. Ralph A. Cantafio, Esq. has practiced law full-time in northwestern Colorado since 1986. He is a graduate of the University of Colorado School of Law and has his Masters of Science in Mineral Economics from the Colorado School of Mines. Mr. Cantafio is an Owner/Broker of Real Living Professional Group.

<sup>2</sup> Mark J. Fischer is licensed to practice law in the State of Colorado. Mr. Fischer has practiced law in the Yampa Valley since 1976. He is a graduate of the University of Michigan. Mr. Fischer currently is involved in water litigation involving a mutual ditch company. Mr. Fischer is also the Owner/Managing Broker of Real Living Professional Group.

- (c) The person in possession of a negotiable instrument evidencing a debt, which has been duly negotiated to such person or to bearer or indorsed in blank; or
- (d) The person in possession of an evidence of debt with authority, which may be granted by the original evidence of debt or deed of trust, to enforce the evidence of debt as agent, nominee, or trustee or in a similar capacity for the obligee of the evidence of debt.

A “qualified holder” may be a “holder of an evidence of debt”; if so, such qualified holder is also permitted to initiate a Public Trustee foreclosure. The term “qualified holder” as defined by C.R.S.A. § 38–38–100.3(20) includes:

...

- (20) “Qualified holder” means a holder of an evidence of debt, certificate of purchase, certificate of redemption, or confirmation deed that is also one of the following:
  - (a) A bank as defined in section 11–101–401(5), C.R.S.;
  - (b) An industrial bank as defined in section 11–108–101(1), C.R.S.;
  - (c) A federally chartered savings and loan association doing business in Colorado or a savings and loan association chartered under the “Savings and Loan Association Law,” articles 40 to 46 of title 11, C.R.S.;
  - (d) A supervised lender as defined in section 5–1–301(46), C.R.S., that is licensed to make supervised loans pursuant to section 5–2–302, C.R.S., and that is either:
    - (I) A public entity, which is an entity that has issued voting securities that are listed on a national security exchange registered under the federal “Securities Exchange Act of 1934”, as amended; or
    - (II) An entity in which all of the outstanding voting securities are held, directly or indirectly, by a public entity;

### **Commencing the foreclosure with the Public Trustee**

C.R.S.A. § 38–38–101(1) establishes the procedures for commencing a Public Trustee foreclosure whenever a holder of an evidence of debt has declared a violation of a covenant of a deed of trust. The holder of an evidence of debt or the holder's attorney shall file the following with the Public Trustee of the county where the property is located:

1. A “notice of election and demand” signed by the holder of an evidence of debt or the holder's attorney. A duplicate original is not required.

2. The original “evidence of debt,” together with the original indorsement or assignment thereof, if any, to the holder of the evidence of debt, or the indorsement or assignment in accordance with subsection (6) of C.R.S.A. § 38–38–101[FN2] or, in lieu of the original evidence of debt, one of the following:
  - a. A corporate surety bond in one and one-half times the face amount of such original evidence of debt;

**OR**

  - b. A copy of the evidence of debt and a certification signed and acknowledged by a holder of an evidence of debt “acting for itself, or as agent, nominee, or trustee under subsection (2)” of C.R.S.A. § 38–38–101, or a statement signed by the attorney for the holder citing the paragraph of C.R.S.A. § 38–38–100.3(20) “under which the holder claims to be a qualified holder and certifying or stating that the copy of the evidence of debt is true and correct and that the use of the copy is subject to the conditions described in C.R.S.A. § 38–38–101(2)(a).”
3. The original recorded deed of trust securing the evidence of debt or in lieu thereof, one of the following:
  - a. A certified copy of the recorded deed of trust;

**OR**

  - b. A copy of the recorded deed of trust and a certification signed and acknowledged by a holder of an evidence of debt “acting for itself, or as agent, nominee, or trustee under subsection (2)” of C.R.S.A. § 38–38–101, or a statement signed by the attorney for the holder citing the paragraph of C.R.S.A. § 38–38–100.3(20) “under which the holder claims to be a qualified holder and certifying or stating that the copy of the recorded deed of trust is true and correct and that the use of the copy is subject to the conditions described in C.R.S.A. § 38–38–101(2)(a).”
4. A “combined notice” required by C.R.S.A. § 38–38–103.
5. An initial “mailing list” containing the names and addresses of the persons listed in C.R.S.A. § 38–38–103(1)(a)(I). A further discussion of the mailing list is contained in § 68.14 *infra*.
6. A check payable to the Public Trustee representing an advance deposit against the Public Trustee’s fees and costs for processing the foreclosure. C.R.S.A. § 38–38–101(10) provides that the Public Trustee “may require” up to a \$500 deposit. The practitioner should always check with the Public Trustee to determine the actual amount that should be tendered.

From the time a foreclosure is commenced, realtors should recall that strict compliance with the requirements of each of the foreclosure statutes is extremely important and cannot be overemphasized. Attention to detail at every step of the Public Trustee process is crucial.

### **Notice of election and demand for sale**

The Notice of Election and Demand for Sale, when recorded by the Public Trustee, commences the Public Trustee foreclosure process. The Notice of Election and Demand for Sale makes demand on the Public Trustee to give notice, advertise for sale, and sell the property. Pursuant to C.R.S.A. § 38-38-101(4) it must contain:

1. The names of the original grantors of the deed of trust being foreclosed and the original beneficiaries or grantees thereof;
2. The name of the holder of the evidence of debt;
3. The date of the deed of trust being foreclosed;
4. The recording date, county, book, and page or reception number of the recording of the deed of trust being foreclosed;
5. The amount of the original principal balance of the secured indebtedness;
6. The amount of the outstanding principal balance of the secured indebtedness as of the date of the notice of election and demand;
7. A description of the property;
8. A statement of whether the property described in the notice of election and demand is all, or only a portion, of the property then encumbered by the deed of trust being foreclosed;
9. A statement of the violation of the covenant of the evidence of debt or deed of trust being foreclosed upon which the foreclosure is based, which statement shall not constitute a waiver of any right accruing on account of any violation of any covenant of the evidence of debt or deed of trust other than the violation specified in the notice of election and demand; and
10. The name, address, and bar registration number of the attorney for the holder of the evidence of debt, which may be indicated in the signature block of the notice of election and demand.

The Public Trustee must cause the Notice of Election and Demand for Sale to be recorded in the office of the county clerk and recorder of the county in which the property is located within ten working days following receipt of the notice. The failure of the Public Trustee to meet this time requirement does not affect the validity of the foreclosure, but the Public Trustee must forfeit five percent of the Public Trustee's fees for each day the Public Trustee fails to meet the time

requirement. The Public Trustee is required to retain a printed or electronic copy of the notice of election and demand and the combined notice (discussed in the next section), which records must be available for inspection by the public at the office of the Public Trustee during the Public Trustee's normal business hours.

If the evidence of debt secured by the deed of trust consists of more than one instrument (*e.g.*, several notes or bonds), C.R.S.A. § 38-38-101(7) permits the holder of the evidence of debt to elect to foreclose with respect to fewer than all of such instruments “by identifying in the notice of election and demand and the combined notice only those to be satisfied in whole or in part, in which case the requirements of this section shall apply only as to those instruments or documents.”

### **The Combined Notice**

The “combined notice,” as defined by C.R.S.A. § 38-38-100.3(4), “means the combined notice of sale, right to cure, and right to redeem described in section 38-38-103(4)(a).” The combined notice of sale, right to cure, and right to redeem (hereafter referred to as the “Combined Notice”) replaces the notice of sale and the notice of cure and redemption rights under prior law. The Combined Notice is required to contain the following:

1. All the information required by C.R.S.A. § 38-38-101(4). This is the same information that must be contained in the Notice of Election and Demand for Sale.
2. The following statement: “A notice of intent to cure pursuant to section 38-38-104 shall be filed with the officer at least fifteen calendar days prior to the first scheduled sale date or any date to which the sale is continued.”
3. The following statement: “A notice of intent to redeem pursuant to section 38-38-302 shall be filed with the officer no later than eight business days after the sale.”
4. The name, address and telephone number of each attorney, if any, representing the holder of the evidence of debt.
5. The date of sale. The date specified must conform to C.R.S.A. §§ 38-38-108(1)(a) and (c). In the case of a foreclosure sale of property that is not agricultural property, the date of sale shall be no less than 110 calendar days nor more than 125 calendar days after the date of recording of the Notice of Election and Demand for Sale. If the property to be sold is agricultural property, the sale date shall be no less than 212 calendar days nor more than 230 calendar days after the date of recording of the Notice of Election and Demand for Sale.
6. The actual place of sale. The place of sale must be determined in accordance with C.R.S.A. § 38-38-110 regardless of the place that is designated for the sale by the terms of the deed of trust.

7. The following statement in bold face type (which is required by C.R.S.A. § 24–70–109): “The lien being foreclosed may not be a first lien.”
8. The first and last dates of publication of the Combined Notice. It should be noted that these publication dates do *not* need to be included in the *mailed* Combined Notice. However, because the same Combined Notice may be used for both mailing and publication if the publication dates are included, it is advisable to include these dates when preparing the mailed Combined Notice to avoid the necessity of preparing a second Combined Notice just for publication.

The attorney for the foreclosing party will typically send an original and two copies of the Combined Notice to the Public Trustee together with all other documents required to commence the foreclosure process. One copy of the Combined Notice will be placed in the Public Trustee's records; the second copy will be sent by the Public Trustee to a local newspaper for publication; and the third copy will be returned to the attorney showing the first and last publication dates and the time and date of sale

## **CURE OF MONETARY DEFAULT PRIOR TO SALE—WITHDRAWAL**

### **Persons Entitled to Cure**

The right to cure a monetary default under an evidence of debt secured by a Deed of Trust has always been an essential part of Colorado's foreclosure statutes. C.R.S.A. § 38–38–104 preserves this right although HB 06–1387 and HB 07–1157 made some changes to the previous cure statute (C.R.S.A. § 38–38–104 as in effect prior to January 1, 2008). The most significant change is the creation of a presumption that any default upon which a Public Trustee foreclosure is based is a monetary default and thus subject to the right of cure. This presumption was created in subsection (1) of C.R.S.A. § 38–38–104, which states that cure is available unless the order authorizing the Public Trustee's sale described in C.R.S.A. § 38–38–105 contains a determination that there is a “reasonable probability that a default in the terms of the evidence of debt, deed of trust, or other lien being foreclosed other than nonpayment of sums due thereunder has occurred....”

Absent such determination in the Order Authorizing Sale, any one of the following persons is entitled to cure such monetary default if the person files with the Public Trustee, not later than 15 calendar days prior to the date of sale, a written notice of intent to cure together with evidence of the person's right to cure (“Notice of Intent to Cure”) to the satisfaction of the Public Trustee:

1. The owner of the property being foreclosed as of the date and time of the recording of the Notice of Election and Demand for Sale;
2. If the owner of the property being foreclosed is dead or incapacitated on or after the date and time of the recording of the Notice of Election and Demand for Sale, the owner's heirs, personal representative, legal guardian, or conservator as of the time of filing of the Notice of Intent to Cure;

3. A transferee of the property being foreclosed where the transfer occurred after the recording of the Notice of Election and Demand for Sale but before the time of the filing of the Notice of Intent to Cure with the Public Trustee.
4. Any person liable upon the evidence of debt secured by the Deed of Trust being foreclosed;
5. A surety or guarantor of the evidence of debt; or
6. A holder of an interest junior to the Deed of Trust being foreclosed by virtue of being a lienor or lessee of, or a holder of an easement or license on, the property or a contract vendee of the property, if the instrument evidencing the interest was recorded prior to the recording of the Notice of Election and Demand for Sale.

### **Notice of Intent to Cure; Cure Statement**

Any person desiring to cure must give written notice of such person's intention to cure the default to the Public Trustee at least 15 calendar days prior to the date of the foreclosure sale. Evidence of the curing party's right to cure must be submitted to the Public Trustee together with the Notice of Intent to Cure. Once the Public Trustee has received the Notice of Intent to Cure, the Public Trustee shall:

“promptly ... but no less than twelve calendar days prior to the date of sale transmit by mail, facsimile, or electronic means to the person executing the notice of election and demand a request for a statement of all sums necessary to cure the default.” If such request is received:

- a. thirty (30) calendar days or less before the date of sale, then the Cure Statement must be filed by Noon on the seventh calendar day before the sale date. If the Cure Statement is not timely filed, then the Public Trustee shall continue the sale date from week to week until the Cure Statement is filed but not to a date later than twelve months from the originally designated sale date.
- b. more than thirty (30) calendar days before the date of sale, then the Cure Statement must be filed within ten (10) *business* days after receipt of the request for a Cure Statement. If the Cure Statement is not timely filed, then the Public Trustee shall continue the sale date from week to week until the Cure Statement is filed but not to a date later than twelve (12) months from the originally designated sale date.

The statement of all sums necessary to cure the default (the “Cure Statement”) must be filed by the attorney for the holder or the holder of the evidence of debt with the Public Trustee and must contain the same detail of the amount required to cure due as required for a bid pursuant to C.R.S.A. § 38–38–106. If the Cure Statement is not filed with the Public Trustee by noon on the seventh calendar day before the last date of sale permitted under C.R.S.A. § 38–38–109(1)(a),

then the foreclosure shall be deemed withdrawn. In that event, the holder of the evidence of debt or its attorney must file a written Withdrawal of the Notice of Election and Demand for Sale with the Public Trustee and pay all fees and costs incurred by the Public Trustee and the withdrawal fee required by C.R.S.A. § 38-37-104(1)(b)(V).

A Cure Statement also shall state the period for which it is effective. It must be effective for at least ten (10) calendar days after the date of the Cure Statement or until the last day to cure, whichever first occurs, but no more than thirty (30) calendar days after the date of the Cure Statement or until the last day to cure, whichever first occurs. The Cure Statement may contain “good faith estimates” as to interest, fees, and costs so long as the Cure Statement contains a statement that “it is a good faith estimate effective through the last day to cure as indicated in the cure statement.” Using a good faith estimate in no fashion changes or extends the period or effective date of a Cure Statement.

### **Computation of Cure Amount and Timing of Cure**

The person desiring to cure the monetary default is required to pay to the Public Trustee, no later than noon on the day before the sale, a sum (the “Cure Amount”) comprised of the following amounts:

1. All sums that are due and owing under the evidence of debt and deed of trust being foreclosed (principal that would not have been due in the absence of acceleration of the outstanding principal balance of the evidence of debt cannot be included); and
2. All fees and costs of the holder of the evidence of debt, including, but not limited to, all attorneys' fees incurred by the attorney for the holder allowable under the evidence of debt and deed of trust through the effective date stated in the Cure Statement. Except as provided in paragraph 3 below with respect to interest for any period of continuance, the Cure Amount typically will be the amount stated in the Cure Statement; and
3. IF A CURE IS MADE, interest for the period of any continuance pursuant to C.R.S.A. § 38-38-109(1) “only at the regular rate and not the default rate” of interest specified in the evidence of debt and/or the deed of trust. IF A CURE IS NOT MADE, interest for such period of continuance at the default rate if such a rate is specified in the evidence of debt and/or the deed of trust.

The payment of the Cure Amount to the Public Trustee must be “in the form of cash, electronic transfer to an account of the Public Trustee available for such purpose, or certified check, cashier's check, teller's check, or a draft denominated as an official check that is a teller's check or a cashier's check as those terms are defined in and governed by the ‘Uniform Commercial Code’, Title 4, C.R.S., made payable to the Public Trustee, and certified or issued by a state-chartered bank, savings and loan association, or credit union licensed to do business in the state of Colorado or a federally chartered bank, savings bank, or credit union.”



Upon receipt of the Cure Amount, the Public Trustee will immediately notify the holder of the evidence of debt or its attorney that a cure has been made and will request that a Withdrawal of Notice of Election and Demand for Sale be filed. As soon as the Withdrawal has been received, the Public Trustee will deliver the Cure Amount (less any fees and costs due the Public Trustee), together with the uncanceled evidence of debt, to the holder or such holder's attorney.

If the default under the terms of the evidence of debt or deed of trust is the failure of a borrower to furnish balance sheets or tax returns, then “any person entitled to cure pursuant to paragraph (a) of subsection (2) of this section” may cure such default by providing the required balance sheets, tax returns, or other “adequate evidence of the borrower's financial condition” to the owner of the evidence of debt “so long as all sums currently due under the evidence of debt have been paid and all amounts due under paragraph (b) of subsection (2) of this section ... have been paid.”

### **Prohibition of Waiver of or Agreement to Shorten Right to Cure**

C.R.S.A. § 38–38–703 provides that a “waiver or agreement to shorten the time period to exercise the right to cure a default granted by the provisions of this article that is made before the date of a default under a deed of trust ... evidencing a lien or an evidence of debt secured thereby shall be void as against public policy.”

### **Withdrawal of Notice of Election and Demand for Sale**

The holder of the evidence of debt or the attorney for the holder may file a written withdrawal of the Notice of Election and Demand for Sale (“Withdrawal”) with the Public Trustee at any time prior to sale, which will cause the foreclosure proceedings to terminate. In such event, the Public Trustee is directed by C.R.S.A. § 38–38–109(3)(a) to “record the withdrawal and collect all fees and costs owed and incurred, including a withdrawal fee in the amount authorized by section 38–37–104(1)(b)(V).”

C.R.S.A. § 38–38–109(3)(b) is a new statute that permits the Public Trustee (instead of the holder of the evidence of debt and deed of trust being foreclosed) to withdraw a foreclosure under certain circumstances. This statute states that if there has been no sale and a withdrawal of the Notice of Election and Demand for Sale has not been filed within 45 calendar days “after the last date of sale permitted by law,” then the Public Trustee may withdraw the foreclosure by following the procedures outlined in the statute.

Funds received by the Public Trustee “for the purposes of a cure, a bid, excess proceeds or for a redemption under article 38 of this title shall be held as custodial funds for the party entitled to receive such moneys.”

### **Rule 120 procedures**

Prior to the foreclosure sale, C.R.S.A. § 38–38–105 requires the holder of the evidence of debt secured by the deed of trust being foreclosed (which deed of trust contains a power of sale) to obtain an Order Authorizing Sale according to the procedures set forth in C.R.C.P. 120. The

Public Trustee cannot sell the subject real property absent an Order Authorizing Sale from the Court of which order must be obtained by the holder of the evidence of debt or such holder's attorney. The Order Authorizing Sale must recite "the date the hearing was scheduled if no hearing was held, or the date the hearing was completed if a response was filed, which date in either case must be no later than the day prior to the last day on which an effective Notice of Intent to Cure may be filed with the Public Trustee under section 38-38-104." Thus, the date recited in the Order Authorizing Sale must be not less than 16 calendar days before the date of the sale. The holder of the evidence of debt or the holder's attorney must provide a copy of the Order Authorizing Sale to the Public Trustee not later than noon on the second business day before the date of sale. Any Public Trustee sale held "without an order authorizing sale shall be invalid."

A verified Motion for Order Authorizing Sale filed in the proper district court is the first step in obtaining the Order Authorizing Sale. The motion must be accompanied by a copy of the deed of trust being foreclosed (which must contain a power of sale), and the motion should set forth the following information: (1) a description of the property being sold; (2) a statement specifying the default or other facts claimed to justify invocation of the power of sale; (3) the names and last known addresses, as shown by the records of the moving party, of the grantor(s) of the deed of trust, the current record owner of the property to be sold, and of any person known or believed by the moving party to be personally liable upon the indebtedness secured by the deed of trust; and (4) the names and addresses of those persons who appear to have acquired a record interest in the property subsequent to the recording of the deed of trust being foreclosed and prior to the recording of the Notice of Election and Demand for Sale.

C.R.C.P. 120(b) provides that the clerk of the court shall fix a place and time for the hearing, which shall be not less than 20 days nor more than 30 days after the filing of the motion. In giving notice to persons who appear to have acquired a record interest in the real property subsequent to the recording of the deed of trust being foreclosed and prior to the recording of the Notice of Election and Demand for Sale, the address of each such person stated in the motion shall be the address that is given in the recorded instrument evidencing such person's interest. Where only the county and state is given as such person's address, the county seat and state shall be stated as such person's address. Where no address is given, no address need be stated for such person in the motion.

Notice of the hearing must be served by the moving party not less than 15 days prior to the date set for the hearing by mailing a copy of the notice to each person named in the motion at the address or addresses stated in the motion. Subsection (b) of the rule should be consulted as to the form of advisement that the notice must provide. Two copies of the notice must then be delivered to the clerk of the court; one will be filed, and the second will be posted by the clerk. The mailing of the notice and the delivery of the notice to the clerk for posting shall be evidenced by a certificate of the moving party or such party's agent and filed with the clerk.

C.R.C.P. 120(f) provides that any proceeding under the rule involving a consumer obligation that is secured by a deed of trust to a Public Trustee *shall* be brought and heard in "the county in which the property or a substantial part thereof is located." Subsection (e) of the rule requires the Court to determine that venue is proper before entering an Order Authorizing Sale. Any interested person who disputes the moving party's right to an Order Authorizing Sale on

grounds within the permissible scope of the court's inquiry, may file a response not less than five days prior to the date set for the hearing. The response must be verified by the oath of the person filing it, must set forth the facts relied upon in disputing the relief requested in the motion, and must have copies attached of all documents that support the position stated in the response. Service of such response upon the moving party must be made in accordance with C.R.C.P. 5(b).

If no response is filed and if the court examines the motion and finds that the moving party is entitled to relief, the court may, without notice, dispense with the hearing and forthwith enter an Order Authorizing Sale. If a response is filed and a hearing is held, the following issues may be considered by the Rule 120 court: the existence of a default, the existence of other facts and circumstances authorizing, under the terms of the deed of trust described in the motion, the exercise of the power of sale contained therein, and any other issues required to be considered by the Soldiers Civil Relief Act.

### **THE PUBLIC TRUSTEE SALE—DATE, CONTINUANCE, CONDUCT, EXCESS PROCEEDS, AND RESCISSION**

Among the most significant changes to the Public Trustee foreclosure statutes produced by the enactment of HB 06–1357 and HB 07–1157 are the enlargement of the period of time between the recording of the Notice of Election and Demand for Sale and the date fixed for the initial Public Trustee sale prescribed by C.R.S.A. § 38–38–108 and the elimination of the owner's formal statutory redemption period, according to R. H. Krohn:

“[t]he goal of the drafters [of these two bills] was to benefit borrowers by substantially extending the time period for the borrower or property owner to cure the default(s) on which the foreclosure is based, to lessen the opportunities for those who would prey on parties in foreclosure to deprive them of the equity in their property or the property itself, and not to lengthen the overall time frame for Public Trustee foreclosure or change the basic structure of the system.”

Enlarging the period of time between the commencement of the foreclosure and the date of sale under HB 06–1357 was, in effect, a combination of the previous statute's “cure” period (from the beginning of the foreclosure up to 12 noon of the day prior to the sale—approximately 60 days) and “redemption” period (75 days or 6 months after the sale) into one large “before-sale” period in which the borrower/owner could either cure the default in the evidence of debt and deed of trust or pay off the evidence of debt entirely.

#### **Date of Sale**

The date of sale is dependent upon whether the property described in the Deed of Trust is or is not “agricultural property.”

Agricultural property. In the case of a Public Trustee sale of property by the Public Trustee, *all* of which is “agricultural property,” the initial date of the sale shall be not less than 215 calendar days nor more than 230 calendar days after the date of recording of the Notice of Election and Demand for Sale.

To determine whether the property is or is not “agricultural property,” one must begin with a careful reading of C.R.S.A. § 38–38–100.3(1). That statute declares that:

“ ‘agricultural property’ means property, none of which, on the date of recording of the deed of trust ... or at the time of the recording of the notice of election and demand ... is: (a) Platted as a subdivision; (b) Located within an incorporated town, city, or city and county; or (c) Valued and assessed as other than agricultural property pursuant to C.R.S. §§39–1–102(1.6)(a) and 39–1–103(5), by the assessor of the county where the property is located.” Any property that does not fit within this definition is not “agricultural property.”

C.R.S.A. § 38–38–108(2)(a)(I) provides that if the nature of the property to be foreclosed (agricultural or nonagricultural) is not evident from the legal description contained in the deed of trust, the Public Trustee shall make such determination not less than 10 calendar days nor more than 20 calendar days after the recording of the Notice of Election and Demand for Sale. The statute further declares that the Public Trustee “shall accept” the following as evidence that the property is not “agricultural property”:

- a. A certified copy of the subdivision plat containing the property or any portion thereof recorded in the office of the clerk and recorder of the county where the property or any portion thereof is located;
- b. A written statement by the clerk of the city, town, or city and county, dated no more than six months prior to the date of filing of the Notice of Election and Demand for Sale with the Public Trustee, that all or a portion of the subject property was located within the incorporated limits of the city, town, or city and county as of the date of recording of the deed of trust or as of the date of the written statement; or
- c. A written statement by the assessor of the county where the property is located, dated no more than six months prior to the date of filing of the Notice of Election and Demand for Sale with the Public Trustee, that any portion of the property was valued and assessed as other than agricultural property after the date of the recording of the deed of trust or as of the date of the written statement.

C.R.S.A. § 38–38–108(2)(a)(II) establishes that the Public Trustee's determination of “whether the subject property is agricultural or nonagricultural property shall be binding and may be relied upon by all parties.”

## **Continuance—Erroneous Publication—Failure to Submit Timely Bid**

C.R.S.A. § 38–38–109(1)(b) permits the foreclosing party or its attorney to ask the Public Trustee to correct any errors in a published Combined Notice and to continue the sale date to permit republication. Upon receipt of such request, the Public Trustee “shall continue the then-scheduled date of sale to a future date within the period of continuance allowed by paragraph (a) of this subsection (1) to permit a corrected combined notice to be published or the original combined notice to be republished pursuant to C.R.S.A. § 38–38–103(5).” The rescheduled sale date must be not later than 30 days after the fifth publication of the corrected Combined Notice or republished Combined Notice.

If a holder of evidence of debt or such holder's attorney fails to submit a bid required by C.R.S.A. §§ 38–38–106(1) and (2) in a timely manner (no later than 12 noon on the second business day prior to the sale), the Public Trustee is required to continue the sale for one week. Such continuance must be announced or a notice of the continuance must be posted at the time and place designated for the sale.

## **Conduct of the Sale**

When the date fixed for the sale approaches, the total amount due under the evidence of debt and deed of trust (the “total indebtedness”) should be calculated and a written bid prepared. C.R.S.A. § 38–38–106 contains the form of bid to be submitted by the holder of the evidence of debt or such holder's attorney to the Public Trustee. Those items identified in the statute are:

1. All amounts due the holder of the evidence of debt secured by the deed of trust being foreclosed including principal, interest, late charges, allowable prepayment penalties or premiums; other amounts due under the evidence of debt (which must be specified); less impound/escrow account credit; plus impound/escrow account deficiency; and other amounts not included in any of the foregoing line items;
2. Fees and costs for: title commitments and insurances [*sic*] or abstractor charges; property, general liability, and casualty insurance; court docketing; appraisals; property inspections; statutory notice; postage; electronic transmissions; photocopies; attorney fees; and telephone charges;
3. Public trustee fees; publication costs and other expenses of the Public Trustee not specifically enumerated;
4. Permitted amounts paid on prior liens; taxes and assessments; utility charges owed or incurred; homeowners' association assessments paid; and permitted lease payments; and
5. Reasonable costs and expenses of defending, protecting, securing, and maintaining and repairing the property and the holder's interest in the property or the improvements thereon; receiver's fees and expenses; inspection fees; court costs; attorney fees, and fees and costs of an attorney in the employment of the

owner of the evidence of debt; costs and expenses made pursuant to a valid order from a court of competent jurisdiction to bring the property and the improvements thereon into compliance with the federal, state, county, and local laws, ordinances, and regulations affecting the property, the improvements on the property of the use of the property; and any other costs and expenses that may be permitted by the deed of trust securing the debt or that may be authorized by a court.

Once the total indebtedness has been calculated and the written bid prepared, the bid must be signed and acknowledged by the holder or signed (without acknowledgement) by the holder's attorney. The signed bid must be submitted to the Public Trustee no later than noon on the second business day prior to the date of sale. A written bid is required even if the holder or his attorney attends the sale, but personal attendance at the sale is not mandatory. A failure to submit timely the written bid to the Public Trustee will result in a compulsory continuance for one week, and such continuance shall be announced or a notice of the continuance must be posted at the time and place of the sale.

The statute contains a requirement that: “the holder must bid such party's “good faith estimate” of the fair market value of the property being sold, less the amount of unpaid real property taxes and all amounts secured by liens against the property being sold that are senior to the deed of trust ... being foreclosed and less the estimated reasonable costs and expenses of holding, marketing, and selling the property, net of income received....” The holder is *not* required to bid more than the amount due under such evidence of debt as itemized on the written bid. The failure of the holder to bid at least the holder's “good faith estimate” of the fair market value of the property will not affect the validity of the foreclosure sale, but can be raised as a defense in any subsequent action to collect a deficiency from any person liable for the same.

If the bid tendered at the sale by the successful bidder is a total indebtedness bid, the evidence of debt will be marked as “cancelled” or “paid” by the Public Trustee and either returned to the maker or held in the permanent files of the Public Trustee. If the bid is a deficiency bid, the Public Trustee will note the amount of the deficiency remaining due on the evidence of debt and return it to the holder.

## **CERTIFICATE OF PURCHASE—RESCISSION OF SALE**

### **Certificate of Purchase**

No later than five business days after the sale has been held, C.R.S.A. § 38-38-401 requires the Public Trustee to “execute and record in each county where the property or a portion thereof is located a certificate of purchase....” The certificate of purchase must contain the following:

1. A description of the property that was purchased at the foreclosure sale;
2. The amount paid for the property at the foreclosure sale;
3. The name and address of the purchaser;

4. A statement that “the purchaser or assignee of the certificate of purchase shall be entitled to a confirmation deed at the expiration of all redemption periods ... unless a redemption is made.”
5. The deficiency, if any, resulting from the successful bid at the foreclosure sale;
6. The Public Trustee's sale number;
7. The date of sale;
8. An attached exhibit containing a copy of the executed Order Authorizing Sale that bears the Public Trustee sale number; and
9. An attached exhibit containing a copy of the initial mailing list and any supplemental or amended mailing list that bears the Public Trustee sale number.

The Public Trustee is required by C.R.S.A. § 38-38-401(2) to retain the recorded certificate of purchase in the Public Trustee's records. Failure of the Public Trustee to comply with the provisions of C.R.S.A. § 38-38-401 will not affect the validity of the Public Trustee sale or the vesting of title in the name of the holder of the certificate of purchase or the certificate of redemption. C.R.S.A. § 38-38-405 declares that the original or a certified copy of a certificate of purchase “shall be deemed to be prima facie evidence of all statements or recitals contained therein.”

The holder of a certificate of purchase is entitled to receive either: (1) the redemption money from the Public Trustee when and if the property is redeemed and redemption funds are tendered; or (2) title to the property described in the certificate of purchase (which title vests automatically pursuant to C.R.S.A. § 38-38-501). Note that a Public Trustee is required to execute and record a confirmation deed to the holder of the certificate of purchase “confirming the transfer of title to the property.”

### **Rescission of Public Trustee Sale**

One of the most significant changes to Colorado's foreclosure statutes, C.R.S.A. § 38-38-113, was included in the provisions of HB 07-1157. This statute provides a procedure whereby certain persons may rescind a Public Trustee sale under limited conditions. If the successful bidder at a foreclosure sale is the holder of the evidence of debt foreclosing the Deed of Trust, then the bidder, the bidder's attorney, the assignee of the bidder, or the assignee's attorney may rescind the sale without obtaining a court order by filing a Notice of Rescission of Sale with the Public Trustee no later than eight (8) business days after the date of the sale. The Notice of Rescission of Sale must state the following:

1. The sale is being rescinded;
2. The number and date of the sale;

3. The name of the person to whom the certificate of purchase was issued;
4. The name of the assignee of the certificate of purchase, if any;
5. The reception number or book and page number for the recorded certificate of purchase; and
6. The legal description of the property foreclosed.

The notice must be signed and properly acknowledged by the successful bidder or assignee or signed by the bidder or the assignee's attorney. C.R.S.A. § 38-38-113(1) states that “[u]pon receipt of the notice of rescission of sale, the original certificate of purchase, any assignment of the certificate of purchase, the Public Trustee's fee for the rescission specified in [C.R.S.A. § 38-37-104], and the costs of recording the notice of rescission of the sale, the Public Trustee shall record the notice of rescission of sale in the county records.”

Within ten (10) calendar days after receipt of all of the documents and the fees and costs described in the foregoing paragraph, the Public Trustee is required to mail a copy of the notice of rescission of sale to each person who was entitled to receive the Combined Notice in the foreclosure proceeding under C.R.S.A. § 38-38-103. The person rescinding the sale is required to provide addressed and stamped envelopes to the Public Trustee for mailing the copies. After the Notice of Rescission of Sale has been recorded, the holder of the evidence of debt, the holder's assignee, or the attorney for the holder or the assignee, “may notify the Public Trustee in writing to reschedule the sale.” The Public Trustee shall then schedule a new sale date at least 30 calendar days, but not more than 45 calendar days, after the date on which the Public Trustee received the notice to schedule a new sale date, “subject to the requirements of C.R.S.A. § 38-38-109(2)”

No later than ten (10) calendar days after receiving the notice to schedule a new sale date, the Public Trustee must mail a Combined Notice stating the rescheduled sale date to each person who was entitled to receive the Combined Notice in the foreclosure proceeding under C.R.S.A. § 38-38-103. No later than twenty (20) calendar days after receiving the notice to schedule a new sale date, but not less than ten (10) calendar days before the new sale date, the Public Trustee is required to publish a copy of the Combined Notice one time only.

The procedures for rescinding a Public Trustee sale set forth in C.R.S.A. § 38-38-113 are not exclusive and rescission of a sale may be pursued judicially.

### **Redemption from sale**

Perhaps the most significant change to the Colorado foreclosure statutes produced by HB 06-1387 and HB 07-1157 is the elimination of the owner's formal statutory redemption period. Although a property owner no longer has a statutory right to redeem from a Public Trustee foreclosure sale (which, in effect, was a right to pay off the lender *after* the foreclosure sale during the redemption period), the owner still may pay off the lender at any time *prior* to the sale. C.R.S.A. § 38-38-108 effectively combined the time periods of the former cure and owner redemption periods into one “before-sale cure and payoff period” (between 110 and 125 calendar



days for nonagricultural property and between 215 and 320 days for agricultural property). As a result, the elimination of the owner's formal statutory redemption period is not truly a substantive change. Further, C.R.S.A. § 38-38-302 preserved the right to redeem for lienors who meet the statutory requirements set forth in subsection (1) of the statute.

### **Redemption Requirements**

C.R.S.A. § 38-38-302(1) states that a “lienor or assignee of a lien” is entitled to redeem if:

1. The lienor's lien is a deed of trust or other lien that is created or recognized by state or federal statute or by judgment of a court of competent jurisdiction.
2. The lien is a junior lien as defined in C.R.S.A. § 38-38-100.3(11).
3. The lienor's lien appears by instruments that were recorded in the office of the clerk and recorder of the county where all or a portion of the property is located **prior** to the recording of the Notice of Election and Demand for Sale, *and* the lienor would be entitled to cure pursuant to C.R.S.A. § 38-38-104(1).
4. The lienor has, within eight business days after the sale, filed a notice with the officer of the lienor's intent to redeem (“Notice of Intent to Redeem”).
5. A lienor may file a Notice of Intent to Redeem more than eight business days after sale (a “Late Notice of Intent to Redeem”) if:
  - a. No lienor junior to the lienor seeking to file the Late Notice of Intent to Redeem has redeemed;
  - b. The redemption period for the lienor seeking to file the Late Notice of Intent to Redeem has not expired;
  - c. All redemption periods have not expired; and
  - d. The Late Notice of Intent to Redeem is accompanied by a written authorization from the attorney for the holder of the certificate of purchase according to the records of the officer conducting the sale or, if no attorney is shown, the holder of the certificate of purchase authorizing the officer to accept such Late Notice of Intent to Redeem.
6. The lienor has attached to the Notice of Intent to Redeem the original instrument or a certified copy thereof or, in the case of a qualified holder, a copy of the instrument evidencing the lien and any assignment of the lien to the person attempting to redeem. (Note that it is not necessary for the assignment to have been recorded.) If the original instrument is delivered to the officer, the officer shall return the instrument to the lienor and retain a copy.

7. The lienor has attached to the Notice of Intent to Redeem a signed and properly acknowledged statement of the lienor, or a signed statement by the lienor's attorney (no acknowledgment necessary), setting forth the amount required to redeem the lienor's lien, including per diem interest, through the end of the lienor's redemption period.

Holders of liens, whether consensual or nonconsensual, recorded *after* the recording of the Notice of Election and Demand for Sale, have absolutely no right to redeem.

### **Redemption Procedures**

Written request for a statement of all sums necessary to redeem. Within one (1) business day after receipt by the Public Trustee of the Notice of Intent to Redeem filed by a person entitled to redeem under C.R.S.A. § 38-38-302(1), the Public Trustee is required to transmit to the attorney for the holder of the certificate of purchase, or, if no attorney, to the holder, a written request for a written or electronic statement of all sums necessary to redeem the sale. The Public Trustee must transmit the written request by mail, facsimile, or other electronic means.

Redemption Statement submitted by holder. Upon receiving notification that a Notice of Intent to Redeem has been filed, the holder of a certificate of purchase must submit a signed and acknowledged statement, or the attorney for the holder must submit a signed statement (no acknowledgment necessary), to the Public Trustee, no later than thirteen (13) business days following the sale, specifying all sums necessary to redeem as of the date of said statement, together with the amount of per diem interest accruing thereafter and the interest rate on which the amount is based (the "Redemption Statement"). The holder or the holder's attorney may amend the Redemption Statement from time to time to reflect additional sums advanced as allowed by law, but the Redemption Statement cannot be amended later than two (2) business days prior to the commencement of the redemption period pursuant to C.R.S.A. § 38-38-302(4)(a) or each subsequent redemption period pursuant to C.R.S.A. § 38-38-302(4)(b).

Public trustee's estimate of redemption amount. If the holder of the certificate of purchase or the holder's attorney fails to submit the initial Redemption Statement to the Public Trustee within 13 business days after the sale, the Public Trustee may calculate the amount necessary to redeem by adding to the successful bid the accrued interest from the sale through the redemption date.

Transmission of Redemption Statement by Public Trustee. Upon receipt of the Redemption Statement submitted by the holder or the holder's attorney, the Public Trustee is required to transmit by mail, facsimile, or other electronic means to the party filing the Notice of Intent to Redeem such Redemption Statement filed by the holder or, if no such Redemption Statement is filed, the Public Trustee's estimate of the redemption amount, which must be transmitted no later than the commencement of the redemption period pursuant to C.R.S.A. § 38-38-302(4)(a), or each subsequent redemption period pursuant to C.R.S.A. § 38-38-302(4)(b).

### **Redemption Periods**

Setting dates of redemption periods for each lienor entitled to redeem. C.R.S.A. § 38-38-302(4)(d) requires the Public Trustee to "set the dates of the redemption period of each lienor" in

accordance with C.R.S.A. § 38-38-302(4) on the ninth business day after the date of sale. In addition, the statute provides that “the redemption period of a lienor shall not be shortened or altered by the fact that a prior lienor redeemed before the expiration of his or her redemption period.”

Redemption by junior lienor having the most senior recorded lien. C.R.S.A. § 38-38-302(4)(a) provides that no sooner than 15 business days nor later than 19 business days after the date of a Public Trustee sale, the junior lienor having the most senior recorded lien on the property sold at the sale, who has first complied with the requirements of C.R.S.A. § 38-38-302(1), may redeem the property from the foreclosure sale by paying to the Public Trustee the amount for which the property was sold with interest from the date of sale, together with all sums allowed under C.R.S.A. § 38-38-301. Interest on the amount for which the property was sold shall be charged at the default rate specified in the evidence of debt or deed of trust or, if not so specified, at the regular rate specified therein.

Redemption by subsequent junior lienor(s). C.R.S.A. § 38-38-302(4)(b)(I) provides that “[e]ach subsequent lienor entitled to redeem shall, in succession have an additional period of five (5) business days to redeem....” A redeeming lienor shall redeem by paying to the Public Trustee, on or before noon of the last day of the lienor's redemption period:

- a. the redemption amount paid the prior redeeming lienor, with interest at the rate specified in C.R.S.A. § 38-38-302(4)(a) plus the amount claimed in the statement delivered by the immediately prior redeeming lienor pursuant to C.R.S.A. § 38-38-302(4)(b); or
- b. if no prior lienor has redeemed, the redemption amount determined pursuant to C.R.S.A. § 38-38-302(4)(a).

The statutory redemption periods may be extended by Court Order, but only in very limited circumstances: (1) where there have been circumstances of fraud, deceit, or collusion by the purchaser at the foreclosure sale; or (2) where a holder of a right of redemption has been misled by, and acted in reliance upon, erroneous information provided by the Public Trustee as to the length of the redemption period.

Redemption by lienor who is either a holder of certificate of purchase or a prior redeeming lienor (serial redemption). C.R.S.A. § 38-38-302(4)(b)(II) states that if the redeeming lienor is the same person as the holder of the certificate of purchase or the prior redeeming lienor as evidenced by the instruments referred to in C.R.S.A. § 38-38-302(1), regardless of the number of consecutive liens held by the redeeming lienor, the redeeming lienor shall *not* pay to the Public Trustee the redemption amount indicated in the certificate of purchase or certificate of redemption held by such person but shall only pay to the officer the unpaid fees and costs required by the redemption and provide the statement (setting forth the amount required to redeem the redeeming lienor's lien) described in C.R.S.A. § 38-38-302(1)(f).

Payment of redemption amount to Public Trustee. Payment of the redemption amount to the Public Trustee must be “in the form of cash, electronic transfer to an account of the Public

Trustee available for such purpose, or certified check, cashier's check, teller's check, or a draft denominated as an official check that is a teller's check or a cashier's check as those terms are defined in and governed by the 'Uniform Commercial Code', made payable to the Public Trustee, and certified or issued by a state-chartered bank, savings and loan association, or credit union licensed to do business in the state of Colorado or a federally chartered bank, savings bank, or credit union.”

“Short” redemption. C.R.S.A. § 38-38-302(4)(c) provides that if the statement (setting forth the amount required to redeem the redeeming lienor's lien) described in C.R.S.A. § 38-38-302(1)(f) so states, or upon other written authorization from the holder of the certificate of purchase, the then-current holder of the certificate of redemption, or the attorney for either such holder, the Public Trustee may accept, as a full redemption, an amount *less* than the amount specified in C.R.S.A. § 38-38-302(3)(a). Notwithstanding this statutory approval of a “short” redemption, “the amount actually bid at the sale (as stated in the bid pursuant to C.R.S.A. § 38-38-106(2)) shall determine the amount and extent of any deficiency remaining on the indebtedness represented by the evidence of debt that is the subject of the foreclosure. Any redemption under C.R.S.A. § 38-38-302(4) shall constitute a full redemption and shall be deemed to be payment of all sums to which the holder of the certificate of purchase is entitled.”

Rights of other lienors to redeem. C.R.S.A. §§ 38-38-306(1) and (2) specifically declare that a judgment creditor whose judgment has been made a lien of record and a mechanic's lien claimant or any person claiming a statutory lien on foreclosed real property may redeem as a lienor.

### **Certificate of Redemption**

C.R.S.A. § 38-38-302(5) provides that upon receipt of the redemption payment pursuant to C.R.S.A. § 38-38-302(4), the Public Trustee “shall execute and record a certificate of redemption” pursuant to C.R.S.A. § 38-38-402. Upon the expiration of each redemption period under C.R.S.A. § 38-38-402, the Public Trustee is required to disburse all redemption proceeds to the persons entitled to receive them.

C.R.S.A. § 38-38-402 provides that no sooner than 15 business days following a sale, but no later than 5 business days following a Public Trustee's receipt of redemption money paid under section C.R.S.A. § 38-38-302, the Public Trustee shall execute and record in each county where the property or a portion thereof is located a certificate of redemption containing the following:

1. The name and address of the person redeeming;
2. The redemption amount paid;
3. The date of sale;
4. The description of the property redeemed; and
5. The Public Trustee's sale number or, in the case of a sale by the sheriff, the district court civil action number.

The Public Trustee is required by C.R.S.A. § 38-38-402(2) to retain the recorded certificate of redemption in the Public Trustee's records.

### **Certificate of Lienor**

C.R.S.A. § 38-38-302(6) provides that at the same time a redeeming lienor pays the amount required to redeem to the Public Trustee, the redeeming lienor must deliver to the Public Trustee “a signed and properly acknowledged statement by the lienor or a signed statement by the lienor's attorney showing the amount owing on such lien, including per diem interest and fees and costs actually incurred that are permitted by [C.R.S.A. § 38-38-302(7)] and for which the lienor has submitted to the [Public Trustee] receipts, invoices, evidence of electronic account-to-account transfers, or copies of loan servicing computer screens evidencing the fees and costs and verifying that the fees and costs were actually incurred as of the date of sale with the per diem amounts that accrue after the date of sale. At any time before the expiration of a redeeming lienor's redemption period, the redeeming lienor may submit a revised or corrected certificate, or the attorney for the lienor may submit a revised or corrected statement.”

### **Misstatement of Redemption Amount**

C.R.S.A. § 38-38-302(8) provides for recovery of court costs and attorneys' fees (in addition to other relief that might be awarded) to an aggrieved person in a court action contesting the redemption amount set forth in the statement required by C.R.S.A. § 38-38-302(1)(f) if a court determines that the redeeming lienor made a “material misstatement” of the amount of that lienor's lien.

### **No Partial Redemption**

C.R.S.A. § 38-38-302(9) prohibits partial redemptions. A lienor holding a lien on less than all of, or a partial interest in, the property sold at sale desiring to exercise such lienor's right of redemption is required to redeem the entire property. The priority of liens for purposes of C.R.S.A. § 38-38-302(9) shall be determined without consideration of the fact that the lien relates to only a portion of the property or to a partial interest therein.

### **Federal Redemption Rights**

C.R.S.A. § 38-38-302(10) states that redemption rights granted under federal law are separate and distinct from the redemption rights granted under C.R.S.A. §§ 38-38-301 to 38-38-306. The statute declares that (1) all liens junior to the deed of trust being foreclosed pursuant to Article 38 of Title 38, C.R.S.A. “shall be divested” by the foreclosure sale conducted by the Public Trustee, subject to the redemption rights provided in C.R.S.A. §§ 38-38-301 to 38-38-306; and (2) that the Public Trustee who conducts a foreclosure under the Colorado foreclosure statutes “is not designated to receive redemptions under federal law.”

### **Vesting of title—Issuance of confirmation deed**

Upon the expiration of all redemption periods allowed to all lienors entitled to redeem or, if there are no redemption periods, upon the close of the Public Trustee's business day eight (8) business

days after the foreclosure sale, title to the property sold automatically vests in the holder of the certificate of purchase or in the holder of the certificate of redemption issued to the lienor last redeeming. Except for the rights of “omitted parties” under C.R.S.A. § 38-38-506 and the homestead rights of a foreclosed party where the foreclosed deed of trust or mortgage did not contain a waiver of such party's homestead exemption, such title shall be free and clear of all liens and encumbrances junior to the lien foreclosed. No less than fifteen (15) business days after the date of sale or, if later, the expiration of all redemption periods and the receipt of all statutory fees and costs, the Public Trustee shall execute and record a confirmation deed pursuant to C.R.S.A. § 38-38-502 or § 38-38-503 to the holder of the certificate of purchase or, in the case of redemption, to the holder of the last certificate of redemption confirming the transfer of title to the property. No federal revenue stamps are required, and Public Trustee's confirmation deeds are exempt from state documentary fees. Failure of the Public Trustee to “execute and record such deed or to record the deed within the time specified shall not affect the validity of the deed or the vesting of title.”

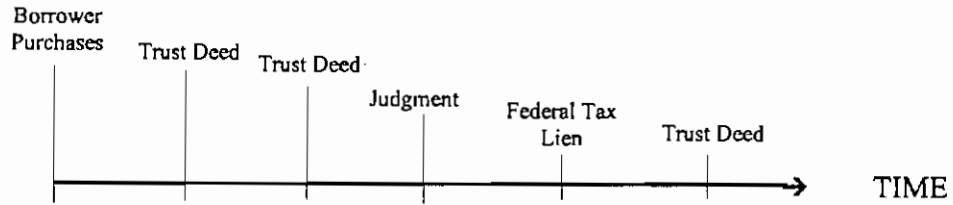
C.R.S.A. § 38-38-502 provides a form of confirmation deed for use by the Public Trustee in confirming the foreclosure sale and the vesting of title in the grantee of said deed.

Pursuant to C.R.S.A. § 38-38-405, a confirmation deed, certificate of purchase or redemption, or a certified copy of thereof “shall be deemed to be prima facie evidence of all statements or recitals contained therein.”

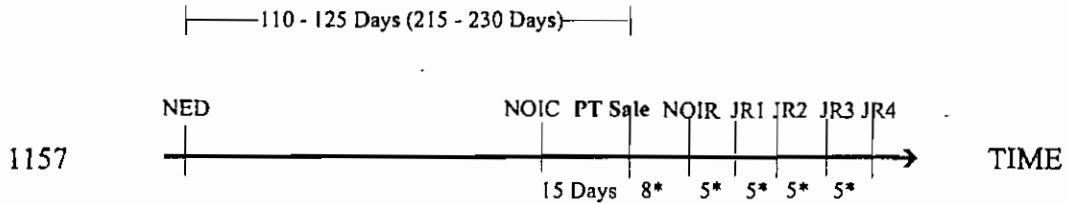
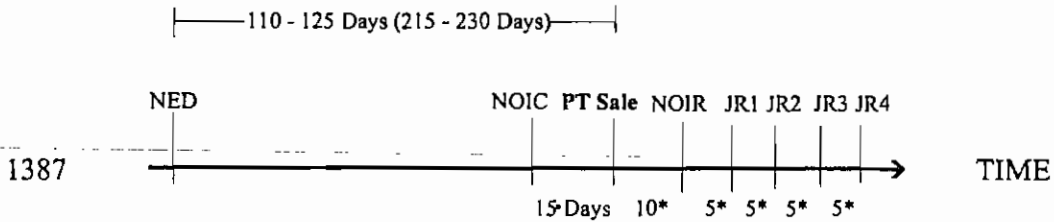
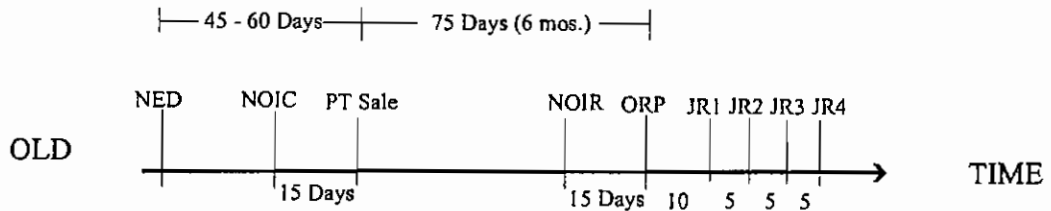
## CONCLUSION

This paper should allow a Realtor to acquaint himself or herself with the foreclosure process as it pertains to the Public Trustee. Judicial Foreclosures are procedurally different, but as a statistical matter extremely rare. This paper is not to replace the seeking of legal counsel. However, this should allow a Realtor to know how the foreclosure process moves forward irrespective of whether a foreclosure has been initiated, a Sale has occurred or at any other point in the process.

# SAMPLE FORECLOSURE



## FORECLOSURE TIMELINE



**KEY:**

- ( ) Foreclosure of ag property - § 38-38-302(4) [HB 06-1387 §38-38-100.3(1)]
- \* Business Days

NED - Notice of Election and Demand  
 NOIC - Notice of Intent to Cure  
 NOIR - Notice of Intent to Redeem

ORP - Owner Redemption Period  
 JR - Junior Lienor

1 The printed portions of this form, except differentiated additions, have been approved by the Colorado Real Estate  
2 Commission. (SSA38-2-08) (Mandatory 3-08)

3  
4 **THIS FORM HAS IMPORTANT LEGAL CONSEQUENCES AND THE PARTIES**  
5 **SHOULD CONSULT LEGAL AND TAX OR OTHER COUNSEL BEFORE SIGNING.**

6  
7 **SHORT SALE ADDENDUM**

8  
9 **Date:** \_\_\_\_\_

10  
11 **1. ADDENDUM TO CONTRACT.** This Short Sale Addendum (Addendum) is made a  
12 part of the following contract that is checked:

13  
14  **Listing Contract (Listing Contract)** dated \_\_\_\_\_ for the  
15 Property for purposes of disclosing to Seller certain matters of a Short Sale, or;

16  
17  **Contract to Buy and Sell Real Estate between Seller and Buyer (Contract)**  
18 dated \_\_\_\_\_ relating to the sale of the Property

19  
20 known as \_\_\_\_\_ (Property).

21 **Street Address City State Zip**

22  
23 This Addendum shall control in the event of any conflict with the Contract. Except as  
24 modified, all other terms and provisions of the Contract shall remain the same.

25  
26 **2. PURPOSE AND DEFINITIONS.**

27  
28 **2.1 Purpose of Addendum.** Seller has debts secured by one or more liens on the  
29 Property. The Purchase Price may not be enough to cover payment for all the liens and  
30 costs of sale. If so, for the Closing to occur, the affected Lien Holders (§ 2.2 below) must  
31 agree to a Short Sale (§ 2.3 below).

32  
33 **2.2 Lien; Lien Holder.** A Lien is a recorded claim or lien against the Property,  
34 including, but not limited to, a mortgage, deed of trust, mechanic's lien or tax lien (Lien).  
35 A title insurance commitment may be used to show the Liens against the Property. A Lien  
36 Holder is a creditor who has a Lien and agrees to release its Lien in a Short Sale (§ 2.3  
37 below).

38  
39 **2.3 Short Sale.** A Short Sale is a transaction in which any Lien Holder releases  
40 its Lien against the Property and (a) accepts an amount less than the full amount Lien  
41 Holder claims is owed or (b) treats the debt secured by the Lien differently than as  
42 originally provided for in the evidence of debt (such as promissory note) (Short Sale).  
43 Before a Short Sale can occur, Buyer, Seller, and each Lien Holder (except those creditors  
44 that are to be paid in the full amount claimed) must consent to the terms of the sale.  
45 Sometimes, a Lien is released but the Lien Holder does not agree to release Seller from  
46 liability or reduce the unpaid portion of the debt, and the Seller and any guarantors will  
47 remain liable after Closing for that unpaid portion, despite the release of the Lien against  
48 the Property at Closing.



50           **2.4 Short Sale Acceptance.** Short Sale Acceptance is when Seller receives one or  
51 more written statements, signed by each Lien Holder, that specify the terms and conditions  
52 of the Short Sale (Short Sale Acceptance).  
53

54 **3. MANDATORY DISCLOSURES TO SELLER AND BUYER.**

55 Note: The disclosures to Buyer are informational only to Seller when used as an addendum to  
56 Listing Contract.  
57

58           **3.1 SELLER IS ADVISED TO CONTACT THE COLORADO**  
59 **FORECLOSURE PREVENTION HOTLINE OPERATED IN COOPERATION WITH**  
60 **THE COLORADO DIVISION OF HOUSING AT 1-877-601-4673 OR THE HUD**  
61 **HOUSING COUNSELING AND REFERRAL LINE AT 1-800-569-4287.**  
62

63           **3.2. Seller acknowledges that there are alternatives to a Short Sale that may be**  
64 **better for Seller. Seller acknowledges that a Short Sale transaction may result in**  
65 **continued liability of Seller or other persons liable for the debt that could be extinguished**  
66 **through foreclosure, bankruptcy or other loss mitigation options, including but not**  
67 **limited to a negotiated loan modification with Lien Holder. Seller acknowledges that it is**  
68 **the responsibility of Seller to investigate these alternative methods of resolution with**  
69 **Seller's legal, accounting or financial advisors and with Lien Holder and it is not the**  
70 **responsibility of any real estate broker to undertake any investigation of other options**  
71 **that may be available to Seller.**  
72

73           **3.3. Short Sales may have serious adverse legal, tax and economic consequences**  
74 **for Seller and any guarantors. Seller is advised to seek legal and tax counsel to advise**  
75 **Seller of the legal effect and meaning of any Short Sale Acceptance from Lien Holder.**  
76

77           **3.4. Lien Holder is not required to agree to a Short Sale. Even if a Lien Holder**  
78 **agrees to a Short Sale, a Lien Holder is not required to forgive repayment of the debt**  
79 **secured by the Lien or release Seller and any guarantors from liability unless Lien Holder's**  
80 **claim is paid in full. Seller acknowledges that Lien Holder may or may not agree to release**  
81 **Seller or any guarantors from liability to Lien Holder. If not released, Seller and any**  
82 **guarantors will remain liable to Lien Holder for any amount that remains unpaid after the**  
83 **Short Sale. Any release of liability by Lien Holder, to be binding, must be in writing, must**  
84 **be executed by Lien Holder, and must provide that Seller and any guarantor is released**  
85 **from liability.**  
86

87           **3.5. Lien Holder may condition its agreement on Seller doing any or all of the**  
88 **following to obtain a Short Sale Acceptance: (a) make a cash payment, (b) sign a new**  
89 **promissory note, (c) continue to owe the Lien Holder the unpaid portion of the debt and**  
90 **(d) agree to other requirements made by Lien Holder.**  
91

92           **3.6. If the Lien Holder accepts less than full payment, Seller understands that**  
93 **Seller may incur federal and state tax liability due to a Short Sale and understands that**  
94 **Lien Holder is required to file all required 1099 Forms with the Internal Revenue Service**  
95 **with respect to this transaction. Seller is strongly advised to seek tax advice regarding the**  
96 **potential adverse tax consequences to Seller of a Short Sale.**  
97

98           **3.7. Seller acknowledges that a Short Sale Acceptance by the Lien Holder will not**  
99 **necessarily repair or rehabilitate Seller's credit rating and Lien Holder has no obligation**  
100 **other than to fairly report this transaction to any credit rating agency.**

101  
102 **3.8. Seller may terminate the Contract: (a) as provided in this Addendum, (b) if**  
103 **Lien Holder does not approve the Contract, or (c) if the terms and conditions from Lien**  
104 **Holder to obtain a release of the Lien are not acceptable to Seller, in Seller's sole**  
105 **discretion, by written notice to Buyer on or before 3 calendar days after the Short Sale**  
106 **Acceptance Deadline (§ 8.1 below).**

107  
108 **3.9. Buyer may terminate the Contract: (a) as provided in this Addendum, (b)**  
109 **if Lien Holder does not approve the Contract, or (c) if the terms and conditions of any**  
110 **Agreement to Amend/Extend Contract are not acceptable to Buyer, in Buyer's sole**  
111 **discretion, by written notice to Seller on or before 3 calendar days after the Short Sale**  
112 **Acceptance Deadline (§ 8.1 below).**

113  
114 **3.10. Release of the Lien against the Property does not by itself release Seller or**  
115 **any guarantors from liability for the debt.**

116  
117 **3.11. Buyer acknowledges that the Short Sale Conditions (§ 4 below) may lead to**  
118 **termination of the Contract. The Short Sale process may result in delays in the Closing.**  
119 **Buyer is advised to consult with legal counsel about this Addendum and its legal effect.**

120  
121 **3.12. Buyer and Seller acknowledge and agree that any Short Sale Acceptance by**  
122 **Lien Holder is made on the condition that none of the terms of the sale shall differ in any**  
123 **material respect from the terms submitted to the Lien Holder on which the Short Sale**  
124 **Acceptance was based. For purposes of the Contract, any change in the date of Closing,**  
125 **Purchase Price, real estate brokerage commissions, concessions or net proceeds to be paid**  
126 **to, or other remuneration to be received by Seller in connection with the proposed Short**  
127 **Sale shall be deemed a material change. Any material change will require that the Short**  
128 **Sale Proposal be re-submitted to the Lien Holder for approval, which could result in**  
129 **delays for approval or even denial of the Short Sale.**

130  
131 **3.13. This Addendum should be signed by both Buyer and Seller at time of**  
132 **contracting, as most Lien Holders will not consider a Short Sale until a signed contract is**  
133 **received for their review.**

134  
135 **4. SHORT SALE CONDITIONS. Notwithstanding anything to the contrary in this**  
136 **Addendum, the Contract between Seller and Buyer, for the benefit of both Seller and**  
137 **Buyer, is conditional upon all of the following occurring:**

138  
139 **4.1. Seller has received from each Lien Holder a Short Sale Acceptance that is**  
140 **acceptable to Seller.**

141  
142 **4.2. Agreement to Amend/Extend Contract signed by Buyer and Seller, so long**  
143 **as both parties agree, in their sole discretion, to the changes to the Contract required by**  
144 **the Short Sale Acceptance.**

145  
146 **5. SELLER DEADLINE FOR SUBMISSION TO LIEN HOLDER. Seller agrees to**  
147 **submit to each Lien Holder a request for a Short Sale and all documents and information**  
148 **requested by Lien Holder, including a copy of the Contract, any Counterproposal, this**  
149 **Addendum and amendments. The initial submission by Seller to each Lien Holder shall be**  
150 **on or before Initial Submission Deadline (§ 5.1 below). Any additional information or**  
151 **documentation requested of Seller by such Lien Holder shall be submitted within five**  
152 **calendar days of such request or Buyer may terminate the Contract pursuant to § 8.2**  
153 **below.**

154  
155 **5.1. Seller Submission Deadline.** The Seller Submission Deadline shall be as set  
156 forth below.  
157

Event	Deadline	From
Initial Submission		calendar days from MEC (§ 2.4 of Contract)

158  
159 **5.2. Seller Consents to Lien Holder's Release of Information.** Seller consents  
160 that Lien Holder and its representatives may supply and communicate any loan, financial  
161 information, or other information of Seller, confidential or otherwise, with any of the  
162 following involved in the transaction and their representatives: Seller's attorney, Broker  
163 or Brokerage Firm working with Seller, transaction coordinator, title insurance company,  
164 Closing Company, and the following as checked:  Other Lien Creditors  Broker  
165 or Brokerage Firm working with Buyer  Buyer  Buyer's attorney.  
166

167 **6. DATES AND DEADLINES.**  
168

169 **6.1. Revised Dates and Deadlines and Other Terms.** Buyer and Seller  
170 acknowledge that an Agreement to Amend/Extend Contract (Amend/Extend) is required  
171 to revise the Dates and Deadlines (§ 2.3 Contract) or other terms based on changes  
172 required by the Short Sale Acceptance. If both Buyer and Seller, in their sole discretion,  
173 agree to the terms of the Amend/Extend, as evidenced by their signatures on the  
174 Amend/Extend; and the offering party to the Amend/Extend receives notice of such  
175 acceptance on or before seven calendar days after the earlier of: (a) the receipt by both  
176 Buyer and Seller of the Short Sale Acceptance; or (b) the Short Sale Acceptance Deadline  
177 (§ 8.1 below), then the Contract shall be so amended. If notice of such acceptance is not  
178 timely received, the Contract shall then terminate.  
179

180 **7. UNCERTAINTY OF SHORT SALE.** Buyer and Seller acknowledge:  
181

182 **7.1.** There are no promises or representations regarding: (a) whether Lien  
183 Holder will agree to a Short Sale, (b) the terms of any Short Sale Acceptance, or (c) when  
184 the Lien Holder will advise of its decision to agree to a Short Sale or provide the written  
185 terms and conditions of the Short Sale Acceptance.  
186

187 **7.2.** Until Closing of the Short Sale, Short Sale Acceptance by the Lien Holder  
188 will not prevent, hinder or delay the Lien Holder from initiating or proceeding with any  
189 enforcement action, including but not limited to a foreclosure. In the event Seller loses  
190 ownership of the Property through foreclosure, the Contract shall terminate.  
191

192 **7.3.** A significant period of time may be required to determine if a Short Sale  
193 Acceptance will be granted. Therefore, Buyer should inform Buyer's lender of this fact for  
194 structuring Buyer's loan, duration of "loan lock", etc. Additionally, Closing is normally  
195 required to be held shortly following the Short Sale Acceptance.  
196

197 **7.4.** After a Short Sale Acceptance is given, Lien Holder will normally not agree  
198 to any additional changes to the terms of the Contract that differ from the Short Sale  
199 Acceptance, to have repairs performed or to reduce the amount it is willing to accept due to  
200 the condition of the Property or results of an inspection. Buyer may want to conduct an

201 inspection of the Property before Seller submits its request for a Short Sale to Lien Holder.  
202 The Purchase Price should reflect the condition of the Property and results of such  
203 inspection. Buyer recognizes the risk that Lien Holder may not agree to the offer  
204 submitted by Buyer.

205  
206 **8. DEADLINE FOR ACCEPTANCE OF SHORT SALE; TERMINATION.** Buyer  
207 and Seller must receive written notice of the Short Sale Acceptance on or before Short Sale  
208 Acceptance Deadline (§ 8.1 below) or the Contract shall terminate.

209  
210 **8.1. Short Sale Acceptance Deadline.**

211

Event	Deadline
Short Sale Acceptance Deadline	

212  
213 **8.2. Termination.** If any party has a right to terminate the Contract, such  
214 termination shall be governed by § 24 of the Contract upon written notice to the other  
215 party as described in § 30 of the Contract.

216  
217  
218  
219

220  
221 **Date:** \_\_\_\_\_ **Date:** \_\_\_\_\_  
222  
223 \_\_\_\_\_  
224 **Buyer** **Buyer**

225  
226  
227 **Date:** \_\_\_\_\_ **Date:** \_\_\_\_\_  
228  
229 \_\_\_\_\_  
230 **Seller** **Seller**

Real Living Professional Group  
1755 Central Park Drive  
Suite 121  
Steamboat Springs, Co 80477

1 The printed portions of this form, except differentiated additions, have been approved by the Colorado Real  
2 Estate Commission. (FPA33-8-07) (Mandatory 1-08)

3  
4 THIS FORM HAS IMPORTANT LEGAL CONSEQUENCES AND THE PARTIES SHOULD CONSULT  
5 LEGAL AND TAX OR OTHER COUNSEL BEFORE SIGNING.

6  
7 FORECLOSURE PROPERTY ADDENDUM  
8 TO CONTRACT TO BUY AND SELL REAL ESTATE  
9 (DOES NOT CONTAIN AN OPTION OR RIGHT TO REPURCHASE)  
10

11 Note: This form is to be used only if (1) the Property is in foreclosure, (2) the Property is residential, (3) Buyer  
12 is not to reside in it for at least 1 year, and (4) ALL of the requirements in Section 3 (Terms) of this Addendum  
13 are satisfied. If these items are fulfilled, this Addendum may be prepared by a Broker for a buyer purchasing  
14 the Property as a rental or as non-owner occupied property. If ANY of the requirements are not satisfied, an  
15 attorney, NOT the Broker, should prepare the contract.  
16

17 1. AMENDMENT TO CONTRACT TO BUY AND SELL REAL ESTATE. This Foreclosure Property  
18 Addendum (Addendum) is made a part of that Contract to Buy and Sell Real Estate (Contract) for the  
19 purchase and sale of the Property known as No.

20 n/a

21 Street Address City State Zip  
22 dated n/a between Buyer and Seller. This Addendum shall control in the event of any  
23 conflict with the Contract to which it is attached.  
24

25 2. PURPOSE. The purpose of this Addendum is to provide that the Contract conforms to the requirements of  
26 the Colorado Foreclosure Protection Act (the Act).  
27

28 3. TERMS. Buyer and Seller agree to all of the following 6 conditions:

29 3.1 There will not be any financial or legal obligations of Seller (related to the Property) after Closing,  
30 except income tax liability, if any.

31 3.2 There are no rental agreements or leases for the Property between Buyer and Seller.

32 3.3 Seller does not have an option or right to repurchase the Property.

33 3.4 A notice of cancellation is attached to this Addendum.

34 3.5 Seller represents that English is the language principally spoken by Seller.

35 3.6 No consideration shall be paid to Seller prior to the expiration of Seller's right to cancel the Contract.

36 If any of the above 6 conditions are changed, modified or amended at any time prior to or at Closing, the  
37 parties agree that the Contract and this Addendum shall be void and of no effect. If Buyer and Seller do not  
38 agree to one or more of the 6 conditions, then the Contract and this Addendum are void and of no effect.  
39

40 If the Contract and Addendum are void, a real estate broker will not prepare a contract for this transaction.  
41 It is recommended that an attorney for one of the parties prepare the required documents.  
42

43 4. NOTICE. The following provision has been completed with the name of Buyer inserted:  
44

45 NOTICE REQUIRED BY COLORADO LAW  
46

47 UNTIL YOUR RIGHT TO CANCEL THIS CONTRACT HAS ENDED,  
48

(Buyer's NAME) OR ANYONE WORKING FOR

PREPARED BY: Barry Goldkind, Associate Broker

FPA33-8-07. FORECLOSURE PROPERTY ADDENDUM TO CONTRACT TO BUY AND SELL REAL ESTATE. Colorado Real Estate Commission

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Buyer(s) \_\_\_\_\_

05/15/08 14:31:57

Page 1 of 2  
Seller(s) \_\_\_\_\_

49 (Buyer's NAME) CANNOT ASK YOU TO SIGN OR HAVE YOU SIGN ANY DEED OR ANY OTHER  
50 DOCUMENT.  
51

52 5. SELLER'S RIGHT TO CANCEL. The parties acknowledge that in addition to any right of rescission  
53 available under state or federal law, the Seller has the right to cancel a contract with Buyer until 12 midnight  
54 of the third business day following the day on which the Seller signs a contract that complies with the Act, or  
55 until 12 noon on the day before the foreclosure sale of the residence in foreclosure, whichever occurs first.  
56

57 6. COMPLETION AND RECEIPT OF NOTICE OF RIGHT OF CANCELLATION. Seller acknowledges:

58 6.1 Buyer is required to set forth the date and time of day on which the cancellation right ends;

59 6.2 Seller has received the original Notice of Cancellation and an additional copy of:

60 6.2.1. the Contract,

61 6.2.2. this Addendum, and

62 6.2.3. the attached "Notice of Cancellation" form containing the date the Contract was signed and that  
63 is easily detachable from the attached Contract, and the Notice of Cancellation contains the following  
64 statement, in at least ten-point type:  
65

66 "YOU MAY CANCEL THIS CONTRACT FOR THE SALE OF YOUR HOUSE WITHOUT ANY  
67 PENALTY OR OBLIGATION AT ANY TIME BEFORE n/a (DATE AND TIME OF  
68 DAY). SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS  
69 RIGHT."  
70

71

72

SELLER \_\_\_\_\_ DATE \_\_\_\_\_

BUYER \_\_\_\_\_ DATE \_\_\_\_\_