

SUMMARY OF THE PUBLIC TRUSTEE FORECLOSURE PROCESS IN COLORADO

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The procedure for foreclosing on property in Colorado through the office of the Public Trustee is complex and has recently undergone some significant changes. The process is designed so that the borrower has a reasonable opportunity to avoid losing the property.

At the time a lender loans the borrower money to purchase real property, the parties will sign a note, which is a contract between them containing the terms on which the borrower will repay the loan. The parties will also prepare a deed of trust, which is recorded in the public records. This deed of trust constitutes a lien on the property.

Once a lender has decided to declare a default under the terms of the note and to begin the foreclosure process, the lender files a document called a "Notice of Election and Demand" (NED) with the Public Trustee in the county where the property is located. The Public Trustee is allowed ten days to file the NED in the public records. The Public Trustee is given an additional twenty days from the recording of the NED to send out a first round of notices of the foreclosure to everyone who might be affected, including the owner, the tenant, all lienholders, any guarantors on the loan, and anyone else whose name appears in the public records as having an interest in the property. The Public Trustee then selects a date for a public sale of the property, which is generally about four months after receipt of the Notice of Election and Demand (about seven months for agricultural property). The Public Trustee will send out a second round of notices between a month and a half and two months before the scheduled sale. The Public Trustee will also cause notice of the foreclosure to be published once each week for five consecutive weeks in the legal notices section of a local newspaper...

Colorado law gives the borrower the right to cure any default which is based on nonpayment, as opposed to a default of a non-monetary obligation such as maintaining the property in good condition. At least fifteen days prior to the scheduled sale, the borrower must give written notice to the Public Trustee of the intent to cure, and then by at least noon on the day before the scheduled sale, the borrower must pay to the Public Trustee all of the delinquent payments, plus any costs, interest, and attorneys fees which have accrued since the default occurred. If the borrower cures the default, the loan is reinstated as if no default had taken place, and the foreclosure sale is cancelled.

A borrower has the opportunity to dispute the existence of a default by appearing in court prior to the foreclosure sale to present evidence and testimony at something called a "Rule 120 hearing". If the court finds that there has been no default, then the foreclosure process will be cancelled. If, on the other hand, the borrower does not contest the existence a default, the judge will sign an order authorizing the sale. A Rule 120 hearing must be held no later than sixteen days before the sale.

Anyone can attend and bid on the property at the foreclosure sale. All bids (other than the bid of the foreclosing lender) must be for cash, and payment must be made to the Public Trustee at the time of the sale. The law requires the foreclosing lender to submit a written bid for the property no later than noon two days before the sale. The lender's bid must be for the fair market value of the property, less the amount of any encumbrances senior to the lender's lien, the outstanding general property taxes, and the reasonable costs of holding and reselling the property; the lender, however, isn't required to bid more than the amount owed to the lender by the defaulting borrower.

The proceeds from the high bid at the sale (up to the amount of the debt) are paid to the foreclosing lender, and the borrower's debt to the lender is satisfied to the extent of the bid. If the winning bid isn't high enough to satisfy the full amount owed to the lender, including attorney's fees and costs incurred by the lender, then the lender has the right to bring a suit against the borrower for the deficiency. If the lender

prevails in this deficiency, then the lender can look to other assets of the borrower for satisfaction of the deficiency. If any other parties have signed the note as guarantors, they may be joined in the deficiency suit and their assets made subject to the claims of the lender. The lender's failure to bid the proper amount at the sale does not invalidate the sale, but the borrower can use this as a defense to the lender's action for a deficiency judgment.

Most promissory notes and deeds of trust provide that the lender is entitled to receive its costs and attorney fees in collecting the indebtedness owed by the borrower. Any attorney fees incurred in a deficiency suit against the borrower will be added to the amount due the lender, and these costs and fees can be substantial.

The high bidder at the foreclosure sale is given a document called a "Certificate of Purchase", but this document does not give the holder an immediate right to the possession of the property. During the weeks following the sale, junior lienholders have an opportunity to redeem the property. In order to preserve this right, each junior lienholder must file a notice of intent to redeem with the Public Trustee no later than eight days after the sale. If there are multiple junior lienholders who file notices of intent to redeem, the public trustee will assign each of them a five-day period in which to redeem, with the most senior of these lienholders having the first five-day period, and any other junior lienholders having a subsequent last five-day period in descending order of priority. A redeeming lienholder or tenant must pay the amount bid at the foreclosure sale, plus interest from the date of the sale until the date of the redemption, plus (when there are multiple junior liens) the balance due on the liens that have already redeemed. At the end of all the redemption periods, the high bidder at the sale or the last redeeming junior lienholder will be entitled to a deed to the property, which will make that party the new owner of the property, subject only to property taxes and any liens that are senior to the lien being foreclosed. For example, if a second mortgage is foreclosed, then the person who receives the public trustee's deed will take title to the property subject to the first mortgage and general property taxes. The new owner of the property will now have the right of possession and, if necessary, the right to evict the occupant.

This is intended only as a summary of the public trustee foreclosure process. Before taking any particular action, carefully review the foreclosure statutes and talk with a real estate attorney.

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