

JUDICIAL FORECLOSURE ACTIONS – PROCEDURES AND TACTICS

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I. Introduction

This talk will outline the basic procedures in judicial foreclosure actions and sales of real property by levy and execution upon a judgment. We will address some of the key problems and pitfalls that counsel may encounter in judicial foreclosure actions. We will talk more about strategy and tactics than about mechanics of the procedure.

A judicial foreclosure action in Colorado is governed by C.R.C.P. 105, which provides a single procedure for the complete adjudication of the rights of all parties to or affecting real property. The mechanics of the foreclosure follow the rules for foreclosures set out in C.R.S. sections 38-38-101, *et seq.*

It is no secret that one would typically prefer to foreclose a debt secured by a deed of trust through the public trustee. It is less expensive. The fees charged by the leading foreclosure firms on routine foreclosures are quite small in comparison with the fees that can be incurred in litigation. Once one commences a foreclosure through the courts, the engine that is “litigation” starts to run, with all of its complexities and uncertainties. If an answer is filed, and the disclosure and discovery process starts, the time and expense involved in realizing upon the security increases. Accordingly, most creditors and their counsel seek to foreclose through the public trustee if at all possible.

Nevertheless, at times one must go to court. Judicial foreclosure actions are required if the security for a promissory note consists of a mortgage, or a deed of trust to a private trustee.¹ It may be desirable or necessary to foreclose through the

¹ See C.R.S. § 38-39-101. The foreclosure statutes in Title 38 went through substantial revisions

court because of defects in either the promissory note or the deed of trust, preventing a public trustee from accepting foreclosure. This may occur if there are variances (date, name, and the like) between the note and deed of trust that cannot be resolved through an affidavit to the liking of the public trustee, but which might be resolved through reformation or other court action. A private party that cannot take advantage of certain statutory provisions favoring institutional lenders may decide to foreclose through a court because a promissory note has been lost; an action in court to foreclose the instrument and deed of trust may be less expensive than the posting of a lost instrument bond. A party seeking to enforce any type of equitable or statutory lien (such as a homeowner assessment lien under C.R.S. 38-33.3-316(d)(11) or a mechanic lien (C.R.S. 38-22-113) will need to foreclose judicially. The vendor seeking to enforce remedies against a vendee of an installment land contract may be required to foreclose in a court action if the contract is deemed in equity to be the functional equivalent of a mortgage.² Finally, an action to foreclose in court may be desirable where there are substantial lien priority issues that should best be resolved before the property goes to sale. Examples here are equitable subrogation claims, conflicts between consensual liens, and priority issues involving the lien of a deed of trust and mechanic or other statutory liens.

Public trustee foreclosures are covered in detail in other lectures in today's program and are discussed thoroughly in two excellent resources published by CLE in Colorado. Robert Holmes, *PUBLIC TRUSTEE FORECLOSURE IN COLORADO* (3d ed. 2007), and Chapter 9, Willis V. Carpenter and Blair Daniels, *COLORADO REAL ESTATE PRACTICE* (CLE, 2011). These resources both highlight the instances where parties foreclosing on a deed of trust are better off proceeding through the courts. Further, Chapter 10 of the Carpenter and Blair work covers the judicial foreclosure process in depth and precision. Finally, a good textual summary of the judicial foreclosure process is found in Chapter 75 of the Colorado Methods of Practice series.³

in 2008. The owner's right of redemption was replaced with an extended, pre-sale "cure" period, along with a host of procedural changes. I will use the convention of specifying for statutory cites "2007" if I refer to the "old" statute. Otherwise, I refer to the statute as it exists today.

² The most recent in a line of cases is *Paraguay Place – View Trust v. Gray*, 981 P.2d 681 (Colo. App. 1999) (trial court has discretion to require a judicial foreclosure as opposed to eviction or forfeiture of the vendees' interest in order to protect vendee's equity of redemption). See also *Grombone v. Krekel*, 754 P.2d 777 (Colo. App. 1988) (allowing eviction but limiting damages to fair rental value for period of possession).

³ Fred Gabler, *Foreclosing Mortgages and Other Liens Under Rule 105*, Chapter 75 in 2A

As with any civil action, a judicial foreclosure begins with the filing of a complaint. A sample is attached. Claims for relief other than foreclosure may be included in one complaint. These may include a claim for judgment on the promissory note that is secured by the lien being foreclosed; a claim for reformation of either the note or deed of trust to correct errors in the instruments; a claim for appointment of a receiver to secure the property during the pendency of the action; a claim to quiet title in order to achieve marketable title to the property subsequent to the foreclosure; and a claim to evict the parties in possession of the property being foreclosed.

II. *Special considerations that may require judicial foreclosure.*

A. **Federal liens and interests.** This topic is covered in detail in another part of this program. Federal liens are granted certain rights a variety of federal statutes that can supersede state law in important respects. To the extent that federal law conflicts with Colorado statutes, federal law applies. These fall into two categories – (a) tax liens created in the Internal Revenue Code, and (b) most everything else, such as a junior deed of trust or judgment lien in favor of a government agency. For Internal Revenue Service liens, the government has 120 days to redeem from a foreclosure sale.⁴ This usually translates into 120 days from the date of sale, not the end of the last-expiring redemption right. For non-IRS federal liens, counsel should study 28 U.S.C. § 2410, which sets forth the requirements for actions affecting property on which the United States has a lien. For these non-IRS liens, federal law grants the United States a one-year period to redeem.⁵ For our purposes, counsel should note that a foreclosure must “seek judicial sale” if a junior lien held by the United States is to be affected. This is generally read to require a judicial foreclosure.⁶ Are there exceptions? Consider the case of a junior lien of a bank seized by the FDIC. 12 U.S.C. § 1825(b)(2), commonly known as FIRREA, which brings back fond memories of the 1980’s, provides that no property of the FDIC, when acting as a receiver, shall be subject to sale without its consent. While a lien interest of the FDIC in its capacity as

Krendl, COLORADO METHODS OF PRACTICE (5th ed. 2007).

⁴ 26 U.S.C. § 7425(d)(1). See the article by my fellow panelist, Bill Frey, *Federal Tax Lien Redemptions in Colorado Public Trustee Foreclosures*, THE COLORADO LAWYER 153 (October, 2001).

⁵ 28 U.S.C. § 2410(c).

⁶ What about a judgment lien obtained by a private party in federal court? See 28 U.S.C. § 3201(c).

receiver is a property interest of the FDIC, *Matagorda County v. Law*, 19 F.3d 215, 221 (5th Cir. 1994), the FDIC has issued a Statement of Policy granting consent.⁷

B. Multiple county properties; personal property security under Article 9. A judicial foreclosure will make sense if one note is secured with property in two or more counties or two or more states. A judicial foreclosure may also make sense if the collateral consists of both real and personal property, such as one might find with a hotel or furnished apartment complex, where the value of the personal property is significant or presents unique priority issues under the UCC.

C. Filing fees. A judicial foreclosure may be less expensive than a Public Trustee's foreclosure if a deed of trust secures a very large sum of money, given the statutory fee structure, or where multiple deeds of trust secure a single debt.

D. Complex priority issues. Priority questions may alert counsel to head to court first, rather than be dragged there later. There may be disputes involving subordination agreements, equitable subrogation,⁸ mechanic lien claims⁹, or future advance priorities.¹⁰ Frequently these claims will likely end up in court anyway, so it may make sense head to head court in the first instance. However, take the question of mechanic liens. In *Alpine of Nederland*, the court of appeals affirmed an order of a trial court enjoining the public trustee from proceeding with a sale of a "first" lien deed of trust during the pendency of a mechanic lien foreclosure action. Such an injunction was almost automatic under our pre-2008 statutes. Under our current law, C.R.S. § 38-38-501, if no party (such as a mechanic lien claimant) redeems from a public trustee foreclosure, title to the property sold shall vest in the holder of the Certificate of Purchase and ". . . such title shall be free and clear of all liens and encumbrances *junior to the lien foreclosed* (emphasis added)." The former version of this statute, C.R.S. § 38-39-110 (2007), provided: ". . . that upon issuance and delivery of the public trustee's deed, title shall vest in the grantee and such title shall be free and

⁷ FDIC Statement of Policy Regarding 12 U.S.C. § 1825(b)(2) and 28 U.S.C. § 2410(c). Regulations can change, so verify this before taking action.

⁸ *Hicks v. Londrè*, 125 P.3d 452 (Colo. 2005) (leading case setting parameters for equitable subrogation in Colorado); *Hicks v. Joondeph*, 235 P.3d 303 (Colo. 2010) (refusing to apply doctrine of derivative subrogation under shelter principle); *Land Title Ins. Corp. v. Ameriquest Mortgage Corp.*, 207 P.3d 141 (Colo. 2009) (subrogation in context of delay in recording); and *Green Tree Servicing Corp. v. U.S. Bank N.A.*, 192 P.3d 1014 (Colo. App. 2007) (subrogation in context of home equity line of credit paid but not released).

⁹ *Boulder Lumber Co. v. Alpine of Nederland*, 626 P.2d 724 (Colo. App. 1981).

¹⁰ C.R.S. 38-39-106 (priority limited to amount stated in mortgage).

clear of all liens and encumbrances *recorded or filed subsequent to the recording or filing of the lien on which the sale was based.*” This is the version of the statute in effect at the time of the court of appeals decision in *Alpine of Netherland*.

E. Suit on the note. In terms of overall collection strategy, a suit on the promissory note, either as a sole claim for relief or in conjunction with a foreclosure claim, can be a powerful collection tool. Judgment on a promissory note claim might be obtained quickly by means of a default judgment or through summary judgment. A creditor may then resort to garnishment or other simple collection procedures, which might result in collection of the indebtedness, notwithstanding the real estate collateral, or may otherwise cause a debtor refinance. Or, the debtor may have little equity in the subject property, but own another property on which a judgment lien may attach.¹¹ Since at least 1932, it has been clear that an action to collect on a promissory note may be brought independent of a mortgage foreclosure action or a Public Trustee foreclosure, and that the different remedies and proceedings may be pursued simultaneously or in any order.¹²

F. Lost or Destroyed Note.

In the case of a lost note, consider:

- C.R.S. § 13-25-113. Secondary evidence of a lost or destroyed note may be introduced by way of affidavit or testimony under oath “. . . to the loss or destruction thereof, and to the substance of the same.” *Walker v. Drogmund*, 101 Colo. 521, 74 P.2d 1235 (1937) (secondary evidence must be “clear and satisfactory” as to the contents of the document).

¹¹ C.R.S. § 13-52-102 (judgment lien attaches to property of the judgment debtor, *if there is equity, upon the recording of a transcript of judgment*). Upon perfection of a judgment lien, a judgment creditor may proceed to sale “through the back door,” by the process of execution and levy described in section VI below. Note *City Center National Bank v. Barone*, 807 P.2d 1251 (Colo. App. 1991) (lien does not attach to any interest in property subject to homestead exemption).

¹² *Mortgage Investors Corp. v. Battle Mountain Corp.*, 70 P.3d 1136 (Colo. 2003), *citing Greene v. Wilson*, 90 Colo. 562, 11 P.2d 225 (1932) (holder of a note secured by a deed of trust can sue on the note, or sue to foreclose on the deed of trust, or join both proceedings; if the party sues on the note and obtains a judgment, but does not collect the judgment, he or she may still foreclose on the deed of trust). As the court in *Battle Mountain* notes, however, one must beware of the applicable 6 and 15-year statutes of limitation in devising a strategy.

- C.R.S. § 4-3-309 (court may require adequate protection “by any reasonable means” to protect against loss that may occur by reason of a claim to enforce the instrument by another person).
- Colorado Rules of Evidence 1003, 1004 (other evidence of a document, such as a copy, is admissible unless there is a genuine question of authenticity or the offering party lost or destroyed the original “in bad faith”).

III. *Planning and Preparation –the Judicial Foreclosure.*

A. Document Review.

In the more typical foreclosure of a deed of trust or mortgage securing a promissory note, the creditor’s counsel should examine the instruments for any conditions to maintaining a foreclosure action. Is the present holder of the note the payee, or is there documentary evidence of an assignment or an endorsement? Have payments been properly accelerated, and notices properly given? Does the promissory note correspond to the deed of trust? If there are problems, the advantage of a judicial foreclosure is the possibility of seeking a decree of reformation to correct a mutual mistake.¹³

B. Notices and Conditions Precedent.

In giving any notices, counsel should arrive at their own conclusion as to whether they are acting as debt collectors under the Fair Debt Collection Practice Act.¹⁴ It is fair to assume that an attorney is a debt collector if she or he “regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another.” It is prudent to include disclosures and other statements required by the FDCPA in all demand letters and foreclosure notices. Get to know the Colorado version of the FDCPA as well; it cannot hurt to be thorough.¹⁵ Because of the uncertainty of the law, if one is a relative newcomer to the FDCPA and its Colorado cousin, seriously consider whether any letter from your office is required in order to accelerate indebtedness or declare a note due. Less is better, from counsel’s perspective. If letters and notices do go out from your office, the usual practice is to insert this disclaimer in capital letters, early and often: “THIS

¹³ *Boyles v. Orion*, 761 P.2d 278 (Colo. App. 1988) (mutual mistake or unilateral mistake coupled with fraud or inequitable conduct).

¹⁴ See 15 U.S.C. § 1692(a)(6); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 125 (Colo. 1992); *First Interstate Bank, N.A. v. Soucie*, 924 P.2d 1200, 1202 (Colo. App. 1996).

¹⁵ C.R.S. § 12-14-101, *et seq.*

COMMUNICATION CONCERNS A DEBT WHICH _____, P.C. IS ATTEMPTING TO COLLECT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.” If a written notice is required by the terms of the documents, incorporate the above language at a minimum and allow the 30 days for response of the debtor under the statute.

C. Title Work - Litigation Guarantee or Foreclosure Certificate.

Title insurance companies offer a variety of products which can be used to obtain the information necessary to initiate a foreclosure. These are commonly called foreclosure guarantees or litigation guarantees. The former is the minimalist approach; the latter offers some additional insurance, at a somewhat greater cost, but is short of a title commitment. A sample of each is attached.¹⁶

The product you select – and you might shop around – should at least contain copies of all documents which affect title to the subject property recorded subsequent to the recording of the deed of trust or other lien being foreclosed and through the effective date of the insurance product. The foreclosure guarantee is usually sufficient for this purpose. These allow you to determine who should receive notice, and at what address.¹⁷ These in turn should be named as parties to the action.

Counsel should also receive a copy of the vesting deed for the current owner, and, if you are diligent, copies of any liens and encumbrances senior to the lien being foreclosed. If a client has a note and deed of trust on certain property and does not have a loan policy of title insurance, it may be advisable to order a commitment for title insurance, showing the foreclosing lender as the proposed insured owner. It may be advisable to get a title policy after foreclosure in any event. If so, the commitment should extend to the end of all redemption periods.

IV. Pleadings – Starting the Action.

A. Parties.

¹⁶ Attachment 1 – Foreclosure Guarantee. Attachment 2 – Litigation Guarantee. Compliments to Judith Bregman, Esq. of Stewart Title Insurance, Denver, Colorado.

¹⁷ C.R.S. § 38-38-104(1)(a), subsections I through V. Curiously, the statute does not mandate notice to a non-occupant owner of the subject property who has taken title subject to the debt being foreclosed. That entity or person should take action to protect itself by recording a reliable notice of address. Name everyone with a legal interest in the property whose interest you wish to terminate.

The defendants to be named in a judicial foreclosure action are those with interests of record subordinate to the lien being foreclosed and parties in actual possession, excepting any parties that you wish to affirm.¹⁸ Since parties in possession will not show from the title work, that must be determined through on-site investigation. A party entitled to notice of the foreclosure sale under the foreclosure statute should be named as a party to the civil action. It is better to be thorough and have the party disclaim its interest under Rule 105 than to sorry at a later date.

B. Intentionally Omitted Parties.

If the client does not want to terminate the interest of a paying tenant, any other easement holder, or any other junior party, those persons or parties should not be named in the action.¹⁹ The complaint might itemize the interests of such parties, including the interests of any senior lien holders not affected by the foreclosure, to educate the court and to be thorough. Although counsel vary on their approach, it is generally not necessary to name “unknown persons” as defendants in a judicial foreclosure action, unless there is some recognized need to quiet title to property in the process.

C. Venue.

Venue is appropriate in the county in which the real property or a substantial part thereof, is located. C.R.C.P. 98(a). A court with proper venue may enter judgment of foreclosure affecting property in adjoining counties, as one might see with large ranches.

D. Bankruptcy issues.

Prior to filing a complaint, bankruptcy records should be checked. This is easily accomplished through the PACER system. If at any time during the course of a judicial foreclosure, one becomes aware of a bankruptcy, it is safe to assume the action is stayed under 11 U.S.C. § 362. The standard forms for relief from the automatic stay are readily available, and generally involve satisfying the court that the creditor lacks adequate protection or that the debtor has insufficient equity in the property. If you are an old timer and have not been to bankruptcy court in a while, recheck the rules and the local rules, especially the required affidavit

¹⁸ C.R.S. § 38-35-114.

¹⁹ C.R.S. § 38-38-506(3), (4) (omitted parties). Prior to the foreclosure sale, one will formally “affirm” the interest of the intentionally omitted parties following the procedure in the statute. A party whose interest is affirmed in this manner has no right to redeem.

regarding the military status of the debtor. Note that recent changes to Chapter 13 of the Bankruptcy Code provide new avenues for relief for debtors, even to the point of modifying, in certain respects, the debt, similar to a Chapter 11.

From the debtor's prospective, relief under the Bankruptcy Code should be brought before the matter goes to sale for maximum benefit. After sale, remedies in bankruptcy are extremely limited, generally usually to extension of the redemption period for 60 days.²⁰ This seems to be enough for the debtor that needs just a little more time to refinance.

The statutory procedures for suspending, continuing, or if necessary rescinding a sheriff's sale following a decree of judicial foreclosure have been revamped effective January 1, 2008, to provide more flexibility to all parties in the event of a bankruptcy filing.²¹ These provisions are the same as apply to public trustee foreclosures, and are covered by other speakers in this program.

E. Other Claims for Relief.

1. ***Water rights as collateral.*** If water rights are included as a part of the collateral, these should be described in detail with the claim for relief. The water rights should be described exactly as listed on the lien instrument, even if they are represented by certificates of stock in a ditch company. It is wise to check with the ditch or reservoir company as to the procedure that they will require. The complaint should request the court to grant such relief as may be necessary to foreclose the interest of the debtor in the water stock.

2. ***Personal property.*** Any personal property included within the collateral should be described in a separate claim for relief, requesting a remedy under the Uniform Commercial Code.²² If the property is mobile, it may make sense to seek appointment of a receiver to take possession of all the property.

3. ***Receivership.*** Appointment of a receiver, to collect those all-important rents during litigation or otherwise, is fairly routine if one's mortgage or trust deed recites that a receiver may be obtained upon a default.²³ The e-filing

²⁰ See Kimberley Tyson's materials presented in this program. Also: *In Re: Cucumber Creek Dev., Inc.*, 33 B.R. 820, 822 (D. Colo. 1983) (redemption period extended 60 days by 11 U.S.C. § 108); *In re Thomas*, 87 B.R. 654 (Bktrcy. Colo. 1988) (title vests automatically under Colorado foreclosure statutes at end of 60-day extension to redemption period).

²¹ C.R.S. § 38-38-109.

²² C.R.S. § 4-9-101, *et seq.*

²³ *Bank of America v. Denver Hotel Ass'n*, 830 P.2d 1138 (Colo. App. 1992). It is frequently overlooked that a court may not appoint a receiver for a mortgage lender until a foreclosure

process has changed the process of obtaining ex parte receivership orders for the better, and simplifies the process of giving any required notices that may be required by the court or the security documents.²⁴

4. ***Declaratory judgment.*** The court can use a declaratory judgment claim to resolve undecided questions of lien priority, reformation of instruments, or to resolve ambiguous terms of a document.

F. Notice of *Lis Pendens*.

Once the civil action has been filed, and a case number and court assignment are obtained, counsel should prepare a notice of *lis pendens*. While this is simply prudent in terms of giving notice to the world of your client's claim, it is now doubly important because of the way dates are scheduled under the 2008 revisions to the foreclosure statutes.

This notice should be recorded in the real estate records of the clerk and recorder in each county in which any portion of the real property is located.²⁵ The notice of *lis pendens* should contain the complete caption with the names of all parties, the nature of the claim, and the legal description of the property involved. Detail here is important. Significant liabilities can run from improper recording of a *lis pendens*. C.R.S. § 38-35-201, *et seq.* I repeat – be careful. In close cases, opposing parties have not been reticent to take on plaintiff's counsel with all manner of retaliatory claims. The problem cases include those in which no *lis pendens* notice is justified. Examples include: (a) cases in which only monetary relief is claimed in the complaint; and (b) claims to foreclose attorney liens prior to reducing the lien to judgment. Even if a *lis pendens* is justified, such as in a claim to set aside a fraudulent transfer, counsel can be quick with counterclaims.²⁶

After the notice of *lis pendens* has been recorded, the title work should be updated through the date of recording of the notice. Any parties who have acquired an interest in the property after the filing of the complaint should be

action has been commenced. *Compare Martinez v. Continental Enterprises*, 730 P.2d 308, 316 (Colo. 1986) (mortgagee in possession doctrine) *with Wynn v. Adams County Bank*, 761 P.2d 234 (Colo.App. 1988) (collection of rents without appointment of receiver).

²⁴ On the subject of notices, review *GE Life & Annuity Assurance Co. v. Fort Collins Assemblage*, 53 P.3d 703 (Colo. App. 2001).

²⁵ C.R.S. § 38-35-110; C.R.C.P. 105.

²⁶ *Hewitt v. Rice*, 154 P.3d 408 (Colo. 2007), presents a harrowing saga of litigation facing counsel who records a notice of *lis pendens* in connection with a garden-variety fraudulent transfer case.

added as defendants by amending the complaint – preferably before service has been obtained of the original complaint. Persons who acquire an interest in the property after the notice of *lis pendens* is recorded may be ignored, unless they choose to intervene in the action.²⁷

A form complaint for judicial foreclosure and a decree of foreclosure are attached for reference.²⁸ Other forms that one will routinely encounter are contained in the Carpenter & Blair work and in Chapter 75 of Colorado Methods of Practice, *supra*.

G. Service Members Civil Relief Act.

It is now possible to do an adequate search on the internet to determine whether parties to a judicial foreclosure are in the military service.²⁹ If your defendant is an entity, the process is simpler. An affidavit regarding military service is required upon application for default judgment, and is required by the Bankruptcy Court with motions for relief from stay.³⁰

V. Prosecuting and Defending the Case.

A. Service of Process.

Service of process of each defendant is accomplished through C.R.C.P. 4, as in any civil action. It used to be considered as a matter of course that any parties that could not be served personally in Colorado or who could not be located in the state could be served through publication. After all, foreclosure is *in rem*.

This approach is outdated, especially in light of amendments to C.R.C.P. 4 and recent appellate decisions.³¹ With substantial amendments, C.R.C.P. 4(f) now provides for “substituted service” for difficult cases. This motion shall recite the efforts made to obtain personal service and the reasons the personal service could not be accomplished. If the court is satisfied that due diligence has been used to

²⁷ *Hammersley v. District Court*, 199 Colo. 442, 610 P.2d 94 (1980). A fine discussion of the common-law doctrine of *lis pendens* and its statutory counterpart is found in G. Reeves, COLORADO REAL PROPERTY LAW § 21.4.1 (BRADFORD, 2005).

²⁸ Attachment 3 – Complaint. Attachment 4 – Judgment and Decree of Judicial Foreclosure.

²⁹ See, <https://www.servicememberscivilreliefact.com/login.htm>. Also Gabler, *supra* n.3 at § 75.5, p. 380, has more information for a web search.

³⁰ The website is <http://ecf.cob.uscourts.gov>.

³¹ See *Jones v. Flowers*, 547 U.S. 220 (2006) (knowledge that notice not received); *Lobato v. Taylor*, 70 P.3d 1152 (Colo. 2003) (due process may require diligent search beyond information in recorded documents).

attempt personal service and that further attempts to obtain personal service would be to no avail, delivery of the process may be made upon another person, or the papers may be mailed to the party. Service by publication is available under Rule 4(g) for *in rem* proceedings such as judicial foreclosure. The process here is similar and requires motion and affidavit showing efforts used to obtain personal service. Beware – counsel have been sued by out-of-state defendants who claim that they could have been found with a little exercise of diligence.

B. Default Judgment.

If all defendants, upon proper service, fail to appear or answer the complaint, which is frequently the case, counsel can proceed with a motion for entry of judgment and foreclosure decree utilizing the procedures in C.R.C.P. 121, § 1-14. While some courts may ask that the motion be set for hearing, courts will now typically review the procedure and call counsel if there is any difficulty with compliance with the rule. Electronic filing procedures vastly simplify this process. If a court asks you to come in for a hearing, assume that you will be expected to put on a *prima facie* case. This can be done in a number of ways, including calling yourself as a witness. There is no ethical prohibition as to this – the facts at this point are undisputed. C.R.P.C. 3.7(a)(1). Alternatively, you can give an oral offer of proof, with a supporting affidavit. Bring the original note, and an affidavit of attorney fees, so that you can get that number reduced to judgment, which may simplify things later in the sale process.

C. Trial Issues – Going all the way.

If a default judgment is not achieved, the next step to an efficient ruling is through summary judgment. However, if the court believes that there are legitimate issues of fact regarding default, priority of liens, or any other issue best determined before a sale is conducted, the case goes to trial, with all of the tools available to the parties under the Rules of Civil Procedure. Only in unusual circumstances would the case be heard before a jury, as the basic thrust of the case is equitable, and the Rules of Procedure do not allow for a jury trial in equitable actions.³²

In the author's experience, courts often do not ask for the original promissory note; copies are routinely accepted. Nevertheless, take the original to court just in case.

³² *Neikirk Nat'l Bank*, 53 Colo. 350, 127 P. 137 (1912); see generally F. Skillern, *Civil Jury Trials*, 1B Krendl, COLORADO METHODS OF PRACTICE § 27.4 (5th ed. 2004).

As with all trials involving real property, judges are typically not familiar with detailed requirements of the law, so it is counsel's obligation to guide the court through the process. This will involve, prior to trial, submission of a trial brief and a proposed form of judgment and decree of foreclosure. I found that it is helpful, in a contested case, to submit the proposed form of judgment and decree at the time of opening statement. Do the judge's job.

D. Judgment and Decree of Foreclosure.

The judgment and decree of foreclosure should contain the full caption – no shortcuts. It may refer to separate written or oral findings of fact and conclusions of law on any issues that were in dispute at trial. It should include any monetary judgment, if there has been personal service. Do the interest calculation for the judge, so that there is one number for which judgment enters; then recite the rate of interest going forward, which will be either the statutory rate of interest or the contract rate.³³ Also include if possible the address of the creditor and the social security or tax identification number for the judgment debtor. (This assists the clerk in preparing an effective transcript of judgment at a later date, *i.e.*, do the clerk's job!).

Attorney fees are handled post-trial, and will be awarded in a subsequent order, so simply recite that fact.³⁴ The decree will have the order for a sheriff's sale, noting any special directions for the sale; a description of how the sheriff must apply proceeds from the sale; a list of all individuals with the right to cure under C.R.S. § 38-38-104; and a list of all individuals with the right to redeem under C.R.S. § 38-38-302.

Help the sheriff do his or her job. As noted, upon entry of judgment, the court should technically cancel the original debt by endorsing the amount of the monetary judgment on the original promissory note and marking the note cancelled. The original promissory note should be retained in the court file. From the time of cancellation of the note by the court, the judgment continues to be secured by the mortgage or deed of trust.

Under certain 2009 revisions to our foreclosure statutes, a certified copy of the judgment is an "evidence of debt" which can theoretically be foreclosed

³³ C.R.S. § 5-12-102. Note that although the statutory rate is compounded annually, which can be highly beneficial, the contract rate is not, unless compounding specifically provided for in the note or mortgage.

³⁴ C.R.C.P. 121, § 1-22.

through the public trustee, if the underlying indebtedness was secured by a deed of trust.

Upon issuance of the judgment and decree of foreclosure, it is good practice to obtain a certified copy of the judgment and decree of foreclosure from the court clerk and record that in any county in which the foreclosure is anticipated. This provides information for parties searching title subsequent to your notice of *lis pendens*. The decree of foreclosure should specifically provide for the sale of any personal property included in the foreclosure action and for any water rights. If these are inadvertently forgotten, one can have difficult issues if a deficiency bid is not made at sale.

If one desires to obtain a judgment lien on property, independent of the deed of trust or mortgage being foreclosed, a transcript of the judgment may be recorded under the procedures set out in C.R.S. § 13-52-102. If a deficiency is anticipated, that transcript should specifically be recorded in counties in which the debtor has or may acquire real property.

E. The Sheriff's Sale.

The sale process will commence with delivery of the decree of foreclosure to the sheriff. Some sheriffs will have a detailed checklist for you to follow from this point forward, following the statutory requirements set out in the general foreclosure statutes, C.R.S. §38-38-101, *et seq.* Two samples are attached.³⁵

1. Date of sale.

Our former statutes had a curious provision which seemingly required the sheriff to commence a sale in rather hasty fashion after entry of a judgment and decree for foreclosure. Under C.R.S. § 38-38-103 (2007), the sheriff was required to mail the combined notice of sale “not less than sixteen nor more than twenty-five days after the entry of a decree of foreclosure or the issuance of a writ of execution directing the Sheriff to sell property.” This led to difficulty in some cases; what if a notice was served after that period? For example, the court may stay execution, or delay entry of a decree to consider post-trial motions. Or, the parties may simply wish to work out their differences. This tight timeline, frequently ignored in practice, has now been fixed.

The statute now simply provides that the sheriff mail the combined notice no less than 16 nor more than 30 calendar days after counsel for the holder of the

³⁵ Attachment 5, Denver County; Attachment 6, Douglas County.

evidence of debt delivers to the sheriff the mailing list and the original or a copy of the decree of foreclosure or a writ of execution directing the sheriff to sell property.³⁶

2. ***Bond.***

The sheriff, upon service of either the decree of foreclosure or writ of execution, may require the judgment creditor to furnish a commercial indemnity bond equal to twice the amount of the unsatisfied judgment. Some sheriffs do not require the bond; currently, the sheriff of Denver County is in this category. Get to know the sheriff that does the civil work including foreclosures – they tend to be lonely and enjoy the attention and your professional assistance. Note that sheriffs now enjoy immunity from liability for claims arising out of judicial foreclosures filed after September 1, 2009.³⁷ A bond should not be necessary.

3. ***Sale procedure – combined notice, bid, issuance of deed, and redemption.***

For a sale by the sheriff of non-agricultural property, the initial scheduled sale date must be no less than 110 calendar days after the date of the recording of the *lis pendens*. If all the property is agricultural, as defined by statute, the initial sale date must be no less than 215 calendar days after the date of the recording of the *lis pendens*. What if one never recorded a notice of *lis pendens* at the outset of the case that led to a foreclosure decree? Ouch – this part of the 2007 legislation could bite a few unsuspecting souls. There is no statutory requirement that a notice of *lis pendens* be recorded in a judicial foreclosure action, although it is obviously the smart thing to do.³⁸

The sheriff's sale proceeds from this point much as a foreclosure conducted through the office of the public trustee. The sheriff mails the combined notice of sale, right to cure and right to redeem to all persons with an interest in the property subsequent to the date of the recording of the lien or judgment being foreclosed, following the statute.³⁹ C.R.S. §38-38-103(3), (4). These should be the same as

³⁶ C.R.S. § 38-38-103(3).

³⁷ C.R.S. § 38-38-702(3).

³⁸ Subsection 3 of section 103 formerly provided that these provisions do not apply to sales following execution and levy. This has been changed, for the better. C.R.S. § 38-38-108(3). In execution sales, the combined notice sections of the statute do apply, and the sale date will have to be set out far enough to allow the publication of notices to be completed 45 to 60 days prior to the first scheduled sale date. C.R.S. § 38-38-103(3),(5).

³⁹ Attachment 7, Combined Notice of Sheriff's Sale of Real Property and Right to Cure and

the persons who have been named in a judicial foreclosure complaint, along with their counsel of record. The notice is published. Counsel for the judgment creditor should provide the Sheriff with a mailing list including all parties to the civil action, in care of their counsel of record, and to the parties by their addresses and any recorded documents evidencing their interest. Parties in possession with rights junior to the foreclosing lien should be included as well if one intends to terminate those rights, by mailing to the address of the premises. If more than one party-in-interest has the same address, a separate envelope should be used for each.

In the context of a judicial foreclosure, where judgment has entered for the entire indebtedness, the advisement to the debtor in C.R.S. §38-38-104(2)(b) is confusing, as it may infer that a debtor may cure the delinquent debt by tendering an amount that does not include the total indebtedness. The judgment creditor should simply persist in arguing that the judgment reflects “all sums that are due and owing under the evidence of debt.”⁴⁰

When the time for sale appears, the form of bid letter and certificate of purchase tracks the forms used in a Public Trustee’s foreclosure. The standard forms are available through Bradford Publishing, and an excellent set of forms are found in Chapter 10 of Volume 2, COLORADO REAL ESTATE PRACTICE by Willis V. Carpenter and Blair (2011).

Redemption for junior lienors proceeds along the lines of a public trustee foreclosure. Note that there may not be much of a pre-sale opportunity for an owner to arrange to pay the full indebtedness if the *lis pendens* was recorded some substantial time before the entry of the decree in foreclosure. The sale could be set fairly quickly, if the combined notices go out shortly after the decree is given to the sheriff.

The preparation of the bid tracks the bid for sale used in a public trustee foreclosure, and the same considerations for bidding calculation of costs and strategies for deficiency apply. As with the public trustee sale, the written bid can

Redeem.

⁴⁰ See C.R.S. § 38-38-104(1)(b)(2008), which allows the debtor to cure by paying all sums due under the evidence of debt, “. . . except that any principal that would not have been due in the absence of acceleration shall not be included in such sums due.” A judgment is now an “evidence of debt.” May the default that preceded acceleration of a note and entry of judgment be cured at this stage? The drafters of this new legislation likely did not intend a “new” cure right in this situation. See *Smith v. Certified Realty Corp.*, 585 P.2d 293 (Colo. App. 1978), *aff’d*, 198 Colo. 222, 597 P.2d 1043 (1979) (no cure after judgment under prior statute).

be withdrawn or amended in writing or orally at the time of sale. If a written bid is submitted, it is not necessary to attend the sale, although it is wise to inspect the sheriff's file prior to sale to make sure all statutory requirements have been satisfied. The procedures for continuing a sheriff's sale are identical to those for continuing a sale through the public trustee.⁴¹

After the foreclosure sale, the sheriff will fill in the amount bid and sign a Report and Return of Sheriff directed to the district court.⁴² A certificate of purchase will be issued to the high bidder. If the judgment creditor is not the successful bidder, the sheriff will receive cash or certified funds from the successful bidder and deliver the amount to the judgment creditor.

Redemption rights track foreclosure sales conducted by the public trustee.⁴³ Only junior lienors or their assignees have the right to redeem after January 1, 2008, and a qualified lienor must have had its lien of record prior to the recording of the foreclosing party's notice of *lis pendens*. At the end of all redemption periods, or after January 1, 2008, if there are no redemption periods, title shall automatically vest in the holder of the certificate of purchase or in the holder of the last certificate of redemption. Vesting of title will therefore occur ten business days after the sale if there are no redemption periods. The sheriff is then to execute a confirmation deed no less than 15 days after the date of sale or the expiration of all redemption periods and upon receipt of all statutory fees and costs.⁴⁴ As before, the failure of the sheriff to issue the deed or to record the deed within the time specified will not affect the validity of the deed or the vesting of title.

The form of "confirmation deed" for a sheriff's sale is set out in statute and is available from Bradford Publishing and other sources.⁴⁵

VI. *The Other Form Of Sheriff's Sale – Sale By Levy And Execution Upon A Judgment.*

A judgment creditor can foreclose on a judgment debtor's property through execution and levy. This is accomplished under the statutory authority found in C.R.S. 13-56-201, *et seq.*

⁴¹ C.R.S. § 38-38-109.

⁴² Attachment 8, Report and Return of Sheriff.

⁴³ C.R.S. § 38-38-302.

⁴⁴ C.R.S. § 38-38-501.

⁴⁵ Attachment 9, Confirmation Deed (Sheriff's Sale).

The judgment creditor may cause the court in which judgment enters to issue a writ of execution to the sheriff of the county in which the judgment debtor owns property under C.R.C.P. 69. The sheriff then issues and records a certificate of levy, which is recorded in the real property records.⁴⁶ The certificate of levy gives notice of the action against the property, and is the functional equivalent of the recording of a notice of *lis pendens* in the judicial foreclosure context. Either act – delivery to the sheriff of the decree of foreclosure or the writ of execution – constitutes “execution” on a judgment. Execution on any judgment is automatically stayed for 15 days after the court signs the judgment.⁴⁷ The court in its discretion may extend the stay pending disposition of post-trial motions or the filing of notice of appeal and the posting of a corresponding supersedeas bond.⁴⁸

An execution lien on real property is created when a certificate of levy is issued by the sheriff and recorded in the real property records of the clerk and recorder in county in which the real property is located.⁴⁹ This lien will be redundant if a judgment lien has been acquired earlier through the recording of a transcript of judgment. Priority of the lien will be based on the earlier of the two recordings.⁵⁰ The execution lien may also become important in a case where a judgment lien has expired, without revival, subsequent to the recording of a certificate of levy.

If a judgment creditor is proceeding by execution and levy, the judgment creditor’s attorney drafts the certificate of levy and states the location and description of the real property.⁵¹ Before attempting to levy on real property, counsel should order the same title work that would otherwise be ordered at the time of filing a complaint for judicial foreclosure.

To avoid later confusion caused by the use of the *lis pendens* recording date as a date-triggering mechanism throughout the foreclosure statutes, it might be wise to also record a notice of *lis pendens* at this point, even though, to be technical, no “action” is pending. For example, to preserve a right to redeem, a junior lienor must have recorded its lien before the recording of the foreclosing party’s notice of *lis pendens*. C.R.S. §38-38-302(1)(c). If one is not of record,

⁴⁶ C.R.S. § 13-56-101.

⁴⁷ C.R.C.P. 62(a). Note that the recording of a transcript of judgment is not considered execution, and is exempt from this rule.

⁴⁸ C.R.C.P. 62(b).

⁴⁹ C.R.S. § 13-56-101, 102.

⁵⁰ *Routt County Mining Co. v. Stutheit*, 101 Colo. 254, 72 P.2d 692 (1937).

⁵¹ C.R.S. § 13-56-101.

problems and confusion may arise, all of which might add to the expense of the proceeding.

If one is proceeding by execution, and if the creditor does not have some waiver of a debtor's homestead exemption (if the debtor lives at the property), one must examine the title work to estimate the value of prior liens on the property, and compare that with the County Assessor's estimate of property of value. If the equity in the property is less than the amount of the homestead exemption, further proceedings would be fruitless. Even if the equity does exceed the amount of the homestead exemption, the pain of having to pay money out to the debtor in order to proceed with the sale may not make the process economical for the judgment creditor.⁵²

To levy on any homestead property, the judgment creditor faces formidable obstacles, outlined in C.R.S. § 38-41-206.⁵³ The judgment creditor must file with the clerk and recorder and with the sheriff an affidavit describing the homestead property; a statement of the fair market value of the property; a statement that the fair market value, less any prior lien and encumbrances, exceeds the amount of the homestead exemption; and a statement that no previous execution arising out of the same judgment has been levied against the property. An affidavit from a professionally qualified independent appraiser must accompany these filings. If the amount offered at the sale of the homestead property does not exceed 70% of the fair market value as stated by the independent appraiser, all proceedings must be terminated and the Sheriff files for record an instrument releasing all levies on the property. The judgment creditor is required to pay all costs. Title of the judgment debtor "shall not be impaired or affected" by the proceedings.⁵⁴

After the execution process is underway, notices must be given to all interested parties. The certificate of levy is served on the judgment debtor under the provisions in C.R.S. §13-55-102. Although the execution statute has one set of rules for advertising notice of the sale in section 13-56-201, one is advised to follow the combined notice provisions outlined in C.R.S. §38-38-103(3), which now (since January 1, 2008) specifically apply to sales of property upon writ of execution. In the event of conflict, the later statutory enactment should apply. After mailing and publication of the combined notices of the right to cure and redeem, the sale process tracks that of a judicial foreclosure, except that the

⁵² See C.R.S. §38-41-206.

⁵³ See more detailed discussion in F. Skillern, *Executions*, 1C Krendl, COLORADO METHODS OF PRACTICE § 40.9 (6th ed. 2011).

⁵⁴ C.R.S. § 38-41-206(2).

execution statute has a particular requirement as to the time of sale (between 9 a.m. and sunset).

VII. *Miscellaneous Issues.*

The 2008 statutory amendments raised a few additional questions which were resolved for the most part in the 2009 session of the legislature.

A certified copy of a monetary judgment entered by a court of competent jurisdiction is now deemed to be an “evidence of debt” which can be foreclosed through a public trustee.⁵⁵ This 2009 amendment corrected the obvious problem of producing an original court judgment.

As noted, certain deadlines in a judicial foreclosure run from the date of recording of a notice of *lis pendens*. For this reason, it is important to record a notice of *lis pendens* at the commencement of any judicial foreclosure action. In the typical execution and levy, however, one may not have recorded a notice of *lis pendens*. A statutory amendment clarifying which (if any) of the sections in C.R.S. 38-38-101 apply to execution sales, and allowing applicable dates in that context to run from the recording of the certificate of levy, would be sensible.⁵⁶

Finally, it would be helpful if the statute provided that a judgment debtor can only “cure” by paying the entire judgment debt. Even if it is obvious!

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⁵⁵ C.R.S. § 38-38-100.3(8)

⁵⁶ See C.R.S. § 38-38-302(1)(c).

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