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A Professional Corporation

## CLIENT ALERT

### NEW FORECLOSURE LAWS TAKE EFFECT ON JANUARY 1, 2008

*Colorado House Bill 06-1387 (the "Act") became law in June, 2006. Although some of its provisions took effect on July 1, 2006, the majority of the provisions were scheduled to take effect on July 1, 2007. However, on June 1, 2007, the General Assembly passed House Bill 07-1157 which amended certain provisions of the Act and changed the effective date to January 1, 2008. The Act is the first major revision to the Colorado foreclosure laws in 17 years and includes numerous important changes to foreclosures administered through the Public Trustees' offices.*

*Please do not hesitate to contact us with any questions you might have regarding these changes.*

#### **Provisions Effective on July 1, 2006**

The following provisions of the Act took effect on July 1, 2006:

- If the county name is omitted or incorrect on the deed of trust, the Public Trustee in the county where the property is located now has the authority to foreclose or release the deed of trust.
- Payments to the Public Trustee must be issued by a state-chartered bank, savings and loan association, or credit union authorized to do business in the State of Colorado or by a federally chartered bank, savings bank or credit union.
- The court order authorizing sale must contain certain language stating the date the Rule 120 hearing was scheduled if no response was filed, or, if a response was filed, the date the hearing was completed, which date must be no later than the day prior to the last day on which the notice of intent to cure could be filed. A copy of the court order authorizing sale in a Rule 120 hearing must be provided to the Public Trustee no later than 12:00 noon on the second business day prior to the sale date. A sale held in violation of these provisions is invalid.
- Public Trustees must establish policies governing the submission of documents in electronic form but can not require electronic filings.
- All certificates of purchase and certificates of redemption are still assignable, but a separate assignment must contain:
  - The name and address of the Assignee;
  - The name and address of the Assignor;
  - A description of the property;
  - The name of the foreclosing holder of the evidence of debt; and

- The number of the foreclosure sale held by the Public Trustee or the case number of the judicial foreclosure.
- Public Trustees are authorized to provide certain educational and other information or materials to persons with an interest in the property being foreclosed.
- All Colorado State tax liens (except for liens for withholding taxes) may be divested by foreclosure in the same manner as other liens upon the property being foreclosed, with the State having the same redemption rights as other lienors in such a foreclosure.
- The process in post-foreclosure unlawful detainer actions was changed so that if no answer to the complaint is filed, and certain other requirements are met, the court must enter judgment for possession, damages and costs.

### **Provisions Effective on January 1, 2008**

The following provisions of the Act take effect on January 1, 2008 and apply to foreclosures where the Notice of Election and Demand (“NED”) is recorded on or after January 1, 2008:

- A. *Elimination of Post-Sale Owner Redemption Period.* One of the most significant changes in the Act is the elimination of the post-sale owner redemption period. Under the new law, the time periods of the former cure and owner redemption periods are combined into a before-sale cure period. The result is that a Public Trustee sale for non-agricultural property is required to be initially scheduled for between 110 and 125 calendar days after the date the NED is recorded and a Public Trustee sale for agricultural property is required to be initially scheduled for between 215 and 230 calendar days after the date the NED is recorded. The post-sale owner redemption period has been eliminated in each case.
- B. *Combined Notice and Multiple Mailings.* Another important provision of the Act is the combination of the notice of public trustee’s sale and the notice of right to cure and right to redeem (the “Notice”). The former law required two separate notices. The new law provides for only one Notice but requires that the Notice be mailed twice. First, the Public Trustee must send the Notice no more than 20 calendar days after recording of the NED to the original grantor of the deed of trust at the address shown therein and also to the last address shown in the records of the holder of the evidence of debt (the “Debt Holder”), if different, and any person known or believed by the Debt Holder to be personally liable under the evidence of debt (including, but not limited to, guarantors and co-obligors on the note) as well as the occupant of the property being foreclosed. Second, the Public Trustee must mail an identical Notice between 45 and 60 calendar days prior to the first scheduled sale date to (1) those persons or entities to whom the initial notice was sent, (2) the owner of the property as of the date of the recording of the NED, (3) each person who appears to have an interest in the property by an instrument recorded in the applicable clerk and recorder’s office if such person’s interest may be extinguished by the foreclosure, and (4) any lessee with an unrecorded possessory interest in the property, if the interest will be terminated by the foreclosure.
- C. *Amended Mailing List.* The Debt Holder or its attorney may deliver an amended mailing list to the Public Trustee from time to time but no less than 65 calendar days prior to the actual date of sale. The Public Trustee must then send the Notice to the persons on the amended mailing list no less than 45 calendar days prior to the actual date of sale.
- D. *Notice of Election and Demand.* Under the Act, only one copy of the NED must be delivered to the Public Trustee. The former law required that two copies be sent. In addition to the requirements of the former law, the Act requires that the following now be included in the NED:
  - 1. The name of the original grantors of the deed of trust being foreclosed and the original beneficiaries or grantees thereof;

2. The name of the Debt Holder;
  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. A description of the property;
  7. A statement of the violation of the covenant described in 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 described in the evidence of debt or deed of trust other than the violation specified in the NED; and
  8. The name, address, and bar registration number of the attorney for the Debt Holder, which may be indicated in the signature block of the NED.
- E. Continuance of Sale. Another significant change in the Act is that the sale can be continued for up to 12 months upon the written request of the Debt Holder or its attorney prior to the commencement of the sale. Under the former law, the foreclosure could only be continued for up to six months. Additionally, if a sale is not held on the scheduled date and is not continued, it will be deemed to have been continued for a period of one week and automatically be continued from week-to-week thereafter.
- F. Effect of Bankruptcy. Under the Act, if a bankruptcy petition is filed after all required publications are complete, the sale will be continued on a week-to-week basis unless otherwise requested in writing prior to the sale date by the Debt Holder or its attorney. If a bankruptcy petition is filed before all required publications are complete, the Public Trustee must cancel any remaining publications and provide a notice that the sale has been enjoined or has been stayed. In this event, the sale shall not be continued and must be recommenced once relief from stay has been granted.
- G. Foreclosure on a Portion of the Property. The Debt Holder may elect to foreclose a deed of trust against only a portion of the property encumbered by the deed of trust if such portion is described as a separate and distinct parcel or lot in the original or amended deed of trust.
- H. Partial Releases. At any time prior to the sale date, a portion of the property subject to the foreclosure may be released from the deed of trust or lien being foreclosed without causing the foreclosure to start over. Upon recording of the release, the Debt Holder or its attorney must amend the NED to describe the property that continues to be secured by the deed of trust or other lien being foreclosed and amend the Notice. Upon receipt, the Public Trustee shall record the amended NED and republish and mail the amended Notice.
- I. Multiple Instruments. If the evidence of debt consists of multiple instruments, such as notes or bonds, the Debt Holder may elect to foreclose with respect to fewer than all of the instruments or documents by identifying in the NED and the Notice only those instruments to be satisfied in whole or in part in which case the foreclosure shall only apply as to those instruments or documents.
- J. Foreclosure Without Originals. A qualified holder (i.e., banks and financial institutions) that elects to foreclose without the original evidence of debt or without the original recorded deed of trust or a certified copy thereof, by operation of law, is deemed to have agreed to indemnify and defend any person liable for repayment of any portion of the original evidence of debt in the event that the original evidence of debt is presented for payment. This is similar to the former law but now includes when a copy (but not a certified copy) of the deed of trust is presented and situations in which the chain of endorsements or assignments to the current Debt Holder is incomplete.
- K. Assignment or Transfer of Debt During Foreclosure. The Debt Holder may assign or transfer the secured indebtedness at any time during the pendency of the foreclosure. Upon receipt of written

notice signed by the Debt Holder who commenced the foreclosure or its attorney, the Public Trustee must complete the foreclosure as directed by the assignee or transferee.

L. Correction of Errors. Upon request, the Public Trustee may correct any errors in the Notice or accept an amended mailing list and shall continue the then-scheduled sale date to a future date to permit a corrected Notice to be published or the original Notice to be republished. The future date of sale shall not be later than 30 calendar days after the fifth publication of the corrected Notice or republished Notice.

M. Bids.

1. By Debt Holder. The foreclosure sale bid must be submitted by the Debt Holder or its attorney no later than 12:00 noon on the second business day prior to the sale. If the bid is not submitted in a timely fashion, the sale will be continued for one week without need for notice from the Debt Holder or any additional publication notices. A written bid may be amended in writing or electronically no later than 12:00 noon on the day prior to the sale or orally at the time of sale if the person amending the bid is physically present at the sale. The following new line items are to be included in the bid:

- a. Allowable prepayment penalties or premium;
- b. Other amounts due under the evidence of debt;
- c. Insurance premiums (now specified as property, general liability and casualty);
- d. Costs for property inspections;
- e. Costs for electronic transmissions;
- f. Permitted amounts paid on prior liens;
- g. Taxes and assessments;
- h. Utility charges owed or incurred;
- i. Homeowners association assessments paid; and
- j. Permitted lease payments.

2. By Others. The payment of any bid amount at sale must be received by the Public Trustee no later than the date and time of sale, or at an alternative time after the sale and on the day of the sale, as specified in writing by the Public Trustee.

N. Cure.

1. Those Entitled to Cure. A significant change in the law with respect to the right to cure is who has the right to cure. Under the new law, the following persons or entities are entitled to cure, unless the order authorizing the sale contains a determination that the default was caused by something other than non-payment of sums due under the evidence of debt: (a) the owner of the property as of the recording of the NED; (b) if the owner is dead or incapacitated on or after the recording of the NED, the owner's heirs or any co-owner with a recorded interest as of the recording the NED; (c) certain transferees of the property after the recording of the NED, including, but not limited to, the owner's spouse as of the recording of the NED, an entity wholly owned or controlled by the owner, the owner by virtue of merger or operation of law, or the holder of a court order or judgment recorded after the recording of the NED vesting title in such person in connection with a divorce, property settlement, quiet title action or other similar proceeding; (d) a person liable on the evidence of debt secured by the deed or trust or lien being foreclosed; (e) a surety or guarantor of the evidence of debt; and (f) a holder of an interest junior to the lien being foreclosed as long as the instrument evidencing the interest was recorded prior to the recording of the NED. As evidenced by the discussion above, with very limited exceptions, both the owner and any junior lienors must have their interests recorded before the NED is recorded in order to have a right to cure.

2. General Provisions. The Act significantly changes the right to cure, but the premise behind it remains the same--cure is permitted when the only default under the deed of trust or lien being foreclosed is nonpayment of sums due under the evidence of debt. Those parties desiring to cure must still provide the Public Trustee with a notice of intent to cure at least 15 calendar days before the sale date, but, due to the elimination of the owner's right to redeem, the length of time in which parties have to cure a default has been extended considerably since sale dates under the new law will be much later than under the former. Also, under the new law, the Public Trustee must now notify the Debt Holder that a notice of intent to cure has been received at least 12 calendar days prior to the sale. In order to cure, no later than 12:00 noon on the day before the sale, the person desiring to cure the default must pay to the Public Trustee all sums that are due and owing under the evidence of debt or other lien being foreclosed and all fees and costs of the Debt Holder; except that any principal that would not have been due in the absence of acceleration shall not be included in such sums that are due.
3. Cure Statement.
  - a. Effective Date. The statement of the amount required to cure the default (the "Cure Statement") must now state the period for which it is effective. The Cure Statement must be effective for at least 10 calendar days but not more than 30 calendar days after the date of the Cure Statement or until the last day to cure, whichever occurs first.
  - b. Good Faith Estimates. The statute authorizes the use of good faith estimates in the Cure Statement with respect to interest and fees and costs, so long as the Cure Statement states that it is a good faith estimate effective through the last day to cure as indicated on the Cure Statement. However, the use of a good faith estimate does not change or extend the effective date of the Cure Statement.
  - c. Debt Holder Response. If the Debt Holder receives a request for a Cure Statement more than 30 calendar days before the sale date and does not file a Cure Statement within 10 business days after receipt, the Public Trustee must continue the sale week-to-week until the statement is filed or 12 months have passed since the original sale date. If the Debt Holder receives a request for a Cure Statement less than 30 calendar days before the sale date, the Cure Statement must be provided by the Debt Holder or its attorney to the Public Trustee by 12:00 noon on the seventh calendar day prior to the sale date. Regardless of when the request for the Cure Statement was received, if the Cure Statement is not received by 12:00 noon on the seventh day prior to the sale, the Public Trustee will continue the sale week-to-week until the Cure Statement is filed but not beyond the period of continuance allowed by law. If the Cure Statement still is not filed by 12:00 noon on the seventh day before the last sale date permitted by law, the foreclosure shall be deemed withdrawn and the Debt Holder or its attorney shall file a written withdrawal of the NED with the Public Trustee.
- O. Waiver of Certain Rights by Debtor. The prohibition against a waiver of the right to cure has been expanded to include an agreement to shorten the time period to exercise the right to cure made before the date of default and both are void as against public policy.
- P. Redemption. (Note: All dates after the foreclosure sale are in business days, not calendar days)
  1. Who is Entitled to Redeem. The new law makes major changes in the redemption area. In all cases, in order to have a right to redeem, the subject lien must have been recorded before the NED. Specifically, under the new law, a lienor is entitled to redeem the property from sale if:

(a) the lien is a deed of trust or other lien that is created by recognized state or federal statute or by judgment of a court of competent jurisdiction; (b) the lien is a junior lien; (c) the lien appears by instruments that were duly recorded prior to the recording of the NED and the lienor would be entitled to cure under the applicable statute; (d) the lienor has, within eight business days after the sale, filed a notice of intent to redeem; provided, however, that, as discussed below, under several enumerated exceptions a lienor may file a notice of intent to redeem more than eight business days after the sale; (e) the lienor has attached to the notice of intent to redeem the original or a certified copy, or in the case of a qualified holder, a copy of the instruments evidencing the lien and any assignment of the lien; and (f) the lienor has attached to the notice of intent to redeem a signed and properly acknowledged statement of the lienor setting forth the amount required to redeem the lienor's lien, including per diem interest, through the end of the lienor's redemption period. With respect to the timing of the filing of a notice of intent to redeem, a lienor may file a notice of intent to redeem more than eight business days after the sale if: (a) no lienor junior to the lienor seeking to file the late intent to redeem has redeemed; (b) the redemption period for the lienor seeking to file the late intent to redeem has not expired; (c) all redemption periods have not expired; and (d) the notice of intent to redeem is accompanied by a written authorization from the attorney for the holder of the certificate of purchase, or if no attorney is shown, then the holder of the certificate of purchase, authorizing the Public Trustee to accept such notice of intent to redeem.

2. Request for Redemption Amount; Statement of Redemption. Within one business day after receipt of a notice of intent to redeem filed by a person entitled to redeem, the Public Trustee must request from the holder of the certificate of purchase a signed and acknowledged statement of all sums required to be paid to redeem, including the amount of per diem interest accrued thereon and the interest rate on which the per diem accrual is based (a "Statement of Redemption"). Upon receipt of notice that an intent to redeem was filed, the holder of the certificate of purchase must submit a Statement of Redemption to the Public Trustee no later than 13 business days following the sale. The Statement of Redemption may be amended to reflect additional sums but it cannot be amended later than two business days prior to the commencement of that junior lienor's applicable redemption period. If the holder of the certificate of purchase does not submit the initial Statement of Redemption 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.
3. Redemption Period. On the ninth business day after the sale, the Public Trustee shall set the dates of the redemption period of each lienor. If a notice of intent to redeem is properly filed, the most senior junior lienor has between 15 and 19 business days after the sale to redeem by paying to the Public Trustee, no later than 12:00 noon on the last day of the lienor's redemption period, the sale price, plus interest from the date of sale, plus all sums allowed by law to be paid the holder of the certificate of purchase. The applicable interest rate shall be the default rate charged in the evidence of debt, deed of trust, or other lien being foreclosed. If different interest rates are specified in the evidence of debt, deed of trust, or other lien being foreclosed, the interest rate specified in the evidence of debt shall prevail. Each subsequent lienor entitled to redeem has a successive additional period of five business days to redeem. The right to redeem is in priority of such liens according to the public records in the county. In each case, the redeeming lienor must pay to the Public Trustee, on or before 12:00 noon of the last day of the lienor's redemption period the amount paid by the prior redeeming junior lienor, if any, plus interest on the amount paid by the prior redeeming lienor, plus the amount claimed in the statement delivered by the immediately prior redeeming lienor, plus interest on

the prior redeeming lienor's lien at the per diem amount specified in that lienor's statement accompanying the notice of intent to redeem.

4. Certificate of Redemption; Disbursement of Redemption Proceeds. No less than 15 business day after a sale, but no more than five business days following receipt of a redemption payment, the Public Trustee is required to execute and record a certificate of redemption. Upon the expiration of each redemption period, the Public Trustee shall disburse all redemption proceeds to the persons entitled to receive them.
  5. Certificate of Lienor. The redeeming lienor must pay to the Public Trustee the amount required to redeem which payment must be accompanied by a signed and acknowledged statement of the lienor, or a signed statement of the lienor's attorney. The acknowledged statement must show the amount owing on such lien, including per diem interest and fees and costs actually incurred that are permitted by statute 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. A revised or corrected certificate may be submitted at any time before the expiration of a redeeming lienor's redemption period.
  6. Redemption by Holder of Certificate of Purchase. If a redeeming junior lienor is the same person as the holder of the certificate of purchase or a redeeming lienor is the same person as a prior redeeming lienor, regardless of the number of consecutive liens held by the redeeming lienor, the redeeming lienor does not have to pay to the Public Trustee the redemption amounts that would otherwise be required, but only the unpaid fees and costs required by statute. For example, Bank A is the holder of the certificate of purchase redeemable for \$1,000,000.00, Bank B is a junior lienor in second position for \$500,000.00, and Bank A is also a junior lienor in third position for \$400,000.00. If Bank A elects to redeem its third-position junior lien, it will only be required to deliver the \$500,000.00 required by Bank B's second position junior lien since Bank A is also the holder of the certificate of purchase.
  7. Short Redemption. If the statement of the amount to redeem attached to a junior lienor's notice of intent to redeem so states, or upon other written authorization from the holder of the certificate of purchase or the then-current holder of the certificate of redemption, or their respective attorneys, the Public Trustee may accept as a final redemption any lesser amount than a full redemption. The amount bid at sale shall still determine the amount and extent of any deficiency remaining on the debt.
- Q. Excess Proceeds of Sale. Substantial changes have been made to this section. Under the Act, the first person entitled to excess proceeds (i.e. the funds paid when the successful bid is in excess of the foreclosing party's bid) is the foreclosing party to the extent of any deficiency taken at the foreclosure sale. The next persons entitled to excess sale proceeds are junior lienors as of the date of recording of the NED who duly filed a notice of intent to redeem and whose liens have not been redeemed in full up to the unpaid amount of each lienor's lien plus fees and costs. Last, any remaining excess proceeds are paid to the owner of the property as of the date of recording of the NED. Under the former law, the excess proceeds were last paid to the owner as of the date of sale. However, a lienor or Debt Holder who accepts a redemption amount less than the full amount of the lien or amount bid at a sale prior to the expiration of all applicable redemption periods is not entitled to receive a portion of any excess proceeds.
- R. 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 eighth business day after the sale, title to the subject property shall vest in the holder of the certificate of purchase or in the holder of the last certificate of redemption in the case of redemption. No less than 15 business days after the date of

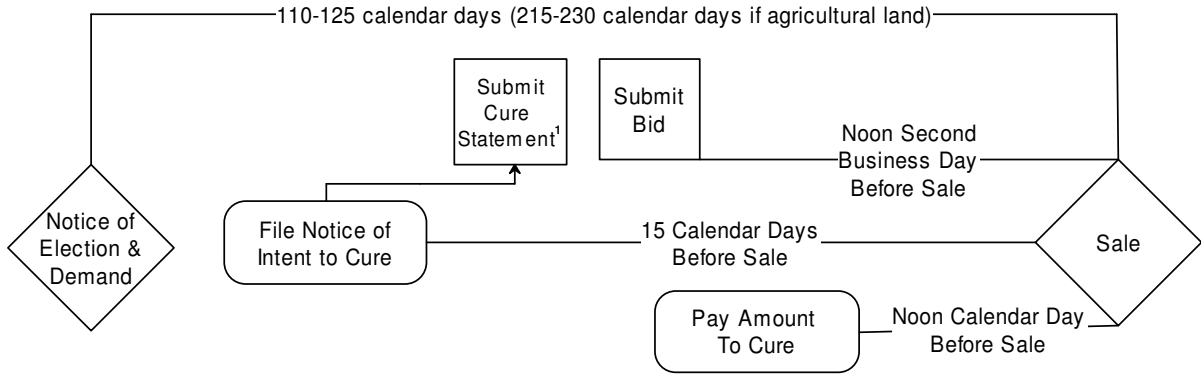
sale or, if later, the expiration of all redemption periods, and the receipt of all statutory fees and costs, the Public Trustee must execute and record a confirmation deed to the holder of the certificate of purchase or to the holder of the last certificate of redemption in the case of redemption.

- S. *Rescission of Public Trustee Sale.* *This is a new statutory section added by House Bill 1157.* If the successful bidder at the sale is the Debt Holder, then the Debt Holder, any assignee or its attorney may rescind the sale without obtaining a court order by filing with the Public Trustee no later than eight business days after the sale date a notice of rescission of sale. Along with the notice of rescission of sale, the Debt Holder must include the original certificate of purchase, any assignment of the certificate of purchase, the Public Trustee's fee for the rescission, and the costs of recording. Upon receipt, the Public Trustee must record the notice of rescission of sale in the county records and within 10 calendar days mail a copy of the notice of rescission of sale to each person entitled to receive the Notice. Following recordation of the notice of rescission of sale, the Debt Holder or its attorney may request that the sale be rescheduled. If this is the case, the Public Trustee must schedule a new sale date at least 30 calendar days but not more than 45 calendar days from the date the Public Trustee receives the notice to schedule a new sale date. Once rescinded, the certificate of purchase is deemed cancelled and the evidence of debt and deed of trust are deemed fully reinstated with the same lien priority as if the sale had never occurred.

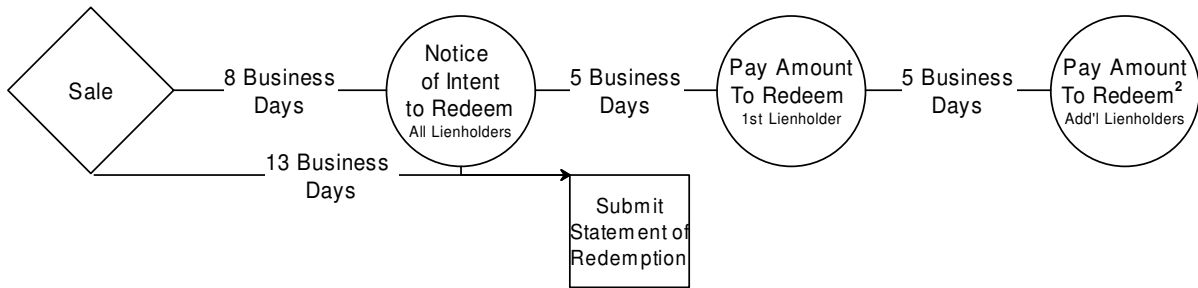
**This Client Alert is a summary of the new Colorado foreclosure laws and does not serve as a substitute for a review of the full text of the Act.**

Attached is a summary timeline of a typical Public Trustee foreclosure. As you can see, the total time involved has not significantly changed.

**Pre-Sale Foreclosure Timeline**



**Post-Sale Redemption by Junior Lienholders**



<sup>1</sup>If the Notice of Intent to Cure is filed more than 30 calendar days before the sale, the Cure Statement must be filed within 10 calendar days thereafter. If the Notice of Intent to Cure is filed less than 30 calendar days before the sale, the Cure Statement must be filed by 12:00 noon on the 7th calendar day before the sale

<sup>2</sup>Each successive junior lienholder has 5 business days to make payment of the redemption amount after the previous junior lienholder's payment due date.

