Chapter 18:
Trust Deeds and Liens

An * in the left margin indicates a change in the statute, rule or text since the last publication of the manual.

I. Trust Deeds and Mortgages

A. Introduction and Background of Mortgages

The purchase of real estate usually involves a considerable sum of money. Rarely is full payment made in cash. In the great majority of real estate transactions, a purchaser makes a down payment in cash and arranges for a loan to cover the balance. Financing of this balance generally involves two legal instruments: a negotiable promissory note and a mortgage. A negotiable promissory note or bond is a writing signed by the maker containing an unconditional promise to pay a certain sum in money on demand or at some future time, and which is payable to the order of the payee or to the bearer of the instrument. A promissory note creates a debt for which the maker is personally liable. A mortgage is a legal document pledging or conveying a piece of real property as security for the indebtedness created by a promissory note.

In early English law, the mortgage was simply a deed conveying the property, from the mortgagor (borrower) to the mortgagee (lender). It contained a clause that defeated the conveyance when the mortgagor paid the debt on time. If the borrower defaulted, the mortgagee became the owner of the property. Foreclosure proceedings were not necessary and did not even exist.

Thereafter, a practice arose that permitted the borrower, in cases of extreme hardship, to repay the debt after default and the mortgagee was required to accept the delayed payment and to convey the property back to the mortgagor. This right to pay and recover the property after default is known as the right (or equity) of redemption, and it soon became a matter of course in all cases of default. Mortgagees then attempted to insert a clause that required that the mortgagor surrender their equity of redemption. However common-law courts held this clause void, stating that because the needy borrowers were in no position to protect themselves, the courts would not let the lender take advantage of them. This left the lender in a somewhat difficult position of owning the land upon default but not being certain whether or not the mortgagor would redeem it.

A new practice rose to remedy this situation. Upon mortgagee default and filing a petition with the court, a judge would decree that the mortgagor had only a certain amount of time, typically six months or a year, to redeem the property. After the lapse of the allotted time, the mortgagor's equity of redemption was thereby barred and foreclosed and the mortgagee became the absolute owner of the property. This procedure is called strict foreclosure and still may exist in some states.

Under strict foreclosure, the lender becomes the owner of property that may be worth many times the amount due, especially if the borrower had repaid most of the debt. If the value of the property were less than the mortgage balance, the mortgagee lost the balance

due, because under common-law the lender had no personal right of recovery against the mortgagor. This injustice led to the next development—foreclosure through public sale.

Up to this point, the concept of a mortgage was based on ownership or "title theory," i.e., that the mortgagor transferred the legal title of the property to the mortgagee.

Foreclosure through public sale gave rise to a new concept of the mortgage as a conveyance not of the land, but only a lien upon the property. Thus, the lien would be enforced through a public sale rather than giving the lender title to the property. If the land sold for more than the debt, the mortgagee would be paid in full and the balance would be awarded to the borrower. It logically followed that if the property sold for less than the debt, then any other assets of the mortgagor would be available to the mortgagee through a deficiency judgment and by virtue of the borrower having signed a note or bond that was secured by the mortgage.

Under modern mortgage law in the United States, there are three theories as to the nature of mortgages: lien, title, and intermediate theories. Most states, including Colorado (38-35-117 C.R.S.), have adopted the lien theory in which a mortgage creates a lien and does not convey title. The mortgagor is entitled to possession until default and passage of the right of redemption. Foreclosure is through court action and a court-ordered public sale. The mortgagor is entitled to any excess funds over and above the amount of the debt and is liable personally for any deficiency. The security interest owned by the mortgagee is a personal property interest, and can be transferred only by assignment of the debt secured by the mortgage. When the debt is satisfied, the mortgage is automatically extinguished.

A few states have adopted a modified version of title theory in which the mortgagee is considered to have the legal title, subject only to the mortgagor's superior equitable ownership. Between default and foreclosure the mortgage is entitled to possession, but must account for all rents and profits and apply them toward reduction of the mortgage debt. Foreclosure is generally by legal action and a court ordered public sale. The mortgagor is entitled to any excess funds and is liable for any deficiency. Upon payment of the debt, the mortgagee's legal title is defeated. The mortgagee's interest is considered to be a real property right rather than personal property. The difference today between lien and title theory is more technical than real. Some states have taken an intermediate position between title and lien theories; wherein legal title actually transfers to the mortgagee, but the enforcement of the mortgage upon default is in the nature of a lien.

* II. The Foreclosure Process 2008

* The following article was written by Jonathan A. Goodman, Esq. of the law firm Frascona, Joiner, Goodman and Greenstein, P.C., to describe the biggest changes in Colorado's new foreclosure law.

Foreclosure Revolution

http://www.frascona.com/resource/jag508foreclosurerev.htm

Question: What are the biggest changes in Colorado's new foreclosure law?

Summary

In Colorado, the foreclosure process historically gave borrowers two opportunities to pull their property out of foreclosure. Prior to the foreclosure sale, the borrower (and others) could "cure" monetary defaults. After the foreclosure sale, the owner could "redeem" the property. Under the new law, applicable to foreclosures filed after January 1, 2008, the time period which would otherwise have been available to an owner to redeem has been moved prior to the foreclosure sale date. Under the new law, the borrower has a longer time to cure and no redemption rights. The total duration of the foreclosure process remains essentially unchanged.

Longer Cure Period

Under the old and new laws, the foreclosure process is essentially commenced by the filing of a "Notice of Election and Demand" with the Public Trustee. The Public Trustee then has ten working days in which to record the Notice of Election and Demand at the Clerk & Recorder's office.

Under the old law, the Public Trustee was required to set up a public trustee's sale date in the 45-60 day window after the recording of the Notice of Election and Demand. The borrower had until noon on the day before the foreclosure sale date to cure the borrower's monetary defaults. In order to cure, the borrower had to tender all back payments, late fees, default interest, and other costs and expenses to restore the lender to the position the lender would have been in had the default not occurred. Because Public Trustee sale dates tended to be set closer to the end of the 45-60 day window, borrowers essentially had two months under the old law to cure. If the borrower, or someone else entitled to cure, did not cure, the property would be sold at a foreclosure sale.

Under the new law, the time otherwise given to an owner to redeem is now moved before the foreclosure sale date, giving the borrower a longer period of time to cure. The amount of time to cure now depends upon whether the property is considered agricultural or non-agricultural. Owners of non-agricultural property now have approximately four months to cure and owners of agricultural property have approximately seven months. (Determining whether a property is agricultural or non-agricultural is not intuitive, and explaining the detailed criteria for the distinction is beyond the scope of this article.)

No Owner's Right to Redeem

After the foreclosure sale, under the old law, the owner had the "owner's redemption period" to redeem the certificate of purchase from the highest bidder at the foreclosure sale. If the property was non-agricultural, the owner's redemption period lasted 75 days after the

foreclosure sale. If the property was agricultural, then the owner had a six month redemption period.

If the owner did not redeem, then each junior lien holder had an opportunity to redeem. The junior lien holders would redeem in sequence, with the senior most lien junior to the lien being foreclosed having the first opportunity to redeem, and with each subsequent junior lien holder having the next opportunity to redeem out the prior redeeming lien holder. In order to redeem, junior lien holders (and the owner of the property) had to file notices of intent to redeem not later than fifteen days prior to the expiration of the owner's redemption period. The first redeeming lienor would have a ten-day window after the expiration of the owner's redemption period, and each subsequent lien holder would have the next five business day window to redeem.

Under the new foreclosure law, if the property is non-agricultural, the Public Trustee must set up the foreclosure sale in the 110-125 day window after the recording of the Notice of Election and Demand. If the property is agricultural, the foreclosure sale must be set up in the 215-230 day window after the recording of the Notice of Election and Demand. Under the new law the borrower still has until noon the day before the foreclosure sale to cure monetary defaults.

Under the new law, junior lien holders still have redemption rights. However, because there is no owner's redemption period, junior lien holders must now file their notices of intent to redeem within the 8 business day window after the foreclosure sale. The junior lien holders still have similar sequential redemption rights (the details of which are beyond the scope of this article).

Why Bother?

Different political constituencies had different reasons for changing the law. Generally, the new foreclosure process is simpler, should increase competitive bidding at foreclosure sales and makes homeowners less juicy as prey for unscrupulous foreclosure investors. Because borrowers are more likely to cure than to redeem, proponents of the change perceive that it is better to shift time to the more practical cure rights. Cures also tend to keep people in their homes more than redemptions. The few borrowers who actually redeemed tended to do so by selling the property. Some borrowers were under selling valuable redemption rights to clever (and sometimes worse than clever) foreclosure investors. The need to wait out an owner's redemption period discouraged third-party investors from bidding at the foreclosure sale. An increase in competitive bidding may cash out more foreclosing lenders, generate proceeds to apply against junior liens (reducing deficiency claims against owners), and generate funds to apply against the owner's equity (in the rare case where an owner with equity doesn't cure or sell the property prior to the foreclosure sale).

The two bills making the above changes total over one hundred pages. There are many nuances and changes to the law which are beyond the scope of this article. The purpose of this article has been merely to identify the most significant conceptual change for non-lawyers. Should any reader have a need to deal with a specific foreclosure or have an interest in the subtleties or multitude of other changes to Colorado foreclosures, he or she should consult an attorney.

* III. Mortgages and Deeds of Trust

Although there are other mortgage devices, the mortgage and the deed of trust are the most prevalent. Both are found in Colorado, but the deed of trust to a public trustee is by far the most common.

A mortgage is a conditional conveyance of the real estate directly from the mortgagor (borrower) to the mortgagee (lender) to secure the indebtedness described therein. There are only two parties to a mortgage.

A deed of trust involves three parties. A trustor or grantor (borrower) conveys legal title via a trust deed to a public official (public trustee) of the county in which the property is situated. The public trustee holds title in trust for the lender (beneficiary) to secure payment of the indebtedness described in the deed of trust.

Upon compliance with the deed of trust provisions, the public trustee must release the deed of trust and reconvey the property back to the grantor. Upon default of the deed of trust's provisions, and after the trustor's right of redemption has expired, the public trustee is empowered to conduct a public sale, and to convey title to a new purchaser. A deed of trust to a public trustee may be foreclosed by public sale through the office of the public trustee or through the courts, at the option of the holder of the indebtedness.

In rare instances, a private trustee may hold a trust deed. According to Colorado law, such a trust deed is considered a mortgage and may be foreclosed only through the courts.

Upon payment of the indebtedness secured by a mortgage, a mortgage should be released by the mortgagee executing a release or satisfaction of mortgage, delivering the same to the mortgagor, who should record it in the office of the county clerk and recorder of the county in which property is situated. When the indebtedness secured by a deed of trust is paid, the procedure to procure a release thereof is to have the beneficiary execute a request for release of deed of trust, present it to the public trustee, together with the cancelled promissory note and deed of trust. The public trustee will then, upon receipt of the appropriate fee, execute the release of deed of trust. The release should be recorded in the clerk and recorder's office in the county in which the property is situated.

Because the deed of trust is the most commonly used real property encumbering instrument in Colorado, it is important to become acquainted with the more pertinent statutes dealing with it.

* IV. Concerning Real Estate Foreclosures (Deeds of Trust)

House Bill 06-1387 was signed into law June 1, 2006 and is a comprehensive rewrite of the provisions pertaining to foreclosure processes. Brokers are cautioned to seek legal advice in matters pertaining to the public trustee and the foreclosure processes. Printed below for informational purposes are substantive portions of the law related to foreclosure process and is **not a complete listing of the law**; for a recitation of the entire law, access the Colorado General Assembly website at: http://www.leg.state.co.us/

Colorado Revised Statutes § 38-38-100.3. Definitions.

As used in articles 37 to 39 of this title, unless the context otherwise requires:

(1) "Agricultural property" means property, none of which, on the date of recording of the deed of trust or other lien or at the time of the recording of the notice of election and demand or lis pendens, 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 sections 39-1-102 (1.6) (a) and 39-1-103 (5), C.R.S., by the assessor of the county where the property is located.

(2) "Attorney for the holder" means an attorney licensed and in good standing in the state of Colorado to practice law and retained by the holder of an evidence of debt to process a foreclosure under this article.

(3) "Certified copy" means, with respect to a recorded document, a copy of the document certified by the clerk and recorder of the county where the document was recorded.

(4) "Combined notice" means the combined notice of sale, right to cure, and right to redeem described in section 38-38-103 (4) (a).

(5) "Confirmation deed" means the deed described in section 38-38-501 in the form specified in section 38-38-502 or 38-38-503.

(5.3) "Consensual lien" means a conveyance of an interest in real property, granted by the owner of the property after the recording of a notice of election and demand, that is not an absolute conveyance of fee title to the property. "Consensual lien" includes but is not limited to a deed of trust, mortgage or other assignment, encumbrance, option, lease, easement, contract, including an instrument specified in section 38-38-305, or conveyance as security for the performance of the grantor. "Consensual lien" does not include a lien described in section 38-38-306 or 38-33.3-316.

(5.7) "Corporate surety bond" means a bond issued by a person authorized to issue bonds in the state of Colorado with the public trustee as obligee, conditioned against the delivery of an original evidence of debt to the damage of the public trustee.

(6) "Cure statement" means the statement described in section 38-38-104 (2) (a).

(7) "Deed of trust" means a security instrument containing a grant to a public trustee together with a power of sale.

(8) "Evidence of debt" means a writing that evidences a promise to pay or a right to the payment of a monetary obligation, such as a promissory note, bond, negotiable instrument, a loan, credit, or similar agreement, or a monetary judgment entered by a court of competent jurisdiction.

(9) "Fees and costs" means all fees, charges, expenses, and costs described in section 38-38-107.

(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 any authority to enforce the evidence of debt or deed of trust. For the purposes of articles 37 to 40 of this title, the following persons 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);

(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.

(11) "Junior lien" means a deed of trust or other lien or encumbrance upon the property subordinate to the deed of trust or other lien being foreclosed.

(12) "Junior lienor" means a person who is a beneficiary, holder, or grantee of a junior lien.

(12.5) "Lienor" includes without limitation the holder of a certificate of purchase or certificate of redemption for property, issued upon the foreclosure of a deed of trust or other lien on the property.

(13) "Lis pendens" means a lis pendens in accordance with section 38-35-110 that is recorded with the clerk and recorder of the county where the property or any portion thereof is located and that refers to a judicial action in which one of the claims is for foreclosure and sale of the property by an officer or in which a claim or interest in the property is asserted.

(14) "Mailing list" means the initial mailing list in accordance with section 38-38-101 (1) (e), the supplemental mailing list in accordance with section 38-38-101 (1) (f), or the amended mailing list in accordance with section 38-38-103 (2), provided to the officer by the holder of the evidence of debt or the attorney for the holder.

(15) "Maintaining and repairing" means the act of caring for and preserving a property in its current condition or restoring a property to a sound or working condition after damage; except that "maintaining and repairing" shall not include, unless done pursuant to an order entered by a court of competent jurisdiction, any act of advancing a property to a better condition or any act that increases the quality of or adds to the improvements located on a property.

(16) "Notice of election and demand" means a notice of election and demand for sale related to a public trustee foreclosure under this article.

(17) "Officer" means the public trustee or sheriff conducting a foreclosure under this article.

(18) "Property" means the portion of the property encumbered by a deed of trust or other lien that is being foreclosed under this article or the portion of the property being released from a deed of trust or other lien under article 39 of this title.

(19) "Publish", "publication", "republish", or "republication" means the placement by or on behalf of an officer of an advertisement containing a combined notice that complies with the requirements of section 24-70-109, C.R.S., in a newspaper of general circulation in the county or counties where the property to be sold is located. Unless otherwise specified by the attorney for the holder, the officer shall select the newspaper.

(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;

(e) An entity in which all of the outstanding voting securities are held, directly or indirectly, by a public entity that also owns, directly or indirectly, all of the voting securities of 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.;

(f) A federal housing administration approved mortgagee;

(g) A federally chartered credit union doing business in Colorado or a state-chartered credit union as described in section 11-30-101, C.R.S.;

(h) An agency or department of the federal government;

(i) An entity created or sponsored by the federal or state government that originates, insures, guarantees, or purchases loans or a person acting on behalf of such an entity to enforce an evidence of debt or the deed of trust securing an evidence of debt; or

(j) Any entity listed in paragraphs (a) to (i) of this subsection (20) acting in the capacity of agent, nominee except as otherwise specified in subsection (10) of this section, or trustee for another person.

(21) "Records" means the records of the county clerk and recorder of the county where the property is located.

(22) "Sale" means a foreclosure sale conducted by an officer under this article.

(23) "Secured indebtedness" means the amount owed pursuant to the evidence of debt without regard to the value of the collateral.

(24) "Statement of redemption" means the signed and acknowledged statement of the holder of the evidence of debt or the signed statement of the attorney for the holder as required by section 38-38-302 (3) or the signed and acknowledged statement of the lienor or the signed statement of the attorney for the lienor as required by section 38-38-302 (1) (f).

38-38-101. Holder of evidence of debt may elect to foreclose.

(1) **Documents required.** Whenever a holder of an evidence of debt declares a violation of a covenant of a deed of trust and elects to publish all or a portion of the property therein described for sale, the holder or the attorney for the holder shall file the following with the public trustee of the county where the property is located:

(a) A notice of election and demand signed and acknowledged by the holder of the evidence of debt or signed by the attorney for the holder;

(b) The original evidence of debt, together with the original indorsement or assignment thereof, if any, to the holder of the evidence of debt or other proper indorsement or assignment in accordance with subsection (6) of this section or, in lieu of the original evidence of debt, one of the following:

(I) A corporate surety bond issued by a company authorized to issue such bonds in the state of Colorado in the amount of one and one-half times the face amount of the original evidence of debt; or

(I) A corporate surety bond in the amount of one and one-half times the face amount of such original evidence of debt; or

(II) A copy of the evidence of debt and a certification signed and properly acknowledged by a holder of an evidence of debt acting for itself, or as agent, nominee, or trustee under subsection (2) of this section or a statement signed by the attorney for such holder, citing the paragraph of section 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 paragraph (a) of subsection (2) of this section;

(c) The original recorded deed of trust securing the evidence of debt, or in lieu thereof, one of the following:

(I) A certified copy of the recorded deed of trust; or

(II) A copy of the recorded deed of trust and a certification signed and properly acknowledged by a holder of an evidence of debt acting for itself or as an agent, nominee, or trustee under subsection (2) of this section or a signed statement by the attorney for such holder, citing the paragraph of section 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 paragraph (a) of subsection (2) of this section;

(d) A combined notice pursuant to section 38-38-103 ;

(e) An initial mailing list containing the names and addresses of the persons listed in section 38-38-103 (1) (a) (I); and

(f) No less than sixty calendar days prior to the first scheduled sale date, a supplemental mailing list containing the names and addresses of the persons listed in section 38-38-103 (1) (a) (II).

(2) Foreclosure by qualified holder without original evidence of debt, original or certified copy of deed of trust, or proper indorsement.

(a) A qualified holder, whether acting for itself or as agent, nominee, or trustee under section 38-38-100.3 (20) (j), that elects to foreclose without the original evidence of debt pursuant to subparagraph (II) of paragraph (b) of subsection (1) of this section, or without the original recorded deed of trust or a certified copy thereof pursuant to subparagraph (II) of paragraph (c) of subsection (1) of this section, or without the proper indorsement or assignment of an evidence of debt under paragraph (b) of subsection (1) of this section shall, by operation of law, be 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 to the extent of any amount, other than the amount of a deficiency remaining under the evidence of debt after deducting the amount bid at sale, and any person who sustains a loss due to any title defect that results from reliance upon a sale at which the original evidence of debt was not presented. The indemnity granted by this subsection (2) shall be limited to actual economic loss suffered together with any court costs and reasonable attorney fees and costs incurred in defending a claim brought as a direct and proximate cause of the failure to produce the original evidence of debt, but such indemnity shall not include, and no claimant shall be entitled to, any special, incidental, consequential, reliance, expectation, or punitive damages of any kind. A qualified holder acting as agent, nominee, or trustee shall be liable for the indemnity pursuant to this subsection (2).

(b) In the event that a qualified holder or the attorney for the holder commences a foreclosure without production of the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof, the qualified holder or the attorney for the holder may submit the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof to the officer prior to the sale. In such event, the sale shall be conducted and administered as if the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof had been submitted at the time of commencement of such proceeding, and any indemnities deemed to have been given by the qualified

holder under paragraph (a) of this subsection (2) shall be null and void as to the instrument produced under this paragraph (b).

(c) In the event that a foreclosure is conducted where the original evidence of debt, proper indorsement or assignment, or original recorded deed of trust or certified copy thereof has not been produced, the only claims shall be against the indemnitor as provided in paragraph (a) of this subsection (2) and not against the foreclosed property or the attorney for the holder of the evidence of debt. Nothing in this section shall preclude a person liable for repayment of the evidence of debt from pursuing remedies allowed by law.

(3) **Foreclosure on a portion of property.** A holder of an evidence of debt may elect to foreclose a deed of trust under this article against a portion of the property encumbered by the deed of trust only if such portion is encumbered as a separate and distinct parcel or lot by the original or an amended deed of trust. Any foreclosure conducted by a public trustee against less than all of the property then encumbered by the deed of trust shall not affect the lien or the power of sale contained therein as to the remaining property. The amount bid at a sale of less than all of the property shall be deemed to have satisfied the secured indebtedness to the extent of the amount of the bid.

(4) **Notice of election and demand.** A notice of election and demand filed with the public trustee pursuant to this section shall contain the following:

(a) The names of the original grantors of the deed of trust being foreclosed and the original beneficiaries or grantees thereof;

(b) The name of the holder of the evidence of debt;

(c) The date of the deed of trust being foreclosed;

(d) The recording date, county, book, and page or reception number of the recording of the deed of trust being foreclosed;

(e) The amount of the original principal balance of the secured indebtedness;

(f) The amount of the outstanding principal balance of the secured indebtedness as of the date of the notice of election and demand;

(g) A description of the property;

(h) 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;

(i) 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

(j) 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.

(5) **Error in notice.** In the event that the amount of the outstanding principal balance due and owing upon the secured indebtedness is erroneously set forth in the notice of election and demand or the combined notice, the error shall not affect the validity of the notice of election and demand, the combined notice, the publication, the sale, the certificate of purchase described in section 38-38-401, the certificate of redemption described in section 38-38-402, the confirmation deed as defined in section 38-38-100.3 (5), or any other document executed in connection therewith.

(6) **Indorsement or assignment.** The original evidence of debt or a copy thereof without proper indorsement or assignment shall be deemed to be properly indorsed or assigned if a qualified holder presents the original evidence of debt or a copy thereof to the officer together with a

statement in the certification of the qualified holder or in the statement of the attorney for the qualified holder pursuant to subparagraph (II) of paragraph (b) of subsection (1) of this section that the party on whose behalf the foreclosure was commenced is the holder of the evidence of debt. Proper indorsement or assignment of an evidence of debt shall also include, in addition to the original indorsement or assignment, a certified copy of an indorsement or assignment recorded in the county where the property being foreclosed is located.

(7) **Multiple instruments.** If the evidence of debt consists of multiple instruments, such as notes or bonds, the holder of the evidence of debt may elect to foreclose with respect to fewer than all of such instruments or documents 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.

(8) Assignment or transfer of debt during foreclosure.

(a) The holder of the evidence of debt may assign or transfer the secured indebtedness at any time during the pendency of a foreclosure action without affecting the validity of the secured indebtedness. Upon receipt of written notice signed by the holder who commenced the foreclosure action or the attorney for the holder stating that the evidence of debt has been assigned and transferred and identifying the assignee or transferee, the public trustee shall complete the foreclosure as directed by the assignee or transferee or the attorney for the assignee or transferee. No holder of an evidence of debt, certificate of purchase, or certificate of redemption shall be liable to any third party for the acts or omissions of any assignee or transferee that occur after the date of the assignment or transfer.

(b) The assignment or transfer of the secured indebtedness during the pendency of a foreclosure shall be deemed made without recourse unless otherwise agreed in a written statement signed by the assignor or transferor. The holder of the evidence of debt, certificate of purchase, or certificate of redemption making the assignment or transfer and the attorney for the holder shall have no duty, obligation, or liability to the assignee or transferee or to any third party for any act or omission with respect to the foreclosure or the loan servicing of the secured indebtedness after the assignment or transfer. If an assignment or transfer is made by a qualified holder that commenced the foreclosure pursuant to subsection (2) of this section, the qualified holder's indemnity under said subsection (2) shall remain in effect with respect to all parties except to the assignee or transferee, unless otherwise agreed in a writing signed by the assignee or transferee if the assignee or transferee is a qualified holder.

(9) **Partial release from deed of trust.** At any time prior to the sale, a portion of the property may be released from the deed of trust being foreclosed pursuant to section 38-39-102 or as otherwise provided by order of a court of competent jurisdiction recorded in the county where the property being released is located. Upon recording of the release, the holder of the evidence of debt or the attorney for the holder shall pay the fee described in section 38-37-104 (1) (b) (IX), amend the combined notice, and, in the case of a public trustee foreclosure, amend the notice of election and demand to describe the property that continues to be secured by the deed of trust or other lien being foreclosed as of the effective date of the release. The public trustee shall record the amended notice of election and demand upon receipt. Upon receipt of the amended combined notice, the public trustee shall republish and mail the amended combined notice in the manner set forth in section 38-38-109 (1) (b).

(10) **Deposit.** The public trustee may require a deposit of up to five hundred dollars at the time the notice of election and demand is filed, to be applied against the fees and costs of the public trustee. The public trustee may allow the attorney for the holder of the evidence of debt to establish one or more accounts with the public trustee, which the public trustee may use to pay the fees and costs of the public trustee in any foreclosure filed by the holder or the attorney for

the holder, or through which the public trustee may transmit refunds or cures, excess proceeds, or redemption proceeds.

38-38-102. Recording notice of election and demand - record of sale.

(1) No later than ten business days following the receipt of the notice of election and demand, the public trustee shall cause the notice to be recorded in the office of the county clerk and recorder of the county where the property described in the notice is located.

(2) The public trustee shall retain in the public trustee's records a printed or electronic copy of the notice of election and demand and the combined notice, as published pursuant to section 38-38-103. Such records shall be available for inspection by the public at the public trustee's offices during the public trustee's normal business hours.

38-38-103. Combined notice - publication - providing information.

(1) (a) The public trustee shall mail a combined notice as described in subsection (4) of this section to the following persons as set forth in the initial mailing list as follows:

(I) No more than twenty calendar days after the recording of the notice of election and demand, to:

(A) The original grantor of the deed of trust or obligor under any other lien being foreclosed at the address shown in the recorded deed of trust or other lien being foreclosed and, if different, the last address, if any, shown in the records of the holder of the evidence of debt;

(B) Any person known or believed by the holder of the evidence of debt to be personally liable under the evidence of debt secured by the deed of trust or other lien being foreclosed at the last address, if any, shown in the records of the holder; and

(C) The occupant of the property, addressed to "occupant" at the address of the property;

(II) No more than sixty calendar days nor less than forty-five calendar days prior to the first scheduled date of sale, to the following persons as set forth in the supplemental or amended mailing list:

(A) The original grantor of the deed of trust or obligor under any other lien being foreclosed at the address shown in the recorded deed of trust or other lien being foreclosed and, if different, the last address, if any, shown in the records of the holder of the evidence of debt;

(B) The owner of the property as of the date and time of the recording of the notice of election and demand or lis pendens as shown in the records at the address indicated in such recorded instrument;

(C) Any person known or believed by the holder of the evidence of debt to be personally liable under the evidence of debt secured by the deed of trust or other lien being foreclosed, at the last address, if any, shown in the records of the holder;

(D) The occupant of the property, addressed to "occupant" at the address of the property; and

(E) Each person who appears to have an interest in the property described in the combined notice by an instrument recorded prior to the date and time of the recording of the notice of election and demand or lis pendens with the clerk and recorder of the county where the property or any portion thereof is located at the address of the person indicated on such instrument, if the person's interest in the property may be extinguished by the foreclosure.

(b) With respect to a public trustee sale, if a deed of trust being foreclosed has priority over a lessee who has an unrecorded possessory interest in the property and the holder of the evidence of debt desires to terminate the possessory interest with the foreclosure, the holder shall include on the mailing list the lessee together with the address of the premises of the lessee and, if different, the address of the property.

(c) If a recorded instrument does not specify the address of the party purporting to have an interest in the property under such recorded instrument, the party shall not be entitled to notice and any interest in the property under such instrument shall be extinguished upon the execution and delivery of a deed pursuant to section 38-38-501.

(2) (a) The holder of the evidence of debt or the attorney for the holder may deliver an amended mailing list to the officer from time to time, but no less than sixty-five calendar days prior to the actual date of sale. The officer shall send the notice pursuant to subsection (4) of this section to the persons on the amended mailing list no less than forty-five calendar days prior to the actual date of sale.

(b) Repealed (effective 1/8/08).

(3) The sheriff shall mail a combined notice as described in subsection (4) of this section to the persons named at the addresses indicated in a mailing list containing the names and addresses of the persons listed in subparagraph (II) of paragraph (a) of subsection (1) of this section no less than sixteen nor more than thirty calendar days after the holder of the evidence of debt or the attorney for the holder delivers to the sheriff the mailing list and the original or a copy of a decree of foreclosure or a writ of execution directing the sheriff to sell property.

(4) (a) The combined notices required to be mailed pursuant to subsections (1), (2), and (3) of this section shall contain the following:

(I) The information required by section 38-38-101 (4);

(II) The statement: A notice of intent to cure filed 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;

(III) The statement: A notice of intent to redeem filed pursuant to section 38-38-302 shall be filed with the officer no later than eight business days after the sale;

(IV) The name, address, and telephone number of each attorney, if any, representing the holder of the evidence of debt;

(V) The date of sale determined pursuant to section 38-38-108;

(VI) The place of sale determined pursuant to section 38-38-110; and

(VII) The statement as required by section 24-70-109, C.R.S.: The lien being foreclosed may not be a first lien.

(b) A legible copy of this section and sections 38-37-108, 38-38-104, 38-38-301, 38-38-304, 38-38-305, and 38-38-306 shall be sent with all notices pursuant to this section.

(5) (a) No more than sixty calendar days nor less than forty-five calendar days prior to the first scheduled date of sale, unless a longer period of publication is specified in the deed of trust or other lien being foreclosed, a deed of trust or other lien being foreclosed shall be deemed to require the officer to publish the combined notice, omitting the copies of the statutes under paragraph (b) of subsection (4) of this section and adding the first and last publication dates if not already specified in the combined notice, for four weeks, which means publication once each week for five consecutive weeks.

(b) The officer shall review all such publications of the combined notice for accuracy.

(c) The fees and costs to be allowed for publication of the combined notice shall be as provided by law for the publication of legal notices or advertising.

38-38-104. Right to cure when default is nonpayment - right to cure for certain technical defaults.

(1) Unless the order authorizing the sale described in section 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, any of the following persons is entitled to cure the default if the person files with the officer, no later than fifteen 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 to the satisfaction of the officer:

(a) (I) The owner of the property as of the date and time of the recording of the notice of election and demand or lis pendens as evidenced in the records;

(II) If the owner of the property is dead or incapacitated on or after the date and time of the recording of the notice of election and demand or lis pendens, the owner's heirs, personal representative, legal guardian, or conservator as of the time of filing of the notice of intent to cure, whether or not such person's interest is shown in the records, or any co-owner of the property if the co-owner's ownership interest is evidenced in the records as of the date and time of the recording of the notice of election and demand or lis pendens;

(III) A transferee of the property as evidenced in the records as of the time of filing of the notice of intent to cure if the transferee was the property owner's spouse as of the date and time of the recording of the notice of election and demand or lis pendens or if the transferee is wholly owned or controlled by the property owner, is wholly owned or controlled by the controlling owner of the property owner, or is the controlling owner of the property owner;

(IV) A transferee or owner of the property by virtue of merger or other similar event or by operation of law occurring after the date and time of the recording of the notice of election and demand or lis pendens; or

(V) The holder of an order or judgment entered by a court of competent jurisdiction as evidenced in the records after the date and time of the recording of the notice of election and demand or lis pendens ordering title to the property to be vested in a person other than the owner in connection with a divorce, property settlement, quiet title action, or similar proceeding;

(b) A person liable under the evidence of debt;

(c) A surety or guarantor of the evidence of debt; or

(d) A holder of an interest junior to the lien 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 in the records prior to the date and time of the recording of the notice of election and demand or lis pendens.

(2) (a) Promptly upon receipt of a notice of intent to cure by the officer, but no less than twelve calendar days prior to the date of sale, the officer shall 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. The statement shall be filed with the officer by the attorney for the holder or, if none, by the holder of the evidence of debt, and shall set forth the amounts necessary to cure as identified in paragraph (b) of this subsection (2), with the same detail as required for a bid pursuant to section 38-38-106.

(b) No later than 12 noon on the day before the sale, the person desiring to cure the default shall pay to the officer all sums that are due and owing under the evidence of debt and deed of trust or other lien being foreclosed and all fees and costs of the holder of the evidence of debt, including but not limited to all fees and costs of the attorney for the holder allowable under the evidence of debt, deed of trust, or other lien being foreclosed

through the effective date set forth in the cure statement; except that any principal that would not have been due in the absence of acceleration shall not be included in such sums due.

(c) If a cure is made, interest for the period of any continuance pursuant to section 38-38-109 (1) (c) shall be allowed only at the regular rate and not at the default rate as may be specified in the evidence of debt, deed of trust, or other lien being foreclosed. If a cure is not made, interest at the default rate, if specified in the evidence of debt, deed of trust, or other lien being foreclosed, for the period of the continuance shall be allowed.

(d) Upon receipt of the cure amount and a withdrawal or dismissal of the foreclosure from the holder of the evidence of debt or the attorney for the holder, the officer shall deliver the cure amount, less the fees and costs of the officer, to the attorney for the holder or, if none, to the holder, the foreclosure shall be withdrawn or dismissed as provided by law, and the evidence of debt shall be returned uncancelled to the attorney for the holder of the evidence of debt or, if none, to the holder by the public trustee or to the court by the sheriff.

(3) Where the default in the terms of the evidence of debt, deed of trust, or other lien on which the holder of the evidence of debt claims the right to foreclose is the failure of a party to furnish balance sheets or tax returns, any person entitled to cure pursuant to paragraph (a) of subsection (2) of this section may cure such default in the manner prescribed in this section by providing to the holder or the attorney for the holder the required balance sheets, tax returns, or other adequate evidence of the party's financial condition 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, where applicable, have been paid.

(4) Any person liable on the debt and the grantor of the deed of trust or other lien being foreclosed shall be deemed to have given the necessary consent to allow the holder of the evidence of debt or the attorney for the holder to provide the information specified in paragraph (a) of subsection (2) of this section to the officer and all other persons who may assert a right to cure pursuant to this section.

(5) A cure statement pursuant to paragraph (a) of subsection (2) of this section shall state the period for which it is effective. The cure statement shall be effective for at least ten calendar days after the date of the cure statement or until the last day to cure under paragraph (b) of subsection (2) of this section, whichever occurs first. The cure statement shall be effective for no more than thirty calendar days after the date of the cure statement or until the last day to cure under paragraph (b) of subsection (2) of this section, whichever occurs first. The use of good faith estimates in the cure statement with respect to interest and fees and costs is specifically authorized by this article, so long as the cure statement states that it is a good faith estimate effective through the last day to cure as indicated in the cure statement. The use of a good faith estimate shall not change or extend the period or effective date of a cure statement.

38-38-105. Court order authorizing sale mandatory – repeal.

(1) (a) Whenever a public trustee forecloses upon a deed of trust under this article, the holder of the evidence of debt or the attorney for the holder shall obtain an order authorizing sale from a court of competent jurisdiction to issue the same pursuant to rule 120 of the Colorado rules of civil procedure. The order shall 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. The holder or the attorney for the holder shall cause a copy of the order to be provided to the public trustee no later than 12 noon on the first business day prior to the date of sale. A sale held without an order authorizing sale shall be invalid.

(b) This subsection (1) is repealed, effective January 1, 2008.

(2) On and after January 1, 2008, whenever a public trustee forecloses upon a deed of trust under this article, the holder of the evidence of debt or the attorney for the holder shall obtain an order authorizing sale from a court of competent jurisdiction to issue the same pursuant to rule 120 of the Colorado rules of civil procedure. The order shall 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. The holder or the attorney for the holder shall cause a copy of the order to be provided to the public trustee no later than 12 noon on the second business day prior to the date of sale. A sale held without an order authorizing sale shall be invalid.

38-38-106. Bid required – form of bid.

(1) The holder of the evidence of debt or the attorney for the holder shall submit a bid to the officer no later than 12 noon on the second business day prior to the date of sale as provided in this section. The holder or the attorney for the holder need not personally attend the sale. If the bid is not timely submitted, the officer shall continue the sale for one week and shall announce or post a notice of the continuance at the time and place designated for the sale.

(2) The holder of the evidence of debt shall submit a signed and acknowledged bid, or the attorney for the holder shall submit a signed bid, which shall specify the following amounts, itemized in substantially the following categories and in substantially the following form:

BID

TO: _____
PUBLIC TRUSTEE (OR SHERIFF) OF THE COUNTY (OR CITY AND COUNTY) OF _____,
STATE OF COLORADO (HEREINAFTER THE "OFFICER").
DATE: _____
_____, WHOSE MAILING ADDRESS IS _____ , BIDS THE SUM OF $ _____ IN YOUR SALE NO. ____ TO BE HELD ON THE _____ DAY OF _____ , 20_____.
THE FOLLOWING IS AN ITEMIZATION OF ALL AMOUNTS DUE THE HOLDER OF THE EVIDENCE OF DEBT SECURED BY THE DEED OF TRUST OR OTHER LIEN BEING FORECLOSED.
(INAPPLICABLE ITEMS MAY BE OMITTED):

PRINCIPAL	$ _____
INTEREST	_____
LATE CHARGES	_____
ALLOWABLE PREPAYMENT PENALTIES OR PREMIUMS	_____
OTHER AMOUNTS DUE UNDER THE EVIDENCE OF DEBT (SPECIFY)	_____
LESS IMPOUND/ESCROW ACCOUNT CREDIT	_____
PLUS IMPOUND/ESCROW ACCOUNT DEFICIENCY	_____
OTHER (DESCRIBE)	_____
CATEGORY SUBTOTAL:	$ _____
PLUS FEES AND COSTS FOR THE FOLLOWING:	
TITLE COMMITMENTS AND INSURANCES OR ABSTRACTOR CHARGES	_____
PROPERTY, GENERAL LIABILITY, AND CASUALTY INSURANCE	_____
COURT DOCKETING	_____
APPRAISALS	_____

PROPERTY INSPECTIONS _____
STATUTORY NOTICE _____
POSTAGE _____
ELECTRONIC TRANSMISSIONS _____
PHOTOCOPIES _____
ATTORNEY FEES _____
TELEPHONE _____
CATEGORY SUBTOTAL: $ _____
PLUS FEES AND COSTS FOR THE FOLLOWING:
OFFICER _____
PUBLICATION _____
OTHER (DESCRIBE) _____
CATEGORY SUBTOTAL: $ _____
PLUS THE FOLLOWING:
PERMITTED AMOUNTS PAID ON PRIOR LIENS _____
TAXES AND ASSESSMENTS _____
UTILITY CHARGES OWED OR INCURRED _____
HOMEOWNERS' ASSOCIATION ASSESSMENTS PAID _____
PERMITTED LEASE PAYMENTS _____
CATEGORY SUBTOTAL: $ _____
TOTAL DUE HOLDER OF THE EVIDENCE OF DEBT _____
BID $ _____
DEFICIENCY $ _____

I ENCLOSE HEREWITH THE FOLLOWING:

1. ORDER AUTHORIZING SALE.
2. CHECK (IF APPLICABLE) TO YOUR ORDER IN THE SUM OF $_____ COVERING THE BALANCE OF YOUR FEES AND COSTS.
3. OTHER: _____.

PLEASE SEND US THE FOLLOWING:

1. CERTIFICATE OF PURCHASE
2. CONFIRMATION DEED
3. PROMISSORY NOTE WITH DEFICIENCY NOTED THEREON
4. REFUND FOR OVERPAYMENT OF OFFICER'S FEES AND COSTS, IF ANY
5. OTHER: _____.

NAME OF THE HOLDER OF THE EVIDENCE OF DEBT
OR THE ATTORNEY FOR THE HOLDER
BY: _____
ADDRESS: _____
TELEPHONE: _____

(3) Upon receipt of the initial bid from the holder of the evidence of debt or the attorney for the holder, the officer shall make such information available to the general public.

(4) The officer shall enter the bid by reading the bid amount set forth on the bid and the name of the person that submitted the bid or by posting or providing such bid information at the time and place designated for sale.

(5) Bids submitted pursuant to this section may be amended by the holder of the evidence of debt or the attorney for the holder in writing or electronically, as determined by the officer pursuant to section 38-38-112, no later than 12 noon 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. A bid submitted pursuant to this section may be modified orally at the time of sale if the person making the modification modifies and reexecutes the bid at the sale.

(6) The holder of the evidence of debt or the attorney for the holder shall bid at least the holder'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 or other lien being foreclosed and less the estimated reasonable costs and expenses of holding, marketing, and selling the property, net of income received; except that the holder or the attorney for the holder need not bid more than the total amount due to the holder as specified in the bid pursuant to subsection (2) of this section. The failure of the holder to bid the amount required by this subsection (6) shall not affect the validity of the sale but may be raised as a defense by any person sued on a deficiency.

(7) Other than a bid by the holder of the evidence of debt not exceeding the total amount due shown on the bid pursuant to subsection (2) of this section, the payment of any bid amount at sale must be received by the officer no later than the date and time of the sale, or at an alternative time after the sale and on the day of the sale, as specified in writing by the officer. The payment shall be in the form specified in section 38-37-108. If the officer has not received full payment of the bid amount from the highest bidder at the sale pursuant to this subsection (7), the next highest bidder who has timely tendered the full amount of the bid under this subsection (7) shall be deemed the successful bidder at the sale.

V. Master Form Mortgage or Deed of Trust

A. Master form of mortgage or deed of trust

Effective July 1, 2001, Colorado statute 38-35-109 enables a master form of mortgage or deed of trust. The purpose of this law is to shorten actual deed-of-trust, by recording the "master form" and then simply referring to the recorded provisions in the actual transaction instruments. Subsection (1.5) reads:

(a) Any person may record in the office of the county clerk and recorder of any county a master form mortgage or master form deed of trust. Such forms shall be entitled to recordation without any acknowledgement or signature; without identification of any specific real property; and without naming any specific mortgagor, mortgagee, trustor, beneficiary or trustee. Every instrument shall contain on the face of the document "master form recorded by (name of person causing instrument to be recorded)." The county clerk and recorder shall index such master forms in the grantee index under the name of the person causing it to be recorded.

(b) (I) Any of the provisions of such master form instrument may be incorporated by reference in any mortgage or deed of trust encumbering real estate situated within the state, if such reference in the mortgage or deed of trust states the following:

(A) That the master form instrument was recorded in the county in which the mortgage or deed of trust is offered for record;

(B) The date when recorded and the book or page or pages or reception or index number where such master form was recorded;

(C) That a copy of the provisions of the master form instrument was furnished to the person executing the mortgage or deed of trust; and

(D) If fewer than all of the provisions of the referenced master form are being adopted or incorporated, a statement identifying by paragraph, section, or other specification method that will clearly identify the incorporated provision or provisions, if in the absence of a specific designation, the entire referenced master form will be deemed to be incorporated.

(II) The recording of any mortgage or deed of trust, which has incorporated by reference any of the provisions of a master form as provided in this section, shall

> have the same effect as if such provisions of such master form had been set forth fully in the mortgage or deed of trust.

B. Acknowledged and recorded for the protection

Deeds of trust and mortgages, and all other instruments affecting real property, should be acknowledged and recorded for the protection of the holder of the interest. Colorado law (38-35-109) states:

> All deeds, powers of attorney, agreements or other instruments in writing conveying, encumbering or affecting the title to real property, certificates and certified copies of orders, judgments and decrees of courts of record may be recorded in the office of the county clerk and recorder of the county where such real property is situated, except that all instruments conveying the title of real property to the state or a political subdivision shall be recorded pursuant to section 38-35-109.5. No such unrecorded instrument or document shall be valid against any person with any kind of rights in or to such real property who first records and those holding rights under such person, except between the parties thereto and against those having notice thereof prior to acquisition of such rights. This is a race-notice recording statute. In all cases where by law an instrument may be filed in the office of a county clerk and recorder, the filing thereof in such office shall be equivalent to the recording thereof, and the recording thereof in the office of such county clerk and recorder shall be equivalent to the filing thereof.

A subsequent innocent purchaser or encumbrancer with no actual knowledge of a prior unrecorded claim will be given a superior right. Unacknowledged recorded instruments constitute notice to subsequent purchasers or encumbrancers, but unless they have been of record for the required ten years they may not be introduced as evidence until their validity is proven according to the court rules of evidence.

VI. Usual elements of a deed of trust or mortgage

The following list serves only as a ready reference to the usual elements of a deed of trust or mortgage. A competent attorney or other person should carefully check these instruments with considerable experience in these matters because many varied and complex details must be adjusted to fit each particular case.

1. **Date.** Though not essential, inclusion of the date might prevent later controversy as to the time of the conveyance of security interest.
2. **Parties.** All parties to a mortgage or trust deed must be named and clearly designated. In a mortgage, they are the mortgagor (grantor) and mortgagee (grantee). In a deed of trust, they are the trustor (grantor), public trustee and beneficiary. The name of the grantor must be exactly the same as on the deed by which the grantor acquired title.
3. **Consideration.** is the money loaned to the trustor or mortgagor usually to assist in purchasing the property. The statement regarding the consideration should contain the following:
   a. Description of the indebtedness;
   b. Amount;

c. Maturity date;
d. Method of repayment of the principal amount;
e. Interest rate and time of payment;
f. Interest coupon notes, if any; and
g. Conditions of default as to principal and interest.

4. **Words of Conveyance.** ''*does hereby convey to*" or similar. This gives the trustee or mortgagee an interest in the property that will serve as security.
5. **Legal Description.** Necessary to identify the real estate subject to the security interest. This description should read the same as that contained in the deed by which title is transferred.
6. **Conditions (trust deed) or Covenants (mortgage).** Usually contains requirements such as keeping the property insured, paying taxes and assessments, maintaining improvements in good repair. See more conditions next section.
7. **Method of sale in case of default.** The beneficiary of a trust deed may foreclose by public sale through the office of the public trustee or through the courts. In Colorado, the mortgagee or beneficiary of a private trust deed may foreclose only through the courts.
8. **Exceptions as to prior liens, if any.**
9. **Signature of the trustor/mortgagor.**
10. **Acknowledgment.** Signing before a notary public is the simplest means of establishing the instrument's proper execution and validity.
11. **Recording.** Recording in the office of the county clerk and recorder of the county in which the property is situated is necessary to protect the interest of the beneficiary or mortgagee against the claim of persons who may thereafter acquire an interest in the property without actual notice of the mortgage or trust deed.

In addition to the above, the following elements may be contained in the mortgage or trust deed:

1. Provide for a higher rate of interest in all notes after maturity;
2. Provide that a default continuing more than a specified time gives the holder of the indebtedness the right to declare all indebtedness to be due and payable immediately without notice. This is called an acceleration clause;
3. Include waiver of homestead rights;
4. Reserve the right to pay taxes if they remain unpaid when due, adding the amount so paid together with interest at a specified rate to the principal sum;
5. Require that the property must be insured in companies acceptable to holder of the indebtedness and the standard mortgage clause added to these policies. In case grantor fails to so insure, provide right of grantee to insure, adding the cost together with interest at a specified rate to the indebtedness;
6. Provide for the appointment of a receiver upon the occurrence of a default;

7. Should a foreclosure or a trustee's sale be necessary, provide for:
   a. All the costs of such suits, advertising, sale and conveyance, including attorneys, solicitors, stenographers, trustee's fees, outlays for documentary evidence and cost of abstract and examination of title.
   b. All monies advanced by the holders of the indebtedness with interest thereupon from the time the advances were made.
   c. The accrued interest remaining unpaid on the indebtedness.
   d. All of the principal money remaining unpaid;
8. In the case of trust deeds, provide for a reconveyance of the property by the trustee to the grantor, upon the payment of the principal and interest and the performance of the covenants and agreements contained in the instrument; or
9. In a case where a private trustee is used, the instrument should provide for a successor in trust in case of the trustee's inability to act.

VII. Assumption of Indebtedness

A buyer and seller may wish to transfer title with the existing loan remaining as a lien upon the property. This is accomplished by a provision in the contract whereby the buyer assumes and agrees to pay the existing indebtedness.

However, assumption is subject to limitations that may be present in the mortgage or trust deed contract. Mortgages and trust deeds often contain a provision to the effect that if the subject property is conveyed, the entire balance of the loan becomes due (strict due-on-sale). This has the same effect as an acceleration clause in the event of default.

The above restriction may alternatively preclude conveyance without the lender's consent (due-on-sale). This enables the lender to adjust (usually upwards) the interest rate or other terms of the loan. If conveyance is made without consent, the lender may call the entire balance of the loan due.

VIII. 38-30-165 C.R.S. Limit on interest rate increase

Colorado law (38-30-165) limits interest rate increases on an assumption to 1% per annum above the existing interest rate on the indebtedness for trust deeds executed on or after July 1, 1975. On October 15, 1982, a new federal law preempted all state laws in this area. Lenders may now enforce a "due-on-sale" clause no matter when the mortgage or trust deed was executed.

Lenders need not necessarily have a "due-on-sale" provision in their trust deeds or mortgages. The Real Estate Commission has approved three types of trust deeds for mandatory use by licensees when preparing deeds of trust on behalf of their principals. One contains a strict due-on-sale clause. The second contains a modified due-on-sale clause, which makes the loan assumable if the purchaser is creditworthy. The third type of trust deed contains no due-on-sale clause and the loan is fully assumable.

IX. The Promissory Note

In the real estate financing process, the principal promissory note or bond is the **evidence of the debt** for which the mortgage or deed of trust is the security. This note is an

unconditional promise in writing, signed by the maker, agreeing to pay on demand or at some future time, a certain sum of money to the payee or bearer. A promissory note creates a personal liability on the part of the maker. In the event of a default, if the security is insufficient to cover the indebtedness, the holder of the note may obtain a deficiency judgment for the balance due and proceed against all other property and assets of the debtor.

The holder of a note secured by the mortgage or trust deed may sell or transfer the note to another. If the note is secured by a deed of trust, the holder simply endorses the note over to the successor holder. No separate transfer instrument is necessary. But if the note is secured by a mortgage, in addition to the endorsement of the note, the mortgage should also be separately assigned in writing to the new holder and the assignment should be recorded.

The reason for recording an assignment of a mortgage but not a deed of trust is to better preserve an unbroken chain of title. Unless default occurs in the payment of the note, a release or satisfaction of the security instrument will eventually be executed. In the instance of a deed of trust, the release is executed by the public trustee who remains the same no matter how many times the note may have changed hands. In a mortgage, the current legal holder of the note, who would have changed each time the note was transferred, will execute the release instrument. A recorded assignment of a mortgage to each new note-holder gives constructive notice of the person who must execute the release thereof.

X. Second Mortgage or Trust Deed

An owner of real property encumbered by a deed of trust (or mortgage) may secure a second loan, secured by a second trust deed (or mortgage). A second trust deed stands in a subordinate position to the first as to priority of lien claim in case of a foreclosure. The recording date of the first deed of trust before the recording of the second legally establishes the priorities of right. If the first trust deed was unrecorded but the holder of the second had actual knowledge of the existence of the first at the time of the second transaction, the first trust deed would still have priority.

When the first deed of trust is satisfied, subsequent encumbrances move upward in priority. The second trust deed would then become first in priority, the third becomes second, and so on. However, the priority of instruments may be controlled by their terms. For instance, the terms of a second deed of trust may allow its lien to continue to be subordinate to the existing first, or any substitution thereof, thus allowing the owner to replace the first deed of trust with another without disturbing the position of the lien holders below the first. This advantage is often very important to the grantor in matters pertaining to refinancing property.

XI. Installment Land Contract

An installment land contract, (ILC or sometimes called a bond for title or a long-term escrow) is essentially a security instrument as is a mortgage or deed of trust. A typical installment land contract provides for all the terms usually found in a buy/sell contract, but withholds a warranty deed transferring title until the full for some part of the purchase price has been paid. ILCs should be recorded. The buyer takes possession and assumes all the risks and responsibilities of ownership. The buyer covenants to insure, repair, pay taxes and assessments, etc., on the premises for the benefit of the seller. The buyer is considered to

have an equitable interest in the land in much the same way as a mortgagor. See the topic index in the back of this manual for more information on installment land contracts.

A purchaser under an installment land contract has the right of entry and possession, but if there are no improvements on the land that can be physically occupied, there is no actual notice of the purchaser's interest given to the public. In recent years, subdividers have been selling vacant land by means of installment land contracts. Although it is advisable that all installment land contracts be recorded, it is especially important to record if the land is vacant.

An ILC should contain an escrow provision whereby a copy of the contract and a warranty deed from the seller to the buyer are delivered to an escrow agent. Upon performance of the covenants in the contract by the purchaser, the escrow agent would then deliver the warranty deed. This type of contract is but another security device that can be used in the financing of real estate.

XII. Liens

A. Introduction

A lien is a right given by law to a creditor to have a debt or charge satisfied out of the property belonging to the debtor. For the purpose of convenience, liens may be classified as either specific or general. A **specific lien** attaches to and affects only a certain piece(s) of property, such as a mortgage, property tax, assessment, mechanic's lien, vendee's lien, vendor's lien, or an attachment. A **general lien** may attach to and affect all the property of the debtor, e.g., a judgment lien, federal or state tax lien, or a lien for a decedent's debts.

B. Specific Liens

Mortgage

A mortgage secures or guarantees payment of the amount due the lender or creditor by conditionally transferring an interest in the property to the lender. A mortgage is specific to one property. The lien becomes null and void upon the payment of the debt.

Taxes and assessments

Property taxes, special assessments, and water and sewer charges levied by law rather than usage become a specific lien on specific real property to which they pertain. The taxing body, usually the city or county, may take action resulting in the sale of the property if these charges are not paid.

Property subject to general ad valorem property tax is assessed on January first each year for the previous year, and a lien for the tax attaches on the same day. Property taxes are a perpetual lien upon the real estate until paid (including penalties, charges and interest that may accrue). Property tax liens have priority over all other liens, regardless of filing date.

Real property taxes may be paid as follows: One-half on or before the last day of February, and the remaining one-half on or before June 15th, or the entire tax may be paid on or before the last day of April (39-10-104.5 C.R.S.).

As soon as the first one-half installment becomes delinquent (March 1), interest penalty accrues until the date of payment; except that, if the first installment is made after the last day

of February, but not later than thirty days after the mailing by the treasurer of the tax statement pursuant to section 39-10-103(l)(a), no such delinquent interest shall accrue. For the single-payment option, interest accrues as of May 1st. On June sixteenth, all unpaid taxes of the preceding year become delinquent and an interest penalty will be assessed in addition to any previous penalty that has accrued. (39-10-104.5 (3)(a), C.R.S.)

When an instrument of conveyance doesn't specify who will pay the current year taxes, the grantee pays if the conveyance is made before July 1, and the grantor is responsible for paying if the conveyance is after June 30. (39-1-108 C.R.S.) Proper real estate practice would have the instrument of conveyance contain a provision for apportionment of the taxes to the date of transfer.

These various authorities determine the property tax:

a. **The county assessor**, publicly elected in 62 counties (appointed in the City and County of Denver) determines the assessed valuation of the property. The valuation for assessment of all taxable residential property is determined by statute and is 9.35% of its actual value, and 29% for commercial and raw land. (39-1-104 and 39-1-104.2 (3)(h) C.R.S.)

b. An elected **board of county commissioners** (except in the City and County of Denver where the authorized body is created by the city charter) determines the **mill levy**, which is a fractional part of the assessed valuation. A "mill" is one-thousandth of a dollar. Eighty-five mills may be expressed as a fraction of a dollar ($.085), both of which equate to eighty-five dollars of tax for each one thousand dollars of assessed valuation. This levy is made no later than November 15th each year.

c. A county **board of equalization**, (except for the City and County of Denver) is composed of the above county commissioners who become the board of equalization from the second Monday in July until the last working day of July each year. In this capacity, they review the assessor- prepared roll of all taxable property located in the county, and hear appeals from protests filed with the county assessor. If an owner is dissatisfied with the decision of the county board of equalization, the owner may within 30 days:
   (i) Appeal to the county commissioners for binding arbitration. An arbitrated decision will be final and not subject to review, or
   (ii) Appeal to the (state) board of assessment appeals. When a decision of the board of assessment appeals is adverse to an owner, the owner has 30 days in which to appeal to the state court of appeals, or
   (iii) Appeal to the district court in which the property is located. When a court decision is adverse to an owner, the owner has 45 days in which to appeal to the state court of appeals.

d. The three-member quasi-judicial **board of assessment appeals** hears appeals concerning local property tax assessments, utilities assessments, and decisions of the property tax administrator. (39-2-123, C.R.S.)

e. The division of property taxation reviews the methods used by the county assessors and the county boards of equalization, and examines where it is alleged in writing that property has not been properly appraised or valued. It also conducts an annual school for assessors.

f. **The state board of equalization** consists of the governor, speaker of the house of representatives (or designee), president of the senate (or designee), and two members appointed by the governor with the consent of the senate. The two appointed members must be qualified appraisers or former assessors, or have knowledge and experience in property taxation. The board meets each year on the second Monday in September to determine if each county has assessed at the percentage of actual value prescribed by law. The board can act only on classes and subclasses of property and not on individual assessments. The board may also meet at the Governor's call.

Before the first day of September of each year, county treasurers notify delinquent taxpayers by mail of the amount of delinquency and penalty interest thereon and afford fifteen days from the time of mailing the said notice to pay the tax. Treasurers then make a list of all the county lands with delinquent taxes, publish the list and designate the date for public sale. If such a list is made later than September 1, a sale held under that list is still valid. (39-11-101 C.R.S.)

Delinquent tax sales commence on or before the second Monday in December of each year and are held at the treasurer's office in each county. (39-11-109 C.R.S.) Such property is "sold" to the person who pays the delinquent taxes, penalty interest and costs due, and who further pays the highest bid over these amounts in cash.

The owner (or agent or assignee) may redeem real property sold for taxes at any time before the issuance of a treasurer's deed. The person redeeming must pay to the county treasurer the amount for which the property was sold together with interest from the date of sale. (39-12-103 C.R.S.)

The county treasurer issues a certificate of purchase to the high bidder at the tax sale. A certificate of purchase is assignable and if the property has not been redeemed, the certificate holder may request the treasurer to give notice of the sale to every person in actual possession or occupancy of the property, to the person in whose name the property was taxed, and to publish such notice. After notice and publication, the treasurer will issue a treasurer's deed to the holder of a certificate of purchase. (39-11-117 and 39-12-104 C.R.S.)

After a treasurer's deed is issued, executed, delivered and recorded, it is presumed to be validly acknowledged. After the deed has been recorded for five years, (nine years if the delinquent owner is legally disabled at the time the deed was issued) the delinquent taxpayer has no legal course by which to recover the land. A holder of a treasurer's deed may initiate "quiet title" suit in order to acquire merchantable title before the expiration of the five or nine-year period. (39-12-101 and 39-12-104 C.R.S.)

Special improvements are assessed in proportion to the benefits to the real estate, as determined by the ordering authority. Such assessments are a perpetual lien against the land and have priority over all liens except property tax liens. Special assessments for local improvements are due and payable within thirty days after final publication of the assessing ordinance, although it is common for special assessments to permit an owner to pay by installments with interest. The number of installments, the period of payment and the rate of interest are determined by the ordering authority and set forth in the assessing ordinance. In case of default in the payment of any installment, the county treasurer may sell the property in the same manner, and with the same effect as provided for in the sale of real estate in default of payment of the general property taxes. (Title 31 Article 25 Part 5, C.R.S.)

Mechanic's lien

Mechanics, material suppliers, contractors, sub-contractors, builders and all other persons rendering professional or skilled service, performing labor upon, or furnishing materials used in the construction, alteration, or repair of any structure or improvement upon land are given a lien upon the property. Mechanic's liens are all effective as of the time the work first commenced and are superior to all subsequently filed or unrecorded liens or encumbrances of which the lienor had no actual knowledge. The order of priority among different mechanic lien claimants is:

a. First, liens of laborers or mechanics working by the day or piece,

b. Second, liens of all other sub-contractors or suppliers whose claims are either entirely or principally for materials,

c. Third, liens of all other principal contractors.

In order to preserve a lien for work performed or materials furnished, a lienor must serve the property owner (or agent) and principal contractor with notice of intent to file a lien at least 10 days before recording the lien statement. The lienor must serve this notice personally or by registered or certified mail. (38-22-109(3), C.R.S.)

Lienors in the first class must file with the county clerk and recorder within two months after completion of the improvement. Lien statements of the second and third class must be filed within four months after completion of the work. (38-22-109(4) & (5), C.R.S.)

No mechanic's lien shall hold a property longer than six months after the last work is performed or materials furnished, or completion of the improvement unless a lawsuit is brought within that time to enforce the lien and, unless a notice stating that such action has been commenced shall have been recorded within that time in the county clerk and recorder's office. (38-22-110, C.R.S.)

The purchaser of a single or double family dwelling is given some protection against hidden liens. No lien may encumber such property unless the purchaser had actual knowledge of unpaid lien claimants at the time of conveyance, or unless a lien statement or notice had been recorded within one month after completion of the work or prior to the conveyance, whichever is later. (38-22-125, C.R.S.)

The "disburser" (usually the lender or owner) who distributes partial payments as mechanic's work progresses must record a notice stating the name and address of the owner, the principal contractor, if any, the disburser, and the legal description of the land. Lien claimants may give the disburser written notice that they are contracting on matters that may affect the property. Upon such notice being received, the disburser must pay the claimant before paying the claimant's contractor. If the disburser fails to do this and the claimant suffers loss, the disburser is personally liable. (38-22-126 (4), (5), (6) and (7), C.R.S.)

Funds disbursed to a contractor in accordance with a contract are declared to be in trust for the payment of subcontractors, material suppliers and laborers. Except for good faith differences of opinion or the existence of performance bonds, wrongful expenditure of these funds constitutes the crime of theft. (38-22-127 (1), (5), C.R.S.)

Vendee's lien

If a seller (vendor) defaults in performing the contract, a purchaser (vendee) has a lien against the property for return of all money paid under the terms of the sales agreement. This is an equitable lien and is enforceable by foreclosure.

Vendor's lien

If a seller does not receive the entire sum agreed upon from the buyer, the seller has a lien against the property for any unpaid balance. Like the vendee's lien, this is an equitable charge and is enforceable by foreclosure.

Attachment

An attachment is an encumbrance on property of a defendant in a pending lawsuit for money damages. Colorado and most states permit issuance of a writ of attachment only under special circumstances, such as when the defendant goes into hiding or is about to fraudulently convey or transfer the property. A plaintiff obtaining an attachment must file a bond to protect the defendant against any loss caused by the attachment in the event the plaintiff loses the case.

Lis Pendens

A **lis pendens** is not technically a lien upon property. A lis pendens is constructive notice to that a claim against the property exists and persons could take title to the property only subject to the outcome of the lawsuit. By filing a lis pendens a few days before the expiration of their lien, a mechanic's lien claimant can keep the lien alive beyond six months.

Fraudulent liens

In some cases persons have filed liens for false or groundless claims. Although without legal effect, such liens can tie up a property being sold and cause legal expense before being declared invalid. Today, any person filing such a claim is civilly liable to the owner of the real property for not less than $1,000 or actual damages caused. In addition, the person commits a misdemeanor punishable by up to two (2) years imprisonment or $5,000 fine, or both. (See Commission position statement CP-25 in Chapter 3 regarding recording contracts and real estate licensees' lien status.)

C. General Liens

Judgments

A judgment results from the determination of the rights of the parties through an action at law. Not all judgments involve monetary awards, but a monetary judgment awarded to a plaintiff may become a lien upon the defendant's real property. Some states provide that a judgment must be entered into the judgment docket and indexed before a lien is created. Other states require that a judgment must be recorded in the county recorder's office before the lien becomes effective. Colorado law provides that the judgment lien attaches when the transcript of the docket entry of the judgment, certified by the clerk of the court, is filed (for recording) in the office of the county clerk and recorder. The judgment then becomes a lien on all the defendant's current or future real property located in that county. The judgment may be filed in any county in the state where the defendant owns property and the lien thus

created continues for six years from the entry of said judgment in the judgment docket. (13-52-102 (1), C.R.S.)

Federal tax liens

Federal tax liens may attach to real property because of violation of federal income tax laws, non-payment of gift taxes, or because of the transfer of the real estate through the owner's death.

When a taxpayer is delinquent in the payment of federal income tax, the government may issue a tax warrant which, when filed in the county wherein the taxpayer's real property is located, becomes a lien upon the real estate. Many people believe a federal tax lien to have some high priority, but are only prioritized among other liens or encumbrances by date filed.

Federal government liens for gift taxes are a lien against gift property and continue for ten years. This lien, too, is subordinate to all prior filed liens and encumbrances upon the property.

A federal inheritance or estate tax becomes a lien upon all personal and real property of the decedent. It continues for ten years and stands in priority by date filed.

State tax liens

Like the federal government, Colorado may also acquire liens against real property for the non-payment of state income taxes. A lien for delinquent state income tax becomes a lien upon the taxpayer's real property. This lien priority is established by date of filing and continues for six years unless paid.

Decedent's debts

A decedent's real property passes upon death to the devisees named in a will or if he or she dies intestate (without a will) according to state laws of descent and distribution. The devisee or heir at law takes title to the property subject to existing liens or encumbrances, and to rights of creditors of the estate. Debts against the estate are paid first out of personal property not specifically bequeathed, then from that which is specifically bequeathed. If the personalty is insufficient to satisfy all debts, then the real property may be sold to pay the remaining debts. Thus, title to a decedent's real estate may be subject to a lien in favor of creditors of the estate.