

**LIEN PRIORITIES  
LENDER FORECLOSURES  
AND  
ASSESSMENT LIEN FORECLOSURES**

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**TABLE OF CONTENTS**

**1. LIEN PRIORITIES IN COLORADO ..... 1**

    a. Real Estate Taxes and Assessments – First Lien..... 1

    b. The Super Lien of CCIOA – Second Lien ..... 1

    c. First Mortgage or First Deed of Trust – Third Lien ..... 1

    d. Owner Association Lien – Fourth Lien ..... 1

    e. So-called Second Mortgage – **Fifth Lien**..... 1

    f. So-called Third, Fourth, etc. Mortgages - **Sixth Lien**..... 1

**2. OWNER ASSOCIATION ASSESSMENT LIENS AS “SECOND PRIORITY” LIENS..... 2**

**3. FIRST LIEN LENDER FORECLOSURES..... 2**

**4. SECOND LIEN LENDER FORECLOSURES..... 2**

**5. WHEN A LENDER BECOMES AN OWNER THEY ARE OBLIGATED TO PAY ASSESSMENTS ..... 2**

**6. OWNER ASSOCIATION JUDICIAL LIEN FORECLOSURE – A VALUABLE COLLECTION TOOL..... 3**

    a. The Authority of the Association to Foreclose..... 3

    b. When Should An Owner Association Foreclose? ..... 3

    c. When should an owner association judicially foreclose the super lien?..... 3

    d. What about the First Mortgage? ..... 3

    e. The Judicial Foreclosure Lawsuit – Court Order Sought to Allow a Sheriff’s Sale of the Property ..... 4

        1. Lawsuit filed ..... 4

        2. Service of process obtained ..... 4

        3. Response periods expired ..... 4

        4. Trial is scheduled, if a response to the lawsuit is filed ..... 4

    f. Common or Typical Result of HOA Foreclosure Lawsuit ..... 4

    g. Court Ordered Foreclosure by the Sheriff ..... 4

    h. What can an owner association do once it has a deed? ..... 5

    i. General Recommendations..... 6

**7. SUMMARY OF THE PUBLIC TRUSTEE FORECLOSURE PROCESS IN COLORADO – THE PROCESS USED BY MOST LENDERS ..... 6**

    a. Notices Required Prior to the Start of Foreclosure..... 6

    b. Lender Attorney Orders Title Work ..... 6

c. Lender Choice on How to Foreclose: Through the Public Trustee (administratively) or through the ... courts (judicially).....	7
d. The Public Trustee Process Begins with an NED .....	7
e. Foreclosure Sale Date Set and Advertised .....	7
f. Notice of Cure Rights to be Mailed.....	7
g. Notice of Sale to be Mailed.....	7
h. Notice of Redemption Rights.....	8
i. Order Authorizing a Public Trustee Sale.....	8
j. Court Mailing of Notice of Rule 120 Hearing.....	8
k. Court action approving and authorizing the foreclosure sale, if no objections are filed .....	8
l. Bid to be Submitted by the Lender’s Attorney, After the Order Authorizing Sale Has Been Entered.....	8
m. Deficiency Bids .....	8
n. Owner Cure Rights and Withdrawal of the Foreclosure Upon Cure .....	8
o. Effect of the foreclosure sale, if it occurs/Certificates of Purchase.....	9
p. Junior Lienor Redemption Rights .....	9
q. Deed Issued by the Public Trustee, After Expiration of Redemption Periods Without any Redemption Occurring.....	9
r. Possession of the Property.....	9
s. Conveyance of the Property by the Lender (now owner) to HUD or VA .....	10
t. Notes on the above “Summary.....	10

**LIEN PRIORITIES  
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AND  
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**1. LIEN PRIORITIES IN COLORADO.**

- a. Real Estate Taxes - **First Lien**. Real estate taxes have priority over all other liens.
- b. The Super Lien of CCIOA- **Second Lien**. A priority lien is created pursuant to a part of CCIOA – CRS 38-33.3-316(2) (b) (1). CCIOA which gives associations a lien over the first deed of trust for an amount equal to the common expense assessments which would have come due during the six months immediately preceding the institution of a foreclosure by either the association or the holder of a lien senior to the association.
- c. First Mortgage or First Deed of Trust – **Third Lien**. This lien is referred to commonly as a first lien, but actually is a third lien, behind real estate taxes and assessments, and also, in Common Interest Communities where the Community is subject to the Colorado Common Interest Ownership Act (CCIOA), first mortgage or first deed of trust lenders are also junior to the owner association’s 6 month super or limited priority lien.
- d. Owner Association Remaining or Primary Lien – **Fourth Lien**. An owner association lien for assessments and other charges (if the Community is subject to CCIOA) is a fourth lien, yet, consistent with the common practice of referring to the senior loan as a first mortgage, owner association assessments liens in Communities subject to CCIOA are typically described as second liens.
- e. So-called Second Mortgage – **Fifth Lien**. A second mortgage lien is a fifth lien (if the Community is subject to CCIOA).
- f. So-called Third, Fourth, etc. Mortgages - **Sixth Lien** for the third mortgage (if the Community is subject to CCIOA), **seventh lien** for the fourth mortgage, etc. Transcript of Judgments or other encumbrances against the property fall into this category as well.

2. **OWNER ASSOCIATION ASSESSMENT LIENS AS “SECOND PRIORITY” LIENS.**

Owner assessment liens are junior to a first deed of trust regardless of when the assessment lien was recorded. Most declarations provide that the association’s assessment lien is junior or subordinate to the lien created by a first lien. This provision is a requirement for approval of FHA, VA, FNMA and FHLMC financing on properties which involve an owners association.

3. **FIRST LIEN LENDER FORECLOSURES.**

When a first lien lender forecloses, they are subject to the super lien (when they take title on completion of their foreclosure). The rest of the sums due the association under the so-called second lien, are eliminated as a lien on the property. The first lien foreclosure eliminates (or forecloses) the association’s second lien. The prior owner remains personally liable for the assessments that occurred while they were the owner. Yet, that personal assessment obligation of the owner is no longer secured by the association’s lien.

4. **SECOND LIEN AND OTHER JUNIOR LENDER FORECLOSURES.**

When a second lien lender forecloses, they are subject to the super lien (when they take title on completion of their foreclosure). The rest of the sums due the association under the so-called third lien, are eliminated as a lien on the property. The second lien foreclosure eliminates (or forecloses) the association’s third lien. The prior owner remains personally liable for the assessments that occurred while they were the owner. Yet, that personal assessment obligation of the owner is no longer secured by the association’s lien.

5. **WHEN LENDERS BECOME OWNERS, THEY ARE OBLIGATED TO PAY ASSESSMENTS.**

Lenders, once they become an owner, are obligated to pay assessments, just like all other owners. The key date is the date they are deemed to be owners. In Colorado public trustee foreclosures, title is deemed to be acquired at the time all redemption periods have expired. This is typically 8 business days after the foreclosure sale. If the lender is a so-called “second” mortgage lender, and not a first lien lender, when they acquire title, they are subject to the Association’s lien for unpaid assessments of the prior owner. This is the point in time in which the mortgage lender becomes responsible to pay the owners association assessments. (See the attached “Public Trustee Foreclosure Timetable.”)

6. **OWNER ASSOCIATION JUDICIAL LIEN FORECLOSURE – A VALUABLE COLLECTION TOOL.**

- a. The Authority of the Association to Foreclose Most declarations grant the owner association a lien against an owner's unit for unpaid assessments. In addition, the Colorado Common Interest Ownership Act (CCIOA) also grants owner associations foreclosure rights on their statutory liens (on the association's super lien and on the remaining lien). A judicial foreclosure process is required to be followed (versus the public trustee foreclosure process used by lenders to foreclose on deeds of trust).
- b. When Should An Owner Association Foreclose? An owner association should consider foreclosing its lien if the following apply:
1. The property is not already involved in foreclosure by the first lien lender
  2. An owner is chronically delinquent in paying assessments
  3. Delinquent assessments cannot be collected from an owner through a County Court collection lawsuit (e.g., the owner cannot be located for service, or the owner is judgment-proof)
  4. There is equity (market value vs. balance of first mortgage) in the property in excess of approximately \$10,000
  5. The community has a high level or ratio of delinquent owners – and an association foreclosure may motivate other owners to voluntarily pay
  6. First lien lenders are not foreclosing on the owner delinquent in paying them – the super lien allows the association to foreclose on the first lien lender for 6 months of budgeted assessments
  7. If there is no equity and a change of ownership is desired
  8. If the association has a high rate or ratio of delinquencies
- c. When should an owner association judicially foreclose the "super lien"? If first lien lenders are not foreclosing on their borrower (the owner), the association should consider a judicial foreclosure of its super lien. The association can pursue a super lien, judicial foreclosure as frequently as once every 6 months, or until the first lien lender forecloses and becomes an owner due to a non-paying owner in a property with no equity.
- d. What about the First Mortgage? Usually, the property will remain subject to the first mortgage following the sale and issuance of a deed to the owner association. (Most Declarations contain a provision which specifically makes the assessment lien subordinate to the first mortgage, except for the super lien).

If the property remains subject to a first mortgage, the owner association must make the mortgage payments, if it wants to keep the property.

If, at any time, the owner is not making first mortgage payments, the lender may foreclose its lien and become the owner.

When the property is subject to a first mortgage, it is very important for the owner association to communicate its intent to the lender and try to work with the lender to make payments on or assume the mortgage or to allow time to sell the property without the lender foreclosing.

- e. The Judicial Foreclosure Lawsuit – Court Order Sought to Allow a Sheriff’s Sale of the Property
1. Lawsuit filed. To start a judicial foreclosure, an owner association files a lawsuit in the district court of the county where the property is located. The suit is brought against the owner and all persons who have an interest in the property as defendants. Further, a Lis Pendens is recorded against the property to give notice to any interested parties that there is pending litigation against said property.
  2. Service of process obtained. The lawsuit is served on all defendants.
  3. Response period expired. Following service of the lawsuit, the defendants are allowed a short period of time to file an answer with the court. If the defendants do not answer the lawsuit, an order for foreclosure can be obtained by "default." This is sometimes referred to as a “default judgment.”
  4. Trial is scheduled, if a response to the lawsuit is filed. If the owner files an answer, the case is set for trial in the same manner as other lawsuits.
- f. Common or Typical Result of HOA Foreclosure Lawsuit.
- An order for foreclosure can frequently be obtained by a summary judgment motion without having to go to trial, or the defendants default and do not answer.
- g. Court Ordered Foreclosure by the Sheriff. The key steps in the Sheriff sale process (similar to the Public Trustee process) are as follows:
1. After a foreclosure order is issued by the court, either by default, summary judgment or trial, that order is sent to the County Sheriff by the owner association’s attorneys.
  2. The Sheriff schedules a sale date. The initial scheduled sale date must be no less than 110 calendar days after the date of the recording of the Lis Pendens.

3. Once the sale date is set, the Sheriff publishes notice of the sale in a local newspaper. The Sheriff also sends notices to all persons who have an interest in the property.
  4. The owner association submits a bid to the Sheriff before the sale. The bid is typically the amount of money that the owner owes the association (including assessment late fees, interest, fines, attorney fees and costs incurred in the foreclosure), and not additional sums or cash. As such, the owner association bids its debt (a sort of paper bid only) without any cash paid or bid at the sale. The bid is generally for the total debt owed to the owner association.
  5. A sale (held by the Sheriff in an auction format) occurs at the Sheriff's office.
  6. The highest bidder at the sale receives a "certificate of purchase" not a "deed."
  7. The owners association is not always the successful bidder. If the owners association is not the highest bidder, it will receive the full amount of its bid (typically within two week's time) through the court and the owner association will be removed from the foreclosure process it started. The successful bidder takes the owner association's place in the foreclosure.
  8. If the owners association is the highest bidder, it receives the "certificate of purchase."
  9. There is no owner redemption period in a judicial foreclosure.
  10. After the Sheriff's sale, other lien holders (i.e., second mortgage, judgment creditor, etc.) have short periods of time to redeem the property. Intent to redeem must be filed with the Sheriff's Office within 10 days after the Sheriff's sale takes place.
  11. If nobody redeems the property, the Sheriff will issue a confirmation deed for the property to the holder of the certificate of purchase (e.g., the owner association or the successful bidder). When the deed is issued, it removes (forecloses) the owner, who is then no longer the owner, and also removes any other encumbrances against the property (except the first mortgage and any tax liens).
- h. What can an owner association do once it has a deed?

Once it is the owner, an owners association can then evict the former owner or occupants. After eviction, the owner association can lease, sell the property or

leave it vacant. If the owner association sells the property, the owner association is entitled to keep the net proceeds following payment of the first mortgage and closing costs.

- i. General Recommendations Judicial foreclosure of owner association liens is an effective and under-utilized collection tool.
- It serves as an additional option to remedy to get an owner to pay
  - It "reminds" the owner that the repercussions of choosing not to pay assessments are both serious and expensive and could potentially lead to the loss of their property.
  - It can be used on the chronic or repeat delinquent owner
  - It "reminds" other owners of the consequences of non-payment
  - It may result in the association acquiring any equity in the owner's property
  - It can be used to foreclose on a first lien lender, by foreclosing the super lien. This can be done as often as once every 6 months, or until the first lien lender starts and completes its own foreclosure
  - It stops the ongoing loss of assessments
  - Effective use of assessment lien foreclosure is the association's commitment to not accepting marginal payment plans and not accepting payment plans once a sale date is set

If your owner association has a high delinquency ratio compared to owners that are paying, repeat delinquency owners or otherwise uncollectible delinquent accounts, then consider a judicial lien foreclosure as another collection remedy.

## 7. **SUMMARY OF THE PUBLIC TRUSTEE FORECLOSURE PROCESS IN COLORADO – THE PROCESS USED BY MOST LENDERS.**

The following paragraphs summarize the Public Trustee foreclosure process used by most lenders. The process is one of “due process” or procedure, requiring notice to persons with interests in the property to be foreclosed.

- a. Notices Required Prior to the Start of Foreclosure. Prior to an attorney for a lender initiating a foreclosure, the deed of trust or mortgage being foreclosed upon must be reviewed by the lenders attorneys, to ensure that any notice requirements have been complied with. This is especially true with the 30-day notice requirement provided for in the FNMA/FHLMC uniform instrument deed of trust and the 20 days notice requirement under Colorado Law for all consumer loans such as second deeds of trust on personal residences.
- b. Lender Attorney Orders Title Work. Once any notice requirements are complied with, a foreclosure certificate or foreclosure guarantee is obtained from a title

company in order to determine the parties who have a record interest in the property. Those parties are entitled to receive notice of the foreclosure. The foreclosure certificate contains copies of all recorded instruments since the recording of the deed of trust which is to be foreclosed, and now, also the notice, if any, recorded by an owners association.

- c. Lender Choice on How to Foreclose: Through the Public Trustee (Administratively) or Through the Courts (Judicially). A deed of trust granted to a Colorado public trustee may be foreclosed through a power of sale public trustee foreclosure proceeding. A mortgage or a deed of trust to a private trustee must be foreclosed through a judicial foreclosure (considerably longer and more expensive and the same as the process used by associations to foreclose their liens).
- d. The Public Trustee Process Begins With an NED. The public trustee foreclosure begins with the filing of a Notice of Election and Demand for Sale with the public trustee in the county in which the property is situated. At the time of filing of the Notice of Election and Demand, all of the required notices to interested parties along with pre-addressed stamped envelopes for the mailings must also be delivered to the Public Trustee.
- e. Foreclosure Sale Date Set and Advertised. The public trustee must set the foreclosure sale no less than 45 days and no more than 60 days from the date of recording of the Notice of Election and Demand. During that period of time, the property is advertised for sale in a newspaper of general circulation for four consecutive weeks.
- f. Notice of Cure Rights to be Mailed. The public trustee must mail a notice to the grantor of the deed of trust and to the owner of the property informing them of their statutory right to cure the default and reinstate the loan (if the default involves only the failure to pay money). These notices, the necessary mailing list and stamped envelopes are prepared and delivered to the public trustee by the attorney for the lender, and it is the lender's attorney not the public trustee who is responsible for the accuracy of the listed parties entitled to receive notice of the foreclosure.
- g. Notice of Sale to be Mailed. The public trustee must mail a copy of the Notice of Sale, as it appeared in the newspaper, to the grantor of the deed of trust at the address given in the deed of trust, and must mail a like notice to each person who appears to have acquired a record interest in the subject property subsequent to the recording of the deed of trust and prior to the recording of the Notice of Election and Demand for Sale. Again, the attorney for the lender must provide the necessary envelopes and mailing list to the public trustee.

- h. Notice of Redemption Rights. Additionally, the public trustee must mail a notice to the grantor of the deed of trust, any subsequent owner of record and to other persons having a right to redeem informing them of their statutory rights of redemption after the sale.
- i. Order Authorizing a Public Trustee Sale. During the period between the recording of the Notice of Election and Demand and the sale date, the holder of the deed of trust being foreclosed must file a separate limited court action in a Colorado District Court to procure an order authorizing sale. This action is commonly referred to as a "Rule 120 proceeding," because the matter is heard pursuant to Rule 120 of the Colorado Rules of Civil Procedure. The purpose of this procedure is to provide the owner of the property with a forum in which they may contest the issue of whether a default exists under the note and deed of trust. Rule 120 also has a procedure for compliance with the Soldiers and Sailors Civil Relief Act of 1940.
- j. Court Mailing of Notice of Rule 120 Hearing. The Clerk of the Court must mail a notice prior to the hearing date notifying all interested parties of the date of the hearing.
- k. Court action approving and authorizing the foreclosure sale, if no objections are filed. If no response is timely filed prior the hearing date, the court will enter the order authorizing sale without a hearing. If a response is filed, a court hearing is set for a later time, and the initially scheduled foreclosure sale will be continued until the order authorizing sale is procured.
- l. Bid to be Submitted by the Lender's Attorney, after the Order Authorizing Sale Has Been Entered. After the order authorizing sale has been entered, the attorney must submit a written bid to the public trustee along with a conformed copy of the order authorizing sale prior to the sale date. The bid letter must contain a complete accounting of the indebtedness and be in the form required by state statutes. If the owner of the property does not timely cure the default before the foreclosure sale, the public trustee will conduct the sale and bid in the amount specified by the holder of the note in its written bid, or in an oral bid made at the sale itself.
- m. Deficiency Bids. A lender can bid an amount less than its total indebtedness at the foreclosure sale and thereby establish a claim for a deficiency. If this is done it is essential that the lender have an appraisal of the property conducted prior to the foreclosure sale in order to support the deficiency claim.
- n. Owner Cure Rights and Withdrawal of the Foreclosure upon Cure. If owner

chooses to cure the default by exercising his statutory right to cure, he must pay the necessary funds directly to the public trustee. After the owner files intent to cure, the lender, through the attorney for the lender, must submit to the public trustee a written statement which contains a complete breakdown of the funds necessary to cure. Upon payment of the cure proceeds, the public trustee will inform the lender's attorney's office of the cure. Upon receipt of the funds and upon filing with public trustee of a "withdrawal" of the foreclosure prepared by the attorney, the public trustee will issue a check to the lender for the cure amount and return the funds along with original note and deed of trust to the attorney. Upon receipt of the cure proceeds and original documents from the public trustee, the attorney will forward them on to the lender.

- o. Effect of the foreclosure sale, if it occurs/Certificates of Purchase. If the foreclosure sale is held and the holder of the note is the successful bidder at the foreclosure sale, the public trustee will cancel the note (or if a deficiency bid is made, will reflect the amount of the deficiency on the note) and issue a "Certificate of Purchase" to the holder of the deed of trust as the successful bidder. If a third party is the successful bidder, the holder of the deed of trust foreclosed will be paid the amount of the holder's bid from the proceeds of the sale.
- p. Junior Lienor Redemption Rights. Junior lien holders may redeem if they timely file a notice of intent to redeem within 8 business days from the date of the sale. The Public Trustee must provide redemption figures within 14 days after the sale, and the lien holder must then redeem 15-20 days after sale. The junior lienor having the most senior lien according to the public records has the first rights to redeem. Each subsequent lienor in succession is allowed an additional five-day period to redeem according to the priority of his lien. It should also be noted that if a Federal Tax Lien exists on the property, the IRS under Federal law has in its favor 120 day redemption period.
- q. Deed Issued by the Public Trustee, After Expiration of Redemption Periods without any Redemption Occurring. If no redemption is made, the public trustee, upon being presented with the original Certificate of Purchase, will issue a public trustee's deed to the holder of the Certificate of Purchase. The holder of the Certificate of Purchase must make a timely demand upon the public trustee to issue the public trustee's deed. The public trustee's deed cannot be executed and recorded less than 15 days after the date of the sale.
- r. Possession of the Property. After the public trustee's deed is issued, it may be necessary for the lender, who has now become the owner, to file an "Unlawful Detainer" or "Eviction" lawsuit to evict any occupant in the property, if they refuse to relinquish possession.

- s. Conveyance of the Property by the Lender (now owner) to HUD or VA. Subsequent to issuance of the public trustee's deed, the lender's attorney should proceed with the necessary title acquisition procedures on HUD and VA loans so that title is timely delivered to the Veterans Administration or to HUD.
  
- t. Notes on the above "Summary." The above summary does not cover all of the details of a public trustee's foreclosure in Colorado. Yet, we hope it is helpful to you to understand the process more clearly. Please contact our collections and other attorneys with any questions.