

Foreclosure Investing (In Colorado)

By Jon Goodman¹
Frascona, Joiner Goodman and Greenstein, P.C.

I. Introduction

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. For 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 post-2008 scheme, the borrower has a longer time to cure and no redemption rights. The total duration of the foreclosure process remains essentially unchanged. **The elimination of the post foreclosure sale owner’s redemption rights have made it much more attractive for persons who are not the foreclosing lender to bid at foreclosure auctions** (See Chart appended at the end of these materials).

A. Longer Cure Period

Under the pre-2008 and post-2008 systems, the foreclosure process is essentially commenced by the lender’s filing of a “Notice of Election and Demand” with the Public Trustee.² The Public

¹ These materials are the latest evolution of an article first published in the Colorado Lawyer in 1998 co-written by this author and Richard Byron Peddie, Esq. Over the years, several legal assistants and law clerks have helped me update this article, including my current assistant De’Chanta Robinson and our law firm’s current law clerk, Jordan Bunch. To the extent these materials convey an intuitive sense of the law of public trustee foreclosure investing, it is also a result of mentoring by Oliver E. Frascona, James C. Smittkamp and David Farus. All of the foregoing receive much credit for the good in this article. All its mistakes are mine.

² COLO. REV. STAT. § 38-38-101

Trustee then has ten working days in which to record the Notice of Election and Demand at the Clerk & Recorder's office.³

Under the pre-2008 system, 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 pre-2008 system 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 post-2008 scheme, 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 cure⁴ and owners of agricultural property have approximately seven months.⁵ (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 these materials.)⁶

³ COLO. REV. STAT. § 38-38-102

⁴ COLO. REV. STAT. § 38-38-104(2)(b); COLO. REV. STAT. § 38-38-108(1)(a)

⁵ COLO. REV. STAT. § 38-38-104(2)(b); COLO. REV. STAT. § 38-38-108(1)(c)

⁶ See COLO. REV. STAT. § 38-38-100.3(1) for the definition of "Agricultural Property."

B. No Owner's Right to Redeem

After the foreclosure sale, under the pre-2008 system, 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 post-2008 foreclosure system, 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.⁷ 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.⁸ Under the post-2008 scheme the borrower still has until noon the day before the foreclosure sale to cure monetary defaults.⁹

⁷ COLO. REV. STAT. § 38-38-108(1)(a)

⁸ COLO. REV. STAT. § 38-38-108(1)(c)

⁹ COLO. REV. STAT. § 38-38-104(2)(b)

Under the post-2008 regimen, junior lien holders,¹⁰ and other non-owner stakeholders,¹¹ 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.¹² The junior lien holders still have similar sequential redemption rights (some of the details of which are discussed later in these materials).

C. Why Bother?

Different political constituencies had different reasons for changing the system. Generally, the post-2008 foreclosure process is simpler for public trustees 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 perceived that it was 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.

D. Undisputed Increase in Third Party Bidding at Foreclosure Auctions

The elimination of the post sale owner's redemption period has increased third party bidding at foreclosure auctions.¹³ The need to wait out an owner's redemption period under the pre-2008 system discouraged third-party investors from bidding at the foreclosure sale. An increase in competitive bidding cashes out more foreclosing lenders, generate proceeds to apply against junior

¹⁰ COLO. REV. STAT. § 38-38-302

¹¹ COLO. REV. STAT. § 38-38-305

¹² COLO. REV. STAT. § 38-38-302(1)(d)

¹³ From tracking data in Adams County, Colorado, this author estimates that under the pre-2008 system, fewer than 3% of properties sold at foreclosure sales sold to third party bidders and that under the post-2008 system, the percentage of properties sold to third party bidders seem to have settled at approximately 18%, more than a six fold increase.

liens (reducing deficiency claims against owners), and occasionally generates funds to apply against the owner's equity.

E. Caveat

The two bills making the above changes totaled over one hundred pages. There are many nuances and changes to the system, which are beyond the scope of these materials. The purpose of this article is merely to identify the law related to the acquisition of properties through Colorado's public trustee foreclosure process. Should any reader have a need for a broader knowledge of foreclosure law, the reader should consult other, more general sources.¹⁴

II. Mechanics

A. Tracking Sales

The public trustees along the front range of Colorado generally have websites that allow investors and others to track the status of properties that are in some stage of the foreclosure process. For non-agricultural property, public trustee's sales cannot be set any sooner than 110 days after the recording of the Notice of Election and Demand.¹⁵ For agricultural property, the foreclosure sale cannot be any earlier than 215 days after the recording of the Notice of Election and Demand.¹⁶ Before the public trustee can take a property to a foreclosure auction, the foreclosing lender must

¹⁴ For the most detailed and broadest discussion of Colorado foreclosure law, consult ROBERT A. HOLMES, *Public Trustee Foreclosure in Colorado, Third Edition (CLE in Colorado, Inc. (2005))*; WILLIS V. CARPENTER, *Colorado Real Estate Practice (Chapters 9 and 10) (CLE in Colorado, Inc. (2008))*. The House Bill introducing what this article calls the pre-2008 law was enacted through HB 06-1387. The Colorado Legislature amended the statutes several times since then. Shortly after the passage of HB 1387, Richard H. Krohn presented an article entitled "The New Foreclosure Act" as part of a continuing legal education course first presented in July of 2006 through CLE in Colorado Inc. The Krohn materials contain a detailed comparison of the pre-2008 law to the post-2008 law. Mr. Krohn has continued to update these materials as the law has evolved.

¹⁵ COLO. REV. STAT. § 38-38-108(1)(a)

¹⁶ COLO. REV. STAT. § 38-38-108(1)(c)

submit a written bid no later than noon, two business days prior to the public trustee sale.¹⁷ Though not required to do so by law, the public trustees in all of the counties that this author monitors along the front range of Colorado seem to make available a “pre-sale” list on their websites. For counties that have Wednesday¹⁸ public trustee sales, the “pre-sale” list is generally available Monday afternoon.

All other things being equal, foreclosure investors should begin tracking properties earlier, rather than later in the foreclosure process. Early tracking of foreclosures allows the investors more time to conduct property condition due diligence, evaluate title and lien priority and investigate the existence and viability of potential junior lien positions which might create redemption rights. Having more time generally decreases the likelihood of error. However, a high percentage of properties for which foreclosures are commenced are not suitable to be purchased by foreclosure investors. The disadvantage of tracking properties too early is that it wastes resources. Each foreclosure investor makes his or her own strategic decisions about when to begin focusing on properties. Because of a high fall out rate for properties, many investors do not begin focusing on properties until after the pre-sale list is produced. Essentially, many foreclosure investors do not begin their serious due diligence on a property until 36 hours before the foreclosure auction.¹⁹

B. Title Issues and Title Insurance

At the time of the drafting of these materials, it is unusual, but not unheard of, for a second deed of trust holder or other deed of trust holder to take a property to foreclosure auction. The vast majority of Colorado residential foreclosures, presently, are of first deeds of trust. The foreclosure of

¹⁷ COLO. REV. STAT. § 38-38-106

¹⁸ Other than the City and County of Denver, which has its public trustee sales on Thursdays, all of the counties with which this author has had experience along Colorado’s front range hold their foreclosure auctions on Wednesdays.

¹⁹ See James R. Haggerty, “House Flipping Makes a Comeback,” WALL STREET JOURNAL (2009), which gives lawyers a good flavor of the chaos involved in foreclosure investing.

the senior deed of trust extinguishes junior liens against the property if the junior lien holders have been properly notified of the foreclosure auction.²⁰ Someone who acquires title to a property via foreclosure of a junior deed of trust takes title subject to senior deeds of trust. Prior to bidding at a foreclosure auction, a foreclosure investor needs to confirm his or her expectations about the priority of the deed of trust being foreclosed.

Properties that are being foreclosed upon can have all of the same title problems that any property can have. A bidder's title expectations can be disappointed if the foreclosure was not handled correctly. Among the ways that a foreclosure can be defective is if there are persons to whom notice of the foreclosure should have been mailed who were not on the public trustee's mailing list.²¹ The Internal Revenue Service is entitled to special notice, under federal law, of the foreclosure.²²

How can a foreclosure investor protect against potential title problems? As of the drafting of these materials, it seems that most foreclosure investors rely upon low cost²³ owners and encumbrance information provided by title companies as a public relations service to market title commitments and other revenue generating services for title companies. As a low cost product, owners and encumbrance reports do not purport to be complete, and create no recourse against a title insurance company that provides them. While this author has found owners and encumbrance reports to be remarkably accurate for a low cost product, it is not unusual for "O&E's" to miss critical information. Among the more common omissions are the release of deeds of trusts recorded prior to the deed of trust which is

²⁰ COLO. REV. STAT. § 38-38-501

²¹ Colorado has a statute specifically addressing the resolution of "omitted parties" claims COLO. REV. STAT. § 38-38-506.

²² See 26 U.S.C. § 7425

²³ Readers should consult 3 COLO. CODE REGS. § 702-3:3-5-1 (2010) which precludes title companies from providing owners and encumbrance reports at no charge.

being foreclosed²⁴ and the omission of subordination agreements.²⁵ Owners and encumbrance information generally purports to only reveal liens organized in “tract” indexed databases. That is, owners and encumbrance reports generally purport to only identify liens that have property specific legal descriptions in them. Owners and encumbrance reports do not generally purport to identify other liens that might attach to the property such as judgment liens or IRS tax liens.²⁶

If a foreclosure investor begins tracking a foreclosure sufficiently early, it allows enough time to order a foreclosure title commitment. It is not practically possible for a foreclosure investor to order a foreclosure title commitment on Monday afternoon for an auction on Wednesday. A key component of making the title commitment useful is allowing the title examiner time to verify that the persons entitled to receive notice of the foreclosure were sent notice of the foreclosure. Generally, a foreclosure title commitment must be ordered no later than the Friday before a Wednesday foreclosure auction in order to be useful.

Care should be taken to ensure that the foreclosure title commitment is issued without the standard requirements, and instead has only the foreclosure appropriate requirements. For example, in a buy/sell transaction, a title commitment would normally have requirements for the conveyance of the deed from the then owner to the buyer, and the release of the seller’s mortgages against the property.

²⁴ Which would cause a foreclosure investor to perceive that the lien being foreclosed was a second deed of trust, rather than a first deed of trust.

²⁵ Which could cause the foreclosure investor to perceive that he was bidding on a senior lien (because of its prior recording date) rather than a junior lien that had been subordinated pursuant to the missed subordination agreement. It might also cause an investor to pass up an opportunity, perceiving that the lien being foreclosed was more junior than its true priority.

²⁶ COLO. REV. STAT. § 38-38-103(4)(a)(VII) and COLO. REV. STAT. § 24-70-109 require that all legal notices published to advertize a foreclosure contain a statement reading, “the lien being foreclosed may not be a first lien.” The lore of foreclosures is that this requirement was added to the statutes when a Colorado state legislator bought a property at foreclosure auction thinking that he was stealing a property while bidding on the sale from a first deed of trust, when the deed of trust actually being foreclosed was a second deed of trust.

These requirements should be eliminated from a foreclosure title commitment, and instead be replaced by a requirement that the public trustee issues a confirmation deed to the insured.

C. Bidding and Tender of Funds

The different public trustees have evolved different protocols for conducting their sales. Most public trustees require potential bidders to register to bid. Some require registration on a property by property basis. Some require bidders to show that they have certified funds at the auction for more than the lender's bid at the foreclosure auction.

Some public trustees require the high bidders to tender good funds immediately after the close of all the auctions. Some require a tender of funds after the close of the auction for property A before the public trustee commences the foreclosure for property B. For the public trustees that allow a later tender of funds, those public trustees designate a time deadline by which the good funds must be tendered. Colorado law stipulates the specific types of payments that are acceptable as good funds in a foreclosure proceeding.²⁷ Since these procedures vary significantly from county to county, any lawyer advising a foreclosure investor should check the relevant county-specific bidding and tender rules. These rules are generally available on the public trustees' websites.

D. The Passage of Title

Upon the expiration of all redemption periods allowed to all lienors who filed a notice of intent to redeem, title to the foreclosed upon property vests in the holder of the certificate of purchase (if none of the junior lien holders actually redeemed) or in the holder of the last certificate of redemption in the case where one of the junior lien holders actually redeems.²⁸ If there are no junior lien holders

²⁷ See COLO. REV. STAT. § 38-37-108

²⁸ COLO. REV. STAT. § 38-38-501

who are entitled to redeem, or if none of the junior lien holders who are entitled to redeem properly file notices of intent to redeem, then title vests in the certificate of purchase holder upon the close of business eight business days after the foreclosure sale.²⁹ When the public trustee later issues the “confirmation deed,” she is merely confirming the passage of title that has already occurred by operation of law.

III. Certificate of Purchase Holders v. Junior Lien Holders

While owners no longer have statutory redemption rights in Colorado, junior lien holders retain the right to redeem the certificate of purchase. This invites competition between investors who have acquired the certificate of purchase versus investors who have acquired, or who would like to acquire, junior liens from which to redeem the certificate of purchase. If the junior liens are sufficiently small, the holder of the certificate of purchase often seeks to satisfy the junior liens and therefore thwart the redemption rights of competing investors. Sometimes the facts align in such a way that junior lien holders seek to satisfy the liens of other junior lien holders. This section seeks to address whether, and how, certificate of purchase holders can destroy junior lienors’ rights to redeem by satisfying those liens. Similar concepts should apply to questions about whether lien holders can destroy other lien holders’ rights to redeem by paying off those liens.

A. Roots of Redemption

Statutory redemption provides holders of liens junior to the lien being foreclosed on, an opportunity to redeem the subject property *after* foreclosure sale. These redemption rights pressure bidders, including the foreclosing lender, to submit bids approaching the fair market value of the property. This tends to prevent the foreclosing lender from acquiring the property for a trifling

²⁹ COLO. REV. STAT. § 38-38-501

amount, while enhancing the likelihood that proceeds from the foreclosure sale will satisfy debts secured by the property.³⁰

Generally, American redemption statutes divide into two classes: “scramble” systems and “order” systems.³¹ In scramble systems, any junior lien holder can redeem property at any time after the debtor’s failure to exercise its right to redeem (if the debtor has a right to redeem). The redeeming lien holder generally pays off all claims attached to the property junior to the lien being foreclosed, regardless of whether those claims are junior or senior to those of the redeeming lien holder. The first lien holder to pay all claims, or not be “out-redeemed” by an unpaid lien holder, takes title to the property.

Colorado fits into the larger category of order systems.³² Order systems establish specific time periods in which junior lien holders must redeem the property or lose their redemptive rights. A redeeming lien holder redeems the property from the holder of the certificate of purchase or from senior positions that have properly exercised their right to redeem the property during the allotted time period. Redemption by a junior lien holder extinguishes and satisfies all senior interests junior to the foreclosed lien, as well as the foreclosed lien itself.

Both scramble and order systems are creatures of statute. Post-sale redemption can be effected only by strict compliance with statutory procedures.³³

³⁰ STORKE & SEARS, *Colorado Security Law* § 70 (Fred B. Rothman & Co., 1955, reprinted 1992)

³¹ NELSON & WHITMAN, *Real Estate Finance Law, Second Edition* § 8.7 (West Publishing Co. 1985)

³² *Id.*

³³ See, e.g. Wiltsie, *A Treatise on the Law and Practice of Mortgage Foreclosures* § 1128 (Matthew Bender & Co. 1927)

B. Colorado's Statute

After the public trustee sale, junior lien holders have the right to redeem. In order to have the right to redeem, the junior lien holder's lien must have been recorded prior to the recording of the Notice of Election and Demand that commenced the foreclosure.³⁴ In order to preserve the junior lien holder's right to redeem, the junior lien holder must file a Notice of Intent to Redeem not less than eight business days following the trustee's sale.³⁵ If no junior lien holder files a Notice of Intent to Redeem within the eight business day period, then title automatically vests in the holder of the certificate of purchase.³⁶ The later issued "Confirmation Deed," merely confirms that title has passed by operation of law.³⁷

If one or more lien holders file a Notice of Intent to Redeem, then the public trustee must notify the certificate of purchase holder within one business day.³⁸ Within the time period that is nine to thirteen business days after the sale, the certificate of purchase holder tenders redemption figures and the public trustee determines the redemption order of the various lien claimants who filed Notices of Intent to Redeem.³⁹ The 14th business day after the public trustee's sale is a rest day in the statutes. The lienor holding the senior most lien junior to the foreclosed lien may redeem within the five business day period which begins on the 15th business day following the public trustee sale and ends on the 19th business day following the public trustee sale.⁴⁰ In successive five-day periods, each junior lienor, in order of seniority,⁴¹ also may redeem, or "out-redeem," each prior senior redemptioner's interest by tendering the redemption amount plus all amounts and charges owing to each prior

³⁴ COLO. REV. STAT. § 38-38-302(1)(c)

³⁵ COLO. REV. STAT. § 38-38-302(1)(d)

³⁶ COLO. REV. STAT. § 38-38-501

³⁷ COLO. REV. STAT. § 38-38-501

³⁸ COLO. REV. STAT. § 38-38-302(2)

³⁹ COLO. REV. STAT. § 38-38-302(3)

⁴⁰ COLO. REV. STAT. § 38-38-302(4)(a)

⁴¹ COLO. REV. STAT. § 38-38-302(4)(b)

redemption. Doing so satisfies the liens held by the senior lienors and extinguishes their interest in the property.

C. Trial Court Confusion in the 1990s

The Colorado Supreme Court in *Bailey v. Erney*⁴² and the Colorado Court of Appeals in *Davis Manufacturing v. Coonskin*⁴³ (both discussed below) have established the general rule that certificate of purchase holders do not have the right to thwart junior lien redemption rights by satisfying the junior liens. Other cases identify exceptions to the general rule. Public trustees and trial courts struggle with the complexity.

In *Poladsky v. Castro*,⁴⁴ the Arapahoe County Public Trustee conducted a foreclosure sale. The plaintiff, the assignee of a judgment lien, held the junior-most lien encumbering the subject property, making him the last person who could redeem. During his redemption period, the plaintiff tendered proper redemption funds to the Public Trustee. The Public Trustee rejected the plaintiff's tender because, two days earlier, Tawara, assignee of a more senior mechanic's lien, had not only redeemed the property, but also tendered funds in satisfaction of the judgment held by the plaintiff. In spite of the decision in *Davis Manufacturing*, discussed below, the district court, ruling as an appellate court, held that Tawara, a stranger to the Poladsky judgment, had the right to satisfy the judgment and extinguish Poladsky's redemption rights.

In *Murer v. Colorado Mortgage Acquisition Ass'n.*,⁴⁵ the Court of Appeals avoided the issue by resolving the case on other grounds. In *Hoff v. Blum and Company Retirement Plan*,⁴⁶ the plaintiff was

⁴² 189 P. 18 (Colo. 1920)

⁴³ 646 P.2d 940 (Colo.App. 1982)

⁴⁴ Case No. 95-CV-2206, Div. 4, Arapahoe Dist. Court (March 5, 1996), on appeal from County Court.

⁴⁵ Case No. 91-CA-2044, Colorado Court of Appeals, February 25, 1993, *cert denied*.

⁴⁶ Case No. 90-CV-0285, Div. 3, Arapahoe County District Court, September 25, 1990.

the assignee of a judgment lien. Without citing authority, the Arapahoe District Court, acting in its appellate capacity, concluded that the plaintiff's redemption rights were cut off when the judgment it purchased by assignment was satisfied by the holder of a second deed of trust against the property.

D. Conflict in the Trial Courts in the 2000s with HOA liens

The trial courts have produced conflicting rulings with regard to Home Owners Association (“HOA”) liens.

i. Rulings For C.P. Holders

One line of cases has held that if the foreclosed deed of trust has a Fannie Mae Planned Unit Development (“PUD”) rider, a certificate of purchase holder has the right to pay off the HOA lien, regardless of whether the HOA lien is senior or junior to the deed of trust being foreclosed.⁴⁷ All these cases have a similar fact pattern: a person or entity purchases the HOA lien in order to redeem the property, the certificate of purchase holder tenders the funds to pay the HOA lien; the foreclosed upon deed of trust has a PUD rider allowing the deed of trust holder to pay off HOA liens; and the holder of the HOA lien refuses to accept the tender.⁴⁸ The courts have held that the holder of the HOA lien must accept the payment tendered by the certificate of purchase holder.⁴⁹ The holder of the HOA lien must accept the payment because the certificate of purchase holder is deemed to be the holder of the evidence of debt, and therefore may pay “[c]osts and expenses allowable

⁴⁷ *Neighborhood Partners, LLC v. Kallima Properties LLC*, Case No. 09-CV-603, Div. 404, Arapahoe Dist. Court (April 2, 2009). One of these cases, *U.S. Capital Funding, LLC v. Done Deal Investments, LLC*, Case No. 08-CV-604, Div. C, Adams Dist. Court (April 9 2009), is ongoing.

⁴⁸ *Id.*

⁴⁹ *Neighborhood Partners, LLC v. Winpark II, LLC*, Case No. 2009-CV-3616, Div. 8, Denver Dist. Court (June 3 2009), *dismissed on appeal*.

under the evidence of debt, deed of trust, or other lien being foreclosed.”⁵⁰ Section F of the PUD rider to the deed of trust in all of these cases “specifically allows any outstanding HOA liens to be paid in full by the lender under the deed of trust.”⁵¹

ii. Ruling For HOA Lien Holder

The recent case of *Ives Associates, Inc. v. Hicks*⁵² diverges from the trial court unanimity in the above-mentioned cases. *Ives* has a similar fact pattern: Hicks purchased an HOA lien in hopes of redeeming the property, the foreclosed deed of trust had a Condominium Rider attached, Ives, the certificate of purchase holder, attempted to extinguish Hick’s right to redeem by paying off the HOA lien, and Hicks refused to accept the tender.⁵³ The court held that Ives did not have a legal right to force Hicks to accept the tender.

The court considered two different provisions in the deed of trust.⁵⁴ The Condominium Rider contained a provision stating that “Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituted Documents;” the deed of trust included a provision stating, “if Borrower fails to perform the covenants and agreements ... Lender may do and pay for whatever is necessary to protect the value of the property.”⁵⁵ The affect of this language is similar to Paragraph F of the PUD Rider in the other trial court decisions; both seem to be allowing a lender to pay off certain expenses. An important difference is that Paragraph F of a PUD Rider specifically refers to HOA

⁵⁰ *Id.*; COLO. REV. STAT. § 38-38-301; COLO. REV. STAT. § 38-38-107

⁵¹ *Neighborhood Partners, LLC v. Winpark II, LLC*, Case No. 2009-CV-3616, Div. 8, Denver Dist. Court (June 3, 2009).

⁵² Case No. 2009-CV-234, Div. K, Summit County Dist. Court (April 6, 2010)

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

liens. Most Condominium Riders contain a Paragraph F that is identical to a PUD Rider Paragraph F.⁵⁶ Based upon an analysis similar to the analysis in section III.E. below, the trial court held that the certificate of purchase holder did not have the ability to extinguish the redemption rights of the holder of the HOA lien. The court did not discuss any of the other trial court decisions, nor did it discuss the exact Paragraph F language, which may or may not have been in the *Ives* condominium rider.

This issue arises frequently, causing confusion for public trustees, trial courts, and real estate investors. In no area of law are certainty and predictability more important than in the law of real property.⁵⁷ Numerous and important commercial transactions occur every day based on the predictability of legal consequences of documents and relationships.⁵⁸ The author has not attempted to find all unpublished cases in which public trustees and trial courts have addressed the question raised by this section III. The remainder of this section III attempts to address the circumstances under which a certificate of purchase holder can eliminate the redemption rights of junior lien holders.

E. Analysis of Case Law

i. Cases Disallowing Defeat of Junior Redemption Rights

In *Bailey*,⁵⁹ the beneficiary of a deed of trust was the successful bidder at its own foreclosure sale and received the certificate of purchase. After expiration of the owner's redemption period, the holder of a judgment lien junior to the foreclosed position attempted

⁵⁶ <https://www.efanniemae.com/sf/formsdocs/documents/ridersaddenda/doc/3140w.doc>

⁵⁷ *First Nat'l. Bank v. Energy Fuels Corp.*, 618 P. 2d 1115, 1121 (Colo. 1980), *reh'g denied* (Lohr, J. dissenting). The credibility of the dissent has been enhanced because the legislature codified the dissent's position in COLO. REV. STAT. § 38-38-302 and COLO. REV. STAT. § 38-38-306.

⁵⁸ *Id.*

⁵⁹ 189 P. 18 (1920)

redemption. The sheriff refused redemption because the holder of the certificate of purchase had deposited sufficient sums to satisfy the judgment.

The holder of the certificate of purchase argued to the Colorado Supreme Court that the holder of the judgment lien was entitled to “nothing more than his judgment, and that when the holder of the certificate of purchase tendered to him an amount sufficient to pay his judgment and costs, the right of redemption was thereby extinguished.”⁶⁰ Rejecting this argument, the Court stated that “the holder of a certificate of purchase has, in our opinion, no right to prevent a judgment creditor from exercising his right of redemption if exercised within the statutory period.” The Court further determined that the judgment lien holder “was entitled to determine for himself *whether he would accept payment of his judgment, or redeem the property.*”⁶¹

In *Davis Manufacturing*,⁶² the Colorado Court of Appeals recognized that only the debtor and certain persons with an ownership interest in the property have a right to pay off a judgment creditor and thereby cancel existing redemption rights.⁶³ In *Davis Manufacturing*, the holder of a certificate of purchase attempted to thwart the redemption rights of a junior judgment lienor by satisfying the judgment lien. The holder of the judgment lien argued that the holder of the certificate of purchase had no right to prevent him from redeeming by paying the amount of the lien.

⁶⁰ *Id.* at 18

⁶¹ *Id.* at 19 (emphasis supplied)

⁶² 646 P.2d 940 (Colo.App. 1982, cert. denied on appeal after remand, 687 P.2d 484 (Colo.App. 1984)), cert. denied.

⁶³ *Id.* At 944 (debtor and those with ownership interest have exclusive right to pay off judgment and cut off judgment lienor’s redemption rights); see also *Bailey, supra*, 13 at 18 (statutory redemption rights of judgment lienor cannot be cut off by holder of certificate of purchase who has no legal or equitable title to the property).

The Court of Appeals agreed, because “the holder of a certificate of purchase on an execution sale acquires only the alternative rights to receive the redemption money, in case of a redemption, or deed for the land after the time for redemption has expired.”⁶⁴ Relying on *Bailey*, the court concluded that the holder of the junior judgment lien was entitled to determine for himself whether he would accept payment of his judgment, or redeem the property.

ii. Cases Allowing Defeat of Junior Redemption Rights

Colorado case law recognizes two exceptions to the general rule that the holder of a certificate has no ability to extinguish the redemption rights of junior lien holders. In *Plute v. Schick*,⁶⁵ the holder of the certificate of purchase, who had already received a deed to the foreclosed property from the foreclosed upon owner, was allowed, prior to expiration of the owner’s redemption period, to satisfy a judgment lien encumbering the property and thereby extinguish that lien holder’s redemption rights. As discussed below, the *Plute* decision is severely criticized.⁶⁶

In *Osborn Hardware Co v. Colorado Corp.*,⁶⁷ the Court of Appeals allowed a holder of a certificate of purchase, who was “acting on behalf of”⁶⁸ the debtor, to extinguish the

⁶⁴ *Id.* at 944

⁶⁵ 71 P.2d 802 (Colo. 1973)

⁶⁶ STORKE & SEARS §70

⁶⁷ 510 P.2d 461 (1973)

⁶⁸ The *Osborne* opinion does not identify the facts on which the court relied to conclude that the holder of the certificate of purchase was acting on behalf of the debtor. This author is not aware of any case law where the courts have explored what it means for a holder of certificate of purchase to act on behalf of a debtor when paying off junior lien positions. It is not unusual for certificate of purchase holders to receive an express grant of authority (such as a power of attorney) from the foreclosed upon debtor to pay off junior liens. Sometimes the certificate of purchase holder receives this express grant as a trade for giving the former owner consideration, such as a later move out date, free rent or cash to the debtor. Armed with the grant of authority, the certificate of purchase holder then attempts to satisfy junior liens with his own funds. Query whether a

redemption rights of a junior lien holder. The holding in *Osborn Hardware* is based, in part, on what some consider to be a tortured reading of the 1973 version of Colorado Rules of Civil Procedure, (“C.R.C.P.”) Rule 58(b). The *Osborn Hardware* court quoted the relevant portion of the rule as follows:

Whenever a judgment shall be so satisfied in fact otherwise than upon execution, it shall be the duty of the party or attorney to give such acknowledgement, and upon motion the court may compel it *or may order the entry of such satisfaction to be made without it.*⁶⁹

The Court of Appeals concluded that the trial court had the authority to order satisfaction: (1) without acknowledgment from the judgment creditor; and (2) without a motion.⁷⁰ The latter conclusion is based upon the premise that the last “it” in Rule 58(b) refers to a motion.

Rule 58(b) has more internal consistency if the last “it” in the quotation refers to the judgment creditor’s acknowledgement of satisfaction, and not the motion. A plain reading of the rule suggests that the final two “its” in the quotation refer to the same thing. The penultimate “it” must refer to the judgment creditor’s acknowledgement of satisfaction.

With this interpretation, the Rule should be construed to read as follows:

Whenever a judgment shall be so satisfied in fact otherwise than upon execution, it shall be the duty of the party or attorney to give such acknowledgment, and upon motion the court may compel [such acknowledgment] or may order the entry of such satisfaction to be made without [such acknowledgment].

certificate of purchase holder who is using his own funds, and not the funds of the foreclosed upon debtor, is “acting on behalf of” the debtor?

⁶⁹ *Id.*, at 463 (*emphasis in original*)

⁷⁰ *Id.*

While a court may compel satisfaction of a judgment without the cooperation of the judgment creditor or the judgment creditor's assignee (often an unwilling foreclosure investor), a motion is still a prerequisite to the court's ability to order satisfaction.

This interpretation is the only one consistent with *Bailey* and *Davis*. Both cases establish that not all persons have the right to satisfy a judgment. The motion requirement not only guarantees due process for the judgment holder, it also ensures that an improper person will not satisfy the judgment. The procedural question of how someone may satisfy a judgment without the judgment holder's cooperation creates frequent practical problems for court clerks and public trustees. It is the experience of the author that court clerks are unaware of the limitations in *Bailey* and *Davis* and will allow anyone tendering sufficient funds to satisfy a judgment.

*Craft v Storey*⁷¹ is a 1997 Colorado Court of Appeals decision resting on *Plute* and *Osborn Hardware*. *Craft* held that an owner (or his or her agent) may satisfy liens encumbering the property to eliminate the redemption rights of junior lien holders even after the lienor has tendered redemption funds, as long as the lien is satisfied before expiration of that lienor's redemption period.⁷²

iii. Wyse v. National Real Estate

In *Wyse Financial Services, Inc. v. National Real Estate Investment, LLC.*,⁷³ the Colorado Supreme Court explicitly overruled the 1997 Colorado Court of Appeals decision

⁷¹ 942 P.2d 1211

⁷² *Id.* at 1214-15

⁷³ 92 P.3d 918, 921 (Colo. 2004)

in *Craft v. Storey*.⁷⁴ In *Craft* the Court of Appeals held that any satisfaction of a junior lien holder's judgment before the end of the statutory redemption period extinguishes the junior's right to redeem.⁷⁵ *Wyse* overruled *Craft* and held that once a junior lien holder has followed the proper statutory requirements for redemptions, including the tender of funds, that junior lien holder is entitled to a certificate of redemption and all the rights that flow from redemption.⁷⁶

iv. Reconciliation of Existing Case Law

Bailey and *Davis Manufacturing* establish that the holder of the certificate of purchase has no right to satisfy junior liens. *Plute* and *Osborn Hardware* establish that an owner (or his or her agents) may extinguish redemption rights of junior lien holders by satisfying junior liens. While the rationale that applies in *Bailey* and *Davis* would seem to preclude one lienor from extinguishing the redemption rights of junior lienors, the gap between *Poladsky* and *Davis Manufacturing* on the one hand, and *Plute*, *Osborn Hardware* and *Craft* on the other, leaves open the possibility for decisions in cases such as *Poladsky*, *Murer* and *Hoff* holding otherwise.

F. Public Policy

The question raised at the beginning of this section III can be annoying to courts, court clerks, and public trustees, who ask: Why should the law reward junior lien holders who seek a windfall by resisting satisfaction of their liens? The answer lies not in protecting foreclosure investors, but in the

⁷⁴ *Id.* at 923

⁷⁵ *Id.*

⁷⁶ *Id.* at 922

law's desire to: (1) benefit debtors through bidding pressure at foreclosure sales; and (2) encourage foreclosure investors to seek out and satisfy junior lien holders.

i. The Case **Against** Allowing C.P. Holder to Satisfy Junior Liens

In the aforementioned *Colorado Security Law*, these policies are discussed in a criticism of the decision in *Plute*:

It is notorious that hard cases make bad law. . . . In *Plute v. Schick* [the Colorado Supreme Court] faced the problem of determining which of two undeserving parties should get a windfall. . . . [The *Plute* court] solved it by taking the property away from the party who would otherwise get the biggest windfall, and whose conduct seemed to the court to be most reprehensible. [The junior-most lien creditor] had borrowed the abstract from [the foreclosing lender] as a prospective purchaser, discovered the outstanding judgment and bought it up in order to get the land for a song.⁷⁷

Why should the law have preferred the junior-most lien creditor in *Plute* over the foreclosing lender? Because the foreclosing lender:

. . . had violated [a principle] which the statute is designed to promote. He had bid in the property cheaply at the sale and should have been penalized for underbidding. . . . The court purported to apply the spirit of the statute as against its letter, but completely failed to comprehend its underlying purpose.⁷⁸

Colorado foreclosure law attempts to strike a balance between: (1) the foreclosing lender's right to take its collateral; (2) protecting the debtor's equity, or, if there is no

⁷⁷ STORKE & SEARS § 70

⁷⁸ *Id.*

equity, maximizing the property's value in satisfaction of debt obligations secured by it; and (3) protecting junior lien holders.⁷⁹

If Colorado courts allow lien holders to extinguish each other's redemptive rights in a chaotic and disorderly fashion, foreclosure investors will have little incentive to seek out junior judgment creditors, homeowner's associations, mechanic's lien claimants, or other junior lien creditors. (This also could inadvertently convert Colorado to a scramble system, rather than the order system prescribed by law.) On learning of each other's redemption rights, foreclosure investors will race to satisfy the liens of their competitors and extinguish each other's redemptive rights. (It is not farfetched to envision a situation in which, unbeknownst to each other, two investors holding liens junior to the foreclosure position extinguish each other's redemption rights, leaving the windfall for the foreclosing lender, who may be less deserving of this windfall than foreclosure investors.)

Profit-seeking as a foreclosure investor is like "looking for a needle in a haystack." The opportunity to make large sums of money on one particular foreclosure (the "needle") is what motivates foreclosure investors to search among the vast number of foreclosures in which the property being foreclosed on has no equity (the "haystack").

If foreclosure investors have no incentive to seek out junior lien holders, then foreclosed-on owners and their secured creditors will be harmed. Foreclosing lenders and other bidders at foreclosure sales will have less incentive to submit bids approaching fair

⁷⁹ "One purpose of giving lienors a right to redeem is to make any surplus value in the mortgaged property available to others having liens thereon. Another purpose, not clearly apparent from the statute itself, is to bring pressure on the foreclosing mortgagee to bid a fair amount for the property." STORKE & SEARS § 70; see also: *Stevenson v. Sebring*, 164 P. 308 (1917); NELSON & WHITMAN, *supra*, § 8.4.

market value.”⁸⁰ Foreclosing lenders will be more likely to reap windfalls from low bids at foreclosure sales. Unsophisticated junior lien creditors, or junior lien creditors without funds to redeem, will be less likely to have their debts satisfied through foreclosure. Public policy dictates that the law should reward foreclosure investors who compete and pay for opportunities to redeem from junior liens.

ii. The Case **For** Allowing C.P. Holders to Satisfy Junior Liens

Earlier this year, the Colorado Senate passed SB 10-093, a bill entitled “Concerning the Orderly Resolution of Claims in Foreclosures Involving Junior Liens.”⁸¹ This bill purported to allow certificate of purchase holders to extinguish the redemption rights of junior lien holders.⁸² This bill did not become law; it was postponed indefinitely in the House local government subcommittee.

Under this bill, junior lien holders who wished to redeem would still have been required to follow the statutory redemption procedures.⁸³ However, once the junior lien holder filed a notice of intent to redeem, the certificate of purchase holder would have been entitled to pay off the junior lien holder.⁸⁴ The junior, in turn, was required to accept the tendered payment and release the lien.⁸⁵ The bill’s authors believed that this law was necessary because the current system may depress the sales price of foreclosure homes.⁸⁶ According

⁸⁰ “The very existence of the possibility of redemption brings pressure on the foreclosing mortgagee to bid the reasonable value of the property.” STORKE & SEARS § 66.

⁸¹ S.B. 10-093, 67th Gen. Assem., Reg. Sess. (Colo. 2010)

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

to the bill, knowledge of junior lien holders may discourage bidding.⁸⁷ This depression of foreclosure sales may leave “defaulting homeowners with little or no cash proceeds from the sale or a greater deficiency, for which they typically remain personally liable, than would otherwise be the case.”⁸⁸

G. No Free Lunch

Experience (and ideally data) should resolve the foregoing debate, not logic. The resolution, however, should be tempered by an awareness that (1) foreclosure investment strategies evolve in response to changes in the law and (2) the foibles of humans.

Before the evolution and unanimity of the recent trial court decisions discussed in section III.D.i. above, investors who had acquired junior liens would show up at foreclosure auctions and announce that they had acquired junior liens. The holders of these junior liens hoped to demoralize bidders at the auction, to depress the winning bid amount, to reduce their redemption amount. There are two factors that suggest that the tactic was successful: Presumably the junior lien holders thought that it was successful, otherwise they wouldn't have repeated the tactic. Perhaps more importantly, once the trial court decisions discussed in section III.D. emerged, winning bid prices as a percentage of a property's value seemed to escalate.

The logic of the Storke & Sears argument is that if bidders are aware of the potential of being redeemed out, they will jump up their bids to a price high enough to discourage redemption by junior lien holders. Yet there are two factors that tend to undermine this logic. First, some public trustees

⁸⁷ *Id.*

⁸⁸ *Id.*

have rules purporting to limit the amount by which bidders can increase the bid beyond the prior bid.⁸⁹ Second, and more importantly, all other things being equal, a redeeming junior lien holder will pay more for a property than an investor who bids at the foreclosure auction because the bidder at the foreclosure auction has his funds tied up longer. Committing funds at auction forces most bidders to pass up other investment opportunities. There are many examples where the bidding at foreclosure auctions gets rich enough to discourage redemption by junior lien holders, but these situations tend to be the exception rather than the rule, and high winning bids tend to be in response to aggressive competition at the auctions, not in response to a bidder who jumps up his bid. Human instinct is to try and win the auction at the lowest price that you can do so. If the analysis stopped here, we would conclude that the premise behind SB 10-093 is correct.

Yet there is at least one more factor to consider. The anecdotal experience of this author suggests that if bidders know that they can defeat the redemption rights of small junior lien holders, they will tend to compete more aggressively at auctions, unless they collaborate not to. The same players tend to show up and compete in the same counties week after week. Investors sometimes run into each other in the field evaluating properties. The shared experience of relatively high stakes competition breeds a certain kind of collegiality and honor among competitors. It is not unheard of for competing investors to strike verbal deals at the auctions that decrease competition, and therefore dampen the competitive bidding. (See discussion in section IV.B. below.) Might competition dampening deals increase if investors did not have to compete against the possibility of being redeemed out by people who are not in the room? In addition to helping junior lien holders get paid

⁸⁹ For counties in which the public trustees demand payment immediately after the auction, this author is not aware of any legitimate reason why public trustees would preclude bidders from jumping up the bid. Systems where investors have a few hours to tender the funds for the winning bid enable, however, the following type of fraud. Investor A and B conspire to bid on the auction of Black Acre as follows. Investor A bids \$100 over the bid of the foreclosing lender. Investor B then jumps up the bid by say \$50,000, discouraging further bidding by competitors. Investor B then does not show up at 1:00 to tender the funds, so that Investor A takes the property at \$100 over the bid by the foreclosing lender.

through the sale of their liens, junior lien redemption rights serve as an important check against collaboration designed to depress competition at the auctions.

The public policy considerations between the two choices is not compelling, so any attempt at clarifying the law in this area should focus on making the law clearer and simpler, for which some perceived fairness might be sacrificed.

IV. Miscellaneous

A. Bid Rigging

In certain situations the courts have equitable discretion to extend statutory redemption periods and void foreclosure sales. Courts have the power to set aside a foreclosure sale or extend the redemption period if there has been “fraud, deceit, or collusion.”⁹⁰ One type of collusion occurs when two or more bidders at a foreclosure sale stifle competition by making an agreement to stop bidding up the price of the property. This agreement can come in a variety of forms. In *Amos v. Aspen Alps 123, LLC*, three bidders agreed to form an LLC to purchase the property; thereby stopping the rise in the price of the property.⁹¹ Bid rigging is distinguishable from permissible joint bidding. Joint bidding occurs when two or more people pool their resources to buy a property that they could not have afforded individually.⁹² When bid rigging has occurred the court has discretion to set aside the foreclosure sale and extend the statutory redemption period.⁹³

The Colorado Court of Appeals concluded that bid rigging is *per se* illegal under both federal anti-trust law, the Sherman Act, and under Colorado state law. Although not controlling, the court

⁹⁰ *Johnson v. Smith*, 675 P.2d 307, 310 (Colo. 1984)

⁹¹ 2010 WL 27401 (Colo.App. 2010)

⁹² *Id.* at 10

⁹³ *Id.* at 12

relied on federal case law to hold that bid rigging is a *per se* violation of the Sherman Act because it is a type of price fixing.⁹⁴ Colorado law states that “it is illegal for any person to contract, combine, or conspire with any person to rig any bid, or any aspect of the bidding process, in any way related to the provision of any commodity or service.”⁹⁵ This statute explicitly forbids bid rigging and suggests a broad reading of the instances in which bid rigging applies by including the phrases “any person” and “in any way.”⁹⁶ For example, in *Amos* the three bidders who formed an LLC had already all bid as high as they could.⁹⁷ However, the court held that this was still bid rigging, not joint bidding, because none of the three knew that the others had reached their limits.⁹⁸

In *Amos* the court held that because bid rigging had occurred, the public trustee’s deed to the LLC must be set aside.⁹⁹ The court then remanded to determine if the foreclosure sale should also be voided.¹⁰⁰

The statutory redemption period contested in *Amos* was the owner’s redemption period, which no longer exists.¹⁰¹ However, other Colorado precedent has held that the court’s equitable authority to extend redemption periods includes redemption periods for junior lien holders.¹⁰² There has not yet been a Colorado case that discusses extending the statutory redemption period for junior lien holders on the basis of bid rigging.

⁹⁴ *United States v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir. 1970)

⁹⁵ COLO. REV. STAT. § 6-4-106(1)

⁹⁶ *Amos*, 2010 WL 27401, 9

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 12

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 8

¹⁰² See Generally *Johnson*, 675 P.2d 307

B. Assignment of Lien Positions

The assignment of junior liens and other redemption positions allows the system and markets to maximize the value of these positions. For example, a home owner's association lien might have little value to the home owner's association in a foreclosure of a senior deed of trust because the homeowner's association does not have sufficient funds to redeem. The lien might be quite valuable to an investor with sufficient capital to redeem because the redemption amount might be less than the value of the property. The sale of the lien from the HOA to the person with capital benefits both the assignor and the assignee and helps keep the bidding honest at the foreclosure auction. In order to further these goals, however, the assignment must be genuine.

In *Beckhart v. HTS Properties, LLC*,¹⁰³ the Colorado Court of Appeals addressed the issue of whether the right of redemption can be severed from the property interest it served. The court concluded that the right of redemption cannot be severed.¹⁰⁴ In this case HTS Properties, the lender, initiated a foreclosure sale on an apartment complex, bid the highest amount at the sale, and received a certificate of purchase.¹⁰⁵ Three tenants in the apartment complex sold their rights to redeem to Beckhart for ten dollars each while retaining all other rights and obligations under their leases.¹⁰⁶ This lawsuit was initiated when HTS Properties refused to recognize Beckhart's redemption rights.¹⁰⁷

The Court of Appeals ruled in favor of HTS Properties because both Colorado law and public policy support the conclusion that rights of redemption cannot be severed from the rights that caused the power to redeem. The assignors' status as lessees does not exempt them from the requirements of

¹⁰³ 981 P.2d 208 (Colo.App. 1998)

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 209

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

junior lien holders because a lessee is considered a lienor without a lien amount.¹⁰⁸ The Colorado statutory redemption language “expressly refers only to those who hold an interest in the property.”¹⁰⁹ Therefore, Beckhart could not redeem because he did not have an interest in the property. Additionally, public policy dictates that people like Beckhart should not be able to redeem. One purpose of redemption laws is to encourage full value bidding at foreclosure sales.¹¹⁰ This goal would be undermined if these types of sham assignments were allowed because people could avoid competing at the foreclosure sale “and instead purchase redemption rights for a nominal price.”¹¹¹

C. Treatment of Excess Proceeds

When a foreclosed property is sold for an amount that exceeds the amount of the deed of trust holder’s bid, Colorado law dictates that the excess proceeds are paid out according to statutory priority until the funds are depleted.¹¹² First, the proceeds flow to the holder of the evidence of debt being foreclosed to cover the full pay off of that debt (if the foreclosing lender bid a deficiency).¹¹³ Next, the proceeds flow to the next junior lien holder who filed a Notice of Intent to Redeem, unless that junior lien holder is itself redeemed out by a more junior lien holder.¹¹⁴ Any remaining proceeds after all such junior lien holders have been satisfied are given to the owner of the property “as of the date and time of the recording of the notice of election and demand or lis pendens.”¹¹⁵ If the owner fails to claim the proceeds within five years of the sale, the proceeds go to the general fund of the county.¹¹⁶ Foreclosure investors generally buy junior liens to acquire the foreclosed upon property. Investors in

¹⁰⁸ *Id.* (Citing COLO. REV. STAT. § 38-38-305)

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² COLO. REV. STAT. § 38-38-111

¹¹³ *Id.*

¹¹⁴ COLO. REV. STAT. § 38-38-111

¹¹⁵ *Id.*

¹¹⁶ *Id.*

junior liens, however, need to consider scenarios in which the bidding tops out at a price that is above the price at which the junior lien holder is willing to redeem. Further, liens junior to the deed of trust being foreclosed but senior to the investor's redemption position may themselves redeem, making the redemption price from the more junior position too rich. Potential acquirers of junior liens need to think out whether they can be content under these scenarios. Whether they wish to redeem or not, any junior lien holder seeking overbid proceeds should file a Notice of Intent to Redeem as a prerequisite to claiming overbid proceeds. Other nuances regarding the treatment of overbid proceeds are explored in James Benjamin's 1994 Colorado Lawyer article, "Foreclosure Sale Excess Proceeds."

D. Padding Redemption Figures

When a certificate of purchase holder is redeemed out the holder is allowed to not only recuperate the amount of the bid, but also interest at the rate applicable under the note secured by the foreclosed upon deed of trust plus any reasonable cost of defending and maintaining the property.¹¹⁷ These reasonable costs include, but are not limited to: attorney's fees, costs to comply with a court order to bring the property into compliance with the law, inspection fees, and costs to secure the property.¹¹⁸

When certificate of purchase holders are redeemed out by junior lien holders, or when junior lien holders are redeemed out by more junior lien holders, they are often disappointed and are tempted to pad their costs. The inherent ambiguity in the word "reasonable" enables this temptation. Some public trustees are more aggressive than others at attempting to tamp down on abusive practices. Practitioners should study the governing statutes as these situations arise.

¹¹⁷ COLO. REV. STAT. § 38-38-301; COLO. REV. STAT. § 38-38-107

¹¹⁸ COLO. REV. STAT. § 38-38-107

V. The Big Picture¹¹⁹

The post-2008 foreclosure system encourages competitive bidding at foreclosure auctions. Some foreclosing lenders are starting to learn that if they bid reasonably, they might get cashed out at a fair price at the foreclosure sale. Local foreclosure investors, putting up their own cash, are much better at cleaning up and moving foreclosed upon properties than lenders.

As the foreclosure investing market matures, real estate brokers, title companies and others are developing services to facilitate bidding by the merely smart (rather than the smart and experienced). Acquiring property through the foreclosure process allows buyers to jump ahead of the competitors for real estate inventory held by lenders. Bidding at foreclosure sales allows cash buyers to obtain an advantage versus buyers who need time to borrow money for short sale or REO acquisitions.

The foreclosing investing market has evolved sufficiently so that persons who desire to live in the auctioned property are buying at auctions. Lenders are starting to facilitate buying at foreclosure auctions. Since owner occupants will tend to bid more at auctions than investors, the arrival of owner occupants will tend to drive up the prices, showering more proceeds on lenders and sometimes the foreclosed upon owners. Lawyers can play an important role in helping lenders, borrowers and investors work through the inherent complexity of foreclosure investing.

¹¹⁹ The law is a seamless web. Among the topics not explored in these materials are: the ways in which buying at sheriff sales might be different than buying at public trustee auctions; the complexities caused by the super priority of some portion of homeowners' association liens; and the Federal Protecting Tenants at Foreclosure Act, which creates some post foreclosure occupancy rights for bona fide tenants in foreclosed upon properties. For a discussion of the Federal Protecting Tenants at Foreclosure Act, see http://www.frascona.com/resource/war110_protecting_tenants_foreclosure_act_eviction.htm.

Trailing 8 Week Average of Foreclosed Properties Sold to Third Parties in Adams County

