Foreclosure by Private Trustee: Now Is the Time for Colorado

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**FORECLOSURE BY PRIVATE TRUSTEE: NOW IS THE TIME FOR COLORADO**

**BY ANDREA BLOOM***

**INTRODUCTION**

Two methods of enforcing payment of a debt secured by a mortgage through the sale of the mortgaged property, otherwise known as mortgage foreclosure, predominate in the United States today. Judicial foreclosure is available in every state.¹ Where a deed of trust or mortgage with a power of sale is used, thirty-three states and the District of Columbia recognize the method of nonjudicial foreclosure by the mortgagee or trustee.²

Colorado's nonjudicial foreclosure procedure is unique in that a public official conducts the entire process.³ All other states that recognize nonjudicial foreclosure allow a private trustee or the mortgagee to exercise the power of sale. For a Colorado mortgagee to take advantage of the relatively simple statutory method to foreclose deeds of trust,⁴ the deed of trust must name as the trustee the public trustee of the county in which the mortgaged property is located.⁵ A deed of trust that names any other person as trustee is deemed to be a mortgage and may be foreclosed only through the courts.⁶ Colorado is the only state that has adopted a public trustee system for nonjudicial foreclosures.

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2. These states are Alabama, Alaska, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. A power of sale clause in a mortgage or deed of trust gives the mortgagee or trustee the right and power on default (i) to advertise and sell the property at a public auction, usually without resort to a court for authority, (ii) to satisfy the debt to the mortgagee out of the sale proceeds, and (iii) to convey the property by deed to the purchaser at the foreclosure sale. Each state's statutes and the terms of the power of sale clause govern the type and degree of notice given and the manner of the sale. NELSON & WHITMAN, supra note 1, at § 7.19. Power of sale foreclosure is generally more efficient and less costly than judicial foreclosure. Id.


4. Id.


6. Id.
A dramatic increase in the number of foreclosures in 1986 and 1987 in Colorado, due to a downturn in the economy, emphasized one weakness in Colorado's public trustee system: the inability of public trustees to deal in a timely manner with large numbers of foreclosures. In search of a remedy for the public trustees' delays in the commencement of foreclosure proceedings, the lending community urged the Colorado legislature to pass a bill permitting private trustees to perform the same functions as public trustees in power of sale foreclosures. Such a bill was introduced in the 1987 session of the Colorado General Assembly. A committee amendment deleted the bill's provision for private trustees due to the legislators' reluctance to proceed without sufficient information regarding the implications and wisdom of adopting a private trustee system. This article considers the issues involved in a private trustee system with the intent to fill the gap left at the end of the 1987 legislative session.

Private trustees should be permitted to conduct nonjudicial power of sale foreclosures in Colorado, provided that the extent and manner of notices and the judicial hearing for an order authorizing the sale are retained as integral parts of the foreclosure process. The potential improvements to the system resulting from the use of private trustees outweigh any perceived advantages in the current public trustee process. With minimal statutory modifications, a private trustee system can be implemented to provide a more efficient system for Colorado.

This study begins with a discussion of Colorado's nonjudicial foreclosure procedures conducted by the public trustee. The article then explores the historical and legislative background for the original adoption of the public trustee system in 1894. Next, the beneficial effects of competition among many private trustees upon the power of sale foreclosure process are addressed, along with suggested statutory modifications to the foreclosure scheme to ensure that a private trustee system is as workable and beneficial as the public trustee system. Finally, the article discusses constitutional due process defects in the existing statutory scheme which should be corrected even if a private trustee system is not adopted.

11. This article examines and addresses the public trustee system as a whole, not the capabilities of individual public trustees. Nothing in this article is intended to suggest that any particular public trustee has performed less than admirably in his or her job. Recommendations are based on changes needed in the system rather than changes in any particular public trustee's office.
I. OVERVIEW OF COLORADO’S NONJUDICIAL FORECLOSURE PROCEDURES

The basic procedures for conducting a nonjudicial foreclosure by the public trustee are set forth in title 38, articles 37, 38, and 39 of the Colorado Revised Statutes. The public trustee begins a foreclosure by recording in the public records the notice of election and demand for sale stating that the beneficiary has elected to foreclose due to a specified default. The recording of this document places all persons who might be interested in the property on constructive notice that foreclosure has commenced. The public trustee then publishes a notice of sale for five consecutive weeks in a local newspaper. The notice of sale states that the property will be sold at a public auction on a given date, time, and place. The sale date must be set no less than forty-five and no more than sixty days after the recording of the notice of election and demand for sale. The public trustee also mails the published notice of sale and notice of right to cure and to redeem to the appropriate parties.

Prior to the sale date, the beneficiary must obtain an order from a court properly having jurisdiction to authorize the sale. The public trustee cannot sell the property prior to the issuance of such a court order.

At the public sale the trustee sells the property to the highest bidder who receives a certificate of purchase from the public trustee. The amount of the debt secured by the foreclosed property and the expenses of the sale are immediately paid from the sale proceeds by either disbursement of funds or cancellation of the debt if the foreclosing beneficiary is the successful bidder.

The owner of the property, any person who is potentially liable on a deficiency, tenants, and junior lienors of record are permitted for a specific period of time after a valid foreclosure sale to redeem the property. For an in-depth discussion of all the steps involved in Colorado’s procedure of foreclosure by public trustee, see BLOOM, PUBLIC TRUSTEE FORECLOSURE IN COLORADO (Continuing Legal Education in Colorado, Inc. 1985).

2. COLO. REV. STAT. § 38-37-113(2), 38-39-102(4), 38-39-118(1)(b) (1973 & Supp. 1987). The owner of the property being foreclosed or any party liable under the note or deed of trust is entitled to cure the default when the default is the nonpayment of any sums due under the note or deed of trust. On or before twelve o’clock noon on the day before the day of the sale, the curing party must pay to the public trustee all delinquent principal and interest payments exclusive of that portion of principal which would not have been due in the absence of acceleration. In addition, the curing party is responsible for all costs and expenses related to the proceedings for collection and foreclosure.

4. See infra notes 127-137 and accompanying text.
by paying the foreclosure sale price plus certain additional amounts.\textsuperscript{23} If redemption is made by the owner of the property, the sale is annulled.\textsuperscript{24} The property remains subject to all liens existing before the sale in the same order of priority, except that the lien of the foreclosed deed of trust is extinguished by the sale.\textsuperscript{25} Any redemption by a lienor is subject to the rights of junior lienors also entitled to redeem.\textsuperscript{26} A junior lienor who fails to redeem loses his lien and any further rights in the foreclosed property.\textsuperscript{27}

Upon the expiration of all periods of redemption, the public trustee issues the deed to the property to the holder of the certificate of purchase, or if the property has been redeemed by a lienor, to the last redeeming lienor.\textsuperscript{28} Title to the property from the public trustee is free and clear of all liens and encumbrances recorded after the foreclosed deed of trust.\textsuperscript{29}

\section{Original Purpose of the Public Trustee System}

Before 1894, deeds of trust in Colorado were granted to private trustees who were authorized, upon default by the trustor, to advertise and to sell the real property in strict compliance with the conditions of the trust.\textsuperscript{30} Although mortgages had to be foreclosed by a sale decreed by a court of equity,\textsuperscript{31} trust deeds did not.\textsuperscript{32} While a statutory right of redemption existed for land sold by court decree,\textsuperscript{33} no right of redemption was provided when the land was sold pursuant to a deed of trust unless the parties had otherwise agreed.\textsuperscript{34}

In January 1894, Governor Davis H. Waite convened an extraordinary session of the Colorado General Assembly, one delineated purpose of which was to "abolish and repeal extraordinary remedies now granted to creditors in Colorado, which have placed a debtor class wholly within the power of the creditor, and 'deprived him,' unjustly and against public policy, 'of his property, without due process of law.'"\textsuperscript{35} To accomplish this purpose, Governor Waite proposed the enactment of a law providing that all deeds of trust be declared mortgages with a right of

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\item \textsuperscript{23} \textit{Id.} at §§ 38-39-102, 103 (1973 & Supp. 1987). The statutory right of redemption gives the debtor or owner additional time after the foreclosure sale to refinance and save the property, allows junior lienors an opportunity to protect their security in the property and encourages recovery of the highest price for the property. For a discussion of the policies underlying the statutory redemption rights, see Comment, \textit{Statutory Redemption in Colorado: 1965 Amendments}, 39 U. Colo. L. Rev. 127 (1966).
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at § 38-39-110 (Supp. 1987).
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Stephens v. Clay, 17 Colo. 489, 30 P. 43 (1892).
\item \textsuperscript{31} \textit{Colo. Code of Civ. P.} ch. XX, § 234, ch. XXII, § 263 (Dawson 1883); Nevin v. Lulu & White Silver Min. Co., 10 Colo. 357, 15 P. 611 (1887).
\item \textsuperscript{32} \textit{Colo. Code of Civ. P.} ch. XXII, § 263 (Dawson 1883).
\item \textsuperscript{33} Mills' \textit{Ann. Stat. of Colo.} ch. 72, § 2556 (1891).
\item \textsuperscript{34} Nippel v. Hammond, 4 Colo. 211 (1878).
\item \textsuperscript{35} S.J., 9th Gen. Ass., Extra Sess. 21 (Colo. 1894) (Proclamation of the Governor).\end{itemize}
redemption and subject to foreclosure according to the rules and proceedings in equity courts. The Governor wanted to protect debtors by entirely eliminating power of sale foreclosures and by involving courts in the entire foreclosure process.

Seemingly in response to the Governor's proclamation, House Bill 48 was introduced on January 16, 1894. This bill, as originally proposed, did not mention the establishment of a public trustee system, nor did it mention the treatment of trust deeds as mortgages. The bill addressed only the granting of a right of redemption for all mortgage instruments including trust deeds. The House passed this bill unanimously.40

As approved by the House, House Bill 48 did not fare well in the Senate. The Senate initially recommended that it not pass.41 A special committee and a committee on revisions then studied the bill. After a committee of the whole Senate and three conference committees of the House and Senate made substantial amendments, the General Assembly finally passed an act concerning deeds of trust on March 5, 1894.43

This act created the office of public trustee in every county of the state and mandated that all deeds of trust given to secure indebtedness of any kind must name the public trustee as the trustee. The act provided that any deed of trust that named any other person as trustee should be deemed to be a mortgage and foreclosed only in and through the courts in the same manner as mortgages. The act provided for the bonding of public trustees and prescribed their salaries and fees. In addition, the act delineated the procedure for notice of sale and advertisement and provided periods of redemption to the grantor and junior creditors.

The motivation for the adoption of this unique system for power of sale foreclosure remains unclear because of the dearth of available legislative history. It has been suggested that the act was designed to eliminate and prevent the widespread abuse of foreclosure by individual trustees revealed after the drastic collapse of property values during the

36. Id. at 27.
37. Id. at 116.
38. As early as 1889, the office of public trustee was established in counties having a population of greater than 50,000. 1889 Colo. Sess. Laws 310. The use of a public trustee was an alternative to a private trustee and appears to have been adopted to provide for an easy successor to a private trustee who could no longer serve in that capacity.
41. Id. at 193.
42. Id. at 196, 355, 363, 371, 377, 390, 392, 400, 401, 404.
43. Act approved March 5, 1894, ch. 6, 1894 Colo. Sess. Laws 50 (adopting H.B. 48).
44. Id. at § 1.
45. Id.
46. Id. at § 2.
47. Id. at § 3.
48. Id. at §§ 4-5.
49. Id. at § 8.
50. Id. at § 9.
depression of the early 1890's.\textsuperscript{51} Indeed, there was no requirement that a private trustee be neutral, disinterested, or unrelated to the mortga-
gee,\textsuperscript{52} thus giving rise to potential conflict and temptation for abuse.\textsuperscript{53} Elimination of abuses of power by private trustees may have been one concern of the legislature in 1894, but this concern could have been remedied by the establishment of controls without the drastic action of adopting a new governmental bureaucracy of public trustees.

Perhaps the public trustee system was adopted as a compromise between the existing method of foreclosure by private trustees, which did not involve the courts or any public entity, and Governor Waite's proposed requirement that the courts supervise all foreclosures. The use of public rather than private trustees gave control of the foreclosure process to a public official without eliminating the ease and cost effectiveness of power of sale foreclosures. This involvement of a public official provided at least a semblance of protection for the debtor, as Governor Waite clearly desired, by constraining creditors and their chosen private trustees from taking unfair advantage of an otherwise totally unsupervised foreclosure process.

Since the implementation of the public trustee system, a mandatory court proceeding to obtain an order authorizing the sale has been added to Colorado's foreclosure process.\textsuperscript{54} Further, an interested party has the right to seek injunctive relief before the foreclosure sale regardless of the grant or denial of an order authorizing the sale.\textsuperscript{55} Under certain circumstances, the court may retain supervisory jurisdiction over the entire foreclosure process.\textsuperscript{56} These judicial proceedings amply protect the debtor and control the mortgagee. With the addition of court involvement in the power of sale foreclosure process, the public trustee system

\textsuperscript{51} Storke & Sears, Enforcement of Security Interests in Colorado, 25 ROCKY MTN. L. REV. 1, 20 (1952); see also Lindsay, Foreclosure by the Public Trustee, 9 DICTA 6 (1931).

\textsuperscript{52} See, e.g., Hamill v. Copeland, 26 Colo. 178, 56 P. 901 (1899) (an officer of a corporation may act as the trustee in a trust deed in which the corporation is the beneficiary); Wells v. Caywood, 3 Colo. 487 (1877) (the husband of the beneficiary can serve as the trustee).

\textsuperscript{53} No cases were found dealing with the abuse of trust power prior to 1894, but the existence of cases which reached appellate review a few years later suggests that such events could have occurred when the public trustee system was adopted in 1894. See Bent-Otero Imp. Co. v. Whitehead, 25 Colo. 354, 54 P. 1023 (1898) (wrongful sale and misapplication of sale proceeds); Appelman v. Gara, 22 Colo. 397, 45 P. 366 (1896) (wrongful release of deed of trust).

\textsuperscript{54} COLO. REV. STAT. § 38-37-140 (1973) provides that the beneficiary of the deed of trust being foreclosed must obtain an order authorizing the sale from a court properly having jurisdiction. COLO. R. CIV. P. 120 sets forth the procedures for obtaining this order.

\textsuperscript{55} COLO. R. CIV. P. 120(d) (the granting of the motion under Rule 120 is without prejudice to the right of any aggrieved person to seek injunctive relief, and the denial of the motion is without prejudice to any right or remedy of the movant); Boulder Lumber Co. v. Alpine of Nederland, 626 P.2d 724 (Colo. App. 1981) (injunction against public trustee's sale was proper when priority of liens was in dispute).

\textsuperscript{56} Bakers Park Mining & Milling Co. v. Dist. Ct., 662 P.2d 483 (Colo. 1983) (Rule 120 does not preclude the court from retaining supervisory jurisdiction over the foreclosure to assure that due process is afforded to the parties).
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is no longer necessary to serve the original purpose for which it was adopted.

III. IMPROVEMENTS FROM COMPETITION

The power to conduct a nonjudicial foreclosure rests exclusively in one person in each county, the public trustee. The elimination of this monopoly of services and the encouragement of competition among many private parties will improve the quality of performance of trustee services. The ones who provide a timely, efficient, and cost effective service will thrive while the others will fail. No such incentive for improvement among public trustees currently exists.

A non-competitive government bureaucracy is hindered in providing timely services because it cannot quickly and efficiently adjust to the demands created by fluctuations in the economy. For example, the dramatic rise in the number of foreclosures in 1986, as compared to the year before, resulted in a huge backlog of unfiled foreclosures and thus prompted the public trustee for the City and County of Denver to cut back on the office’s public hours to give employees time to work on this backlog. Likewise, the deputy public trustee of El Paso County acknowledged that her office was unable to file the foreclosure notices as fast as they came in. It is common knowledge in the real estate community that, in 1986, none of the metropolitan county public trustees could meet the statutory time requirements for the recording of the commencement of foreclosure proceedings.

Although it is certainly possible for private trustees to become overburdened as well, the total foreclosures that can be efficiently handled will increase if the number of people who offer the service increases. Further, private industry can usually reallocate resources to accommodate increased demand for a particular service more easily than the public sector. If trustees can be substituted, one private trustee who reaches capacity could use another trustee to perform additional foreclosures. Finally, private trustees are motivated to take the steps necessary to do a timely job because their failure to do so will result in a

57. It is assumed that competition in the open market, a touchstone of a free enterprise economic system, is favored over a monopoly and should be promoted whenever possible and appropriate. Indeed, the promotion of competition is the basic objective of the antitrust laws. Report of the Attorney General's National Committee to Study the Antitrust Laws 1 (March 31, 1955). Supporters of the similar concept of "privatization" (the public sector contracts for the performance of public services by private industry) assert that private businesses generally perform the services more efficiently and that competition has reduced the cost to the government. Main, When Public Services Go Private, FORTUNE, May 27, 1985, at 92. But see McEntee, City Services: Can Free Enterprise Outperform the Public Sector?, 55 BUS. SO. REV. 43 (1985).

58. Rocky Mountain News, Sept. 23, 1986, at B6, col. 1. As of September 1986, the number of foreclosures in Denver was 18.1% higher than for a comparable period in 1985. Id.

59. Id. at col. 1.

60. COLO. REV. STAT. § 38-37-113(1) (Supp. 1987) provides that the public trustee shall record a copy of the notice of election and demand for sale in the office of the county clerk and recorder within seven working days following its receipt.
mortgagee taking its business elsewhere. All of these motivational factors and abilities for resource allocation should enhance the timeliness of performance by trustees. Few such factors operate within the public trustee system.\(^6\)

Price competition among private trustees seeking business could result in lower fees than those currently charged by public trustees\(^6\)\(^2\) which would benefit the financially troubled debtor.\(^6\)\(^3\) Presently, there is no competition among public trustees to encourage lower fees, nor can the mandatory fees established for public trustees be adjusted to coincide accurately with the revenue needs of their particular offices.\(^6\)\(^4\) The statutory fee schedule should be modified to establish maximum fees that can be charged for trustee services rather than mandatory amounts.\(^6\)\(^5\) With this flexibility, private trustees could charge less than the statutory fee amount if the operation of a competitive, cost-efficient business justified such charges.

IV. ADVANTAGES OF PUBLIC TRUSTEE SYSTEM RETAINED BY THE PRIVATE TRUSTEE SYSTEM

Public trustees act impartially to protect both the debtor and the beneficiary. They provide a central repository for foreclosure documents in each county, and are also less likely than private trustees to abuse their power. These perceived advantages of a public official's involvement in the foreclosure process are either non-existent or can be equally available from a private trustee with minor statutory modifications.

A. IMPARTIALITY

Arguably, the public trustee acts as an impartial party to protect all

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61. A new provision requiring the public trustee to forfeit five percent of his fees for each day the public trustee fails to meet the statutory time requirements was recently enacted. *Id.* at § 38-37-143 (Supp. 1987). It remains to be seen whether the threat of this penalty will result in more timely performance by the public trustees.

62. The mandatory fees that a public trustee must charge for the different services performed are fixed by statute. *Id.* at § 38-37-105(l)(b) (Supp. 1987) (if the original principal indebtedness secured by the deed of trust being foreclosed does not exceed $240,000, then the public trustee fee is $75; where such amount exceeds $240,000, the fee is 1/32 of 1% of the original principal indebtedness, but in no case less than $75).

63. All public trustee fees, charges, and costs are charged against the grantor of the deed of trust or those holding under him, and are deducted from the proceeds of the foreclosure sale. *Id.* at § 38-37-119 (1973).

64. In at least one county the mandatory fees appear to be excessive. In El Paso County, the fees collected in 1986 for all public trustee services exceeded expenses, not including office rent, by $272,597.99. This information was obtained from an internal accounting sheet provided by the public trustee's office in El Paso County.

65. Although this suggested price control may be considered anti-competitive, it is necessary to protect the debtor from any potential increase in the cost of foreclosure by a private trustee, one of the major concerns of the opponents of private trustees. California has enacted such fee limitations. See *Cal. Civ. Code* §§ 2924c(d), 2924d(a) (West Supp. 1987). Other costs of foreclosure, such as attorneys' fees, may decrease if a private trustee expands the services it provides for the maximum statutory fee to include services like document preparation, which are currently performed by the attorney for the beneficiary.
parties, especially the debtor, and his involvement assures a degree of fairness in the proceedings. A public trustee, however, provides no greater neutrality or fairness than a private trustee while performing under the same statutory scheme. The acts of the public trustee are not discretionary. The procedures that must be followed are prescribed in detail by statute and the deed of trust.

Although the public trustee administers the foreclosure, the mortgagee prepares all of the documents and provides all of the necessary information, including the list of all notice recipients. The public trustee has no liability for any errors or omissions in the names and addresses stated on this mailing list. Further, the public trustee has no responsibility for determining the amount or reasonableness of a bid, the costs and expenses allowable in computing the debt, or the amount necessary for cure or redemption. Although the public trustee may give a stronger appearance of impartiality and fairness because he is a public official, a private trustee, like the public trustee, could be bound to act only in accordance with statutes and the deed of trust, and would owe a duty of fairness and good faith to all parties involved. Furthermore, the retention of the requirement for a court order authorizing the sale, regardless of whether a public or private trustee administers the foreclosure proceedings, assures a degree of fairness to all parties.

B. Document Repository

Another perceived advantage of the public trustee system is that each public trustee’s office provides one central repository in each county for all documents relating to each foreclosure conducted in that county. Admittedly, a central location for documents simplifies review of the foreclosure proceedings for title and other purposes, and, under the present statutory scheme, this advantage would be lost if many private trustees were allowed to conduct nonjudicial foreclosures under a power of sale. The public land records, however, easily could serve as an effective substitute to the public trustee’s office for the central location of all pertinent documents. Currently, the only documents regarding the foreclosure that are filed of record with the county clerk and recorder are: the notice of election and demand for sale (declaring a default under the deed of trust and the mortgagee’s election to advertise

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67. The courts generally do not evaluate a trustee’s performance based on whether he abused his discretion. Rather, the courts determine whether the trustee was correct in applying the statutory mandates. See, e.g., *Johnson v. Smith*, 675 P.2d 307 (Colo. 1984); *Dolan v. Flett*, 582 P.2d 694 (Colo. App. 1978).
69. Id. at § 38-37-113(1), (9) (Supp. 1987).
70. Id. at § 38-37-113(9) (Supp. 1987).
71. Id. at § 38-37-105(4) (Supp. 1987).
the property for sale),74 the certificate of purchase (identifying the purchaser at the sale and the amount paid at the sale for the property),75 the certificate of redemption (containing the name of the person redeeming and the amount paid by him)76 and the public trustee's deed.77 Additionally, the recording of one or more affidavits of the trustee stating the names and addresses to whom all notices were sent, the manner of publication of the notice of sale, the manner of disbursement of sale proceeds, and a certified copy of the court order authorizing the sale should be required. With the recording of all of these documents, an interested party would have easy access to the pertinent documents to determine whether any foreclosure was conducted in accordance with the statutory procedures.78

Finally, the inclusion of the private trustee's name, address, and phone number on the notice of election and demand for sale should inform junior lienors of where to file their notices of intent to redeem, and mortgagors of where to tender cure payments. This information would also be available for anyone interested in knowing the location of the entire foreclosure file.

C. Abuse of Power

Certainly both public and private trustees will make mistakes.79 No sure method exists to totally prevent errors or fraudulent conduct by either public or private trustees. Some limitation on who can act as a private trustee, however, will bolster the quality of service and discourage abuses by private trustees in the first instance. Some states have provided that the only ones who can act as private trustees are members of the state bar,80 banks, savings and loan associations,81 corporations authorized to do trust business in the state,82 title insurance companies,83 licensed real estate brokers,84 and licensed insurance

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74. Id. § 38-37-113(1) (Supp. 1987).
75. Id. § 38-39-115(2) (1973).
76. Id. §§ 38-39-104 to 105 (Supp. 1987).
77. Id. § 38-39-110 (Supp. 1987).
78. For examples of statutes requiring the recordation of certain documents regarding foreclosure, see ALASKA STAT. § 34.20.080(d) (1985) (affidavit of mailing notice of default and of publication of notice of sale); ARIZ. REV. STAT. ANN. § 33-808(A)(3) (Supp. 1986) (notice of sale); IDAHO CODE § 45-1506(7) (Supp. 1987) (affidavit of mailing notice of sale and of posting and publication of notice of sale); N.Y. REAL PROP. ACTS. LAW §§ 1421, 1423 (McKinney 1979) (affidavits of sale, publication of notice of sale, and service of copy of notice).
79. See, e.g., Johnson v. Smith, 675 P.2d 307 (Colo. 1984) (public trustee gave incorrect information to a junior lienor regarding the applicable redemption period); Stephens v. Clay, 17 Colo. 489, 30 P. 43 (1892) (private trustee provided only 89 days notice instead of 90 days notice required by the applicable trust deed).
agents. In addition, prohibiting anyone who is related or affiliated with the mortgagee from acting as the trustee can reduce the potential for fraud and abuse of the trust power.

Liberal provisions for the appointment of a successor or substitute trustee if the original trustee is unwilling, unable, or unqualified to serve or resigns, as well as in the event the mortgagee simply wants to remove the trustee for failure to perform, are needed to assure the efficient operation of a private trustee system. These provisions should include the giving of notice of the substituted or successor trustee to both the original trustee and the grantor of the deed of trust. Additionally, these provisions should provide for the recording of the substituted or successor trustee’s name and address in the public records.

V. RECOMMENDED CHANGES TO REMEDY CONSTITUTIONAL DEFECTS

Unlike the nonjudicial foreclosure procedures used by jurisdictions recognizing a power of sale in a private trustee with no court authority for the sale, a system in Colorado of nonjudicial foreclosure by private trustees that retains a court’s involvement constitutes direct participation by the state in the foreclosure procedures. Consequently, the

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85. Id. at § 33-803(A)(4).
86. Before entering office, every public trustee must execute a bond from a responsible surety company in the amount of $25,000, $10,000, or $5,000, depending upon the class of the county. Colo. Rev. Stat. § 38-37-102 (1973). Private trustees should also be required to be bonded, albeit in a larger amount. This might not actually prevent fraud and abuse of the trust power but would provide a remedy for parties injured by such acts.
89. The major premise of this article is that the court’s involvement will be retained as an integral part of the power of sale foreclosure process by a private trustee. It should be noted that if the private trustee is allowed to conduct the foreclosure proceedings and the requirement for a court order authorizing the sale is eliminated, no state action would be present and the fourteenth amendment would give no protection regardless of how discriminating or unfair the private conduct may be. See supra, note 88 and cases cited therein.
90. See, e.g., Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975) (statutory procedure for foreclosure and sale under which the clerk of the court audits the trustee’s report of the sale involves state action for due process purposes). In the following cases, the involvement by public officials was not enough to constitute state action: Kenly v. Miracle Properties, 412 F. Supp. 1072 (D. Ariz. 1976) (court clerk records the deed and receives excess funds); Global Industries, Inc., v. Harris, 376 F. Supp. 1379 (N.D. Ga. 1974) (clerk of the court performs the ministerial action of recording the deed); Garfinkle v. Superior Court, 146 Cal. Rptr. 208, 578 P.2d 925 (1978) (county recorder ascertains that documents relating to the property contain the information required by law and the court enforces the agreement of the parties made with respect to the nonjudicial foreclosure procedures or enforces the purchaser’s right to possession after the sale).
procedures afforded in the process must comply with the due process constraints of the fourteenth amendment of the United States Constitution. Although the current statutory scheme meets the due process requirements of notice and hearing, the existing statutes fail to meet the constitutional guidelines regarding the manner in which notice is given. This constitutional deficiency in the statutory foreclosure procedures should be remedied as part of establishing a private trustee system to assure that the private trustee system is fair and comports with due process from the outset.

A. Notice

The Colorado statutory foreclosure scheme adequately provides for the notice required. Notice by publication alone cannot be relied on for notice to interested parties whose names and addresses are known from the public records. Notice by mail of the foreclosure sale and of the hearing to all persons shown by the public records to have an interest in the property is required. This satisfies at least one aspect of the notice requirements for procedural due process under the fourteenth amendment.

The manner in which these notices are given is suspect under due process requirements. The foreclosing party must send the published notice of sale, the notice of redemptive and cure rights, and the notice of the hearing only to the address given in the recorded instrument demonstrating such person’s interest in the real estate. The foreclos-

91. As a factual predicate to any claim under the due process clause of the fourteenth amendment, a significant degree of state involvement must be established. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Reitman v. Malkey, 387 U.S. 369 (1967).

92. Even if the public trustee system is retained, the suggested modifications to remedy constitutional defects should be enacted. The same constitutional deficiencies are present whether a public or private trustee is involved.

93. Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) (notice by publication is not reasonably calculated to inform interested parties who can be notified by more effective means such as personal service or mailed notice); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (prior to an action that will affect an interest in life, liberty, or property protected by the Due Process Clause, a state must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections).

94. COLO. REV. STAT. § 38-37-113(2) (1973); COLO. R. CIV. P. 120(b).


96. COLO. R. CIV. P. 120(b).

97. Id. at 120(a)-(b); COLO. REV. STAT. § 38-37-113(2) (1973).

98. See supra note 93 and accompanying text.


ing party only needs to mail the required notices to the county seat where the county and state are the only address given for any named person.\textsuperscript{101} If the recorded instrument does not give an address, it is not necessary to mail any notice to that particular person.\textsuperscript{102} The one exception to this general rule is that the grantor of the deed of trust, the current record owner of the property to be sold, and persons known or believed by the movant to be personally liable upon the indebtedness secured by the deed of trust, must be given notice of the hearing sent to their last known address as shown by the movant’s records.\textsuperscript{103}

In summary, there is no requirement for foreclosing parties to give anyone, not even the record owner of the property or the grantor of the deed of trust, notice of the sale at an address other than the address given of record. Parties with interests in the property have no right to any notice if their addresses are not of record. Only a limited few must be given notice of the hearing at their last known address. Junior lienors whose rights will be extinguished by the foreclosure sale if they fail to redeem have no right to receive notice at an address other than the address given of record.\textsuperscript{104} Colorado’s statutory scheme thus fails to provide for actual notice to a party whose property interest may be adversely affected even when the foreclosing party knows or can ascertain such party’s name and address with relative ease.

In \textit{Mennonite Board of Missions v. Adams},\textsuperscript{105} the United States Supreme Court, purportedly following the Court’s previous analysis in \textit{Mullane v. Central Hanover Bank & Trust Co.}\textsuperscript{106} and a long line of cases thereafter,\textsuperscript{107} found that the manner of notice of a tax sale provided to a mortgagee under Indiana law was unconstitutional. The challenged notice provision permitted notice by posting and publishing an announcement of the tax sale and by mailing a notice to the mortgagor by certified mail. The Court recognized that a mortgagee possesses a substantial, legally protected property interest that is significantly affected by a tax sale under Indiana law,\textsuperscript{108} thereby entitling the mortgagee to notice reasonably calculated to apprise him of a pending tax sale.\textsuperscript{109} In

\textsuperscript{101} COLO. REV. STAT. § 38-37-113(3) (1973); COLO. R. CIV. P. 120(a).
\textsuperscript{102} COLO. REV. STAT. § 38-37-113(3) (1973); COLO. R. CIV. P. 120(a).
\textsuperscript{103} COLO. R. CIV. P. 120(a).
\textsuperscript{105} 462 U.S. 791 (1983).
\textsuperscript{106} 339 U.S. 306 (1950).
\textsuperscript{108} At the time of the case, Indiana law provided for the annual sale of real property for property tax payments which were delinquent for 15 months or longer. Prior to the sale, the county auditor had to post and publish notice of the sale. The owner of the property was entitled to receive notice by certified mail at his last known address, but mortgagees were not entitled to such notice. After the required notice was provided, the county treasurer held a public auction. The tax sale was followed by a two year redemption period for the owner, occupant, lienholder, or any other person who had an interest in the property. Since no one redeemed the property during the statutory redemption period, the purchaser at the sale was entitled to a deed for the property free and clear of all liens and encumbrances on the property.
\textsuperscript{109} Adams, 462 U.S. at 798.
Adams, the Court rejected the argument that constructive notice to the mortgagee was sufficient since the public records identified the mortgagee.\footnote{10} The Court stated: "When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service."\footnote{11} In making its decision, the Court in Adams assumed that the foreclosing party could have discovered the mortgagee's address through reasonable diligence.\footnote{12} The Court acknowledged, however, that a governmental body should not be required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record.\footnote{13}

In view of Adams, a constitutional due process challenge may prevail as to two aspects of the existing Colorado foreclosure statutes.\footnote{14} First, notice of the sale and hearing are not required if the recorded instrument contains no address for the interested party even though that party is identified in the public records.\footnote{15} Further, a foreclosing party is not required to make any effort other than a review of the public land records to determine an address for a notice recipient. This is true even if sending notice to the address given in the recorded instrument is unlikely to provide actual notice.\footnote{16}

To meet the constitutional guidelines stated in Adams, Colorado should amend its notice requirements to provide for notice of the sale and hearing to be sent to the address of all persons otherwise entitled to receive notice (i) as stated in the recorded instruments; (ii) as set forth in any subsequently recorded document specifically changing the address; and (iii) to the last known address as shown by the mortgagee's own records. These requirements will increase the likelihood of the receipt of notice by those entitled to it without imposing an unreasonable duty on the mortgagees to undertake efforts to discover their whereabouts. The ruling in Adams may indicate that a governmental body is required only to search the public records to determine the "last known available address" of interested parties.\footnote{17} Yet, under Colorado's statutory scheme, the governmental body is not responsible for determining who

\footnotesize
\begin{enumerate}
  \item Id.
  \item Id.
  \item Id. at 798 n.4.
  \item Id.
  \item A challenge under the due process clause of the Colo. Const. art. II, § 25, would also prevail since the Colorado Constitution requires, at a minimum, the same due process guarantees as the U.S. Constitution. City and County of Denver v. Eggert, 647 P.2d. 216, 224 (Colo. 1982).
  \item At least one court has suggested that a reasonably ascertainable address is one given in the public land records. Benoit v. Panthaky, 780 F.2d 356, 358 (3d Cir. 1985). Another court was satisfied that due process had been given by the mailing of notice to the last known address of the owner of the real estate as it appeared on the records of the treasurer. Bender v. City of Rochester, N.Y., 765 F.2d 7 (2d Cir. 1985). In both cases the governmental body itself was deciding to whom and where notices were to be sent.
\end{enumerate}
should receive notice and where such notice is sent. The mortgagee makes these decisions, and neither the trustee nor the court has responsibility for the accuracy of the decisions. Under these circumstances, a reasonably diligent effort to ascertain a correct address for the notice recipient as required by the Court in Adams should include, at a minimum, a review of the mortgagee’s own records.

B. Hearing

The United States Supreme Court has consistently held that a fundamental requirement of due process is to afford an individual the opportunity to be heard at a meaningful time in a meaningful manner before he is finally deprived of a property interest. The formality, procedural requisites, and timing for the hearing vary depending on the nature of the interest involved and the nature of the subsequent proceedings.

Prior to 1977, the Colorado statutory foreclosure scheme had no provision requiring a hearing of any type, either before or after the public trustee’s sale of the property. In 1977, the Colorado legislature enacted a law which assures the mortgagor of at least one opportunity to be heard before the foreclosure sale.
Rule 120 of the Colorado Rules of Civil Procedure sets forth the procedure used to obtain the order authorizing the sale. This rule allows any interested person seeking such order to file a verified motion with the district court. A response opposing the motion is also provided for.\textsuperscript{127} The rule allows an opportunity for a hearing,\textsuperscript{128} although the court may dispense with it if no response is filed and the court is satisfied that the movant is entitled to the order authorizing the sale.\textsuperscript{129} The rule limits the scope of the hearing to a determination of whether there is a reasonable probability of the existence of a default or other circumstances justifying the exercise of the power of sale under the terms of the deed of trust.\textsuperscript{130} The hearing may also include consideration of issues required by the Soldiers' and Sailors' Civil Relief Act of 1940.\textsuperscript{131}

Many issues that could vitally affect the rights of the debtor, the owner of the property, and junior lienors and their ability to cure or to redeem, cannot be considered in the Rule 120 court hearing.\textsuperscript{132} These types of issues can appropriately be raised and considered in independent actions for declaratory relief\textsuperscript{133} or injunctive relief\textsuperscript{134} regardless of the outcome of the motion for an order authorizing the sale.\textsuperscript{135} In addition, the court may retain supervisory jurisdiction over the proposed foreclosure if circumstances warrant such continued supervision.\textsuperscript{136} These proceedings which provide interested persons the opportunity to be heard can occur prior to the foreclosure sale but no later than before the owner or any lienor is finally deprived of his property interest.\textsuperscript{137} Thus, Colorado's statutory foreclosure scheme, combined with the procedures allowed by the Colorado courts, meets the due process requirements of an opportunity for a hearing prior to the deprivation of a significant property interest.\textsuperscript{138}

\textsuperscript{127} COLO. R. Civ. P. 120(a)-(c).
\textsuperscript{128} Id. at 120(d).
\textsuperscript{129} Id. at 120(e).
\textsuperscript{130} Id. at 120(d).
\textsuperscript{131} Id.
\textsuperscript{132} These include the reasonableness of foreclosure costs, whether or not the procedures followed were defective, and the priority of liens. See, e.g., Bakers Park Mining & Milling Co. v. Dist. Ct., 662 P.2d 483, 485 (Colo. 1985) (consideration of attorneys' fees charged beyond scope of Rule 120 hearing); Boulder Lumber Co. v. Alpine of Nederland, 626 P.2d 724, 725 (Colo. App. 1981) (priority of mechanics' liens is beyond scope of Rule 120 hearing).
\textsuperscript{133} Bakers Park, 662 P.2d at 483.
\textsuperscript{134} Id. at 485; see also Boulder Lumber, 626 P.2d at 725.
\textsuperscript{135} COLO. R. Civ. P. 120(d).
\textsuperscript{136} Bakers Park, 662 P.2d at 483; Princeville Corp. v. Brooks, 188 Colo. 37, 533 P.2d 916 (1975).
\textsuperscript{137} In Colorado, the owner's and lienor's rights in the property are not terminated until the expiration of all redemption periods. COLO. REV. STAT. § 38-39-110 (Supp. 1987).
\textsuperscript{138} At least two courts have stated that the right to bring a suit for injunctive relief alone is not enough to satisfy due process. However, the right to bring a suit for injunctive relief combined with a requirement for the mortgagor to bear the burden of proving the probable validity of his claim and allowing the mortgagor the opportunity to rebut and defend the charges, is sufficient to comply with the due process requirements for a hear-
The public trustee system has outlived its original purpose. Only a few changes to Colorado’s foreclosure scheme are needed to take advantage of the potential improvements to the power of sale foreclosure process that competition among private trustees will bring. The Colorado legislature should enact requirements regarding the recording of several additional documents, the substitution of trustees, and limitations on who can act as a private trustee. The lack of procedural due process in the manner of notice provisions currently in force should be corrected. With these changes, the private trustee, like the public trustee, will be compelled to act in accordance with the existing statutes and deed of trust. The changes this article proposes would thus create a more responsive and efficient foreclosure process while continuing to protect the rights of debtors and others in the property being foreclosed.