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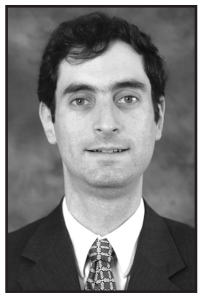
Public trustee foreclosure process



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In Colorado in the last couple of years, due to the recent severe economic downturn, real estate foreclosure rates have increased. According to the Colorado Department of Local Affairs, in 2009 there were more than 46,000 foreclosure filings for deeds of trust by public trustees in Colorado, which was an increase of 18 percent over 2008. This compares with less than 14,000 in 2003. Of the 46,000 or so foreclosure filings in 2009, more than 20,000 ended up as foreclosure sales. One might wonder what the role of the public trustee is and what the foreclosure process entails. This article will summarize the public trustee foreclosure process, which is unique to Colorado.

■ **Deeds of trust and mortgages.** More people tend to be familiar with the concept of a "mortgage" than a "deed of trust." They are similar documents utilized for real estate loans, but lenders use deeds of trust more often than mortgages in Colorado. A mortgage is a two-party document in which the borrower pledges real estate to the lender as security for the loan. If the borrower defaults on the loan, the lender can go to court to foreclose the property and cause its sale to repay the obligation, which is known as a judicial foreclosure. Although mortgages are valid in Colorado, their use is fairly limited. Instead, deeds of trust secure most real estate loans. A deed of trust is a three-party document. Like a mortgage, the borrower pledges the property. The owner, however, pledges the property to a public trustee, for the benefit of the lender. In case of a default, the lender can either have a judicial foreclosure like a mortgage or can have the public trustee conduct a foreclosure without the substantial involvement of a court.

A foreclosure conducted by a public trustee, therefore, tends to be much quicker and less expensive than a judicial foreclosure. However, many states do not allow the use of a deed of trust.

■ **The public trustee and the foreclosure process.** With deeds of trust, the lender designates a trustee who is a neutral third party who conducts the foreclosure sale if needed. There are state specific requirements as to who can serve as a trustee. For example, in some states, the trustee must be a person who actually resides in the state. Colorado, however, has a public trustee system where a government official serves as the trustee. In fact, it is the only state with a public trustee system. Long ago, Colorado developed this system in part to have a truly independent trustee available that would not be influenced by the lenders but allow a quicker foreclosure process. As other states do not utilize a public trustee system, the lender in one of those states designates a private trustee. If the lender elects to use a private trustee in Colorado, then the deed of trust must be foreclosed as if it was a mortgage.

The laws of Colorado provide that for certain larger counties, the governor appoints the public trustee. For other counties, the county treasurer serves as the public trustee. One key task of the public trustee is to release real estate from the lien of the deed of trust when the borrower repays the loan. Another key task of the public trustee is to conduct a public trustee foreclosure in case of a loan default.

A deed of trust provides a "power of sale." If the borrower defaults on the loan, the public trustee under the deed of trust has the power to conduct a sale of the property for the lender's benefit. Once a default occurs, the lender requests that the public trustee commence the public trustee foreclosure process. The lender provides certain items to the public trustee including a notice of election and demand for sale. The public trustee then publishes notice and allows a minimum time to elapse to allow the borrower to cure the default in some cases. Additionally, Colorado law allows others, such a junior lienholders, to also cure the default. Assuming that there is no cure for the default, the public trustee then conducts a sale of the property by accepting bids. The public trustee then sells the property to the highest bidder, which often is the lender. After the sale, there is a short period in which certain junior lienholders can redeem the loan by paying the amount bid plus other costs such as interest. Due to recent changes to the foreclosure process, the borrower is no longer allowed to redeem following the sale.

■ **Conclusion.** Colorado is unique in that it provides for public trustees to serve when a borrower and lender utilize a deed of trust for purposes of securing property in connection with the loan. The public trustee allows for an independent official to conduct the foreclosure process while allowing a less expensive and faster result than would be the case with a mortgage and foreclosure through the court system.▲