CHAPTER 10 - LIENS & ENCUMBRANCES

Notes:

DEEDS OF TRUST & MORTGAGES

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

In early English law, the mortgage was simply a deed which conveyed the property, from the **mortgagor** (*borrower*) to the **mortgagee** (*lender*). This deed contained, either expressed or implied by court interpretation, a clause which defeated the conveyance of title if the mortgagor paid the debt when due. If the borrower defaulted, the mortgagee became the absolute owner of the property. Foreclosure proceedings were not necessary and did not even exist.

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

A new practice rose to remedy this situation, called **strict foreclosure**. Upon default and upon the mortgagee filing a petition with the court the court would decree that the mortgagor could have only a *certain amount of time*, usually six months or a year, *to redeem the property*. After the lapse of the time allotted, the mortgagor's equity of redemption was thereby barred and foreclosed and the mortgagee became the absolute owner of the property. Strict foreclosure still exists in some states.

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Under strict foreclosure, the lender might become the owner of property worth many times the amount due, especially if the borrower had repaid part or most of the debt. On the other hand, although not so often, it was possible that the value of the property might be less than the mortgage and the mortgagee would lose the balance due, because under the old common law mortgage the lender had no personal right of recovery against the mortgagor. This resulting injustice led to the next development, foreclosure through public sale.

Up to this point, the concept of a mortgage was based on a **title theory** (or **ownership theory**,) i.e., that the *mortgagor transferred the* <u>*legal*</u> *title of the property to the mortgagee*. As the practice of foreclosure through public sale became more common, there emerged another concept of the mortgage, called the lien theory. The **lien theory** of mortgage stated that it was not a conveyance of the land but *only a lien upon the property*.

A **lien** is a *charge or claim against a property which provides security for the creditor*.

Thus, the lien of the mortgagee was to be enforced through a public sale and not by simply giving the lender absolute title to the property. (Hence, even though the lender had **legal** title to the property, by virtue of the mortgage, the *borrower* still had **equitable title** and enforceable right – interest - in the property.) If the land sold for more than the debt, the mortgagee would be paid in full and something would be salvaged for the borrower.

It logically followed that if a mortgaged property should sell for an amount inadequate to cover the debt, then any other resources or assets of the mortgagor should be available to the mortgagee for the satisfaction of the deficit from other property of the mortgagor as established through a deficiency judgment and by the borrower having signed a note or bond which was secured by the mortgage.

Under modern mortgage law in the United States, there exist three theories as to the nature of mortgages: lien, title and intermediate theories. The majority of states have adopted the lien theory. The mortgage is considered to create a lien and not to convey any title. The mortgagor is entitled to possession until they default and the right of redemption has terminated. Foreclosure is generally by court action and a court ordered public sale. The mortgagor is entitled to any excess funds over and above the amount of the debt and liable for any deficiency.

The security interest owned by the mortgagee is classed as personal property and can be transferred only by assignment of the debt secured by the mortgage. Upon full payment of the debt, the mortgagee no longer has any legal title. *Colorado has adopted the lien theory*. (CRS 38-35-117)

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A minority of the states have adopted a modified version of this common law title theory of mortgages. In theory, the mortgagee is considered to have the legal title, subject only to the mortgagor's superior equitable ownership. The mortgagee upon default and before foreclosure is entitled to possession, but must account for all rents and profits and apply them in reduction of the mortgage debt. Foreclosure is generally by legal action and a court ordered public sale. The mortgagor is entitled to any excess of funds and liable for any deficiency. Upon payment of the debt, the mortgagee's legal title is defeated. The mortgagee's interest is considered to be a real property right rather than personal property. In actual practice, the difference today between the lien and title theory is more technical than real.

Some states have taken a position midway between the title and lien theories. Naturally, they are called “intermediate” states. The deed of trust involves the actual transfer of the legal title to the trustee, but enforcement of the mortgage upon default is in the nature of a lien.

Although there are other mortgage devices, the mortgage (or "regular" mortgage as it is sometimes called), and the trust deed are the most prevalent. *In Colorado, the Deed of Trust to the Public Trustee is by far the most common.*

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

A **deed of trust** *involves three parties*. A trust deed to the public trustee is a *conveyance of the legal title by the borrower to a public official, the **public trustee** of the county in which the property is situated. The public trustee holds the title in trust for the lender (called the **beneficiary** of the trust) to secure the payment of the indebtedness described in the deed of trust*.

The trust deed to the public trustee involves:

1) The actual transfer of title by the owner of the property to a public official who holds it in trust, according to the terms thereof, for the benefit of the lender.
2) Upon compliance with the provisions of the deed of trust, the public trustee *reconveys* the property back to the grantor.
3) However, upon default of the provisions of the trust deed, the public trustee, according to the terms of said deed and as provided by law, is empowered to convey the title of the property, after the grantor's right of redemption has terminated, to the new purchaser of the property at the *public sale*.

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A type of trust deed, similar to the trust deed to the public trustee but which is infrequently used, is a **deed of trust to a private trustee**. According to Colorado law such a trust deed is and will be *foreclosed only as mortgages are foreclosed (in and through the courts)*. A deed of trust to the public trustee may be foreclosed by public sale through the office of the public trustee or through the courts.

Upon payment of the indebtedness secured by a mortgage, the *mortgage should thereupon be released* by the mortgagee executing a **Release** or **Satisfaction of Mortgage**, delivering the same to the mortgagor, who should record it in the office of the County Clerk and Recorder of the county in which property is situated.

When the indebtedness secured by the *deed of trust is paid*, the procedure to procure a release thereof is to have the *beneficiary (lender) execute* a **Request for Release of Deed of Trust**, *present it to the Public Trustee together with the canceled note or notes and the deed of trust*, whereupon the Public trustee will, *upon payment of his fee, execute the Release of Deed of Trust*. The Release of Deed of Trust should be *recorded* at the Clerk and Recorder's of the county in which the property is situated.

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

ELEMENTS OF MORTGAGES AND DEEDS OF TRUST

The following list is intended to serve only as a ready reference to the usual elements of a deed of trust or mortgage. The execution of these instruments should be carefully checked by a competent attorney or other person with considerable experience in these matters because complex details must be adjusted to fit each particular case.

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

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e. Interest rate and time of payment
f. Interest coupon notes, if any
g. Conditions of default as to principal and interest

4. **Words of Conveyance**. (Such as, "I hereby grant…") This is necessary to give the trustee or mortgagee an interest in the property that will serve as security.

5. **Description** of the property. The description is necessary to identify the real estate subject to the security interest. The description used in the mortgage instrument should read the same as that contained in the deed by which the grantor acquired his interest.

6. **Conditions** of the trust deed (or *covenants* of the mortgage). Usually contains such things as: The property will be kept insured, taxes and assessments will be paid, buildings will be kept in repair.

7. **Method of sale in case of default**. The beneficiary of a trust deed may foreclose by public sale through the office of the public trustee or through the court. In Colorado, the mortgagee or beneficiary of a private trust deed may foreclose only in and through the courts.

8. **Exceptions as to prior liens**, if any.

9. **Signature** of the trustor/mortgagee.

10. **Acknowledgment**. Acknowledgment is the simplest means of establishing the instrument's proper execution and validity.

11. **Recording**. Recording in the office of the county clerk and recorder of the county in which the property is situated is necessary to protect the interest of the beneficiary or mortgagee against the claim of persons who may thereafter acquire an interest in the property without actual notice of the mortgage or trust deed.

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

1. Provide for a higher rate of interest in all notes after maturity.

2. Provide that a default continuing more than a specified time gives the holder of the indebtedness the right to declare all indebtedness to be due and payable immediately without notice. This is called an acceleration clause.

3. Include waiver of homestead rights.

4. Reserve the right to pay taxes if they remain unpaid when due, adding the amount so paid together with interest at a specified rate to the principal sum.

5. Require that the property must be insured by companies acceptable to holder of the indebtedness. In case grantor fails to insure, the trust deed should provide the right of grantee to insure, adding the cost together with interest.

6. Provide for the appointment of a receiver upon the occurrence of a default.

7. Should a foreclosure or a trustee's sale be necessary, provide for:

a. All the costs of such suit or suits, advertising, sale and conveyance, including attorneys, solicitors, and stenographers, trustee's fees,

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outlays for documentary evidence and cost of said abstract and examination of title.

b. All monies advanced by the holders of the indebtedness with interest thereupon from the time the advances were made.

c. The accrued interest remaining unpaid on the indebtedness.

d. All of the principal money remaining unpaid.

8. In the case of trust deeds, provide for a reconveyance of the property by the trustee to the grantor, upon the payment of the principal and interest and the performance of the covenants and agreements contained in the instrument.

9. In a case where a private trustee is used, the instrument should provide for a successor in trust in case of the trustee's inability to act.

ASSUMPTION

When real estate is sold, the *purchaser and the seller may wish to sell with the existing loan remaining as a lien upon the property*. This is in the contract whereby the purchaser **assumes and agrees to pay** the existing debt.

However, this assumption is subject to limitations that may be present in the mortgage or trust deed contract. The mortgage or trust deed may contain an **acceleration clause**, a provision to the effect that *if the subject property is conveyed, the entire balance of the loan may become due*. This acceleration clause in the event of a conveyance is similar to the acceleration clause in the event of default and is common to all mortgage or trust deed contracts.

Lending institutions regularly place a **due-on-sale** clause in their contracts that will make the *entire balance of the loan become due if the property is conveyed to another*. (This is also known as the **alienation clause**, the **assumption clause**, and the **due on transfer clause**.) This provision lets the lender raise the interest rate on the loan or the lender will not consent to a conveyance. If the conveyance is made without consent, the lender may call the entire balance of the loan due.

Colorado law, 38-30-165 C.R.S., as amended, places a limit of 1% per annum above the existing interest rate on the indebtedness when a dwelling unit is sold and the mortgage or trust deed was executed on or after July 1, 1975. On October 15, 1982, a new federal law preempted all state laws in this area. All lenders may now enforce a "due-on-sale" clause no matter when the mortgage or trust deed was executed.

The Real Estate Commission has approved three types of trust deeds - the use of which is mandatory by licensees when they are preparing deeds of trust on behalf of their principals (see Rule F-9, and Chapter 21 in this manual):

1) The first contains the **strict** "due-on-sale" clause. (This is, by far, the most common deed of trust in use);

2) Another contains a modified "due-on-sale" clause which makes the loan assumable if the purchaser is **creditworthy**. (This is typically used only for FHA or VA loans.)
3) The third type of trust deed contains no "due-on-sale" clause and the loan is **fully assumable**.

FORECLOSURE

In the event the mortgagor defaults on any one or more of the covenants or conditions of the mortgage, the property may be sold through foreclosure proceedings in a court of law, as prescribed by law. The proceedings are initiated by the mortgagee for the satisfaction of the indebtedness owing to him. This is a more complicated procedure for a foreclosure action than would be necessary for foreclosure under a trust deed.

In Colorado, deeds of trust may be foreclosed in the following manner and without benefit of a court hearing:

C.R.S. 38-38-101. Holder of evidence of debt may elect to foreclose.
(1) Documents required. Whenever a holder of an evidence of debt declares a violation of a covenant of a deed of trust and elects to publish all or a portion of the property therein described for sale, the holder or the attorney for the holder shall file the following with the public trustee of the county where the property is located:
(a) A notice of election and demand signed and acknowledged by the holder of the evidence of debt or signed by the attorney for the holder;
(b) The original evidence of debt, together with the original indorsement or assignment thereof, if any, to the holder of the evidence of debt or other proper indorsement or assignment in accordance with subsection (6) of this section or, in lieu of the original evidence of debt, one of the following:
(I) A corporate surety bond in the amount of one and one-half times the face amount of such original evidence of debt; or
(II) A copy of the evidence of debt and a certification signed and properly acknowledged by a holder of an evidence of debt acting for itself, or as agent, nominee, or trustee under subsection (2) of this section or a statement signed by the attorney for such holder, citing the paragraph of section 38-38-100.3 (20) under which the holder claims to be a qualified holder and certifying or stating that the copy of the evidence of debt is true and correct and that the use of the copy is subject to the conditions described in paragraph (a) of subsection (2) of this section;
(c) The original recorded deed of trust securing the evidence of debt,

RIGHT TO CURE (before foreclosure) / REDEMPTION (after foreclosure)

In 2008, the Colorado legislature extended the length of time ***prior to the foreclosure sale*** available to a defaulting borrower to ***cure*** the past due

balances. However, citing the inability of the vast majority of borrowers to redeem the entire balance of the loan, the Legislature *eliminated all rights of redemption after* the foreclosure sale.

Right to Cure (prior to foreclosure sale):
For *Residential* properties - Any foreclosure *sale may not be held earlier than 110 days after notice* of election if the foreclosure is through the Public Trustee's office, and *not later than 125 days* after notice of such election.

During that time - following lender's Notice of Intent to Foreclose and *prior to the actual foreclosure sale* – the delinquent mortgagor may **cure the default** if:

1) *Fifteen (15) days before the foreclosure sale he or she gives written notice of their intention to pay all delinquencies including attorney fees*; ***and***
2) *actually does pay them before noon of the day before the sale*.

The acceleration clause in the mortgage or trust deed will not then be operative and the mortgagor will not have to immediately pay the entire balance of the note. The mortgagor will pay only the delinquencies (past due payments) and the costs.

For ***Agricultural*** properties – the defaulting owner has between **215 and 230 days prior to the foreclosure sale** to cure the default.

Redemption (following foreclosure sale):
Effective January 1, 2008, in Colorado there is *no Right of Redemption after* the foreclosure sale. In other words, once the property is sold at foreclosure, the borrower/mortgagor can *not* redeem (reclaim) title to the property. (This previously required *full payment* of the entire loan that had been due.) Once it is sold in foreclosure, the (former) owner has lost title to the property forever.

THE PRINCIPAL NOTE

In the real estate financing process, the principal **promissory note** or bond is the *evidence of the debt for which the mortgage or deed of trust on the property is the security*. This note is an unconditional promise in writing made by one person to another signed by the maker *promising to pay on demand or at a fixed or determinable future time, a sum certain in money to the order of the payee* or the bearer. This note creates a liability on the part of the maker for which he or she is personally responsible. If the security is *insufficient to cover the indebtedness*, the holder of the note may obtain a **deficiency judgment** for the balance due and proceed against all other property and assets of the debtor.

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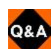
The *holder of a note secured by the mortgage or trust deed may sell and transfer the note to another*. Where the note is secured by a deed of trust, the transfer is effected by endorsing the note over to the new holder. No assignment or transfer of the trust deed is necessary. But where the note is secured by a mortgage, in addition to the endorsement of the note, the mortgage should also be assigned to the new holder of the note and said assignment should be recorded.

The reason for the requirement of a recorded assignment of a mortgage but not of a deed of trust will become clear if the desirability of keeping an unbroken chain of title in the abstract is kept in mind. Unless default occurs in the payment of the note, a release or satisfaction of the trust deed or mortgage will eventually be executed. In the instance of a deed of trust, the release is executed by the public trustee who remains the same no matter how many times the note changes hands. In the case of the mortgage, the release instrument is executed by the legal holder of the note, who changes each time the note is transferred. A recorded assignment of the mortgage to each new holder of the note shows at any given time who is the person who must execute the release thereof.

SECOND MORTGAGE OR DEED OF TRUST

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

The broker should know that in the event of the *satisfaction of the first deed of trust, those subsequent encumbrances move upward in priority*. The second trust deed becomes first in priority, the third becomes second, and so on. However, the matter of priority may be controlled by the terms of the instruments. For instance, the terms of the second deed of trust may specify that its lien shall continue to be subordinate (lower in priority) to the existing first deed of trust, or any substitution thereof, thus allowing the property owner to replace the first deed of trust with another without disturbing the position of the lien holders below the first. This advantage is often very important to the grantor regarding refinancing of the property.



Without having provided for the subordinate positions (by virtue of a **subordination agreement**) of the subsequent encumbrancers upon the payment of the first trust deed, the second automatically becomes the first. This is true even though the owner may only wish to substitute the first trust deed with a new first trust deed.

INSTALLMENT LAND CONTRACT

An **installment land contract**, (alternately known as a **bond for title**, **long-term escrow of deed**, **contract for deed** or **land contract**), is essentially a security device as is the mortgage or deed of trust. A typical installment land contract provides for all the terms usually found in a contract of sale to purchase real estate but contains, in addition, a provision that the *deed to the property will not be delivered to the purchaser until the full purchase price, or some specified portion such as one-third or one-half, has been paid*. This contract is typically recorded. The buyer goes into possession and assumes all the risks and responsibilities of ownership. The buyer covenants to keep the premises insured, repaired, taxes and assessments paid, etc., for the benefit of the seller. The **vendee** (*buyer*) *is often considered to have an **equitable interest***, (while the **vendor** (seller) has ***legal title***) in the land in much the same way as a mortgagor.

The purchaser under an installment land contract has the right of entry and possession, but, if there is no dwelling or structure upon the land that can be physically occupied, there is no actual notice of the purchaser's interest given to the public. In the past, subdividers sold vacant land by means of an installment land contract. Therefore, although it is advisable that all installment land contracts be recorded, it is especially important to record if the land is vacant.

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

Due to complications caused to parties to installment land contracts by the financial troubles in the real estate market of the 1980’s, the Real Estate Commission withdrew from use all approved forms for installment land contracts. So, the licensee’s *only* course of conduct is must recommend to the parties that they have an attorney draft this complicated legal document.

LIENS

A **lien** is a *legal right of a creditor to have a debt or charge satisfied out of the property belonging to the debtor*. For the purpose of convenience, liens may be classified into two groups: specific and general liens. A **specific lien** is one that *attaches to and affects only a particular piece, or pieces, of property*, such as a mortgage, property taxes and assessments, a mechanics lien, vendee's lien, vendor's lien, and an attachment. A **general lien** *may attach to and affect all the property of the debtor*, such as a judgment lien, federal tax liens, state tax liens, and liens for a decedent's debts.

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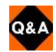
Specific Liens

1. **Mortgage**. One who borrows money or owes a debt may execute a mortgage on a piece of property for the purpose of securing or guaranteeing payment of the amount due the lender or creditor. The **mortgage** is a *conditional transfer of an interest in the property* and is a specific lien or claim against said property. The lien becomes null and void upon the payment of the debt.
2. **Taxes and assessments**. Property taxes, special assessments, and water and sewer charges levied according to law become a specific lien on the real property. The taxing body, usually the city or county, may take action resulting in the sale of the property if these charges are not paid.



Property subject to the general **ad valorem tax** is listed and <u>*assessed*</u> *on the first day of January of the then current year*, and the lien against the property for the taxes attaches at the same time. Taxes levied upon real estate are a *perpetual lien* upon such real estate *until* the taxes and penalties, charges and interest that may accrue, are *paid*, and such lien *has priority over all other liens*.

Property taxes *become* <u>*due*</u> *on January first following the year for which issued*. They are therefore *paid in arrears*. Property taxes in Colorado may be paid, without penalty, as follows: One-half on or before the last day of February, and the remaining one-half on or before the fifteenth day of June, or the entire tax may be paid on or before April 30 of the year following the one in which it was assessed. (39-10-104.5 C.R.S.)

As soon as the first one-half installment becomes delinquent (March 1), interest penalty accrues until the date of payment; except that, if the first installment is made after the last day of February, but not later than thirty days after the mailing by the treasurer of the tax statement pursuant to section 39-10-103(I)(a), no such delinquent interest shall accrue. For the single-payment option, interest accrues as of May 1st. On June sixteenth, all unpaid taxes of the preceding year become delinquent and an interest penalty will be assessed in addition to any previous penalty that has accrued. (39-10-104.5 (3)(a), C.R.S.)

These are the various authorities which determine the property tax:

a. The **County Assessor** who is elected in 63 counties (appointed in the City and County of Denver) by the voters of the county, *determines the general assessed valuation for property in the county*. The valuation for assessment of all taxable *residential* property is determined by statute and is currently 8.24% of its assessed value, or 29% for commercial and raw land. (39-1-104 and 39-1-104.2 (3)(h) C.R.S.)

b. The elected **Board of County Commissioners** (except in the City and County of Denver where the authorized body is created by its charter)

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*determines the **mill levy***, (which is synonymous with "**tax rate**") which is a fractional part of the assessed valuation. It is usually expressed as **mills** e.g. 85 mills, or expressed as fractional dollars e.g. $.085, which if expressed in words would say eighty-five dollars of tax for each one thousand dollars of assessed valuation. This levy is made no later than the 15th day of November of the current taxable year.

[NOTE: The student must know the calculation for tax questions, contained in Chapter 13, Math.]

c. The **County Board of Equalization**, (except for the City and County of Denver) is composed of the county commissioners who sit in this capacity beginning on the second Monday in July until the last working day of July of each year. This board *reviews the assessment roll of all taxable property located in the county*, as prepared by the assessor, and hears appeals from protests filed with the county assessor. If an owner is dissatisfied with the decision of the County Board the owner may within 30 days of the County Board of Equalization's decision:

(i) Appeal to the County Commissioners for binding arbitration. An arbitrated decision will be final and not subject to review, or

(ii) Appeal to the State Board of Assessment Appeals. When a decision of the Board of Assessment Appeals is adverse to an owner, the owner has 30 days in which to appeal to the State Court of Appeals, or

(iii) Appeal to the district court in which the property is located. When a court decision is adverse to an owner, the owner has 45 days in which to

(iv) Appeal to the State Court of Appeals.

d. The three-member quasi-judicial State **Board of Assessment Appeals** duties and functions are to *hear appeals concerning local assessments*, concerning the assessment of utilities and *from decisions of the Property Tax Administrator*. (39-2-123, C.R.S.)

e. The State **Division of Property Taxation** *reviews the methods used by the boards of equalization*, and examines where it has not been properly appraised or valued. It also conducts an annual school for assessors.

f. The State **Board of Equalization** consists of the governor, speaker of the House of Representatives (or designee), president of the senate (or designee), and two members appointed by the governor with the consent of the senate. The two appointed members shall be qualified appraisers or former assessors, or have knowledge and experience in property taxation. The Board meets each year on the second Monday in September to *determine if each county has assessed at the percentage of actual value prescribed by law*. The Board can act only as to classes and subclasses of property and *not as to individual assessments*. The State Board of Equalization may also meet at such times as may be called by the Governor.

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The *county treasurer, no later than the first day of September of each year notifies a delinquent taxpayer by mail of the amount of delinquency and penalty interest* thereon and affords the taxpayer fifteen days from the time of mailing the said notice for the payment. The treasurer will make a list of all the lands upon which taxes have not been paid and cause such list to be published designating a day for public sale. If such a list is not made until after September 1, the sale held thereunder shall not be void by reason thereof. (39-11-101 C.R.S.)

The *sale of lands upon which taxes remain delinquent commences on or before the second Monday in December of each year* and are held at the treasurer's office in each county. Such property is *sold to the persons who pay the taxes, penalty interest, and costs due, and who shall further pay the largest amount in cash, in excess of the taxes, penalty interest, and costs*. (39-11-109 C.R.S.)

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

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

After the deed has been issued, executed, delivered and recorded it is presumed to be validly acknowledged. *After the deed has been recorded for five years*, (nine years if the owner was legally disabled,) *no action can be maintained in the courts for recovery of the land*. The owner of the treasurer's deed usually initiates a *quiet title suit* to have merchantable title before the expiration of the five or nine year period. (39-12-101 and 39-12-104 C.R.S.)

Costs for **special improvements,** such as streets, sidewalks and street lighting, are assessed in accordance with the benefits to the real estate, as may be determined by the ordering authority. Such assessments are a *perpetual lien* against the land and have *priority over all liens except general property tax liens*. All local improvements are due and payable within thirty days after final publication of the assessing ordinance, provided that such assessments may be paid, in installments with interest. The number of installments, the period of payment and the rate of interest are determined by

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the ordering authority and set forth in the assessing ordinance. In case of default in the payment of any installment, the county treasurer may sell the property at the same time, in the same manner and under all the same conditions and penalties and with the same effect as provided for in the sale of real estate in default of payment of the general property taxes. (Title 31 Article 25 Part 5, C.R.S.)

3 . **Mechanics lien**. Mechanics, material suppliers, contractors, sub-contractors, builders and all other persons rendering professional or skilled service, performing labor. upon, or furnishing *materials* used in the construction, alteration, or repair of any structure or improvement upon land are given a lien upon the said property. All such liens are *valid as of the time the work first commenced on the property*. They have *priority over other liens or encumbrances subsequent in time* and also over prior liens and encumbrances not recorded and of which the lienor had no actual knowledge. As between different mechanic lien claimants, the order of priority is:

(a) First, the lien of laborers or mechanics working by the day or piece,

(b) Second, the lien of all other sub-contractors and of all material suppliers whose claims are either entirely or principally for materials,

(c) Third, the lien of all other principal contractors.

To preserve the right to file a lien, the contractor *must serve a* **notice of intent** *to file a lien upon the owner* of the property or the owner's agent and the principal contractor or their agent at least *10 days before recording the* **mechanics lien statement**. (38-22-109(3), C.R.S.)

Lien statements of the lienors in the *first class must be filed* for record in the office of the clerk and recorder of the county wherein the property is situated, *within two months after the date of completion of the improvement*. Liens of the *second and third class must be filed within four months after completion of the work*. (38-22-109 (4), C.R.S.)

No mechanics lien shall hold the property *longer than six months after the last work* or labor is performed, or materials furnished, or completion of the improvement *unless an action shall have been commenced* within that time to enforce the lien and, also, unless a notice stating that such action has been commenced shall have been filed for record within that time in the office of the clerk and recorder of the county in which the property is located. (38-22-1 10, C.R.S.)

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

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The "**disburser**" (usually the *lender or owner*) *who disburses money from time to time as work progresses must record in the county where the land is situated a* **disburser's notice** *stating the name and address of the owner, the principal contractor, if any, the disburser, and the legal description of the land*. Lien claimants may give the disburser written notice that they are contracting on matters which may affect the property. Upon such notice being received by the disburser, it is their duty to make sure that the claimant is paid before the disburser pays the claimant's contractor. If the disburser fails to do this and the claimant suffers loss the disburser is personally liable. (38-26-126 (4), (5), (6) and (7), C.R.S.)

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

4. **Vendee's lien**. If the seller (vendor) defaults in their performance, the *purchaser (vendee) has a lien against the property for the return of all money paid* under the terms of the sales agreement. This is an **equitable lien** and is enforceable by foreclosure.

5. **Vendor's lien**. If the seller conveys the property to the purchaser and does not receive the entire amount of money agreed upon to be paid to the seller by the purchaser, the *seller has a lien upon the property for said unpaid balance*. Like the vendee's lien, this lien is an equitable charge and is enforceable by foreclosure.

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

7. **Lis Pendens**. A lis pendens, technically speaking, is not a lien upon property. It is *public notice, filed against specific lands, that an action at law is pending that may affect the title to the land in question*. For example, a mechanics lien claimant may file a lis pendens a few days before the expiration of their lien; and thus, by such filing, the lien is kept alive beyond the six months provided by law to allow the court to determine the validity of the claim. A lis pendens is notice to a prospective purchaser, encumbrancer or any other party in interest, that a claim against the property exists and such *persons can take title to the property only subject to the outcome of the law suit*.

8. **Fraudulent liens**. In the past there have been instances of persons filing liens for false or groundless claims. Such liens, although without legal effect, can tie up a property being sold and result in legal expense before being declared invalid. Today, any person filing such a claim is civilly liable to the owner of the real property for not less than $1,000 or the actual damages caused. In addition, the person commits a misdemeanor punishable by up to two (2) years imprisonment or $5,000 fine, or both.

General Liens

1. **Judgments**. A judgment *results from court's determination of the rights of the parties through an action at law*. Not all judgments involve money awards, but when the plaintiff is awarded a money judgment, such judgment *may become a lien upon the real property of the defendant*. Some states provide that the judgment must be entered into the judgment docket, or register, and indexed before a lien is created. Still other states require that the judgment must be recorded in the county recorder's office before the lien becomes effective.

Colorado law provides that the judgment lien *attaches when the transcript of the docket entry of the judgment, certified by the clerk of the court, is filed in the office of the county clerk and recorder*. Upon such filing, the judgment becomes a lien on *all the defendant's real property located in that county* which he or she now owns or may afterwards acquire. The judgment may be filed in any county in the state where the defendant owns property and the lien thus created *continues for six years* from the entry of said judgment in the judgment docket. (13-52-102 (1), C.R.S.)

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

When a taxpayer is delinquent in the payment of federal income tax, the government may issue a **tax warrant** which, *when filed in the county wherein the taxpayer's real property is located becomes a lien upon the real estate*. Such lien is *subordinate to prior liens and encumbrances* on the property.

The federal government's lien for *gift taxes* is a lien upon the gift property and continues for a period of ten years. This lien is also subordinate (lower) to prior liens and encumbrances upon the property.

The federal inheritance or estate tax becomes a lien upon all the personal and real property of the decedent. It also continues for ten years and is subordinate (lower) to prior liens and encumbrances upon the property.

3. **State tax liens**. Like the federal government, the state government may also acquire liens upon real property for the non-payment of income taxes.

In Colorado, the lien for delinquent income taxes, when established according to law, becomes a lien upon the taxpayer's real property. This lien has *priority over all subsequent liens and encumbrances and continues for six years* unless paid.

4. **Decedent's debts**. Upon death, the decedent's real property passes to the devisees if he or she leaves a will or to the heirs at law if he or she dies without a will. *Title to the real property vests in the devisee or heir at law subject to any existing liens, or encumbrances, and subject also to rights of creditors of the estate*. Debts against the estate are paid out of the personal property, using first that which is not specifically bequeathed, then the specifically bequeathed Personal property. If the personal property is insufficient to satisfy all debts, then the real property may be sold to pay the remaining debts. Thus, title to a decedent’s real estate may be subject to a lien in favor of the creditors of the estate.

NOTE: The above general liens are enforceable through foreclosure and public sale.

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