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UNDERSTANDING THE PRODUCER'S RIGHTS IN
FORECLOSURE AND REPOSSESSION CASES

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George E. Radosevich, J.D.

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ANRE Research Report Number AR:86-3
November 1986

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UNDERSTANDING THE PRODUCER'S RIGHTS IN FORECLOSURE AND REPOSSESSION CASES

This report answers questions Colorado farmers and ranchers may have regarding their rights under trust deed foreclosure law and repossession law. This report is a summary or overview of sections of these areas of law which appear to be of most interest to Colorado producers. The mortgage foreclosure process will not be discussed in this report, as trust deeds have virtually supplanted mortgages in Colorado as the preferred legal devise for encumbering real estate.¹

FORECLOSURE

Producers who borrow money and use land as collateral to secure the promissory note generally sign a deed of trust giving the lender a lien on the land. The lien is given to the lender on the condition that it will be void or cancelled once the debt is paid off. When the debt is not repaid the lender will take action to obtain possession of the land and to extinguish the producers legal interest in the land. Following the foreclosure process the lender can sell the land to someone else.

The following legal terms are frequently used in foreclosure cases:

1. Trust Deed - is a legal instrument by which the producer transfers land in trust to the Public Trustee (for the county in which the real estate is located) as security for the payment of indebtedness.

¹Those producers, or other affected or interested parties, with more detailed questions should consult an attorney. Producers are cautioned against representing themselves in either a court of law or in negotiations with creditors. This publication is not intended to be a substitute for legal or tax counsel. Statements made in this report are based solely on Laws in force as of October 15, 1986.

2. Public Trustee - is a government official (county) responsible for the handling of trust deeds and their foreclosure. In counties of the first and second class the governor appoints the public trustee for the county. In all other counties the county treasurer serves as the public trustee. As a general rule the public trustee's office is located in the County Courthouse.
3. Verified Response - is a legal plea which describes any objections of the debtor to the foreclosure sale. It should be prepared and filed by an attorney. An example of an objection would be that there is no default under the trust deed.
4. Injunctive Relief - is a court order which prohibits a party from doing something. The Colorado courts have held that, in certain situations, an injunction should be issued barring the lender from having the foreclosure sale.
5. Acceleration Clause - is a provision in loan documents which allows the creditor to declare the entire balance due when the loan is in default.

When can the lender start the foreclosure?

The promissory note and trust deed, which you signed, detail what conditions must be fulfilled before the lender can start the actual foreclosure. These documents vary among lenders. As a general rule the lender cannot start foreclosure until (1) you have defaulted on the loan, and (2) the lender has given all notices and grace periods required by the loan documents. The default is usually the failure to make the payments as required in the promissory note. You will generally be given notice in writing of the lenders

intent to start the foreclosure process. If there is an acceleration clause in your loan papers, the lender will probably declare the entire balance plus interest and costs, due and payable. Note that if there isn't an acceleration clause in the loan documents, the lender can only seek to collect past due payments, not the entire debt.

What does the lender do to actually start the foreclosure?

The lender provides the public trustee with your original note, the deed of trust to be foreclosed, and a legal document called a Notice of Election and Demand for Sale. This legal document demands that the trustee give notice of, advertise, and conduct a sale of the property. The lender also provides the public trustee with a number of other documents which the public trustee will need during the course of the foreclosure. The public trustee will then schedule the sale of the land not less than 45 days nor more than 60 days from the date of the recording of the Notice of Election and Demand for Sale.

Can a sale occur without a court order?

No. The district court must sign an order authorizing a sale. The lender's attorneys will file a motion asking the court to enter such an order. The clerk will set a hearing date not less than 20 nor more than 30 days after the motion is filed. The clerk will furnish you with a written notice of the hearing. This hearing is sometimes referred to as a "120 Hearing", as it is required by rule 120 of the rules of civil procedure.

What should I do when I receive notice of the hearing?

At this point, you and your attorney should determine if you have any valid objections to the sale. If, for example, you have given the lender additional collateral based on the lenders oral promise to give you an extension of time, that may be a valid objection. If you do have an objection you will need to file a Verified Response with the court at least five days prior to the hearing. If you do file such a response, the hearing will be rescheduled for a later date. If you don't file the Verified Response the judge will probably enter the Order authorizing the sale. The judge at the 120 hearing will decide whether or not your objection should prevent the sale from taking place.

What should I do if I discover an objection to the sale after the judge has signed the order authorizing the sale?

You should consider asking the court for injunctive relief. This means that you file a legal pleading in court asking the judge to stop the sale. Your attorney will prepare the legal pleading and present it to the court. The judge that presided at the 120 hearing will determine if, based on your objection, an injunction should be issued. If such an order is entered, the sale will be cancelled. Note that some objections to the sale can't be raised at the 120 hearing. These objections can be raised in your request for injunctive relief.

Do I have a right to pay up the loan after the judge has signed the order authorizing the sale?

Yes. However, you must file a notice of your intent to pay up or "cure" the debt. This notice must be filed at least seven days prior to the sale. It

is filed at the Public Trustee's office. The pay off, or "cure", must include all past due payments, various legal costs, including the public trustee's fee, and any late charges allowed for in the trust deed. The Public Trustee will figure the exact amount. You have until noon of the day prior to the sale to make the cure payment.

If I am negotiating the terms of workout plan with my lender just before the sale, can the sale be postponed?

Yes. The lender must request postponement in writing before the sale. The public trustee will then appear at the sale and announce the date to which the sale has been rescheduled.

If the sale takes place who may bid on the land?

Anyone may bid on the property. If the entire debt is bid, then your note will be cancelled. If anyone other than the lender is the successful bidder, the full amount of the bid must be paid, in cash or certified funds at the sale.

Does the successful bidder receive a deed to my land on the day of sale?

No. The successful bidder receives a "Certificate of Purchase". This document allows the holder the right to receive a deed to the land after the redemption period expires. If redemption money is paid by another party, the holder of the certificate will receive the redemption money.

Do I have redemption rights after the sale?

Yes. If the land is agricultural the redemption period is six months. This means you have six months to redeem the property. To redeem means you pay

back the party that was the high bidder at the sale. The redemption right is available to you, or anyone else who may be liable for a deficiency. Also, a junior lienor, such as a lender holding a second lien, has redemption rights. If you redeem the land, the sale is annulled and the trust deed is discharged. If there are other liens, they reattach to your land with the same relative priority status as they had before the sale.

How much is the redemption price?

It will include the full amount of the foreclosure bid, interest from the date of sale, and may include certain expenses paid by the high bidder in order to maintain or improve the property.

If another creditor also has a lien on my property, how does that other creditor redeem?

A creditor with a junior lien, such as a second mortgage holder, can redeem if that creditor filed a notice of intent to redeem during your redemption period. The effect of such a redemption is that a junior lien holder will succeed to the rights of the purchaser at the foreclosure sale. Note that if you, the owner, redeem, a junior lienholder cannot then redeem.

Can I stay on the land during the redemption period?

Yes, under most circumstances you can remain on the farm until the trustee gives a deed to the new owner. If you want to exercise your rights as a qualified farm owner tenant, it is essential that you do not abandon the land. This will be discussed below.

Can I buy back part of my land during the redemption period?

Yes. Under legislation enacted in April 1986, you have a right to buy back a part of your farm or ranch. Specifically, you can buy back a parcel of up to 40 acres, but not more than five acres without the lenders consent. The parcel will include your home, and may include outbuildings.

The parcel cannot include: a) outbuildings that are necessary for the operation of the remainder of the farm or ranch; b) interfere with access to water rights on the remaining portion of the land; c) interfere with access to the remainder of the land. If you and the lender cannot agree on a fair price for the parcel, or the legal description, the court will decide these matters. You must make an offer to purchase the parcel at least 60 days prior to the end of your redemption period. In other words, you have approximately four months after the sale to exercise your rights. The offer must include a legal description of the parcel you want to keep, the amount you are willing to pay for it, and a statement of the method of paying for it. For a more complete discussion of your rights to buy back part of your property, please see the Colorado State University - Department of Agricultural and Natural Resource Economics Research Report Number AR:86-2. This report is entitled "Understanding the Producer's Legal Rights Under HB 1284", and can be obtained through your county extension office.

When does the public trustee issue a deed for my land?

The public trustee issues a deed after the redemption period has expired. The party entitled to the deed must apply within nine months after the redemption period ends. Issuance of the deed creates a presumption that all legal requirements have been fulfilled. The deed gives title to the party that

receives it, and the title is free of all liens junior to the trust deed which was the subject of the sale.

Do I have the right to lease back the land after the public trustee has delivered the deed to the new owner?

Yes, if you meet the requirements of a qualified farm owner-tenant. To be a qualified farm owner-tenant you must: a) have been the titled owner or equitable owner of the property which was foreclosed upon; b) have been the producer on the property at the time the lender proceeded to foreclose; c) have resided with a reasonable distance from the property and actively managed the farm or ranch operation on that property; d) have had farming or ranching as your primary occupation; e) agreed to continue the operation in a reasonable manner; and f) show that the debt which was foreclosed upon existed on January 1, 1986, and the redemption period did not expire before April 18, 1986. Debts which existed on January 1, 1986, but were later refinanced, will qualify.

How and when do I assert the right to lease back the land?

You must remain in possession of the land after the foreclosure. Do not abandon the farm or ranch. When the lender starts an eviction case against you, you assert your right to lease back the farm or ranch. You must agree in writing to lease the property on "fair and reasonable" terms. Fair and reasonable means crop rents in kind or cash equivalent to rents general paid in your area. Note if the lender has other farm leases in the area you will pay the same rate the other tenants pay. For a more detailed discussion of your rights to lease back the land please see Colorado State University - Department of Agricultural and Natural Resource Economics Report AR:86-2, entitled

"Understanding the Producer's Legal Rights Under H.B. 1284". It can be obtained at your county extension office.

Do I have the right to repurchase all of the land after the Public Trustee has delivered the deed to the new owner?

Yes. You have a right of first refusal under the new legislation enacted in April 1986. This means you have a right to buy back the land from the lender on the same terms as offered by a third party. In other words, if someone makes a good faith offer to buy the farm or ranch, you will have a right to buy it back on the same terms. The lender must give you written notice of any bona fide offer to buy the property. For a more detailed discussion of your rights to repurchase the farm or ranch please see ANRE Research Report AR:86-2. It can be obtained at your county extension office.

REPOSSESSION

When you use your farm or ranch machinery, equipment, or livestock as collateral for a loan you usually sign a security agreement. The security agreement gives the lender a lien on your personal property much like a trust deed gives the lender a lien on your land. When you default in payment the lender will take action to obtain possession of the collateral.

The following terms are frequently encountered in repossession cases:

1. repossession - to take back from one who has not made his payments. Technically, repossession doesn't involve a court action.
2. replevin - a court action brought to obtain possession of personal property. Lenders often bring this type of action to obtain possession of collateral.

3. security agreement - a security agreement is an agreement which gives the creditor a lien on your personal property.
4. secured party - the lender or creditor who holds a lien on the collateral. This lien secures a loan made by the secured party.
5. collateral - the personal property listed in the security agreement. In this report collateral will refer to farm or ranch machinery, equipment, livestock or feed or inventory held for livestock.

Can the secured lender repossess my collateral without first obtaining a court order?

Yes, but only if you have abandoned the collateral or if you have voluntarily surrendered it to the lender and signed a waiver. If you have not surrendered or abandoned the collateral, the lender cannot come onto your property and repossess it without a court order.² The lender will have to schedule a hearing before the judge, and ask for a court order. You will usually receive notice at least five days prior to the hearing.

What should I do if I receive notice of the repossession hearing?

First decide whether or not you want to keep the collateral. If you do, you and your attorney should plan on attending the hearing. At the hearing the court must determine which party is entitled to possession of the collateral pending the final decision of the court. You will have to explain to the court why you think the lender shouldn't be given possession of the collateral. If the court determines that the lender is entitled to a prejudgement order for

²This assumes you have not had a court hearing on a plan you submitted to the judge to pay your loan.

possession, the court will direct the sheriff to take possession of the property. Note that this is not the final say on the matter. In other words, if the court rules that the lender is entitled to a prejudgement order, this does not mean that your rights have ended. This is simply a preliminary hearing. You will be entitled to a full trial on the merits of the case.

If the lender is eventually granted possession of the collateral will I be given notice of the sale?

Yes. The lender must give you at least 20 days written notice of the sale. The only exception is if you have surrendered the collateral and signed a waiver of your rights.

What should I do if I receive notice that the lender is going to sell my collateral?

When you receive such notice you should decide whether you want to keep the collateral. If you do, you and your attorney need to discuss which legal method is best for you. There are two basic methods. One is to prepare a payment plan. The other is redemption, which will be discussed below. The payment plan is an offer or bid to buy back the collateral with a portion of the proceeds from your crops or livestock for the current year. Your plan must be filed in court, and a copy served on the lender, not less than ten days before the sale. You do not need to make any type of payment at this time. If the lender wants to contest the feasibility of your plan the matter will be set for hearing before a judge. If the court finds your plan to be feasible an order will be entered declaring the amount which you are able to pay. If the court finds that your plan is not feasible the lender may go ahead and dispose of the collateral without further proceedings and without further notice or

court order. Note that if another party makes a higher bid at the sale the lender is free to sell the collateral to the other party. If this happens, your right to retain the collateral will be terminated.

If your offer is the high bid, and you are the purchaser of the collateral, you must make the payment as set forth in your plan. If you don't the lender may dispose of the collateral without further court proceedings and without further notice. The advantage of submitting such a plan is that you do not need to pay cash. You will be repurchasing the collateral with a part of your proceeds from the sale of your crops or livestock. The disadvantage of using this method is that if the lender or another party overbids the amount set forth in your payment plan, your rights to retain the collateral will terminate.

Do I have a right to redeem the collateral before this sale?

Yes, redemption of the collateral is the second method by which you can retain possession of the collateral. The word redemption is confusing to some people. Redemption simply means that you are getting back on track with your loan payments, or that you are paying off the loan. Redeeming the collateral differs from the offer to repurchase, described above, in that when you redeem there is no sale, and thus you don't need to be concerned about another party making a higher bid. There are three ways to redeem. The first is by tendering a lump sum payment to the lender. This amount must include the entire balance that is secured by the collateral with interest, as well as the reasonable expenses the lender paid in holding the collateral, and in preparing it for sale. In some cases you will also have to pay the lenders legal costs.

This is probably the least attractive method of redeeming, as you must pay off the entire balance of the loan prior to the sale.

The second method of redeeming the collateral is by tendering to the court an amount necessary to "cure" past due payments. In other words, you do not have to pay the entire amount secured by the collateral. You only have to pay the past due payments, with interest from the date of default, plus certain costs. By paying the past due payments, with interest and costs, you will have cured the default in the eyes of the law. Thus, the lender can neither proceed with the sale nor demand that you pay the entire balance due. In essence, you are getting back on track with the loan payment schedule set forth in your promissory note.

The third method of redeeming the collateral is to prepare an agreement with a payment plan whereby you agree to cure the past due payments with future proceeds from the sale of your crops or livestock. The payment plan is submitted to the court. If the court finds it to be reasonably fair you will be allowed to redeem the collateral according to your plan. The plan must be accompanied by your affadavit which shall state the facts upon which your plan and agreement are founded. These documents must be filed with the court, and a copy served upon the lender no later than ten days prior to the sale. If the court finds that your plan is feasible, you will be entitled to possession and use of the collateral. Note that under this method you do not have to come up with any money at the time the plan is submitted to the court. You will simply cure the past due payments, plus interest, with your future income from your crops and livestock. Your attorney will assist you in preparing the payment plan, and submitting it in court.

For a more complete and detailed discussion of your rights to redeem, see the ANRE Research Report AR:86-2. You may obtain a copy from your county extension office.

