Proposed Rule
Changes to CRCP 120

Colorado Rules of Civil Procedure

Rule 120. Orders Authorizing Foreclosure Sale Under Power in a Deed of Trust to the Public Trustee

(red line of most recent 2015-2016 recommendation to Colorado Supreme Court – subcommittee comments dated 3/15/2017 in footnotes)

(a) Motion for Order Authorizing Sale. When an order of court is desired authorizing a foreclosure sale under a power of sale contained in a deed of trust to a public trustee, any person entitled to enforce the deed of trust may file a verified motion in a district court seeking such order. The motion shall be captioned: "Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120," and shall be verified by a person with knowledge of the contents of the motion ~~with direct knowledge~~ who is competent to testify regarding the facts stated in the motion.[1]

(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion shall describe the property to be sold, shall specify the facts giving rise to the default, and may include documents relevant to the claim of a default.

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[1] Subcommittee comments by Mr. Skillern – Our final subcommittee draft in 2015 had "with knowledge." This had been after long debate – we had rejected "with personal knowledge" as ambiguous. The problem? Almost all knowledge of any agent of the foreclosing lender or servicer is based largely on business records. The subcommittee believes that "personal" or "direct knowledge may be an impossible standard when discussing whether, for example, a payment check had been received by a loan servicer. That entity, and anyone speaking for it, must be able to rely on its business records. The Civil Rules committee felt that "with knowledge" was ambiguous, and added (we believe in the post-meeting edit) "direct knowledge." We agree with Terry Jones, in his comment letter to the Supreme Court dated 4/6/2016, section III, par. 1 ("Jones letter", written on behalf of the Colorado Mortgage Bankers Association and other interested entities) that this is ambiguous as well. We sense that the Supreme Court was also troubled by "direct knowledge." We discussed this again at length, and propose as a solution, "with knowledge of the contents of the motion who is competent to testify regarding the facts stated in the motion." Recall, one unstated purpose of this requirement is to identify a person with knowledge of the facts, gained through a study of the loan file, who is likely closer to the business records of the moving party than its outside counsel.

We will now discuss each of the comments raised in the Jones letter, in order, with our comments in the corresponding footnotes.

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder of the county where the property or any portion thereof is located [2] and the records of the moving party, of:

(i) the grantor of the deed of trust;

(ii) the current record owner of the property to be sold;

(iii) all persons known or believed by the moving party to be personally liable for the debt secured by the deed of trust; and

(iv) those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale, ~~or that is otherwise subordinate to the lien of the deed of trust.~~ or who may otherwise be entitled to notice of the foreclosure. [3]

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address that is given in the recorded instrument evidencing such person's interest. If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

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[2] The subcommittee agrees with Mr. Jones that this conforms better to the C.R.S. § 38-38-100.3(1.5) requirement for the "Amended Mailing List" provided in the foreclosure process to the public trustee and is a helpful clarification.

[3] This is tricky terrain, and Mr. Jones at sec. 3 makes a valid point. This is tricky because some interests recorded before the deed of trust being foreclosed may nevertheless be extinguished by the foreclosure under certain circumstances (a subordination agreement, for example, or through equitable subrogation), and some interests not recorded until later may have priority over the mortgage (statutory mechanic liens, or community association liens, for example). The bottom line is that a foreclosing party should at least have the option of naming and giving notice to parties with interests that the moving party seeks to terminate by foreclosure. The statute describing the contents of the "amended mailing list" is sufficient to give notice to the class of people we have in mind. C.R.S. § 38-38-100.3(1.5)(b). We offer replacement language, "or that may otherwise be entitled to notice of the foreclosure" to at least allow such notice. Without this one may infer that such notice must **only** be given to those recording between the date of the deed of trust and the date of the NED, which is more restrictive that the statutory language. Our subcommittee was unanimous on this point.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, the clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be not less than 21 nor more than 35 days after the filing of the motion. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; Service of Notice. The moving party shall issue a notice stating:

(1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;

(2) the right of any interested person to file and serve a response as provided in section (c), including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response.

(3) the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response."; and

(4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of ~~the person authorized to modify the evidence of debt~~ a representative authorized to address loss mitigation requests.[4] A copy of C.R.C.P. 120 shall be included with or attached to the notice. The notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person's address or addresses stated in the motion;

(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

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[4] The subcommittee considered several options here, to address the concerns raised in par. 4 of the Jones letter and the concerns raised by members of our subcommittee. We discussed "a person", and "the single point of contact, if any, as that term is defined by statute", and "one or more persons." We settled on this language, with only one dissenting voice, as it recognizes the reality that: (a) no one person can be identified, as these decisions typically involve committees or persons in multiple entities, and the personnel change frequently; and (b) this terminology ("loss mitigation requests") is language familiar to those in both the lender and in the "debtor counsel" communities, and is the best way to "make a contact" if you will, without using specific language now in regulations or statutes which stand the chance of changing in the near future.

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, shall be set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right to an order authorizing sale may file and serve a response to the motion. The response must describe the facts the respondent relies on in objecting to the issuance of an order authorizing sale, and may include copies of documents which support the respondent's position. The response shall be filed and served not later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. Service of the response on the moving party shall be made in accordance with C.R.C.P. 5(b).

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior the new hearing date.

(d) Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order. The court shall examine the motion and any responses.

(1) If the matter is set for hearing, the scope of inquiry at the hearing shall not extend beyond

(A) the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust described in the motion;

(B) consideration by the court of the requirements of the Servicemembers Civil Relief Act, 50 U.S.C. ~~A.P.P.~~ § ~~521~~3931, as amended;[5]

(C) whether the moving party is the real party in interest; and

[5] The statutory cite has changed since in the past intervening months. Another option may be to delete the reference to the specific statute number. However, we decided to keep it, thinking this will aid counsel in the future.

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law. [6]

The court shall determine whether there is a reasonable probability that a default justifying the sale has occurred, whether an order authorizing sale is otherwise proper under the Servicemembers Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court shall grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale. [7]

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4) An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of a motion authorizing a foreclosure shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any other right or remedy of the moving party.

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[6] On this point, the committee disagrees with the suggestion in the Jones letter, paragraph 5, and keeps the same language approved by the Civil Rules Committee in 2015. Mr. Jones suggests: "Whether the borrower has received confirmation that a complete loss mitigation application has been submitted at least thirty-seven (37) days prior to the sale date or a loss mitigation option has been offered and accepted and the borrower is complying with its provisions." It is the opinion of the subcommittee that our more general language is understandable, and that the more detailed language suggested by Mr. Jones is subject to change in a very fluid federal regulatory scheme. In particular, a strong majority of the subcommittee feels that requiring the borrower to prove that confirmation has been given by a lender that a borrower's package has been offered and accepted would be unfair to borrowers and is not required by existing case law under the federal statutes. Depending on regulations existing at any given time, a district court can get to the bottom of this issue with this, more general language.

[7] The subcommittee disagrees with Mr. Jones (par. 7) that this section d (2) of the proposed rule, which has been in the rule for several decades as former subsection (e), creates a conundrum for attorneys drafting a motion for order authorizing sale. The creditor counsel on our subcommittee do not see this as an issue. Judges on the subcommittee have emphasized that the review of the motion should not be mechanical and should leave room for consideration of information provided by a *pro se* debtor even if no formal response has been filed.

(e) The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

(f) Venue. For the purposes of this section, a consumer obligation is any obligation

(1) as to which the obligor is a natural person, and

(2) is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part of the property is located. Any proceeding under this Rule that does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of sale to be made to the court. If it appears from the return that the sale was conducted in conformity with the order authorizing the sale, the court shall enter an order approving the sale. This order [8] is not appealable and shall not have preclusive effect in any other action or proceeding ~~shall not have preclusive effect on the parties in any action for a deficiency judgment or in a civil action challenging the right of the moving party to foreclosure or seeking to set aside the foreclosure sale~~.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing the motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

[8] While the subcommittee disagrees (Jones letter, par. 6) that the "no preclusion" language suggested in 2015 changes existing law or undermines the quality of title achieved in a public trustee foreclosure, see C.R.S. § 38-38-501(1) ("title shall vest" eight days after the end of any redemption periods), we now suggest this change to limit redundancy and coordinate better with section d (4) of our proposal.

We note that while the return of sale and the order approving it may in practice seem to be inconsequential acts, both are required to comply with the Servicemembers Civil Relief Act, 50 U.S.C. § 3953(c)(1).

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(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion shall describe the property to be sold, shall specify the facts giving rise to the default, and may include documents relevant to the claim of a default.

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(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder of the county where the property or any portion thereof is located [2] and the records of the moving party, of:

(i) the grantor of the deed of trust;

(ii) the current record owner of the property to be sold;

(iii) all persons known or believed by the moving party to be personally liable for the debt secured by the deed of trust; and

(iv) those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale, or who may otherwise be entitled to notice of the foreclosure. [3]

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address that is given in the recorded instrument evidencing such person's interest. If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, the clerk shall set a deadline by which any response to the motion must be filed. The deadline

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shall be not less than 21 nor more than 35 days after the filing of the motion. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; Service of Notice. The moving party shall issue a notice stating:

(1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;

(2) the right of any interested person to file and serve a response as provided in section (c), including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response.

(3) the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response."; and

(4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of a representative authorized to address loss mitigation requests.[4] A copy of C.R.C.P. 120 shall be included with or attached to the notice. The notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person's address or addresses stated in the motion;

(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by

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statute. Proof of mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, shall be set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right to an order authorizing sale may file and serve a response to the motion. The response must describe the facts the respondent relies on in objecting to the issuance of an order authorizing sale, and may include copies of documents which support the respondent's position. The response shall be filed and served not later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. Service of the response on the moving party shall be made in accordance with C.R.C.P. 5(b).

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior the new hearing date.

(d) Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order. The court shall examine the motion and any responses.

(1) If the matter is set for hearing, the scope of inquiry at the hearing shall not extend beyond

(A) the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust described in the motion;

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(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law. [6]

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[6] On this point, the committee disagrees with the suggestion in the Jones letter, paragraph 5, and keeps the same language approved by the Civil Rules Committee in 2015. Mr. Jones suggests:

The court shall determine whether there is a reasonable probability that a default justifying the sale has occurred, whether an order authorizing sale is otherwise proper under the Servicemembers Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court shall grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale. [7]

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4) An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of a motion authorizing a foreclosure shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any other right or remedy of the moving party.

(e) The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers

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"Whether the borrower has received confirmation that a complete loss mitigation application has been submitted at least thirty-seven (37) days prior to the sale date or a loss mitigation option has been offered and accepted and the borrower is complying with its provisions." It is the opinion of the subcommittee that our more general language is understandable, and that the more detailed language suggested by Mr. Jones is subject to change in a very fluid federal regulatory scheme. In particular, a strong majority of the subcommittee feels that requiring the borrower to prove that confirmation has been given by a lender that a borrower's package has been offered and accepted would be unfair to borrowers and is not required by existing case law under the federal statutes. Depending on regulations existing at any given time, a district court can get to the bottom of this issue with this, more general language.

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(g) Return of Sale. The court shall require a return of sale to be made to the court. If it appears from the return that the sale was conducted in conformity with the order authorizing the sale, the court shall enter an order approving the sale. This order [8] is not appealable and shall not have preclusive effect in any other action or proceeding.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing the motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

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We note that while the return of sale and the order approving it may in practice seem to be inconsequential acts, both are required to comply with the Servicemembers Civil Relief Act, 50 U.S.C. § 3953(c)(1).