

Second Regular Session
Sixty-eighth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 12-0186.01 Duane Gall x4335

HOUSE BILL 12-1156

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A BILL FOR AN ACT

101 CONCERNING MEASURES TO IMPROVE THE RELIABILITY OF
102 INFORMATION PROVIDED IN CONNECTION WITH REAL ESTATE
103 FORECLOSURES.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

Current law allows a "holder of an evidence of debt" (holder), generally, a bank or other financial institution, to foreclose on real property under a deed of trust even if the holder's interest is based on an assignment from the original lender and the assignment or other

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

intermediate documents are not produced, simply by providing a statement from the holder's attorney that the holder's interest in the property is valid. **Sections 1 and 3** of the bill remove this provision and otherwise tighten the rules for documentation of the holder's interest that must be filed with the public trustee before a foreclosure sale is authorized.

Section 2 amends provisions governing the court order authorizing sale by a public trustee (rule 120 order, referring to C.R.C.P. 120) to place the burden of proof on the holder in all cases to demonstrate that the holder does in fact have a valid assignment or other basis for its assertion that it is entitled to foreclose on the property. Section 2 also explicitly states that the rule 120 order is not a final judgment adjudicating all claims of rights and interests in the property, as a judgment under rule 105 (a "quiet title judgment") would be.

Section 4 suspends any eviction proceeding if the rule 120 order has been challenged, until the challenge is resolved.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 38-38-101, **amend**
3 (1) introductory portion, (1) (b) introductory portion, (1) (b) (II), (1) (c)
4 introductory portion, (1) (c) (II), (1) (g), (2) (a), and (8); **repeal** (6) (b);
5 and **add** (1) (i) and (1) (j) as follows:

6 **38-38-101. Holder of evidence of debt may elect to foreclose.**
7 (1) **Documents required.** Whenever a holder of an evidence of debt
8 declares a violation of a covenant of a deed of trust and elects to publish
9 all or a portion of the property ~~therein~~ described IN THE DEED OF TRUST
10 for sale, the holder or the attorney for the holder shall file the following
11 with the public trustee of the county where the property is located:

12 (b) The original evidence of debt, including any modifications to
13 the original evidence of debt, ~~together with~~ AND the original indorsement
14 or assignment ~~thereof~~ OF THE EVIDENCE OF DEBT, if any, to the holder of
15 the evidence of debt or other proper indorsement or assignment in
16 accordance with subsection (6) of this section or, in lieu of the original

1 evidence of debt, one of the following:

2 (II) A copy of the evidence of debt and ~~a certification~~ AN
3 AFFIDAVIT signed and properly acknowledged by ~~a~~ THE holder of ~~an~~ THE
4 evidence of debt, acting for itself or as agent, nominee, or trustee under
5 subsection (2) of this section, ~~or a statement signed by the attorney for~~
6 ~~such holder~~ citing the paragraph of section 38-38-100.3 (20) under which
7 the holder claims to be a qualified holder and certifying ~~or stating~~ that the
8 copy of the evidence of debt is true and correct and that the use of the
9 copy is subject to the conditions described in paragraph (a) of subsection
10 (2) of this section; or

11 (c) The original recorded deed of trust securing the evidence of
12 debt and any original recorded modifications of the deed of trust or any
13 recorded partial releases of the deed of trust, or in lieu ~~thereof~~ OF THE
14 ORIGINAL RECORDED DEED OF TRUST, MODIFICATIONS, OR PARTIAL
15 RELEASES, one of the following:

16 (II) Copies of the recorded deed of trust and any recorded
17 modifications of the deed of trust or recorded partial releases of the deed
18 of trust and ~~a certification~~ AN AFFIDAVIT signed and properly
19 acknowledged by ~~a~~ THE holder of ~~an~~ THE evidence of debt, acting for
20 itself or as an agent, nominee, or trustee under subsection (2) of this
21 section, ~~or a signed statement by the attorney for such holder~~ citing the
22 paragraph of section 38-38-100.3 (20) under which the holder claims to
23 be a qualified holder and certifying ~~or stating~~ that the copies of the
24 recorded deed of trust and any recorded modifications of the deed of trust
25 or recorded partial releases of the deed of trust are true and correct and
26 that the use of the copies is subject to the conditions described in
27 paragraph (a) of subsection (2) of this section;

1 (g) A statement, executed by the holder of ~~an~~ THE evidence of
2 debt, ~~or the attorney for such holder,~~ identifying, to the best knowledge
3 of the person executing ~~such~~ THE statement, the name and address of the
4 current owner of the property described in the notice of election and
5 demand; ~~and~~

6 (i) COPIES OF ALL DOCUMENTS NOT OTHERWISE LISTED IN
7 PARAGRAPHS (a) TO (h) OF THIS SUBSECTION (1) SHOWING AN UNBROKEN
8 SERIES OF INTERVENING INDORSEMENTS OR ASSIGNMENTS BETWEEN THE
9 ORIGINAL EVIDENCE OF DEBT SECURED BY THE DEED OF TRUST AND THE
10 HOLDER FILING THE NOTICE OF ELECTION AND DEMAND; AND

11 (j) IF THE PERSON COMMENCING THE FORECLOSURE IS ACTING AS
12 AN AGENT, NOMINEE, OR TRUSTEE FOR ANOTHER PERSON, DOCUMENTS
13 DEMONSTRATING THE PERSON'S AUTHORIZATION TO ENFORCE THE
14 EVIDENCE OF DEBT.

15 (2) **Foreclosure by qualified holder without original evidence**
16 **of debt, original or certified copy of deed of trust, or proper**
17 **indorsement.** (a) (I) A qualified holder, whether acting for itself or as
18 agent, nominee, or trustee under section 38-38-100.3 (20) (j), that elects
19 to foreclose without the original evidence of debt pursuant to
20 subparagraph (II) of paragraph (b) of subsection (1) of this section, or
21 without the original recorded deed of trust or a certified copy ~~thereof~~ OF
22 THE ORIGINAL RECORDED DEED OF TRUST pursuant to subparagraph (II) of
23 paragraph (c) of subsection (1) of this section, or without the proper
24 indorsement or assignment of an evidence of debt under paragraph (b) of
25 subsection (1) of this section, ~~shall,~~ by operation of law, ~~be deemed to~~
26 ~~have agreed~~ AGREES to indemnify and defend:

27 (A) Any person liable for repayment of any portion of the original

1 evidence of debt in the event that the original evidence of debt is
2 presented for payment to the extent of any amount, other than the amount
3 of a deficiency remaining under the evidence of debt after deducting the
4 amount bid at sale; and

5 (B) Any person who sustains a loss due to any title defect that
6 results from reliance upon a sale at which the original evidence of debt
7 was not presented. ~~The indemnity granted by this subsection (2) shall be~~
8 ~~limited to actual economic loss suffered together with any court costs and~~
9 ~~reasonable attorney fees and costs incurred in defending a claim brought~~
10 ~~as a direct and proximate cause of the failure to produce the original~~
11 ~~evidence of debt, but such indemnity shall not include, and no claimant~~
12 ~~shall be entitled to, any special, incidental, consequential, reliance,~~
13 ~~expectation, or punitive damages of any kind.~~

14 (II) A qualified holder acting as agent, nominee, or trustee ~~shall~~
15 ~~be~~ IS liable for the indemnity pursuant to this subsection (2).

16 (6) **Indorsement or assignment.** (b) ~~Notwithstanding the~~
17 ~~provisions of paragraph (a) of this subsection (6), the original evidence~~
18 ~~of debt or a copy thereof without proper indorsement or assignment shall~~
19 ~~be deemed to be properly indorsed or assigned if a qualified holder~~
20 ~~presents the original evidence of debt or a copy thereof to the officer~~
21 ~~together with a statement in the certification of the qualified holder or in~~
22 ~~the statement of the attorney for the qualified holder pursuant to~~
23 ~~subparagraph (H) of paragraph (b) of subsection (1) of this section that~~
24 ~~the party on whose behalf the foreclosure was commenced is the holder~~
25 ~~of the evidence of debt.~~

26 (8) **Assignment or transfer of debt during foreclosure.**

27 (a) (I) The holder of the evidence of debt may assign or transfer the

1 secured indebtedness at any time during the pendency of a foreclosure
2 action without affecting the validity of the secured indebtedness. Upon
3 receipt of written notice signed by the holder who commenced the
4 foreclosure action or the attorney for the holder stating that the evidence
5 of debt has been assigned and transferred and identifying the assignee or
6 transferee, the public trustee shall complete the foreclosure as directed by
7 the assignee or transferee or the attorney for the assignee or transferee.

8 (II) EACH ASSIGNEE OR TRANSFEREE DESCRIBED IN
9 SUBPARAGRAPH (I) OF THIS PARAGRAPH (a) SHALL COMPLY WITH THE
10 DOCUMENTATION REQUIREMENTS OF PARAGRAPHS (i) AND (j) OF
11 SUBSECTION (1) OF THIS SECTION AND SHALL SUPPLEMENT THE RECORD
12 ACCORDINGLY.

13 (III) ~~No~~ A holder of an evidence of debt, certificate of purchase,
14 or certificate of redemption ~~shall be~~ IS NOT liable to any third party for the
15 acts or omissions of any assignee or transferee that occur after the date of
16 the assignment or transfer.

17 (b) The assignment or transfer of the secured indebtedness during
18 the pendency of a foreclosure ~~shall be deemed~~ IS made without recourse
19 unless otherwise agreed in a written statement signed by the assignor or
20 transferor. The holder of the evidence of debt, certificate of purchase, or
21 certificate of redemption making the assignment or transfer and the
22 attorney for the holder ~~shall~~ have no duty, obligation, or liability to the
23 assignee or transferee or to any third party for any act or omission with
24 respect to the foreclosure or the loan servicing of the secured
25 indebtedness after the assignment or transfer. ~~If an assignment or transfer~~
26 ~~is made by a qualified holder that commenced the foreclosure pursuant to~~
27 ~~subsection (2) of this section, the qualified holder's indemnity under said~~

1 subsection (2) shall remain in effect with respect to all parties except to
2 the assignee or transferee, unless otherwise agreed in a writing signed by
3 the assignee or transferee if the assignee or transferee is a qualified
4 holder.

5 (c) If an assignment or transfer is made to a holder of an evidence
6 of debt other than a qualified holder, the holder ~~must~~ SHALL file with the
7 officer the original evidence of debt and the original recorded deed of
8 trust or, in lieu thereof OF THE ORIGINAL DOCUMENTS, the documents
9 required in paragraphs (b) and (c) of subsection (1) of this section. ~~An~~
10 assignee or transferee shall be presumed to not be a qualified holder, and
11 as such, shall be subject to the provisions of this paragraph (c), unless a
12 signed statement by the attorney for such assignee or transferee that cites
13 the paragraph of section 38-38-100.3 (20) under which the assignee or
14 transferee claims to be a qualified holder is filed with the officer.

15 **SECTION 2.** In Colorado Revised Statutes, 38-38-105, **amend**
16 (2) (a) as follows:

17 **38-38-105. Court order authorizing sale mandatory - notice of**
18 **hearing for residential properties.** (2) (a) (I) ~~On and after January 1,~~
19 ~~2008,~~ Whenever a public trustee forecloses upon a deed of trust under this
20 article, the holder of the evidence of debt or the attorney for the holder
21 shall obtain an order authorizing sale from a court of competent
22 jurisdiction to issue the same pursuant to rule 120 or other rule of the
23 Colorado rules of civil procedure. The order ~~shall~~ MUST recite the date the
24 hearing was scheduled if no hearing was held, or the date the hearing was
25 completed if a hearing was held, which date in either case must be no
26 later than the day prior to the last day on which an effective notice of
27 intent to cure may be filed with the public trustee under section

1 38-38-104.

2 (II) NOTWITHSTANDING ANY OTHER PROVISION OF LAW AND
3 REGARDLESS OF WHETHER A HEARING IS HELD, THE COURT SHALL REVIEW
4 THE APPLICATION AND SUPPORTING DOCUMENTS FILED BY THE APPLICANT
5 FOR THE ORDER AUTHORIZING SALE AND SHALL MAKE SPECIFIC FINDINGS
6 ON THE FOLLOWING ISSUES:

7 (A) WHETHER THE APPLICANT IS THE HOLDER OF THE EVIDENCE OF
8 DEBT;

9 (B) WHETHER THE APPLICANT IS THE REAL PARTY IN INTEREST TO
10 FORECLOSE THE DEBT;

11 (C) WHETHER THE APPLICANT HAS LEGAL STANDING TO
12 FORECLOSE THE DEBT; AND

13 (D) WHETHER THE DOCUMENTS PROVIDED BY THE APPLICANT ARE
14 AUTHENTIC AND SUFFICIENT TO RESOLVE THE ISSUES IDENTIFIED IN
15 SUB-SUBPARAGRAPHS (A) TO (C) OF THIS SUBPARAGRAPH (II).

16 (III) THE COURT SHALL SET FORTH ALL FINDINGS ON THE ISSUES
17 IDENTIFIED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (a) IN THE COURT'S
18 ORDER THAT EITHER GRANTS OR DENIES THE APPLICATION FOR AN ORDER
19 AUTHORIZING SALE. THE BURDEN OF PROOF IS ON THE APPLICANT TO
20 DEMONSTRATE COMPLIANCE WITH ALL DOCUMENTATION REQUIREMENTS
21 SET FORTH IN THIS ARTICLE AS PART OF ITS APPLICATION FOR AN ORDER
22 AUTHORIZING SALE.

23 (IV) A sale held without an order authorizing sale issued in
24 compliance with this paragraph (a) ~~shall be~~ is invalid.

25 (V) AN ORDER AUTHORIZING SALE THAT IS ISSUED PURSUANT TO
26 THIS SECTION IS NOT A FINAL JUDGMENT AND IS ENTERED WITHOUT
27 PREJUDICE TO ANY PARTY SEEKING INJUNCTIVE OR OTHER RELIEF,

1 INCLUDING A COMPLETE ADJUDICATION OF ALL CLAIMS OF RIGHTS AND
2 INTERESTS IN THE SUBJECT PROPERTY UNDER C.R.C.P. 105 IN A COURT OF
3 COMPETENT JURISDICTION.

4 **SECTION 3.** In Colorado Revised Statutes, 38-38-100.3, **amend**
5 (10) (d) as follows:

6 **38-38-100.3. Definitions.** As used in articles 37 to 39 of this title,
7 unless the context otherwise requires:

8 (10) "Holder of an evidence of debt" means the person in actual
9 possession of or person entitled to enforce an evidence of debt; except
10 that "holder of an evidence of debt" does not include a person acting as
11 a nominee solely for the purpose of holding the evidence of debt or deed
12 of trust as an electronic registry without any authority to enforce the
13 evidence of debt or deed of trust. For the purposes of articles 37 to 40 of
14 this title, the following persons are presumed to be the holder of an
15 evidence of debt:

16 (d) The person in possession of an evidence of debt with
17 EVIDENCE THAT PROVES THE PERSON'S authority, which may be granted
18 by the original evidence of debt or deed of trust, to enforce the evidence
19 of debt as agent, nominee, or trustee or in a similar capacity for the
20 obligee of the evidence of debt.

21 **SECTION 4.** In Colorado Revised Statutes, 13-40-104, **amend**
22 (1) introductory portion and (1) (f) as follows:

23 **13-40-104. Unlawful detention defined.** (1) ~~Any~~ A person is
24 guilty of an unlawful detention of real property in the following cases:

25 (f) (I) EXCEPT AS PROVIDED IN SUBPARAGRAPH (II) OF THIS
26 PARAGRAPH (f), when:

27 (A) The property has been duly sold under any power of sale,

1 contained in any mortgage or trust deed that was executed by ~~such~~ THE
2 person, or any person under whom ~~such~~ THE person claims by title
3 subsequent to THE date of the recording of ~~such~~ THE mortgage or trust
4 deed; and

5 (B) The title under ~~such~~ THE sale has been duly perfected; and

6 (C) The purchaser at ~~such~~ THE sale, or his or her assigns, has duly
7 demanded the possession ~~thereof~~ OF THE PROPERTY.

8 (II) IF AN ACTION FOR INJUNCTIVE OR OTHER RELIEF THAT
9 CHALLENGES THE SALE OF THE PROPERTY UNDER A POWER OF SALE UNDER
10 C.R.C.P. 120 (d) HAS BEEN FILED IN A COURT OF COMPETENT
11 JURISDICTION, THE COURT SHALL STAY OR DISMISS WITHOUT PREJUDICE AN
12 ACTION FOR POSSESSION UNDER THIS PARAGRAPH (f) UNTIL THE ACTION
13 FOR INJUNCTIVE OR OTHER RELIEF HAS BEEN DETERMINED BY JUDGMENT
14 ON THE MERITS IN THAT COURT;

15 **SECTION 5. Applicability.** The provisions of this act apply to
16 foreclosure proceedings in which the notice of election and demand is
17 filed on or after the effective date of this act.

18 **SECTION 6. Safety clause.** The general assembly hereby finds,
19 determines, and declares that this act is necessary for the immediate
20 preservation of the public peace, health, and safety.