

January 2006

## Wyoming Foreclosure Law: Conforming to the Broad Changes Made by House Bill 112

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### Recommended Citation

Cottam, Dale W. and Edwards, Jack D. (2006) "Wyoming Foreclosure Law: Conforming to the Broad Changes Made by House Bill 112," *Wyoming Law Review*. Vol. 6: No. 1, Article 1.  
Available at: <https://scholarship.law.uwyo.edu/wlr/vol6/iss1/1>

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**WYOMING FORECLOSURE LAW:  
CONFORMING TO THE BROAD  
CHANGES MADE BY HOUSE BILL 112**

*Dale W. Cottam<sup>1</sup> and Jack D. Edwards<sup>2</sup>*

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## 1. INTRODUCTION

Most of Wyoming's statutory foreclosure laws were enacted or amended in the late 1800s and early 1900s.<sup>3</sup> Wyoming Statute section 34-4-113, regarding the payment of surplus proceeds following a foreclosure sale, has not been amended since its enactment in 1882.<sup>4</sup> Unlike Wyoming, other states have more recently amended their statutes as the need and opportunity for refinement arose. The benefit of improving certain provisions of Wyoming's foreclosure laws is evident, especially in today's real estate environment where second mortgages are commonplace, property values are increasing at rapidly accelerating rates, and litigation abounds.

Wyoming House Bill 112 (the "Bill") is a collaborative effort of many individuals, none of whom were paid for their efforts by a client, political action committee, or other similar type of special interest group.<sup>5</sup> Instead of being financially motivated, the drafters and supporters undertook these efforts because of a genuine interest in improving the clarity and judicial soundness of Wyoming's foreclosure laws.

In addition to minor "housekeeping" amendments,<sup>6</sup> the Bill makes eight significant changes to Wyoming's current foreclosure laws:

- First, the Bill creates consistent sale procedures for the various real estate foreclosure types (judicial, execution, and advertisement and sale).<sup>7</sup> Under prior law, these procedures were not consistent either because various provisions conflicted, or be-

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3. The current Wyoming foreclosure statute can be found in sections 34-4-101 et seq. WYO. STAT. ANN. §§ 34-4-101 et seq. (LexisNexis 2005).

4. See *id.* at § 34-4-113.

5. In this regard, the authors wish to thank the many individuals who assisted in the drafting of the Bill and in the legislative process involved in its passage, including: Wyoming Representatives Pete Illoway, Ed Buchanan, Tom Lubnau, and Colin Simpson; Wyoming Senators Phil Nicholas, John Hanes, and Tony Ross; the Honorable Peter G. Arnold, P. Jaye Rippley, John Patton, Bob Bailey, Georgiana Stewart, Professor John Burman, Olen Snyder, Tim Summers, Jim Belcher, Terry Buffington, Greg Dyekman, Tammy Powell, Loyd Smith, Steve Freudenthal, Mark Stewart, Mark Voss, First American Title Company of Wyoming, Laramie County Abstract and Title, Summit Title, and the Wyoming Bankers Association.

6. See *infra* Section 5.

7. See WYO. STAT. ANN. § 34-4-113.

cause certain provisions existed under one type of foreclosure procedure that did not exist under another.<sup>8</sup>

- Second, the Bill requires junior lienholders to record their liens at least twenty-five days before the date of sale to be entitled to a notice of sale.<sup>9</sup> No deadline existed before under Wyoming law. This deadline now provides the foreclosing lienholder and title companies with a date certain upon which to certify title of the real estate to be foreclosed upon and the parties in interest who must now be given notice.<sup>10</sup>
- Third, the Bill requires foreclosing lienholders to provide the notice of sale to the mortgagor, person in possession, and all junior lienholders.<sup>11</sup> Prior to the effective date of the Bill, only the notice of intent to foreclose was required to be served on the mortgagor and person in possession.<sup>12</sup> Publication of the notice of sale was required under prior law, but did not have to be served on anyone.<sup>13</sup>
- Fourth, notices of sale must now contain a “bidders beware” warning that reads as follows: “*The property being foreclosed upon may be subject to other liens and encumbrances that will not be extinguished at the sale and any prospective purchaser should research the status of title before submitting a bid.*”<sup>14</sup> This warning will help prevent a third party bidder from naively bidding at a junior lienholders’ foreclosure sale and obtaining the property subject to a senior lien unaffected by the sale.<sup>15</sup>
- Fifth, the Bill requires a notice of postponement to be published at least twice in addition to the four publications of the notice of sale.<sup>16</sup> Under prior law, it was unclear how many times the notice of postponement had to be published. Requiring at least two publications removes the uncertainty and will also help maximize the bidding at the sale by providing ample notice of the postponed sale date and time.

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8. See *infra* Section 5.

9. WYO. STAT. ANN. § 34-4-104(a) (LexisNexis 2005).

10. *Id.* See *infra* Section 4(b)(iii).

11. *Id.*

12. *Id.* § 34-4-103(a)(iv) (LexisNexis 2003).

13. *Id.* § 34-4-104.

14. *Id.* § 34-4-105(a)(vi) (LexisNexis 2005) (emphasis added).

15. See *infra* Section 4(b)(i).

16. WYO. STAT. ANN. § 34-4-109 (LexisNexis 2005).

- Sixth, the Bill prevents a foreclosure sale from taking place if the foreclosing lienholder is not present or does not submit its bid in writing.<sup>17</sup> Higher, commercially reasonable bids benefit all parties at foreclosure sales, including the mortgagor. If the foreclosing mortgagee is always present or otherwise submits a bid, this objective is more likely to be attained.
- Seventh, the Bill requires surplus proceeds to be distributed to the junior lienholders in the order of their priority.<sup>18</sup> Prior law addressing surplus proceeds was adopted in 1882 and has never been amended despite the proliferation of second and third mortgages and ever increasing land values.<sup>19</sup> Further, prior provisions relating to surplus proceeds were difficult to interpret and unclear at best.<sup>20</sup> As a result, there are decisions from two separate district court judges reaching opposite results and conflicting interpretations.<sup>21</sup> The Bill lays these issues to rest by specifying how surplus proceeds shall be distributed.<sup>22</sup>
- Finally, the Bill provides a statutory procedure for dealing with the interest of a lienholder who was omitted from a foreclosure proceeding.<sup>23</sup> Specifically, the omitted party will have the right to redeem from the sale, or the senior lienholder may extinguish the lien through a judicial proceeding.<sup>24</sup>

The Bill became effective on July 1, 2005.

The changes made by the Bill are more understandable and appreciated when placed in a historical context. Therefore, this article will first provide a general discussion of foreclosure law prior to the effective date of the Bill, followed by a discussion of the law with changes made by the Bill.

## 2. WHAT IT MEANS "TO FORECLOSE"

Mortgages came into existence in the 17th century.<sup>25</sup> At that time, the Courts of Chancery would grant redemption decrees in suits brought by defaulting mortgagors. The redemption decree allowed the mortgagor to regain his land by paying the debt owed within the time specified in the de-

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17. *Id.* §§ 1-18-101(a)(iii), 34-4-106, 34-4-108.

18. *Id.* §§ 1-18-113, 11-34-123(a), 34-4-104(b), 34-4-113.

19. WYO. STAT. ANN. § 34-4-113 (LexisNexis 2003).

20. *See infra* Section 6.

21. *Id.*

22. *Id.*

23. *See infra* Section 7.

24. *Id.*

25. E. GEORGE RUDOLPH & JAMES R. BELCHER, *THE WYOMING LAW OF MORTGAGES* 3 (1993).

cree.<sup>26</sup> The possibility of redemption could continue on for an indefinite period of time, and therefore clouded the foreclosing mortgagee's title.<sup>27</sup> As a result, mortgagees began bringing suits to "foreclose" the mortgagor's equitable right to redeem, thereby making the mortgagee's title absolute.<sup>28</sup> Therefore, "foreclosure" was the process of terminating the equity of redemption.<sup>29</sup>

With the change in standard procedure to foreclosure by sale, it has become customary to speak of "foreclosing the mortgage."<sup>30</sup> Because Wyoming is a "lien theory" state, the change in terminology is particularly appropriate because foreclosures under the lien theory effectively divest a mortgagor of title at the conclusion of the redemption period.<sup>31</sup> In a lien theory state such as Wyoming, legal title to the property remains with the mortgagor until the statutory redemption period has expired.<sup>32</sup> The mortgagee enjoys only a lien on the property with a right to foreclose in the event of a default.<sup>33</sup> Wyoming's lien theory is a creation of the Wyoming Supreme Court:

In this state . . . the title to the property mortgaged does not pass by the mortgage to the mortgagee, even on condition broken. The mortgage simply creates a lien upon the land, and it must be sold on foreclosure to pass the title.<sup>34</sup>

Furthermore, Wyoming is a "race-notice" state.<sup>35</sup> To be effective against third parties, mortgages must be recorded in the office of the registrar of deeds or county clerk's office for the county in which the property is located.<sup>36</sup> Once recorded, the mortgage is constructive notice to third parties and will take precedence over any unrecorded or subsequently recorded interest in the property.<sup>37</sup> Unrecorded mortgages and other interests in the property are unenforceable as against subsequent bona fide purchasers who give valuable consideration.<sup>38</sup>

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 4.

30. RUDOLPH & BELCHER, *supra* note 25, at 4.

31. *Id.* at 4-5 & 23-24; WYO. STAT. ANN. §§ 1-18-102, 1-18-104(e) (LexisNexis 2005).

32. *Id.*

33. *Id.*; WYO. STAT. ANN. § 34-4-103(a)(i) (LexisNexis 2005).

34. Robinson Mercantile Co. v. Davis, 187 P. 931, 932 (Wyo. 1920).

35. Grose v. Sauvageau, 942 P.2d 398, 404 (Wyo. 1997).

36. WYO. STAT. ANN. §§ 34-1-118 and 34-4-120 (LexisNexis 2005).

37. *Id.* § 34-1-121.

38. *Id.* § 34-1-120.

In Wyoming, there are two different methods by which to foreclose a mortgage: judicially and by advertisement and sale.<sup>39</sup> Judicial foreclosures are discussed first due to their earlier roots from a historical perspective, and because judicial foreclosures are commenced as court proceedings, but concluded very similar to advertisement and sale foreclosures.<sup>40</sup>

### 3. JUDICIAL FORECLOSURE

Judicial foreclosure is an *in rem* proceeding, with venue being proper in the county where the land is situated.<sup>41</sup> The ultimate goal pursued by the mortgagee in a judicial foreclosure is to obtain two primary objectives: first, a judgment granting the entire amount of the debt due from the mortgagor, and second, a decree of foreclosure specifying the terms of the foreclosure sale and extinguishing the rights of all junior lienholders as a result of the sale. All persons holding a recorded interest in the land junior to that interest being foreclosed are necessary party defendants.<sup>42</sup> However, a party who acquires an interest *during* the course of the proceedings is not a necessary party defendant.<sup>43</sup> This is so because “[u]nder the doctrine of *lis pendens*, such person will be considered in privity with his transferor and bound by the outcome of the suit.”<sup>44</sup> When a junior lienholder is omitted as a party to the foreclosure, he can foreclose his lien on the property as if the foreclosure had never taken place.<sup>45</sup> A foreclosure will not affect a senior interest and the purchaser will take subject to it.<sup>46</sup>

For reasons discussed in Section 4, *infra*, it is often more desirable to foreclose by advertisement and sale, rather than judicially. However, circumstances may require judicial foreclosures in order to obtain the necessary level of certainty following the sale.<sup>47</sup> For example, title companies may require that a mortgage be judicially foreclosed in the event the mortgage or its acknowledgement contains a defect. In *Harney v. Montgomery*, the Wyoming Supreme Court held that a mortgage which is not properly recorded due to a defective acknowledgment could not be foreclosed using the power of sale.<sup>48</sup> The same problem was encountered when a title company was unwilling to issue a foreclosure guarantee insuring a power of sale foreclosure where the husband failed to include his middle initial in his signature, yet the acknowledgment clause contained it. As a result, the title com-

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39. Fitch v. Buffalo Fed. Sav. & Loan Ass'n, 751 P.2d 1309, 1313 (Wyo. 1988).

40. RUDOLPH & BELCHER, *supra* note 25, at 37.

41. WYO. STAT. ANN. § 1-5-101 (LexisNexis 2005).

42. RUDOLPH & BELCHER, *supra* note 25, at 39.

43. *Id.* (citing *Olson v. Leith*, 257 P.2d 342 (Wyo. 1953)) (emphasis added).

44. *Id.* at 39-40.

45. *Patel v. Khan*, 970 P.2d 836 (Wyo. 1998); *Chesney v. Valley Live Stock Co.*, 244 P. 216 (Wyo. 1926); RUDOLPH & BELCHER, *supra* note 25, at 42.

46. RUDOLPH & BELCHER, *supra* note 25, at 40.

47. *Id.* at 37.

48. *Harney v. Montgomery*, 213 P. 378, 382 (Wyo. 1923).

pany required a judicial foreclosure confirming and validating the mortgage, and authorizing a foreclosure sale pursuant to a decree of foreclosure.<sup>49</sup>

A judicial foreclosure is also appropriate when separate mortgagees or lienholders assert superior priority over each other. In *Wyoming Bank & Trust v. Haught*, a judgment creditor claimed priority over a mortgagee who obtained its interest in the property following a fraudulent conveyance.<sup>50</sup> Conversely, the mortgagee claimed priority over the judgment creditor, asserting it had the status of a bona fide purchaser without notice of the fraudulent conveyance.<sup>51</sup> In response, the judgment creditor maintained that the mortgagee had inquiry notice of the fraudulent conveyance, and, therefore, was not entitled to the protection of a bona fide purchaser.<sup>52</sup> Neither the judgment nor a *lis pendens* of the suit to set aside the fraudulent conveyance were recorded in the real estate records prior to the recording of the mortgages.<sup>53</sup>

In ruling for the mortgagee and against the judgment creditor, the Wyoming Supreme Court held that:

For a purchaser to be charged with inquiry notice, a reasonable investigation must disclose a claim to the title of the property. Under these circumstances, [the judgment creditor] had, at most, a potential claim on [the] property through a judgment lien. A possibility or probability is not sufficient to impute inquiry notice on a purchaser:

Inquiry notice should be held to exist only when the purchaser has such information as must, in the court's opinion, have led him by reasonable investigation to "full information," to "a complete knowledge of all matters." The purchaser should have not merely knowledge of the *existence* of a prior conveyance, but *such appreciation of it as a superior title as can fairly be attributed to him on the issue of good faith . . .*<sup>54</sup>

This principle—that notice will not be imputed to a purchaser unless a reasonable inquiry would disclose a *claim to the property* – was implied in prior cases, but was not expressly set forth until *Wyoming Bank & Trust*.

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49. Beneficial v. Jorgensen, Lincoln County District Court Doc. 21, No. 11608 (Jul. 1, 2005).

50. Wyoming Bank & Trust v. Haught, 76 P.3d 301 (Wyo. 2003).

51. *Id.* at 305.

52. *Id.*

53. *Id.* at 307.

54. *Id.* at 307 (emphasis added).



Once the desired decree of foreclosure is obtained in a judicial foreclosure proceeding, the mortgagee typically conducts a foreclosure sale in accordance with the procedures for advertisement and sale foreclosures. However, one important variation should be noted: the notice of sale pursuant to a decree rendered in a judicial foreclosure must also contain the "names of the plaintiff and defendant in the action."<sup>55</sup>

#### 4. FORECLOSURE BY ADVERTISEMENT AND SALE

The second type of foreclosure allowed in Wyoming is by advertisement and sale.<sup>56</sup> Advertisement and sale foreclosures must be conducted according to prescribed statutory procedures, with substantial compliance being the standard.<sup>57</sup> The obvious advantage of this type of foreclosure over the judicial version is avoidance of the typical expense and delay involved with court proceedings.<sup>58</sup> Three important prerequisites of advertisement and sale foreclosures should be noted at the outset. First, the procedure is only available if the mortgage to be foreclosed contains a power of sale clause.<sup>59</sup> Second, advertisement and sale foreclosures cannot be commenced unless no suit has been instituted to recover the debt secured by the mortgage, or unless an execution upon the judgment rendered in such suit has been returned unsatisfied in whole or in part.<sup>60</sup> Third, the mortgagee must confirm that the mortgage and all assignments thereof have been recorded.<sup>61</sup> Once the foregoing threshold requirements have been met, the next step is to comply with any notice of default, acceleration, and right to cure provisions contained in the mortgage. When the applicable cure period has elapsed without a cure by the mortgagor, the mortgagee has the right to proceed with an advertisement and sale foreclosure.<sup>62</sup> Formal advertisement and sale proceedings are commenced by serving the notice of intent to foreclose.<sup>63</sup>

##### a. *Notice of Intent*

The statute requiring notice of intent to foreclose was unchanged by the Bill. The notice of intent must be

served upon the record owner, and the person in possession of the mortgaged premises if different than the record owner, by certified mail with return receipt, mailed to the

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55. WYO. STAT. ANN. § 1-18-101(b) (LexisNexis 2005).

56. *Id.* § 34-4-102.

57. RUDOLPH & BELCHER, *supra* note 25, at 66-67 (citing *Peterson v. Johnson*, 28 P.2d 487 (Wyo. 1934)).

58. *Id.* at 63.

59. WYO. STAT. ANN. §§ 34-4-101, 34-4-103(a)(iii).

60. *Id.* § 34-4-103(a)(ii).

61. *Id.* § 34-4-103(a)(iii).

62. *Id.* § 34-4-103(a)(i).

63. *Id.* § 34-4-103(a)(iv).

last known address of the record owner and the person in possession at least ten (10) days before commencement of publication of notice of sale.<sup>64</sup>

Wyoming Statute section 34-4-103, which requires the notice of intent to foreclose, does not specify the contents of the notice of intent. However, it may serve cautious practitioners well to include within their notice of intent all of the information required by Wyoming Statute section 34-4-105 to be included in a notice of sale.

*b. Notice of Sale*

Wyoming Statute section 34-4-105 prescribes the content of the notice of foreclosure sale, while Wyoming Statute section 34-4-104 requires service and publication of the notice of sale.

*i. Contents of the notice of sale*

Occasionally, the entrepreneurial, yet unsophisticated third-party purchaser bids at a second mortgagee's foreclosure sale, naively believing he will obtain the property free and clear of *all* mortgages and other monetary liens.<sup>65</sup> Under prior law, if the purchaser reviewed nothing more than the notice of sale, then one can see how he could reach that belief, however ill-founded. Had the purchaser hired a competent attorney, obtained title insurance, or researched the real estate records himself and understood the information contained therein, he could have saved himself significant embarrassment and expense. The situation has occurred often enough to gain the attention of a lobbyist who, during the Senate hearings on the Bill, requested that the notice of sale contain a listing of all of the liens and encumbrances that would not be extinguished by the foreclosure sale. Such a burdensome requirement was met with opposition, and the concept that survived the political process is the following "bidders beware" statement now required by Wyoming statute section 34-4-105: "The property being foreclosed upon may be subject to other liens and encumbrances that will not be extinguished at the sale and any prospective purchaser should research the status of title before submitting a bid."<sup>66</sup> The "bidders beware" statement must also be included in notices of sales pursuant to judicial foreclosure decrees and notices of judgment execution sales.<sup>67</sup>

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64. *Id.*

65. *See, e.g., Johnson v. Dodson et al*, Sweetwater County District Court Doc. C, No. 04-411-R (Sept. 23, 2004).

66. WYO. STAT. ANN. § 34-4-105(a)(vi) (LexisNexis 2005).

67. *Id.* § 1-18-101(b).

## ii. Service of the notice of sale

Prior to the effective date of the Bill, *no person or entity on earth*, including the mortgagor, person in possession, or junior lienholders, was statutorily entitled to receive the notice of sale.<sup>68</sup> Instead, the mortgagee was merely required to publish the notice of sale for four weeks in a newspaper printed in the county where the property being foreclosed was located.<sup>69</sup> According to Rudolph and Belcher, lack of any such requirement “is an unfortunate omission,” although they conclude, under the case of *Kottcamp v. Fleet Real Estate Funding*, that “it does not constitute a denial of due process.”<sup>70</sup> The *Kottcamp* holding was based on a lack of state action involved in a foreclosure sale conducted by a Sheriff.<sup>71</sup> The Wyoming Supreme Court refused to change its position on the matter when recently given the opportunity in *McNeill Family Trust v. Centura Bank*, and still holds that failing to provide a junior lienholder with the notice of sale does not constitute a violation of due process.<sup>72</sup>

In *McNeill Family Trust v. Centura Bank*, attorneys for the foreclosing mortgagee, Centura Bank, sought to void their own foreclosure sale because they failed to notify a second mortgagee of the sale.<sup>73</sup> The Wyoming Supreme Court rejected this argument and correctly observed that “[w]e can identify no legal requirement that the mortgagee either attend the sale or provide notice of the sale to a second mortgagee.”<sup>74</sup> However, the court went on to hold that when a foreclosing mortgagee fails to serve notice of the sale upon a junior mortgagee, it does not “resolve” the junior mortgagees’ encumbrance, and he “is entitled to exercise his rights as if the foreclosure had never taken place.”<sup>75</sup>

Failing to require that the notice of sale be sent to junior lienholders presents obvious problems in today’s mortgage lending world. Second mortgages in the form of home equity lines of credit are commonplace. Only a fraction of mortgages of any priority are held by mortgagees residing in the county where the property is located, or even in the State of Wyoming for that matter. Regardless of whether one believes that junior mortgagees deserve greater protection in the form of a right to the notice of sale, they now have it. Newly amended Wyoming Statute section 34-4-104 requires that a copy of the notice of sale be served by certified mail with return receipt requested upon the record owner, the person in possession of mort-

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68. WYO. STAT. ANN. § 34-4-104 (LexisNexis 2003).

69. *Id.*

70. *Kottcamp v. Fleet Real Estate Funding*, 783 P.2d 170 (Wyo. 1989).

71. RUDOLPH & BELCHER, *supra* note 25, at 64.

72. *See generally* *McNeill Family Trust v. Centura Bank*, 60 P.3d 1277 (Wyo. 2003).

73. *Id.* at 1281.

74. *Id.* at 1286.

75. *Id.* at 1287 (citations omitted).

gaged premises, and all holders of recorded mortgages and liens subordinate to the mortgage being foreclosed.<sup>76</sup> The notice must be sent prior to the first date of publication.<sup>77</sup>

iii. Other amendments relating to the notice of sale

At the same time it granted greater rights to junior mortgagees, the Bill further amended Wyoming Statute section 34-4-104 to place responsibility on them to record their mortgages and liens no later than twenty-five (25) days before the scheduled foreclosure sale. Consequently, practitioners should obtain a date down of their foreclosure guarantee or foreclosure title policy less than twenty-five days prior to the foreclosure sale. The notice of sale should then be provided to all identified holders of an interest in the real estate prior to the first date of publication.

Regarding publication of the notice of sale, Wyoming Statute section 1-18-101(a)(ii) was also amended. The statute, which relates to publication of judicial foreclosure and judgment execution sale notices, now specifies that such notices of sale must be advertised in “a legal newspaper of general circulation” in the county where the real estate is located, as opposed to the prior requirement of simply a “county newspaper.” This amendment makes publication of judicial foreclosure sale and judgment execution sale notices consistent with publication of advertisement and sale notices.<sup>78</sup>

Practitioners should also be aware of Wyoming Statute section 1-6-203, which provides that:

In all cases where under the laws a notice is required or permitted to be published for a specified number of weeks, it is sufficient that the publication be made once each week for the number of issues corresponding to the number of weeks for which such publication is required to be made, provided that not more than twenty (20) days shall intervene between the date of the last publication and the time set for the intended action.<sup>79</sup>

Consequently, when drafting the notice of sale, care should be taken to schedule the sale within twenty days of the last date of publication. Note, however, that the statute does not specify that a longer intervening period

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76. WYO. STAT. ANN. § 34-4-104(a) (LexisNexis 2005).

77. *Id.*

78. *Id.* § 1-18-101(a)(ii).

79. *Id.* § 1-6-203.

makes a sale “defective;” but instead, that notice of sale publications in accordance with the statute are “sufficient.”<sup>80</sup>

Finally, newly amended Wyoming Statute section 34-4-104 allows the foreclosing mortgagee to rely on the address set forth in the mortgage or lien filed of record unless another address has been recorded or has been provided to the foreclosing mortgagee or lienholder.<sup>81</sup> Proof of compliance with the notice requirements must be made by affidavit, and “[a] person or entity who acts in reliance upon the affidavit without knowledge that the representations contained therein are incorrect shall not be liable to any person for so acting and may assume without inquiry the existence of the facts contained in the affidavit.”<sup>82</sup> This provision would appear to primarily benefit owners of the property following the foreclosure sale and their insurers of the title thereto.<sup>83</sup>

*c. Notice of Postponement*

Wyoming Statute section 34-4-109 addresses postponements of foreclosure sales. Prior to the Bill, the statute provided that in order to postpone a sale, a notice of the postponement must be advertised as soon as practicable and continued until the date of the sale. Unfortunately, the statute provided no guidance on a minimum number of times the notice of postponement was to be published, nor did the statute describe how the publication of the notices of sale and notices of postponement were to be coordinated.

For example, if the original notice of sale had only been published twice at the time the foreclosing mortgagee decided to postpone the sale, then when, and how many times, should a notice of postponement be published? For better or for worse, the newly amended statute outlines a safe harbor “provided that the original advertisement is published at least once a week, over four (4) consecutive weeks, and the notice of postponement is published at least once a week, over two (2) consecutive weeks.”<sup>84</sup> This “four plus two” requirement immediately brings to mind the situation mentioned above, where the foreclosing mortgagee decides to postpone the sale after the second publication of the original notice of sale. In such a situation, the newly amended statute requires that the original publication continue twice more, and then the notice of postponement be published twice after

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80. *Id.* § 1-6-203.

81. *Id.* § 34-4-104(a).

82. *Id.*

83. *Id.*

84. *Id.* § 34-4-109.

that.<sup>85</sup> In the alternative, a foreclosing mortgagee may begin anew with an “amended notice of sale” setting forth the new, “postponed” sale date.

## 5. SALE PROCEDURES

According to Rudolph and Belcher, Wyoming Statutes specifying how foreclosure sales are to be conducted “are still far from models of clarity and consistency.”<sup>86</sup> The Bill was an attempt to improve the statutes in these two areas. One example of improved consistency is the requirement that all three types of foreclosure sales (judicial, judgment execution, and advertisement and sale), must now be conducted between the hours of 10 a.m. and 5 p.m.<sup>87</sup> Prior to the effective date of the Bill, advertisement and sale foreclosures could be conducted as early as 9 a.m., while judicial and judgment execution foreclosure sales could not be held before 10 a.m.<sup>88</sup> Also, the publication requirement was clarified to allow publication in “a legal newspaper of general circulation” in the county where the real estate is located for all types of foreclosures, as described in section 4(b)(i), *supra*. Another improvement is the addition of Wyoming Statute section 1-18-113 and the amendment of Wyoming Statute section 11-34-123, which specifies that excess proceeds following judgment execution sales and State Loan and Investment Board foreclosure sales, respectively, shall be distributed in accordance with the newly amended Wyoming Statute section 34-4-113.<sup>89</sup>

Clarity has also been added in response to recent caselaw interpretation of the longstanding foreclosure statutes. The most interesting decision regarding the conduct of foreclosure sales is the aforementioned case of *McNeill Family Trust v. Centura Bank*.<sup>90</sup> In *McNeill Family Trust*, the foreclosing mortgagee, Centura Bank, unsuccessfully made the argument that sales conducted without the foreclosing mortgagee present were void.<sup>91</sup> Although the mortgagees’ attorneys had intended to cancel the sale when they discovered problems with the notice of sale, they failed to do so, and also failed to arrange for an agent to attend and bid at the sale.<sup>92</sup> At the sale, only the sheriff and third-party bidder McNeill were present.<sup>93</sup> Mr. McNeill sub-

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85. An alternative interpretation of the requirement could be that the final two publications of the original notice of sale and the two publications of the notice of postponement of sale may be conducted simultaneously.

86. RUDOLPH & BELCHER, *supra* note 25, at 54.

87. WYO. STAT. ANN. §§ 1-18-101(a)(i), 34-4-106 (LexisNexis 2005).

88. Compare WYO. STAT. ANN. §§ 1-18-101(a)(i), with 34-4-106 (LexisNexis 2004).

89. See WYO. STAT. ANN. §§ 1-18-113, 11-34-123.

90. *McNeill Family Trust v. Centura Bank*, 60 P.3d 1277 (Wyo. 2003).

91. *Id.* at 1281.

92. *Id.* at 1280.

93. *Id.*

mitted the only bid of \$20,000 to purchase the property.<sup>94</sup> Despite \$87,320.82 due on the note, the sheriff accepted Mr. McNeill's bid.<sup>95</sup>

Subsequently, Mr. McNeill was issued a certificate of purchase. Centura filed suit to have the sale declared void and of no effect, the \$20,000 payment returned to Mr. McNeil, and a new sale ordered.<sup>96</sup> Reversing the district court, the Wyoming Supreme Court confirmed the sale. In its opinion, the Court said: "We can identify no legal requirement that the mortgagee either attend the sale or provide notice of the sale to a second mortgagee."<sup>97</sup>

Although some may contend that the parties in the *McNeill* case simply suffered the obvious result under the facts and applicable law, Wyoming Statute sections 1-18-101, 34-4-106, and 34-4-108 were amended by the Bill in response to the *McNeill* decision. The result is that no foreclosure sale of any type (judicial, judgment execution, or advertisement sale) may be conducted if the foreclosing mortgagee or its authorized agent is not present at the sale.<sup>98</sup> The only exception is when the foreclosing mortgagee has previously waived, in writing, his right to appear and bid at the sale.<sup>99</sup> If a foreclosing mortgagee so chooses, he may submit his bid in writing to the sheriff conducting the sale, which is equivalent to appointing the sheriff as his agent for purposes of the sale.<sup>100</sup> Apparently, only the foreclosing mortgagee has the right to appoint the sheriff as its agent, not third-party bidders.

Any foreclosure sale conducted without complying with these new requirements "is void, in which case the mortgage, power of sale, judgment or other lien which is the subject of the voided sale is not extinguished or exhausted, but may be properly foreclosed in a subsequent foreclosure sale in compliance with applicable law."<sup>101</sup> Wyoming Statute section 34-4-108 allows the foreclosing mortgagee to postpone any sale at which it is not present, rather than re-commence a new foreclosure sale publication.<sup>102</sup>

## 6. SURPLUS PROCEEDS

Until July 1, 2005, Wyoming's law on how and to whom surplus proceeds of foreclosure sales should be distributed had remained unchanged

94. *Id.*

95. *Id.* at 1281.

96. *Id.* at 1281.

97. *Id.* at 1286.

98. WYO. STAT. ANN. §§ 1-18-101(a)(iii), 34-4-106, 34-4-108 (LexisNexis 2005).

99. *Id.* §§ 1-18-101(a)(iii), 34-4-106, 34-4-108. Section 34-4-108 requires any such waiver to be "in writing," and such requirement should be implied in the former two statutes. *Id.* § 34-4-108.

100. *Id.* §§ 1-18-101(a)(iii), 34-4-106.

101. *Id.*

102. *Id.* § 34-4-108.

since 1882.<sup>103</sup> In the authors' opinion, Wyoming Statute section 34-4-113 is likely the statute most deserving of Rudolph and Belcher's criticism of being "far from a model of clarity and consistency."<sup>104</sup> The prior statute was defective because it directed that surplus proceeds be "paid over . . . to the mortgagor, his legal representatives or assigns," instead of requiring that such surplus proceeds first be paid over to junior mortgagees or other lienholders who held loans secured by the same property.<sup>105</sup> These junior lienholders' rights were severely degraded following a first mortgagee's sale under prior law because their interest in the property had been extinguished by the foreclosure sale.

Consider the following scenario under applicable law prior to the Bill. A mortgagor grants a first mortgage in exchange for a loan. Months or years later, he grants a second mortgage in exchange for another, smaller loan. The mortgagor defaults on the first mortgage by failing to make the payments, but for at least some period of time, continues making payments on the second mortgage. The first mortgagee commences foreclosure, but is not required to send notice to the second mortgagee, and therefore does not do so. As a result, the second mortgagee has no actual knowledge of the first mortgagee's foreclosure sale. A foreclosure sale is conducted and the property is purchased by a third-party bidder who pays \$15,000 more than the balance due on the first mortgage. Within days after the sale, the first mortgagee pays the \$15,000 in surplus proceeds "over to the mortgagor," as suggested by the prior statute.<sup>106</sup> Eventually, the mortgagor defaults on the second mortgage, but shortly thereafter files bankruptcy. When the second mortgagee learns of the first mortgagee's sale, he attempts to obtain the surplus proceeds from the first mortgagee but cannot get them because the first mortgagee does not have them anymore. Instead, the first mortgagee has distributed them to the mortgagor according to his interpretation of the statute and denies any wrongdoing or liability. Similarly, the second mortgagee cannot easily obtain the surplus proceeds from the mortgagor, because the mortgagor has spent them. Furthermore, the Bankruptcy Court has discharged the mortgagor from his personal liability on the note in connection with the second mortgage, and therefore the second mortgagee has no right to collect the balance due on such note.

Unfortunately, the above scenario has actually occurred, and what should have been a straightforward disbursement of surplus proceeds in accordance with statutory priorities resulted in costly and unneeded lawsuits.<sup>107</sup> Compounding the problem were inconsistent state district court decisions

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103. WYO. STAT. ANN. § 34-4-113 (LexisNexis 2004).

104. RUDOLPH & BELCHER, *supra* note 25, at 54.

105. WYO. STAT. ANN. § 34-4-113 (LexisNexis 2004).

106. *Id.* § 34-4-113.

107. U.S. Bank v. Ferrin, Laramie County Circuit Court Civil No. 2004-2327 (Jan. 14, 2005).



regarding whether a junior lienholder could be entitled to the excess proceeds under a reasonable interpretation of the “assigns” language of the statute prior to amendment.<sup>108</sup> The following two cases further illustrate the inadequate statutory guidance and clarity under the law prior to the Bill.

In *Principal Residential Mortgage v. Lindstrom and Western Vista FCU*, the mortgagors, Nancy and Robert Lindstrom, granted a first mortgage on their home to Western Vista Federal Credit Union which was later assigned to Principal Residential Mortgage, Inc.<sup>109</sup> The first mortgage was recorded as instrument number 659184. On the same day, the Lindstroms executed a second mortgage in favor of Western Vista FCU, which was recorded as instrument number 659185. The Lindstroms defaulted on their obligations contained in the Principal Residential mortgage. A foreclosure by advertisement and sale was held and the Principal Residential mortgage was paid. Approximately \$20,000 in surplus proceeds remained. Western Vista FCU made a demand upon Principal Residential Mortgage for the excess proceeds. However, in the meantime, Nancy Lindstrom’s ex-husband, Donald Halberg, claimed an interest in the excess proceeds pursuant to the divorce decree between the Halbergs. The parties resorted to litigation.

As noted above, the prior Wyoming Statute section 34-4-113 provided: “the surplus shall be paid over to . . . the mortgagor, his legal representatives or assigns.” In the Order Granting Summary Judgment in favor of Western Vista FCU, Judge Skavdahl interpreted the language “assigns” to include second mortgagee Western Vista FCU, and thereby awarded it the surplus proceeds of the sale. However, in *Midfirst Bank v. Ruth Ebling*, under similar circumstances, Judge Park awarded surplus proceeds to the mortgagor instead of the junior lienholder. Because of these conflicts, both mortgagors and mortgagees alike needed certainty.<sup>110</sup>

The Bill completely rewrites the language of Wyoming Statute section 34-4-113 and adds an additional subsection to Wyoming Statute section 34-4-104 to mirror the corresponding Uniform Commercial Code provisions.<sup>111</sup> According to the Bill, if excess proceeds remain following payment of the mortgage being foreclosed and the related foreclosure expenses, then the foreclosing mortgagee must serve a copy of the sale results on the mort-

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108. See *Midfirst Bank v. Ruth Ebling*, Seventh Judicial District Civil Action No. 82441-A (Apr. 15, 2004) (Judge Park awarded surplus proceeds to the mortgagor); *Principal Residential Mortgage v. Lindstrom and Western Vista FCU*, Seventh Judicial District Civil Action No. 81909-C (Jan. 28, 2004) (Judge Skavdahl awarded surplus proceeds to the junior lienor).

109. See *Midfirst Bank v. Ruth Ebling*, Seventh Judicial District Civil Action No. 82441-A (Apr. 15, 2004) (Judge Park awarded surplus proceeds to the mortgagor); *Principal Residential Mortgage v. Lindstrom and Western Vista FCU*, Seventh Judicial District Civil Action No. 81909-C (Jan. 28, 2004) (Judge Skavdahl awarded surplus proceeds to the junior lienor).

110. *Midfirst Bank v. Ruth Ebling*, Seventh Judicial District Civil Action No. 82441-A (Apr. 15, 2004).

111. WYO. STAT. ANN. §§ 34.1-9-608, 34.1-9-608 (LexisNexis 2005).

gagor and on all junior lienholders within ten (10) business days following the sale.<sup>112</sup> The sale results must specify the amount due the foreclosing mortgagee as of the date of sale, the name of the successful bidder, and the amount of the successful bid.<sup>113</sup> If the certificate of sale awarded to the successful bidder includes the information required by the statute, then the foreclosing mortgagee may comply with the new requirement by providing a copy of the certificate of sale.

The Wyoming Legislature was careful to make certain that if a foreclosing mortgagee received competing demands to the surplus proceeds, and all claimants are subsequently unable to reach an agreement regarding their disposition, then a court with competent jurisdiction must order payment of the surplus proceeds to the parties in interest in accordance with their priority.<sup>114</sup> If no demand for the surplus proceeds is made, then the statute specifically provides that the foreclosing mortgagee may either retain them for later disposition, or may dispose of them in accordance with the Uniform Unclaimed Property Act (Wyoming Statute section 34-24-101 et seq.).<sup>115</sup> If the foreclosing mortgagee receives a demand for the surplus proceeds accompanied by the materials required by Wyoming Statute section 1-18-104(c) (the redemption statute), then within thirty (30) days after the sale results are served, the surplus proceeds “shall be paid over . . . as agreed upon by all parties in interest, or by court order, to the subordinate mortgagees or lienholders in accordance with their priority and to the extent of their interest.”<sup>116</sup> Finally, the foreclosing mortgagee must account to the mortgagor for his handling and disposition of any surplus.<sup>117</sup>

As noted above in Section 5, the legislature added Wyoming Statute section 1-18-113 and amended Wyoming Statute section 11-34-123. As a result, surplus proceeds following judgment execution sales and State Loan and Investment Board foreclosure sales, respectively, shall be distributed in accordance with the newly amended Wyoming Statute section 34-4-113.

## 7. OMITTED PARTIES

### *a. Changes made by the Bill*

Occasionally, even a careful title examiner or attorney may fail to identify, join, or provide notice to a junior mortgagee or other lienholder who is a necessary party defendant in a judicial foreclosure or who is entitled to notice in an advertisement and sale foreclosure. Such a junior mort-

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112. *Id.* § 34-4-104(b).

113. *Id.*

114. *Id.* § 34-4-113(b).

115. *Id.* § 34-4-113(a)(iv).

116. *Id.* § 34-4-113(b).

117. *Id.* § 34-4-113(c) (LexisNexis 2005).

gagee or lienholder is referred to as an “omitted party.” According to Rudolph and Belcher, in such a situation, “[t]he only logical remedy for the purchaser is a new foreclosure against the omitted party, and for this purpose the purchaser succeeds to the interest of the mortgagee.”<sup>118</sup> The most likely Wyoming case supporting this proposition is *Powers v. Pense*,<sup>119</sup> however, the case did not involve an omitted party under circumstances one would encounter today. In addition, any statements in the case that could possibly be interpreted to authorize any such “new foreclosure” appear to be dicta.

In any event, the matter is now settled with the passage of the Bill, which not only confirms the “logical remedy” identified by Rudolph and Belcher, but also provides a specific, statutory procedure for terminating the interest of an omitted party.<sup>120</sup> According to newly amended Wyoming Statute section 1-18-114, an “interested person” may terminate the interest of an “omitted party” in a civil action in the district court for the district in which the property is located, provided that the omitted party is afforded redemption rights that are just under the circumstances, which may not be more favorable than the omitted party’s statutory rights had he been provided notice of the sale.<sup>121</sup> The omitted party concept and most of the text included in Wyoming statute section 1-18-114 was borrowed from Colorado Revised Statute section 38-38-506.

An “omitted party” is any person who:

(a) subsequent to the recording of a mortgage . . . or other lien instrument pursuant to which a foreclosure sale has been conducted, has either acquired a record interest in the property subject to a mortgage foreclosure, deed of trust or execution sale, or has obtained a valid possessory interest and is in actual possession of the property; and (b) is not included as a party defendant in a judicial foreclosure action or, if included, is entitled to notice, but was not served with process, or was not mailed notice of the execution sale or is not notified pursuant to Wyoming statute section 34-4-104 of a mortgage foreclosure sale.<sup>122</sup>

An “interested person” is “any holder of a certificate of purchase or certificate of redemption issued pursuant to [Wyoming Statute sections] 1-18-102

118. RUDOLPH & BELCHER, *supra* note 25, at 42-43 (quoting *Powers v. Pense*, 123 P. 925 (Wyo. 1912), “The purchasers had at least a lien equal to that of the mortgage, the foreclosure proceedings and sale being regular; and if the sale was irregular or invalid for any reason, they would be entitled to be subrogated to the rights of the mortgagee, and the mortgage would be regarded as assigned to them.”)

119. *Powers v. Pense*, 123 P. 925 (Wyo. 1912).

120. WYO. STAT. ANN. § 1-18-114 (LexisNexis 2005).

121. *Id.* § 1-18-114(b).

122. *Id.* § 1-18-114(a)(i).

and 1-18-106 or any owner of the property by virtue of a sheriff's or public trustee's deed or person claiming through such owner."<sup>123</sup> Importantly, "the mortgage, judgment or other lien which is the subject of the sale shall be not extinguished by merger with the title to the property acquired upon issuance and delivery of the sheriff's deed."<sup>124</sup> Instead, such a merger can only occur when the interest of any omitted party has been terminated according to the specified procedure.<sup>125</sup>

Before leaving the area of omitted parties, it is helpful to apply the provisions of Wyoming statute section 1-18-114 to a few hypothetical situations. First, consider a third-party bidder who successfully purchases property at a foreclosure sale affecting a junior lienholder. In this hypothetical, the junior lienholder failed to record his lien at least twenty-five days prior to the date of the sale.<sup>126</sup> As a result of his failure to do so, he is not entitled to notice of the sale.<sup>127</sup> Despite his failure to timely record his lien, he may still be entitled to redeem beginning in the fourth month following the sale under the provisions of Wyoming statute sections 1-18-103 and 1-18-104. However, once the redemption periods set forth in those statutes have expired, the junior lienholder cannot qualify as an "omitted party" entitled to extended redemption rights under Wyoming statute section 1-18-114(b). Instead, the junior lienholder's interest in the property is irreversibly extinguished upon the issuance of a sheriff's deed. This is so because in order to qualify as an omitted party under Wyoming Statute section 1-18-114, the junior lienholder must be entitled to notice of the sale pursuant Wyoming Statute section 34-4-104.<sup>128</sup> In order to be entitled to notice under Wyoming Statute section 34-4-104, the junior lienholder must have recorded his interest in the property at least twenty-five days prior to the date of sale, which he did not do.<sup>129</sup>

Now, again consider a third-party bidder who successfully purchases property at a foreclosure sale affecting a junior lienholder. However this time, imagine that the junior lienholder properly recorded his lien within twenty-five days of the sale, but the foreclosing mortgagee negligently failed to provide him with notice of the sale. The junior mortgagee learns of the sale after the issuance of a sheriff's deed, threatens to foreclose, and is shortly thereafter named as a defendant in an omitted party proceeding brought by the foreclosing mortgagee. Can the junior lienholder redeem the

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123. *Id.* § 1-18-114(a)(ii).

124. *Id.* § 1-18-114(c).

125. *Id.*

126. According to the recollection of the primary author, this hypothetical was proposed by Wyoming Representative Tom Lubnau during the House Judiciary Committee hearings on the Bill. In his version of the hypothetical, Representative Lubnau preferred a "nice couple with five children" as the third-party bidders in order to make his point.

127. WYO. STAT. ANN. § 34-4-104 (LexisNexis 2005).

128. *Id.* § 1-18-114(a)(B).

129. *Id.* § 34-4-104.

property out from under the holder of the sheriff's deed or his successor in interest in the omitted party proceeding? The most logically sound answer appears to be "yes." The third-party bidder in this scenario would be charged with record notice of the junior lienholder's interest because it was recorded in the real estate records prior to the foreclosure sale. Consequently, the third-party bidder could not possibly be afforded the protection of a bona fide purchaser.<sup>130</sup>

Disallowing redemption to the junior lienholder in the first hypothetical seems harmless because he failed to record his interest within the specified period of time.<sup>131</sup> Alternatively, redemption of the property out from under the third-party bidder in the second hypothetical also seems harmless, especially in light of the "bidders beware" statement now required in the notices of sales, although one would hope that he purchased title insurance.<sup>132</sup>

It can plainly be seen that Wyoming Statute section 1-18-114 does not enlarge the redemption rights granted under Wyoming Statute sections 1-18-103 and 1-18-104. Instead, it merely gives an omitted party who is otherwise entitled to such rights access to those rights at a later time.

*b. The IRS as a possible "Omitted Party"*

Occasionally, a foreclosing mortgagee discovers that the United States holds a lien on the mortgaged property. If such lien is junior to the mortgage being foreclosed, it may be extinguished following the sale. In order to do so, specific procedures proscribed by federal law must be followed. The procedures are set forth in 26 U.S.C. § 7425; 28 U.S.C. § 2410; and 26 C.F.R. § 400.4-1.

The two methods for discharging a lien of the United States are described in 26 U.S.C. § 7425. First, through "judicial proceedings," and second, through "other sales." Judicial foreclosures qualify as "judicial pro-

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130. First Interstate Bank of Sheridan v. First Wyoming Bank, 762 P.2d 379, 382 (Wyo. 1988). A foreclosure sale purchaser or subsequent titleholder who qualifies as bona fide purchaser would enjoy rights superior to a prior lienholder. In order to achieve bona fide purchaser status, and therefore be afforded a higher priority than the prior lienholder, the foreclosure sale purchaser has the burden of proving that he is (1) a purchaser in good faith, (2) for a valuable consideration, not by gift, (3) with no actual, constructive, or inquiry notice of any alleged or real infirmities in the title, (4) who would be prejudiced by cancellation or reformation of the instrument. *Id.* The foreclosure sale purchaser in this scenario would not be able to meet the third element of the test because he had constructive notice of the prior lienholder's interest due to its recording.

131. See *Elrick v. Merrill*, 10 P.3d 689 (Colo. 2000).

132. WYO. STAT. ANN. §§ 1-18-101(b), 34-4-105(a)(vi) (LexisNexis 2005).

ceedings,” and advertisement and sale foreclosures qualify as “other sales.”<sup>133</sup>

Regarding judicial foreclosures, if the lien of the United States is recorded in the county real estate records at the time the judicial foreclosure suit is commenced, then the United States must be joined as a party in order to discharge its lien.<sup>134</sup> If the lien of the United States is not of record at the time the suit is commenced, and the United States is not joined as a party, then the lien of the United States will be extinguished under Wyoming law in the same manner as other junior liens.<sup>135</sup> However, in such situation, “the United States may claim, with the same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.”<sup>136</sup> Specific requirements on the form of the complaint, information required therein, upon whom it must be served, and the period of time in which the United States has to answer are provided in 28 U.S.C. § 2410.

Regarding “other sales,” which include advertisement and sale foreclosures, if the lien of the United States is of record at least thirty (30) days prior to the date of sale, then the United States must be provided with notice of the sale in accordance with 26 U.S.C. § 7425(b) and 26 C.F.R. § 400.4-1. The statute sets forth the requirement for the notice, and the regulation sets forth the content and manner of the notice. The notice must be provided by registered or certified mail not less than twenty-five days before the date of sale,<sup>137</sup> and it must contain all of the information set forth in 26 C.F.R. § 400.4-1(f)(1).<sup>138</sup> In the event a notice of sale does not contain all such information, it will “not be considered inadequate” unless the district director of the IRS receiving the notice “give[s] written notification of the items of information which are inadequate to the person who submitted the notice.”<sup>139</sup> The notice will be considered adequate if the person submitting the notice does not receive notification from the district director that the notice is inadequate more than five days prior to the date of sale.<sup>140</sup> If the notice of sale is submitted in duplicate with a written request that receipt of the notice be acknowledged and returned, “this request will be honored.”<sup>141</sup> The district director may also give his consent to the sale “free of the lien of the United

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133. 26 U.S.C. §§ 7425(a), 7425(b) (2005).

134. *Id.* § 7425(a).

135. *Id.* § 7425(a)(2).

136. *Id.* § 7425(a).

137. *Id.* § 7425(c)(1).

138. 26 C.F.R. § 400.4-1(f)(2) (2005).

139. *Id.*

140. *Id.*

141. *Id.* § 400.4-1(f)(3).

States even though notice of the sale is not given 25 days prior to the sale."<sup>142</sup>

Regarding redemption, the United States has one-hundred and twenty (120) days to redeem from the sale in the case of tax liens,<sup>143</sup> and one year from the date of sale in the case of other liens extinguished as a result of judicial proceedings.<sup>144</sup> The redemption period is calculated according to 28 U.S.C. § 2410(d) and is different than the calculation under Wyoming law.

Consider the situation where the United States has properly filed its lien more than 30 days before an advertisement and sale foreclosure, but the foreclosing mortgagee fails to give notice to the United States. Can the foreclosing mortgagee or other holder of the certificate of sale extinguish the lien of the United States under the omitted party provisions of Wyoming statute section 1-18-114? The best chance of succeeding in this goal would be to commence a judicial foreclosure *after* the non-judicial sale took place. The United States would have to be joined as a party as required by 28 U.S.C. § 2410. The foreclosing mortgagee would then have to request that the prior, non-judicial sale be voided or otherwise rescheduled.<sup>145</sup> If the mortgagee's request was granted, it would then have to follow the procedures necessary to extinguish the lien of the United States before the rescheduled sale.

## 8. RECENT DEVELOPMENTS IN TITLE INSURANCE PRODUCTS

The Holy Grail following a foreclosure sale is insurable title after the issuance of a Sheriff's Deed. Therefore, all necessary care should be taken in order to avoid mistakes and omissions that could result in title being uninsurable following a mortgage foreclosure sale. One useful tool in accomplishing this goal is the checklist used by title companies to determine if foreclosure sales have been properly conducted, which are generally freely available upon request. The other useful, if not absolutely necessary, tool is some type of title insurance product for the benefit of the foreclosing mortgagee.

In partial response to the Bill, First American Title Company of Wyoming developed a new title insurance product called a "foreclosure title policy," which became available July 1, 2005, the effective date of the Bill. Previously, foreclosing mortgagees customarily obtained "foreclosure guarantees" from title companies. A foreclosure guarantee is an insurance product which typically insures a foreclosing mortgagee against loss sustained by

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142. *Id.* § 400.4-1(f)(2).

143. 26 U.S.C. § 7425(d)(1) (2005).

144. 28 U.S.C. § 2410(c).

145. *Id.* This is so because 28 U.S.C. § 2410(c) requires that "an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale." *Id.*

reason of any incorrectness in the assurances contained in the foreclosure guarantee. These assurances typically include that according to the public records on the date of the foreclosure guarantee:

1. title to the real estate being foreclosed upon was vested in the vestee named, subject to the matters shown as exceptions in the foreclosure guarantee, (which are not necessarily shown in their order of priority); and
2. the names of the persons who appear to have acquired an interest of record affecting the title to the property being foreclosed are shown in the foreclosure guarantee.<sup>146</sup>

By comparison, the foreclosure title policy provides greater assurances, including:

1. the title to the real estate is vested as shown in the policy;
2. the defects, liens, and encumbrances affecting the title are revealed in the policy;
3. the mortgage being foreclosed has sufficient priority, as a matter of law, to extinguish the interest of the owner and the liens and encumbrances shown in the exceptions (i.e., junior liens and mortgages);
4. the land is located as described in the policy;
5. the correct names and addresses of parties entitled to notice of the foreclosure;
6. the names and addresses of federal, state, and other governmental authorities entitled to notice of the foreclosure;
7. the newspaper(s) that will qualify as a publication for notice of the foreclosure; and
8. whether the owner of the property or a junior lienholder has filed for relief under the bankruptcy code to invalidate the foreclosure more than fifteen days prior to the date of the policy.<sup>147</sup>

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146. First American Title Company of Wyoming foreclosure guarantee.

147. *Id.*



## 9. POSSIBLE ADDITIONAL AMENDMENTS TO WYOMING'S FORECLOSURE LAWS

### a. *Mortgagor's possession during the redemption period*

Most practitioners who conduct foreclosure sales are familiar with the ambiguity in Wyoming statute section 1-18-104(e), which provides that "the mortgagor or owner in case of a mortgage foreclosure, is entitled to possession of the lands sold . . . for a period of three (3) months after the sale."<sup>148</sup> This three-month period conveniently coincides with the mortgagor's redemption period following the sale of non-agricultural real estate. However, the mortgagor of agricultural real estate is entitled to a twelve month redemption period following the sale.<sup>149</sup> Rudolph and Belcher correctly observe that "[t]he statute, as presently drawn is defective in this respect."<sup>150</sup> Specifically, "[the statute] only provides that the mortgagor is entitled to possession for three months following the sale and makes no provision with respect to agricultural lands for which the mortgagor has a 12-month redemption period."<sup>151</sup> The lack of a separate statutory redemption period for agricultural property begs the following question: "Does the foreclosing mortgagee have the right to evict the mortgagor at any time during the fourth through twelfth months following the sale?"

According to University of Wyoming College of Law Professor John Burman, if the plain language of the statute controls, the purchaser at the foreclosure sale is entitled to possession after three months, notwithstanding the remaining nine months of the mortgagor's redemption period.<sup>152</sup> On the other hand, if the intent of the longer redemption period is to allow the mortgagor to retain possession, then the purchaser is not entitled to possession until twelve months after the sale, notwithstanding the language of the statute.<sup>153</sup>

Until the statute is amended to address this defect, foreclosing mortgagees are most likely to attempt the remedy of evicting the mortgagor and obtaining a court-appointed receiver beginning in the fourth month following the foreclosure sale, as was the remedy in *Institutional Agriculture v. Meyer*.<sup>154</sup>

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148. WYO. STAT. ANN. § 1-18-104(e) (LexisNexis 2005).

149. *Id.* § 1-18-103.

150. RUDOLPH & BELCHER, *supra* note 25, at 86.

151. *Id.*

152. JOHN BURMAN, MORTGAGES, SUMMIT BAR REVIEW MATERIALS (2004).

153. JOHN BURMAN, MORTGAGES, SUMMIT BAR REVIEW MATERIALS (2004).

154. WYO. STAT. ANN. § 1-33-101 et seq. (LexisNexis 2005); *Institutional Agriculture v. Meyer*, Platte County District Court Civil No. 02-198 (involving the foreclosure of agricultural real estate in Platte County, Wyoming).

*b. Effect of redemption on a redeeming junior mortgagee's debt*

According to Rudolph and Belcher, the most difficult problem surrounding redemption by a junior lienholder is the effect such redemption has on the debt secured by its lien.<sup>155</sup> Apparently, states are divided on the issue, with two possible outcomes.<sup>156</sup> The first possibility is that the debt is not affected at all by the redemption and the junior lienholder may collect on the personal obligation given by the mortgagor or other promisor.<sup>157</sup> The second possibility is that the debt owed to the junior lienholder is discharged to the extent the value of the redeemed property exceeds the amount he paid in order to redeem it.<sup>158</sup>

Because Wyoming has adopted the Uniform Commercial Code ("UCC"), it would seem most reasonable for real estate collateral to be treated in the same manner personal property collateral is treated under the UCC.<sup>159</sup> In *Wagner v. Wyoming Production Credit Association*,<sup>160</sup> the Wyoming Supreme Court indicated such an approach is the correct one. The action involved debts secured by both real and personal property in favor of the creditor, Wyoming Production Credit Association ("WPCA").<sup>161</sup> WPCA first repossessed personal property pursuant to an order of the district court under the terms of promissory notes executed in favor of WPCA.<sup>162</sup> "A sale was conducted, and the proceeds were applied to the debt" resulting in a deficiency.<sup>163</sup> Then, in a "transaction . . . somewhat like a contract for deed,"<sup>164</sup> WPCA took possession of the real property and thereafter elected to retain it and "permit a credit for the appraised value against the debt owed."<sup>165</sup> WPCA then brought suit on the promissory note seeking a judgment on the remaining deficiency, which was granted by the trial court.<sup>166</sup> The Wyoming Supreme Court reversed, stating:

We cannot find anything in Wyoming law which allows a creditor to repossess collateral and do nothing with it, then commence suit on the underlying obligation. It seems that the creditor can only:

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155. RUDOLPH & BELCHER, *supra* note 25, at 92.

156. *Id.*

157. *Id.*

158. *Id.*

159. See WYO. STAT. ANN. § 34.1-9-101 et seq. (LexisNexis 2005).

160. *Wagner v. Wyoming Prod. Credit Ass'n*, 773 P.2d 927 (Wyo. 1989).

161. *Id.* at 927.

162. *Id.* at 929.

163. *Id.*

164. *Id.* at 930.

165. *Id.*

166. *Wagner v. Wyoming Prod. Credit Ass'n*, 773 P.2d 927 (Wyo. 1989).

1. Repossess the collateral and sell it;
2. Repossess the collateral in satisfaction of the debt (also known as strict foreclosure); or
3. Obtain a judgment, then execute on the judgment, i.e., have the sheriff repossess the collateral.<sup>167</sup>

For its analysis, the Court relied on two prior Wyoming cases applying UCC law to the repossession and sale of personal property; however, the Court also added that “much of what is said about applying security to the debt [the UCC] should apply for the same reasons when real property is involved.”<sup>168</sup>

Although the *Wagner v. Wyoming Production Credit Association* court admitted that “the peculiar facts in this case do not fit into any of the traditional financial transactions involving the application of collateral to an obligation,” the collateral involved was real property.<sup>169</sup> If the UCC approach (and holding in *Wagner*) were applied to the scenario of a redeeming junior lienholder, then such lienholder would lose his right to a deficiency judgment following redemption if the property were not sold. The most obvious open question would seem to be: “How long can a redeeming junior lienholder wait to actively market the property for sale or consummate a sale without being deemed to have ‘strictly foreclosed’”? This question will likely remain open until addressed by subsequent statutory amendments.

c. *The “Johnny-come-lately” mortgagee; limiting redemptions by mortgagees who obtain mortgages during the mortgagor’s redemption period*

Consider the following scenario. The sole mortgagee of a parcel of land forecloses on the property, and is outbid at the sale by a third-party bidder. The bidder believes the property is worth substantially more than the amount he paid for it at the sale. The mortgagor fails to redeem, but before the end of his three-month redemption period, he grants a separate mortgage to a completely unrelated party for a few thousand dollars. Then, during the fourth month following the sale, this “Johnny-come-lately” mortgagee redeems from the third-party bidder. The third-party bidder is unhappy because he only gets ten percent interest per annum from the date of the sale instead of the substantial equity he saw in the property. Should the “Johnny-come-lately” mortgagee be allowed to deprive the third-party bidder of his

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167. *Id.* at 931 (citations omitted).

168. *Id.*

169. *Id.* at 930.

spoils, or should he be required to competitively bid at the sale in order to obtain the benefit of the equity in the property?

Wyoming Statute section 1-18-104(a), which allows for redemption by junior lienholders, is very broad in providing redemption rights to “any judgment creditor of the person whose real estate has been sold, or any grantee or mortgagee of the real estate or person holding a lien on the real estate sold.” In addition, according to Rudolph and Belcher, legal title to the foreclosed real estate during the redemption period remains in the mortgagor; the holder of the certificate of purchase has nothing more than a lien on the real estate.<sup>170</sup> Consequently, it is logical that the mortgagor would have the legal right to grant an additional mortgage during the mortgagor’s redemption period. Colorado specifically allows this practice, although it limits the number of new mortgages that may be created during the mortgagor’s redemption period to three.<sup>171</sup> It should also be noted that the “Johnny-come-lately” mortgagee could obtain the same result by taking an assignment of the mortgagor’s right of redemption, and then redeeming from the third-party bidder, provided there are no liens that would be revived by such a redemption. The Wyoming Supreme Court has declared it is “obvious” that the mortgagor’s right of redemption is freely assignable.<sup>172</sup>

For so long as this practice continues in its current form, successful bidders at foreclosure sales should refrain from improving the property during the mortgagor’s redemption period, and they should also be certain to re-examine record title to the property at the end of the mortgagor’s redemption period. If the mortgagor has granted a subsequent mortgage during the redemption period, then the holder of the certificate of sale should refrain from improving the property for an additional month, and can expect the “Johnny-come-lately” mortgagee to redeem the property out from under him.

*d. Complete repeal and replacement*

Finally, complete repeal and replacement of Wyoming’s foreclosure laws in order to bring about uniformity among all the states’ foreclosure laws may be a goal worthy of pursuing. In 2002, following four years of drafting, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Nonjudicial Foreclosure Act (“UNFA”). An in-depth discussion of the UNFA is outside the scope of this article; however, for those interested in additional reading, an excellent reference regarding

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170. RUDOLPH & BELCHER, *supra* note 25, at 89-90.

171. COLO. REV. STAT. §§ 38-38-303(b), 38-38-303(c) (LexisNexis 2004).

172. McNeill Family Trust v. Centura Bank, 60 P.3d 1277, 1285 (Wyo. 2003).

the UNFA is *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act* by Grant S. Nelson and Dale A. Whitman.<sup>173</sup>

One provision in the UNFA worth noting is its elimination of the post-sale statutory right of redemption.<sup>174</sup> Specifically: “A person having the right to redeem collateral from a security interest may not redeem after the time of foreclosure.”<sup>175</sup> The comment to the quoted section states: “This section embodies the fundamental concept of foreclosure – that its effect is to cut off the right of foreclosed parties to redeem the collateral from the security interest. Under the Act there is no right of redemption after the foreclosure is completed.”<sup>176</sup> In the opinion of commentators Nelson and Whitman: “whatever the fair period during which to allow mortgagors to redeem their properties, this period ought to run before the date of foreclosure, not after.”<sup>177</sup>

Additionally, the UNFA provides an alternative to selling the property via auction by adopting two alternative methods to foreclosure: foreclosure by negotiated sale and foreclosure by appraisal.<sup>178</sup> Under a foreclosure by negotiated sale, the foreclosing mortgagee may use any means of attracting a buyer and then proceed to enter into an agreement for the sale of the property.<sup>179</sup> The mortgagee, having arranged the sale, then notifies the mortgagor of the terms of sale, and specifies the amount the mortgagee proposes to credit against the debt.<sup>180</sup> The mortgagee is allowed to credit an amount up to fifteen percent less than the contract price to allow the mortgagee compensation for brokerage, marketing, and holding expenses.<sup>181</sup> The mortgagor, once notified of the sale proposed by the mortgagee, has the right to either accept or reject it.<sup>182</sup> The concept of the negotiated sale is intended to allow foreclosing mortgagees to complete the disposition of property in one step, rather than two as is more commonly employed.<sup>183</sup>

Foreclosure by appraisal permits the mortgagee to obtain and give to the mortgagor an appraisal of the property, together with an offer of a proposed net amount that the mortgagee agrees to allow in exchange for taking

173. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399 (2002).

174. National Conference of Commissioners on Uniform State Laws, THE UNIFORM NONJUDICIAL FORECLOSURE ACT art. 2, § 209 (2002).

175. *Id.*

176. *Id.* at art. 2, § 209 cmt.

177. NELSON & WHITMAN, *supra* note 173, at 1441.

178. *Id.* at 1440.

179. *Id.*

180. *Id.*

181. *Id.* at 1440-1441.

182. *Id.* at 1441.

183. *Id.* at 1442.

title to the property.<sup>184</sup> This method resembles common law strict foreclosure in that the mortgagee winds up owning the real estate.<sup>185</sup> Unlike a foreclosure by negotiated sale, foreclosure by appraisal does not allow the ultimate disposition of the property in a single step. Instead, the mortgagee takes title immediately, and then may engage in marketing the property at its desired pace.<sup>186</sup> This has an obvious advantage when the property is not ripe for expedited marketing and sale.<sup>187</sup>

## 10. CONCLUSION

Although the Bill makes broad changes to Wyoming's foreclosure laws, complying with these changes should pose only minimal additional burdens for attorneys who represent foreclosing mortgagees. In exchange for these minimal additional burdens, foreclosing mortgagees, junior lienholders, and mortgagors all obtain significant benefits not available under prior law. In addition, the Bill provides clear guidance and certainty in the areas of surplus proceeds and omitted parties where there was little, if any, beforehand.

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184. *Id.* at 1444.

185. *Id.*

186. *Id.*

187. *Id.*

