

## Tales From the Vault - Claims Stories

### BEWARE THE NAKED RELEASE

A release recorded without any other instruments, such as a deed/sale of the property or refinance mortgage in and around the same timeframe, is referred to in the title industry as a "naked release" and is considered a red-flag warning of fraud and forgery.

Since it is rare that a property owner suddenly has a couple hundred thousand dollars suddenly appear on their doorstep to suddenly pay off their loan, presume a question and double-check with the lender purportedly paying off!!

Make sure the check has cleared, no questions involved. Even check with the property owner about how they were so lucky as to suddenly have those funds! (Inheriting from a rich uncle or sweepstakes or major sale of another asset?)

- From FNF Fraud Insights

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POSTAGE

Chicago Title  
EXAMINER  
150 Fayetteville Street, Ste. 570  
Raleigh, NC 27601



### CALENDAR OF EVENTS

#### July 29

Customer Ice Cream Social  
CTIC Morehead City Office

#### August 7

Triangle CREW Membership Meeting  
Women's Club of Raleigh

#### August 12

CREW Charlotte Membership Meeting  
Westin / Charlotte

#### August 14 - 16

NCLTA Annual Meeting  
Grove Park Inn / Asheville

#### August 21

Customer Ice Cream Social  
CTIC Monroe Office

#### September 6

CREW Charlotte Membership Meeting  
Westin / Charlotte

#### September 16

CTIC Customer Coffee  
Port City Java / Southport

#### September 18

CTIC Customer Coffee  
Coffee Affair / Morehead City

#### October 2

Triangle CREW Membership Meeting  
Women's Club of Raleigh

#### October 15 - 18

CREW Network Convention  
Houston, TX

#### COMING SOON!

FALL 2008 - 3 Hour NC Bar Certified  
Paralegal Seminars

#### COMING SOON!

FEB 2009 - 6 Hour CLE Seminars

### FOCUS ON FORECLOSURES

#### CTIC UNDERWRITING TEAM

The term "foreclosure" is a hot topic, not only in North Carolina, but across the United States. People are falling behind on their loan payments and losing homes by the truckload. Foreclosure is the principal method used by lenders to recoup their money. The title industry is receiving a lot of requests to insure title derived from a foreclosure and the "little problems" we are asked to insure over are somewhat disturbing. The North Carolina foreclosure law codified in Article 2 of Chapter 45 of the North Carolina General Statutes is fairly precise as to the requirements. Here is a short refresher on some of the law, primarily dealing with foreclosure by power of sale, and some of the foreclosure miscues that we see routinely. These statutes deal with procedures, pleadings, timeframes, and confirmation of completed sales. They should be consulted and followed very specifically when handling foreclosures.

The foreclosure errors or omissions run the gamut from minor to major. Lack of a trustee named in the security instrument, lack of a legal de-

scription in the deed of trust, improper notice to parties in the foreclosure proceeding or no notice when a request for notice is of record, and failure of notice to the IRS when applicable are a few of the problems that we are asked to overlook or for which we are asked to provide affirmative coverage.

Often it is reported to the company that a problem has been corrected and affirmative insurance is needed for this correction. Attempts are made to turn mortgages into deeds of trust by the addition of a trustee and legal descriptions are added to recorded deeds of trust that initially had no description. These, and other corrections, are attempted under the liberal use and interpretation of NCGS 47-36.1. This statute permits changes where the error is an "obvious typographical error or other minor error." The previous examples do not fall into either category. Attempts to make corrections by misusing this statute can result in failed priority, unenforceable instruments, or instruments which do not constitute a valid lien.

Recently Chicago Title was

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asked to insure the purchaser at foreclosure of such a corrected deed of trust. A & B gave a deed of trust to a lender properly executed, recorded, and all seemed well. Later A & B gave a deed of trust to another lender properly executed and recorded. The first deed of trust went into foreclosure and it was discovered that it had been recorded without a description of the secured property. The foreclosing attorney, citing the previously mentioned NCGS 47-36.1, recorded a memorandum of correction attaching a legal description and stating that the same was inadvertently omitted from the deed of trust when initially recorded. The foreclosure was completed and the trustee was prepared to give a deed to purchaser at the foreclosure sale. It was the opinion of Chicago Title that this correction was improper: The deed of trust foreclosed was not a valid lien on the real property and the second deed of trust was actually first. The buyer's attorney agreed, but as is often the case, the attorney who prepared and recorded the original deed of trust and the foreclosing attorney who "fixed" the error had a different opinion.

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## CTIC INSURES: MAYFAIRE



Wilmington's Mayfaire Project Continues

The Mayfaire project in Wilmington is the first mixed-use project of its kind in the Cape Fear Region. The 400+ acre development affords the Wilmingtonians an array of living, shopping and dining opportunities in a single community. For residents, there are choices of large single family residences, upscale condominiums, loft style condominiums situated in the bustle of the shopping district and upscale apartments. There are shopping opportunities from high-end retailers such as Williams-Sonoma, Talbots, Ann Taylor, Joseph A. Banks and Pottery Barn, as well as big box retailers - Barnes and Noble, Harris Teeter, Michaels and Belk. Recent and upcoming additions include Fresh Market, Hilton Comfort Suites and Panera Bread Company.

Chicago Title has been pleased to provide title insurance services to much of the Mayfaire Development from land acquisition, construction financing, residential sales and permanent financing. Michael Lee of Smith Moore, LLP together with Jerry Eatman and Katherine Wilkerson of Eatman and Lynch, LLP have shared responsibility for the representation of the developers, handling land acquisition and construction financing transactions. Attorney Russ Bryan of Clark, Newton, Evans and Bryan handled many of the residential closings for the condominiums both within Mayfaire Town Center and within The Village at Mayfaire.

## PRACTICE PITFALLS

### ...and how to avoid them

#### TIPS FOR TACKING -

When performing a limited title exam updating from an existing title insurance policy (tacking), several things come to mind that the attorney should be mindful of and discuss when necessary with the client.

Tack only to an owner's policy to be sure all exceptions to title are noted. It is a customary practice in the title industry to exclude exceptions in a loan policy that would appear in an owner's policy because a title insurer's risk of loss for certain title matters is less under a loan policy.

Determine from the public records or parties in the current transaction who conducted the prior title exam. You'll want to make sure that attorney is one that is versed in real estate law and has a reputation for quality title work.

Disclose to your client that you are tacking. Rule 1.4 of the North Carolina Revised Rules of Professional Conduct and Ethics Opinion RPC 99 require that an attorney who plans on tacking to an existing title policy notify his client prior to accepting employment. The client should be advised to rely on the title insurance policy for matters concerning title and not upon the attorney's exam of the public records.

Should you discover or be made aware of unresolved title matters which predate the beginning date of your search period, be sure you disclose those to the title company. Failure to do so may result in a loss of coverage for your client. Title policies contain an exclusion for some defects, liens, encumbrances, adverse claims or other matters not known to the title company but known to the insured.

## WELCOME JENIFER

In May of this year Jenifer Taylor joined Chicago Title as Manager of our Morehead City office. While she may be new to Chicago Title, Jenifer is no stranger to the legal community in Carteret County. Jenifer is a North Carolina Certified Paralegal with over 10 years of experience in the area. She began her paralegal career with the law firm of Taylor and Taylor and has most recently worked as a Contract Paralegal for several Morehead City firms. She is an Adjunct Instructor at Carteret Community College where she teaches real property courses in the Paralegal Degree program. She is a graduate of Queens College with a BA in Business Administration and a graduate of Carteret Community College with an AAS in Paralegal technology. Jenifer is married and has two college age sons. Please join us in welcoming Jenifer!

## SOAP BOX

Shawn Harlan

Agency Rep / Special Projects

Shawn has been working with our direct offices and agents since May 2002. Prior to joining Chicago Title, she handled the 1031's for one of our competitors and even taught 3rd grade. Shawn is our jack-of-all trades - assisting forty plus agencies with a multitude of products and services as our Agency Representative, and performing installations, training and troubleshooting as one of our DocPrep contacts. Shawn also assists in the creation and design of ads that appear in several publications throughout the year. While I could go on about the various areas of our organization in which Shawn's handprint is visible, her determination to provide exceptional customer service has made her one of our best secret weapons for many years.

- Debbie Brittain  
CTIC State Manager

No need to check the mailbox!

Ask your local CTIC office to return your policies via email.



FORECLOSURES / CONTINUED FROM PAGE 1

Sometimes we are asked to insure transactions based on a deed in lieu of foreclosure. The borrower gives a deed to the lender, and as consideration the debt that is owed at the time is extinguished. This process seems simple enough but more is required. If the transfer is later contested, it will be important that there is evidence that the grantor entered into the transaction of his or her own free will and not under any duress or undue influence, that the grantor was not insolvent or rendered insolvent by the transaction, that the grantor surrendered possession of the land, and that the deed of trust was cancelled of record. This is usually accomplished by inclusion of language addressing these matters in the deed from the borrower to the lender or a separate affidavit, commonly referred to as an Estoppel Affidavit, executed in conjunction with the deed to the lender.

Unlike the foreclosure of a deed of trust, a deed in lieu of foreclosure will not cut off liens filed after recording of the deed of trust which is the subject of the deed in lieu of foreclosure. This is extremely important when one method or the other is being selected to deal with the debt and subsequent liens are involved.

The rule for dealing with IRS liens involved in foreclosures is very specific. Even though they may be subordinate to the foreclosed deed of trust, IRS liens recorded at least thirty days before the foreclosure sale will not be cancelled by foreclosure unless proper notice is given to the IRS. Even if proper notice is given, the IRS has a 120-day redemption period during which they can purchase the property by paying the bid price.

Failure of the naming of a trustee is a common error. A security instrument without a named trustee could be deemed a mortgage in North Carolina and result in the inability of the insured lender to foreclose by power of sale and/or to bid or purchase at a foreclosure sale. Usually in North Carolina, the beneficiary is the purchaser at the sale. The right to bid and/or purchase at a foreclosure sale allows the lender to protect its investment. That right is not present with foreclosure of a mortgage which must be accomplished by a judicial foreclosure.

A "Request for Notice" is just what it says - a request by a junior lien holder to be notified that the senior lien holder is preparing to institute a foreclosure procedure under the senior deed of trust. More and more the notice is being either overlooked or just ignored. To be valid, the request must be a separate instrument in substantial compliance with NCGS 45-21.17A. It cannot be inserted into the junior instrument. Failure to comply with the Request for Notice could allow the junior lien holder to bring an action to set aside the foreclosure. There is a short statute of limitations for bringing an action to set aside the sale. If the property is sold to a party other than the original lender that instituted the foreclosure, such an action must be brought prior to the filing of the final accounting and report in the Clerk's office. If the property was purchased by the secured party, the junior lien holder has six months from the date of the filing to bring an action to set aside the sale.

Time limits and timeframes required by the statute are often not properly followed, such as ten-day notification prior to the date of hearing or twenty days under certain circumstance (publication, posting). These dates should be strictly adhered to, and a day later or a day sooner can cause the foreclosure to be invalid.

NCGS 1-47 (3) is a statute of limitation forbidding the foreclosure of a mortgage or deed of trust by a creditor with a power of sale if the mortgagor or grantor had been in possession of the property within ten years after the forfeiture of the mortgage or after the power of sale became absolute, or within ten years after the last payment on the same. By statute and case law two things must happen. There must be a time of ten years after forfeiture or after the power of sale becomes absolute or after the last payment on the same. The mortgagor must be in possession during the entire ten-year period. The application of the statute depends upon possession of the property by the mortgagor and such possession needs to be actual.

The above statute should not be confused with NCGS 45-37 (b). This statute states that a mortgage or deed of trust is presumed paid in full after the expiration of fifteen years from the date of maturity of the last installment. The time can be extended by the holder filing proper documentation with the Register of Deeds.

When a sale of property is held under foreclosure, it must be held in the county where the property is situated. If the property is located in two counties, the sale may be held in either of the counties where a part of the property is located. If so designated in the instrument, the place of sale shall be held where the instrument specifies. The instrument to be foreclosed may confer upon the mortgagee or trustee the right to designate the place of sale. NCGS 45-21.4 (d) statutorily addresses this situation.

Foreclosure can be affected by the Bankruptcy Code. The filing of a bankruptcy petition by the debtor/mortgagor precludes any action in a foreclosure. The Code should be closely studied whenever a bankruptcy action becomes involved in a foreclosure. The "stay" of the foreclosure will remain in place until the trustee obtains approval of the bankruptcy court to proceed in the foreclosure action.

North Carolina's real property and foreclosure laws are designed to protect the rights of all parties. Failure to comply with these laws may result in injury to a party, typically a borrower, and may lay the foundation for a future action to set aside a foreclosure. In these times of economic hardship and government sponsored programs aimed at protecting consumer rights, it is increasingly important that the attorney representing a lender's interest in a foreclosure proceeding adhere to statutory and security instrument requirements. Gambling that the process is not compromised by what might seem a small deficiency could be a losing bet.

## LEGISLATIVE CORNER

The North Carolina Legislature is still in session and working on a few important real property items, from NCARD rewrite of G.S. 47-36.1 & G.S. 47-14 (Sec. 7, HB 545, <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H545v2.html>) to possible coastal storm water deed restrictions to railroad authority to foreclosure reform initiatives - and the Real Property Section Council will be getting started preparing for the new year shortly. So, look for an updated itemized Legislative Chart, coming to our website soon ([www.northcarolina.ctt.com/](http://www.northcarolina.ctt.com/) --> Legal --> Bulls, Bulletins, Articles & Forms --> Legislation).

The new Legislative Committee Chair of the Real Property Section, Katherine Wilkerson, will certainly appreciate all the help she can get as the 2009 Session portends to be very, very busy!

