



## Hottest Issue in NC Real Estate Law: Foreclosures!

CTIC UNDERWRITING TEAM

Given that this is the most pervasive source of questions and title concerns these days, below are a few "hot" issues – resources for distressed homeowner-clients, "foreclosure rescue scams" (the same old scams just in new packaging), reverse mortgage scams, statutory changes and related NC State Bar ethics updates.

### Resources for Representing Clients in Avoiding Foreclosure

Real estate practitioners volunteered, the Bar Association provided the CLE, and the NC Commissioner of Banks in cooperation with the NC Department of Justice, last year created a program to assist qualified delinquent borrowers in approaching foreclosures. Also valuable resources are available on-line to assist consumers (and attorneys hoping to help them) to save their homes, such as identifying and reporting scams, defending foreclosure actions (where justified), negotiating modifications and obtaining refinances.

- NC Foreclosure Help site: [www.ncforeclosurehelp.org](http://www.ncforeclosurehelp.org)
- NC Department of Justice: [www.ncdoj.com](http://www.ncdoj.com) - Consumer - Credit & Loans - "Foreclosure" or "Home Equity Scams"
- NC Commissioner of Banks: [www.nccob.org](http://www.nccob.org) - Consumer Assistance - Foreclosure Information (providing multiple links to many agencies)
- Making Home Affordable program: <http://makinghomeaffordable.gov/index.html>
- HOPE Now program: [www.hopenow.com](http://www.hopenow.com)
- HUD resources, counselors, scam alerts: [www.HUD.gov](http://www.HUD.gov) - "Avoid Foreclosure"
- HUD State and Local assistance in avoiding foreclosure for North Carolina: [www.hud.gov/local/nc/homeownership/foreclosure.cfm](http://www.hud.gov/local/nc/homeownership/foreclosure.cfm)
- National Consumer Law Center: [www.consumerlaw.org](http://www.consumerlaw.org) - Issues and Initiatives - Homeownership and Consumer Credit - various topics including Debt Collection, Foreclosure Prevention, Predatory Lending (including manuals for lawyers)
- Mortgage Bankers Association Home Loan Learning Center (including contacts for top national mortgage lenders):  
[www.homeloanlearningcenter.com](http://www.homeloanlearningcenter.com) - Your Finances - Foreclosure Prevention

Many useful resources, forms and even videos are available at The Home Equity Theft Reporter: <http://homeequitytheft.blogspot.com>.

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## CHICAGO TITLE INSURANCE COMPANY 2010 CLE LIVE WEBINAR



### Foreclosure – Gauging Insurability One Case at a Time

Date: April 20, 2010 (Tuesday)  
Time: 11:30 am to 1:00 pm  
Presenter: Nancy Short Ferguson/Chicago Title Counsel  
1.5 Hours of General CLE Credit

The presentation will focus on interesting or problematic situations encountered in various steps of the foreclosure process. The materials and discussion will include application of old and revised or new statutes and old and recent cases.

Two methods of payment and registration are available: (Registration must be received by 4-15-2010)

(1) You may register online and make payment by PayPal by logging onto our website at [www.northcarolina.ctt.com](http://www.northcarolina.ctt.com) and clicking on the link under [What's New for Chicago Title Webinar in April of 2010](#);

OR

(2) You may complete the Registration Form below and mail the completed form along with your check in the amount of \$30.00 payable to Chicago Title Insurance Company to:

Chicago Title Insurance Company  
Attention Sharon Conyers  
P.O. Box 2657  
Greensboro, NC 27402-2657

Registration confirmation and instructions: After we receive your completed registration application and payment, an email will be sent to your email address provided on the registration form confirming registration. On Friday, April 16, 2010, a follow-up email will be sent which will provide the web address for the live PowerPoint presentation and a toll-free telephone number and conference ID# for the live audio portion. Note that you do not have to have PowerPoint installed on your computer to view the presentation. Please make sure you advise us if your email address changes.

### REGISTRATION FORM

Name: Last \_\_\_\_\_ First/Middle Initial \_\_\_\_\_

Firm Name: \_\_\_\_\_

Address: Street/PO Box \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Email Address: \_\_\_\_\_  
(Verify the accuracy of this email address as it will be used for all communications as explained above.)

Telephone #: \_\_\_\_\_ Fax #: \_\_\_\_\_

Attorney NC State Bar #: \_\_\_\_\_

Paralegal NC Certified #: \_\_\_\_\_

The webinar will be presented on:

X April 20, 2010 (Tuesday) from 11:30 am to 1:00 pm

Comment (or question for possible inclusion in webinar):

\_\_\_\_\_



# Practice Pitfalls...and how to avoid them

## HANDLING A SHORT SALE

A "short sale" is a transaction in which the potential net proceeds from sale (or refinance) of the property (after payment of costs) will not be sufficient to fully payoff the existing mortgage debt(s) of the seller. The seller (or their agents) must obtain written approval from their lender to release the property for less than the outstanding mortgage balance, under specified terms, typically based on reduced value of the asset (thus, a current appraisal) and the borrower's financial situation taking a turn for the worse.

Handling a short sale can be very labor-intensive and may entail significant delays. The buyer's and seller's interests may not always be totally in sync. The seller's goal is to end the transaction without the property and without further debt, which can get complicated if there are subordinate liens, significant repairs needed, or the short sale lender insists on a deficiency note. The attorney handling the seller's side of the closing (whether the same as the buyer's or a separate attorney) will have substantial additional time in the closing caused solely because of assuring compliance with the seller's lender's short sale requirements. In addition, even with a binding written confirmation of compliance with the short sale terms, a dissatisfied lender may be difficult to deal with in trying to clear the title as required by the buyer and the buyer's lender.

The buyer may be looking at significant delays (and loan commitment deadlines not met), repairs that must be calculated into their purchase price (usually paid by them), and hoping that no subordinate liens attach in the interim which would prevent the short sale from happening. This might include not just judgments, but owners' association dues, taxes, or even a casualty to the property.

### MINIMUM REQUIREMENTS – PRE-CLOSING

Title opinions, commitments, contracts, and the HUD-1 Settlement Statement should accurately reflect the actual current vesting of the seller in title and preferably itemize all conveyances taking place at closing. Many lenders now require that the commitment reflect any changes of ownership within the past 30, 60, or 90 days as an indication to the new lender of the possibility of an illegal flip (or violation of FHA Regulations, even with recent temporary waivers, discussed hereafter). However the short sale lender typically relies on the HUD-1 to reflect the actual nature of the sale transaction, to assure that an immediate flip of the property to an ultimate purchaser for substantially more than the short payoff is not involved. (See later section on mortgage fraud hereafter.)

Therefore, many title insurers now include a specific requirement in their commitments to address this pre-closing disclosure, such as:

If this transaction involves a "short sale" or "short pay" under which an existing lender has agreed to cancel or release land from a deed of trust for less than the current balance owed on the debt or attributed to the land to be released, certification that (a) all lender requirements are met, and (b) lender's agreement to cancel or release does not include any condition or right to refuse to cancel or release land from said deed of trust or to later void the cancellation or release after receipt of the payment amount specified by lender.

Prior to closing, the attorney must have confirmation from the lender (not just the mortgage broker) that certain conditions outside of their control are confirmed met and the conditions removed such as verification of the appraised or market value of the property, of the distressed seller's financial condition, and that the sale is a bona fide arms-length transaction for sufficient value to meet the short sale lender's requirements. The lender should be provided a copy of the final HUD-1 Settlement Statement, whether they will approve it or not, so that the attorney's file will have verification of proof of notice of the terms of the transaction. The lender must know that innocent third parties, for value, are relying upon this transaction and their exact terms so that they can be met at or before closing.

Since the attorney must assure that all requirements for release of the property are met at or before closing, the attorney should not close until (s)he can verify that there are no outstanding conditions that render the transaction void, revocable, or allow a right of rescission or avoidance by the lender agreeing to accept the short payoff; especially conditions that can be exercised after the lender has received the payoff funds to which they have otherwise agreed and after a third party innocent purchaser or lender has advanced value for the property. All due diligence, proof required, and conditions other than those totally within the control of the attorney (i.e., recording and delivery of the payoff funds in appropriate form) should be met prior to closing.

Even more so than with written closing instructions, the short payoff instructions must be complied with to the letter and no assumptions should be made. It is highly recommended that the closing attorney be the addressee to assure that the actual lender (noteholder or servicer, but not mortgage broker) is both aware of their reliance and that they are notified if there are any discrepancies or changes. (It is not unheard of that a fax of a copy is either unintentionally or fraudulently inconsistent with the lender's requirements, incomplete, or even changed by those desperate for the transaction to occur.)

## SHORT SALE FROM PAGE 3

There is no "standard in the industry" of what the lender (or its investors) will require. Some points of risk or ambiguity include (but are definitely not limited to) the following:

- Promissory note from the distressed borrower for a deficiency balance
- Terms related to escrows such as unearned insurance premiums, property taxes in limbo, or mortgage insurance
- Changes in amounts accrued to be paid to third parties that come due or change in the interim
- Restrictions on payments on subordinate liens
- Repairs required to protect collateral vs. simply to render in condition buyer (or a new lender) will accept
- Restrictions on realtors' commissions
- Recent transfers, transfers into a non-possessory trust (not managed by the distressed borrower), or contemplated transfer at closing (even if legitimate)
- No money back to borrower
- No straw buyers or flips to third parties already waiting in the wings!
- Any condition that will survive closing, such as a prohibition on conveyance for 30 days thereafter, must be evidenced in the title documents and pre-approved by the buyer, the new lender, and the title insurer if it is to remain outstanding post-closing. (Certain short-term conditions should be discussed with the title insurer to determine if limitations on the buyer's ownership will be sufficient to provide the new lender with affirmative coverage.)
- If the property is encumbered by multiple liens, written enforceable confirmation of conditions, all of which must be handled at closing, must be verified on all of the liens, even if from the same lender. The attorney must not assume that the department holding the first mortgage and providing a first mortgage short payoff agreement will be binding on a different loan even with the same lender or servicer. And most second mortgage holders are still requiring some payment, even if there is no equity in the property above the outstanding first mortgage balance. So if the first mortgage does not make concessions, the short sale may not be feasible.

Again, the lender who is agreeing to the short payoff should be provided a copy of the final HUD-1 Settlement Statement, whether they will approve it or not, so that the attorney's file will have verification of proof of notice of the terms of the transaction. There must be NO EXCEPTIONS from the lender's written requirements unless approved in writing by the lender prior to closing.

At closing, the payoff must be made at or before the expiration of the short payoff agreement, in the manner (wire or certified cashier's or trust account check via overnight verifiable delivery service) and to the office designated in the letter.

Post-closing, it is more critical than ever that the attorney assure that they follow up to obtain the actual record satisfaction of the debt as soon as possible! Delays can be costly; memories can be short; individual employees disappear; lenders are taken over by FDIC. This is not a situation where there is full satisfaction of the debt -- only contractual and estoppel reliance on a letter agreement.

The North Carolina Bar Association and the North Carolina Association of Realtors® have adopted the Short Sale Addendum (NC Bar Form 2-A-14) addressing closing delays, termination by either party, repairs, backup contracts, foreclosure in the event a short sale cannot be negotiated, and tax consequences.

**WHERE CAN ATTORNEYS FIND FREE  
REAL ESTATE SOFTWARE THAT INCLUDES  
THE 2010 HUD-1?**

**CHECK OUT CHICAGO TITLE'S  
DOCPREP FOR WINDOWS OR  
DOCPREP ONLINE [HERE](#).**



### Foreclosure Rescue & Mortgage Elimination Scams

Many consumers are marginal or simply cannot qualify for refinance or mortgage modification, yet are being scammed out of even their residual finances. They simply need help and the scam artists need to be gotten off the streets! Announced in late August 2009, NC Attorney General joined with the U.S. Justice and Treasury departments, FBI, FTC, HUD, other federal agencies and states' attorneys general to form the State-Federal Task Force on Mortgage Enforcement described as "an unprecedented partnership to target fraudsters." Their targets include not just mortgage fraud, but various scams which deceive and harm consumers, stepping up the pressure on scammers.

The "red flags" and indicia of fraud are still the same: quitclaim deeds, trusts to unrelated third parties, "naked" payoffs, common law liens, UCC's to unusual parties, "bonds", etc., just repeated in new packaging as foreclosure rescue, modification, "consultant", short sale or reverse mortgage scams designed solely to separate distressed homeowners from their homes and money!

Now these scams have "morphed" into newer versions aimed at desperate homeowners facing credit crises and potential loss of their homes. THESE SCAMS ARE VERY ACTIVE IN OUR STATE AND NC ATTORNEYS AND STAFF NEED TO BE FAMILIAR WITH THE "RED FLAGS!" Chicago Title receives inquiries daily all over the state about situations that appear unusual, many of which are these scams. The "true" owner of the property may be in desperate financial straits or buys into the "easy" way to simply avoid their debts. Or the property may have been foreclosed already, or may be vacant rental or vacation property. The scammers use seemingly legitimate types of legal instruments – deeds, existing entities, specially created trusts, high pressure sales tactics (urgency!) – so both the legal effect and the whole situation has to be considered by an attorney exercising professional judgment and experience!

Are these combinations of instruments, people, entities and procedures legitimate? Many probably are not.

Can a potential "innocent" purchaser and lender obtain title insurance? That has to be determined on a case-by-case basis. In a foreclosure, it will require assuring notice is given to the true owner as well as this "scammer", since they have some title, specious though it may be, as well as addressing any leasehold interests created. In the event the "true" owner is able to obtain a refinance or sale, the closing may require unwinding the scheme, i.e. obtaining required deeds back (and clearing any title problems created by the scammer), especially if the true owner is still in possession indicating that the "conveyance" was never intended as that!

The audacity is amazing -- like the conveyance of the Empire State Building to "Nelots" – yes, "stolen" spelled backwards – or just forging and recording a quitclaim deed to the scammer in their own name, then listing the property to sell within a couple of months! One company, "Loan Forensics," which, while reciting RESPA, TIL and a multitude of statutes, asserted that "We have full legal right to ask your lender or bank for a full forensic mortgage audit on your behalf, and if they are found in violation and cannot provide all evidence of the mortgage being legal and binding in 90 days, the title to your home is all yours, and you will no longer have a mortgage. Most just "modify" and settle out of court, we have the full legal right to act as a judge and make claim for title and make sure you own your home with NO MORTGAGE!"

The FBI's Mortgage Fraud page (including foreclosure and debt elimination scams), on-line at [www.fbi.gov/hq/mortgage\\_fraud.htm](http://www.fbi.gov/hq/mortgage_fraud.htm) and the FBI's 2008 Mortgage Fraud Report, [www.fbi.gov/publications/fraud/mortgage\\_fraud08.htm](http://www.fbi.gov/publications/fraud/mortgage_fraud08.htm) are the best resources identifying frauds that are currently under investigation. The report defines "foreclosure rescue schemes" in Appendix A: "Foreclosure rescue schemes are often used in association with advance fee/loan modification program schemes. The perpetrators convince homeowners that they can save their homes from foreclosure through deed transfers and the payment of up-front fees. This "foreclosure rescue" often involves a manipulated deed process that results in the preparation of forged deeds. In extreme instances, perpetrators may sell the home or secure a second loan without the homeowners' knowledge, stripping the property's equity for personal enrichment." The 2009 "Emerging Schemes," include Reverse Mortgage fraud scheme, Credit Enhancement Schemes (co-borrowers, joint account owners so all appear to have more funds, brokers or seller-builders even depositing money into borrowers account temporarily), Builder-Bailout Schemes – Modified (builders offering undisclosed incentives such as condominium conversion giving cash back, paying association dues, guaranteeing rentals, or "pump and pay" conspiracies to inflate values), Serial Property Flipping of foreclosed properties, and Short Sale Schemes (including intervening "trusts" and immediate resale flips). In all of these cases, the same red flags keep appearing repeatedly, and especially the bad pseudo-legal advice by a non-lawyer.

Specifically, the FBI's on-line information described the below 2009 emerging Foreclosure Rescue Schemes:

Foreclosure rescue schemes continue to be problematic, especially in the current distressed market in which more than 2.3 million properties were in foreclosure in 2008... These schemes typically consist of perpetrators soliciting homeowners in foreclosure and offering to "rescue" them from losing their home for a fee. Recent modifications to this scheme:

**Foreclosure Rescue – Arson:** Homeowners, property flippers, and investors are committing arson to avoid real estate foreclosure. The insurance policy holder files a false insurance claim following the arson to extract illicit proceeds from the property to avoid foreclosure.

**Foreclosure Rescue – Bankruptcy:** Perpetrators are exploiting US Bankruptcy courts to defraud homeowners who are facing foreclosure. They are targeting distressed homeowners through Internet advertisements, newspapers, flyers, and through publicly available county foreclosure notices. They offer to provide the homeowner with assistance designed to prevent them from losing their home. They charge the homeowner an up-front fee, typically ranging from \$200 to \$1,000. In many instances, the perpetrators convince the homeowner to continue to make their monthly mortgage payment, but to direct the payment to the perpetrator. They also misguide the homeowner to cease any communication with the lender. The perpetrators direct the homeowner to complete the necessary paperwork which includes signing a bankruptcy petition. The perpetrator subsequently files the bankruptcy petition in the homeowner's name with either the signed petition or a forged petition.

The bankruptcy petition invokes the automatic stay, resulting in the imminent foreclosure being postponed, and the homeowner stops receiving collection calls and letters. Frequently, homeowners are unaware of the bankruptcy petition and believe that the perpetrators have fulfilled their obligation to prevent them from losing their home. The perpetrators further misinform the homeowners to ignore any court notices to appear at the bankruptcy hearing. However, when no one appears at the bankruptcy hearing, the foreclosure process begins again.

In a variation of this scheme, the perpetrators convince the homeowner to "quit-claim" the property to the perpetrator or to sell the property for a nominal fee, usually \$1. The perpetrators charge the homeowner rent until the mortgage problems are resolved. After which, the homeowner is able to repurchase the property or share the profits if the perpetrator sells the property. In some property transfers, the homeowner is instructed to transfer only a fractional interest in the property to the perpetrator who then transfers that interest to another individual or entity (often fictitious). Often, the fractional interest is transferred numerous times as the automatic stays are lifted, which delays foreclosure for months and generates additional proceeds for the perpetrators. According to the Executive Office of US Trustees, one residential property was linked to 24 different bankruptcy cases.

#### "Foreclosure Consultant" or the "Loan Modifier" Rescue Scams – the latest

The FBI's "Emerging Schemes" report (above) described these Foreclosure Rescue - Loan Modification Program Schemes as follows:

Loan modification schemes, typically in the form of an advance-fee/foreclosure rescue scheme, are emerging as recent vulnerabilities in HERA and EESA legislation becomes apparent. Lenders are mandated by recent legislation to work with homeowners to assist them in keeping their homes out of foreclosure; however, individuals are perpetrating advance-fee schemes to generate income from victim homeowners. Perpetrators solicit homeowners with mail flyers offering to help them stop the foreclosure process on their homes. Homeowners are falsely told that their mortgages would be renegotiated, their monthly payments would be reduced, and delinquent loan amounts would be renegotiated to the principle. Perpetrators require an up-front fee ranging from \$1,500 to \$5,000 from homeowners to participate in the loan-modification program. Perpetrators often request that the victim homeowners stop payments and communication with their lender. When victims receive delinquency and foreclosure notices, the perpetrators convince them that the loan was renegotiated, but that the lender needs a good faith payment to secure the new account.

According to the OCC Consumer Advisory 2009-1, ([www.occ.treas.gov/ftp/ADVISORY/2009-1.pdf](http://www.occ.treas.gov/ftp/ADVISORY/2009-1.pdf)) consumers should contact [www.makinghomeaffordable.gov](http://www.makinghomeaffordable.gov) for information on modifications and refinancing options and counseling and should beware of the "Ten Warning Signs of a Mortgage Modification Scam":

- "Pay us \$1,000, and we'll save your home." [upfront fee payments]
- "I guarantee I will save your home – trust me." [guarantees of any kind]
- "Sign over your home, and we'll let you stay in it."
- "Stop paying your mortgage."
- "If your lender calls, don't talk to them."
- "Your lender never had the legal authority to make a loan." [old common law lien and Dorean Group scams in another version]
- "Just sign this now; we'll fill in the blanks later."
- "Call 1-800-Fed-Loan." [or other specious names implying falsely some government affiliations]
- "File for bankruptcy and keep your home."
- "Why haven't you replied to our offer? Do you want to live on the streets?" [high pressure scare tactics]

Notice that these are all nearly the same high-flying assertions of any fraud scam, just updated for a newer context.

#### Report Fraud to:

- Federal Trade Commission ([www.ftc.gov](http://www.ftc.gov)) or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261
- North Carolina Attorney General, Consumer Division
- Your local Better Business Bureau
- The Authorized Practice Committee of the State Bar ([www.ncbar.gov](http://www.ncbar.gov) - Programs - Authorized Practice)
- The Commissioner of Banks: 1-866-234-4857 or <https://www.nccob.org/online/cts/complaintonline.aspx>.

## Other Resources and Further Information

Below are some informative sites with interesting stories and “red flags” to share among the attorney’s staff.

- [www.northcarolina.ctt.com](http://www.northcarolina.ctt.com) - Legal - Bulls Bulletins Articles and Forms - “Fraud,” which lists a multitude of articles, Chicago Bulls outlining the red flags for any type of scam, interesting stories of particular types of fraud schemes and helpful resources
- NC Bar Association Real Property Section listserv posts - alerting lawyers to the latest scams, such as “bonded promissory notes” and “loan forensics”
- OCC Consumer Advisory 2009-1 – “OCC Consumer Tips for Avoiding Mortgage Modification Scams and Foreclosure Rescue Scams” Consumer Advisory 2009-1 (April 21, 2009), [www.occ.treas.gov/ftp/ADVISORY/2009-1.pdf](http://www.occ.treas.gov/ftp/ADVISORY/2009-1.pdf), including a list of the “Ten Warning Signs of a Mortgage Modification Scam”
- [www.quatloos.com](http://www.quatloos.com) - where you can ask Tony the Wonder-Llama
- [www.ftc.gov](http://www.ftc.gov) - including recent actions against foreclosure rescue scammers “official” sounding companies like FedMod, Bailout.hud.gov.us and Home Assure (also investigated in North Carolina) - Home Assure, LLC, B Home Associates, LLC, doing business as (dba) Expert Foreclosure. Various excellent articles on equity lines, equity scams, and foreclosure rescue scams can be found at [www.ftc.gov](http://www.ftc.gov) - Consumer - Credit&Loans - Mortgage/Real Estate - The red flags, obvious if you are alerted, but not so much to a desperate homeowner:
  1. Giving guarantees to stop the foreclosure process – no matter the circumstances.
  2. Advising the owner not to contact their lender, lawyer, or credit or housing counselor.
  3. Advising the owner not to make mortgage payments to their lender, but just pay to the scammer and they’ll “take care of it.”
  4. Up front fees, especially if by cashier’s check or wire transfer, before the scammer will contact the lender and “negotiate a deal”, much less start actually passing through any payments on the loan itself, and sometimes even filing a bankruptcy proceeding in the owner’s name.
  5. “Rent to buy” scheme where homeowner transfers title to the scammer, then pays rent for a while purportedly to rehabilitate their credit rating for a future loan, but under often burdensome if not impossible financial terms, so equity is lost.
  6. Advising the owner to transfer your property deed or title to it, whether to protect it from creditors or to rent it to a third party to make the payments, which ultimately does not happen leaving the now former owner without their equity, their home or any hope of redeeming their credit rating (“equity skimming”).
  7. Offering to buy the home for cash at a fixed price that is not set by the housing market at the time of sale.
  8. Scammer completes “paperwork,” (sometimes including deeding over the home, the “bait-and-switch”) pressuring owner to sign without a chance to review or talk with an advisor (attorney or even credit counselor).
- FBI Mortgage Fraud page (including foreclosure and debt elimination scams) - [www.fbi.gov/hq/mortgage\\_fraud.htm](http://www.fbi.gov/hq/mortgage_fraud.htm) and the FBI’s 2008 Mortgage Fraud Report - [www.fbi.gov/publications/fraud/mortgage\\_fraud08.htm](http://www.fbi.gov/publications/fraud/mortgage_fraud08.htm) .

## Ethical Cautions for Lawyers

Beware the offer to represent a business that say they’ll retain an attorney for the consumer, but they expect the attorney do very little - often at most talking with the consumer, then following the business’s forms with all information intake and production through the business’s personnel. Taking many forms, ultimately the non-lawyer sets up a set of “one size (or a limited repertoire) fits all” documents, and, if they retain a local attorney, they only engage the attorney as window-dressing to “advise” the distressed and delinquent client to accept those documents.

As stated by the court in the Ohio case of Cincinnati Bar Association v. Mullaney: “Contrary to professional duties and responsibilities, the three lawyers in Mullaney did not assess individualized needs of Foreclosure Solutions customers to determine the best course of legal action for relieving their financial distress, including whether to petition for bankruptcy immediately. They instead pursued the single strategy the respondents offered as a resolution — to stall the pending foreclosure proceedings in the hope of the agents’ or lawyers’ negotiations of a settlement with the mortgagee.”

See “Ohio Supreme Court cites foreclosure rescue company for UPL” The Legal Description (8/27/09). See “Ethics Alert: Lawyers should be very wary of loan modifiers,” By Elizabeth Tarbert, Florida State Bar (11/15/09), [www.floridabar.org](http://www.floridabar.org). See also, “ETHICS ALERT -- Legal Services to Distressed Homeowners and Foreclosure Consultants on Loan Modifications,” State Bar of California: Committee on Professional Responsibility and Conduct (February 2, 2009), on-line at: <http://calbar.ca.gov/calbar/pdfs/ethics/Ethics-Alert-Foreclosure.pdf>



FORECLOSURE FROM PAGE 7

## Recent NC Foreclosure Ethics Opinions

Below are on-line at [www.ncbar.gov](http://www.ncbar.gov) - Ethics - Adopted Opinions or Proposed Opinions and a chart, as well as opinions, are on-line at [www.northcarolina.ctt.com](http://www.northcarolina.ctt.com) - Legal - Bulls Bulletins Articles and Forms - Ethics.

2004 Formal Ethics Opinion 3 (April 23, 2004) - Common Representation of Lender and Trustee on a Deed of Trust. Proposed opinion rules that a lawyer may represent both the lender and the trustee on a deed of trust in a dispute with the borrower if the conditions on common representation can be satisfied.

2006 Formal Ethics Opinion 3 (January 23, 2009) - Representation in Purchase of Foreclosed Property. Opinion rules that a lawyer who represented the trustee or served as the trustee in a foreclosure proceeding at which the lender acquired the subject property may represent all parties on the closing of the sale of the property by the lender provided the lawyer concludes that his judgment will not be impaired by loyalty to the lender and there is full disclosure and informed consent.

2006 Formal Ethics Opinion 5 (April 21, 2006) - County Tax Attorney Purchasing Property at Tax Foreclosure Sale. Opinion rules that the county tax attorney may not bid at a tax foreclosure sale of real property.

2008 Formal Ethics Opinion 11 (January 15, 2010) - Representation of Beneficiary on Other Matters While Serving as Foreclosure Trustee. Opinion rules that a lawyer may serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

Proposed 2009 Formal Ethics Opinion 17 (October 22, 2009) - Tacking as Question of Standard of Care. Proposed opinion rules that whether a lawyer rendering a title opinion to a title insurer should tack to an owner's policy of title insurance or a mortgagee's (lender's) policy is a question of standard of care and outside the purview of the Ethics Committee.



## HAVE YOU HEARD?

### PEOPLE ARE TALKING ABOUT JACKSONVILLE MANAGER DENISE BAKER!

"Our firm has been ordering title insurance commitments and policies from your Jacksonville office for several years. During that time Denise Baker has been the Jacksonville Branch Manager. Denise has always been cordial, professional, and prompt in providing commitments and policies. She is also very helpful in working out any problems we encounter in removing title exceptions objected to by purchasers and lenders. I have enjoyed working with Denise and look forward to many more years of doing so."

- J. Dewey Edwards, Jr. / Gaylor, Edwards & Vatcher

"Denise is very accessible and mindful of the time restraints placed on practicing attorneys. If an underwriting problem or question arises, Denise is quick to seek guidance, if needed, from other professionals at Chicago Title. Denise is a pleasure to work with and her work ethic makes our job less stressful."

- Charles S. Lanier / Lanier, Fountain & Ceruzzi



CTIC - Jacksonville • 410 New Bridge St., Ste. 10B, Jacksonville, NC 28540 • 910-346-3378