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The NC Connection

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Real Estate Closing 101

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Click [here](#) for Marc's Bio

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Welcome to the Real Estate Closing 101 final exam. There will be one question that encompasses most of the issues we have discussed this past year. You will have one hour to complete the question and you may start as soon as the loan package arrives. After you have completed your exam, please make three copies...

Cliff Clavin and his wife Diane Chambers have asked you to close a purchase transaction for a 2.89 acre piece of property located in Henderson County, North Carolina. This is a new house that was just completed about a month ago. You ask for a copy of the contract and provide them with your engagement letter outlining what they can expect to receive with regard to your services. They have signed the letter and you are ready to start preparing for the closing that will occur in two weeks.

Your paralegal is on vacation and you are by yourself. You go to the register of deeds and begin to search the title. The property is currently owned by WAF Builders, LLC who bought the property out of foreclosure in 2008. You notice there are two deeds of trust outstanding on the property, one of which is an equity line. You then begin to search the foreclosure file from 2008. Everything looks to be in order except for the fact that there are three city tax liens filed against your property. The foreclosed deed of trust,

however, was recorded prior to the filing of these city tax liens.

You complete the 30 year search and remember that you forgot to check access to the property. It is not in a subdivision but you do find a recorded easement that benefits your property. You now feel comfortable with the access and submit your preliminary title opinion to your favorite title company.

Fast forward to 12 minutes before closing...Cliff and Diane are in the lobby of your office with their 5 children, along with 2 realtors, a loan officer, a broker, and a guy who wants you to donate money for the fish fry in Bat Cave next Saturday (of course, you give him \$20.00 in exchange for 2 tickets). You run to your office and shut the door to find that the loan package just arrived via email. You hit print, get up, and walk to the printer to refill it with paper. 100 pages later, you begin a thorough review of the loan instructions and the loan package. This lender requires that you fill in some blanks on the deed of trust. Luckily, the HUD was approved by the lender an hour ago and the sellers have already come in and signed everything. You bring everyone into your conference room and 2 diaper changes later you have completed the loan closing and successfully helped Cliff and Diane with one of the most important events in their lives. They

go off to move into their new home and live happily ever after. Cheers to all.

Everyone has left your office when you glance down at your watch and discover that it is now 4:20 pm. You hurry to the computer and begin printing checks and then race to the register of deeds office. You arrive at 4:45 pm, update title, and sprint to get in line to record. You submit the deed and deed of trust for recording and slowly walk back to your car ready to call it a day.

Continued on page 2.

Inside this issue:

Real Estate Closing 101	1-3
NC Fun Facts	2
Claims Corner	3-4
Implied Reversionary Interests	4
RESPA Roundup Newsletter Link	5
ALTA 22.1-06	5

Real Estate Closing 101 (cont. from page 1):

What issues do you see in the preceding scenario? Please take your time.

Sample Answer

The following are the issues, and brief discussions of each, that I deemed to be relevant in the preceding scenario. Thank you and good luck to each of you in the future.

Yours truly,

Professor Norm Peterson

Construction

The first issue that needs to be addressed is the fact that this is a new home that was completed about a month ago. This obviously falls within the 120 day lien period and we must analyze which lien waiver to use. The North Carolina Land Title Association (NCLTA) has drafted forms that have been adopted by most title companies. These can be found on our website at <http://nc.invtitle.com/resource/forms/> as well as the NCLTA website. In this fact scenario, we would use Form 2 because we are dealing with construction recently completed. If the owner and the general contractor are the same person or entity, then the owner, general contractor, and all subcontractors must sign the lien waiver. If the owner and the general contractor are different, then only the owner, general contractor, and anyone else contracting directly with the owner must sign. If you have any questions about a specific transaction with regards to who needs to sign the lien waiver, please feel free to contact a title attorney.

Equity Line

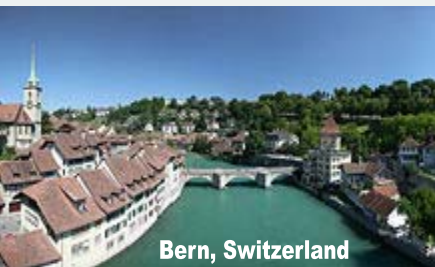
In your search you found two outstanding deeds of trust, one of which is an equity line. An equity line block payoff letter must be signed by the borrowers and sent to the lender directing them to cancel the deed of trust and close the account. You can find a sample letter at <http://nc.invtitle.com/resource/forms/>. Also, keep in mind that in a purchase transaction this close account letter would be signed by the seller, so remember to include this letter if the seller comes in early to sign their documents.

City Tax Liens

There were 3 city tax liens that were discovered in your search; however, the deed of trust was recorded before the tax liens were filed. So a proper foreclosure wipes them out, right? No, these liens survive a foreclosure. These liens are often for mowing or clean up fees associated with the property. You will find the statutory reference on the filed lien document. These liens are given what amounts to a super priority, much like ad valorem taxes, and must be paid.

Access

You searched access and found a recorded easement that benefits your 2.89 acre parcel. Remember to search the underlying parcel or parcels so that you can report to the title company any issues or defects that impact the title to the servient tract or tracts.



Bern, Switzerland

NC Fun Facts

The Swiss and German settlement of New Bern was named in honor of

the founder's home, Bern, Switzerland. When Bern, Switzerland was founded, it was named by a group of hunters. They named the city for the first animal they came upon on their hunting expedition. It was a bear.

"Bern" is the old Germanic word for Bear, and the bear became the symbol of the city. It has been adopted by New Bern, as well.



Forgery

Most lenders require that you make copies of the proper identification of the borrowers. Just make sure you remember to check the identification of the sellers as well. Also, keep this issue in mind when you are mailing documents to be signed. What protections are in place to make sure that the proper parties are signing these documents? Some have suggested that it might be prudent to mail the documents to the signor's attorney as a better safeguard against forgery concerns.

Filling in the Blanks

Some of the deeds of trust that you receive require you to fill in certain information. Every blank is important; however, I wish to focus on two significant areas; grantor names and identification of the note.

Continued on page 3.

Real Estate Closing 101 (cont. from page 2):

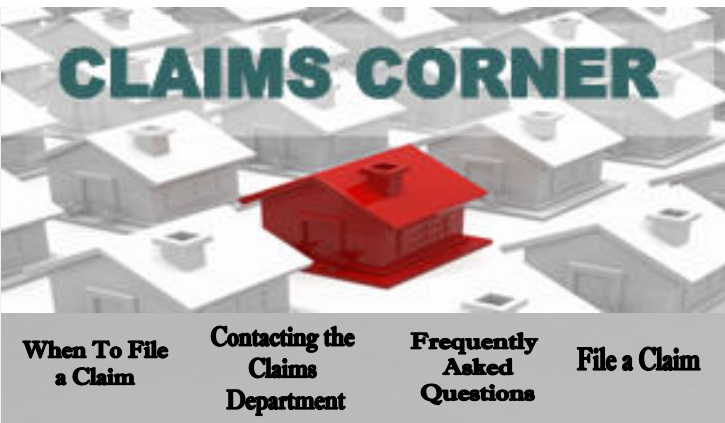
Grantor names- Make sure that the grantors on the deed of trust are the owners of the property. Sometimes the borrower is not the grantor which creates a hypothecation issue, where one is pledging their collateral for the benefit of another. Furthermore, look to the body of the deed of trust to make sure that the grantor definition and the borrower definition properly identify the correct people or entity. In addition, make sure that the interest of any spouses, who may not be borrowers or even on title, is properly addressed.

Identification of the note/debt- The note must be properly identified on the deed of trust. Oftentimes, the deed of trust will identify the note date by stating “of even date herewith.” Just be certain that the note date and the deed of trust date match. If the note is identified with a specific date please make sure that date is correct. The bankruptcy trustee in *In re Head Grading Co., Inc. Bkrcty. E.D.N.C.* 353 B.R. 122, 2006 held that the \$180,515.75 deed of trust was an unsecured lien because the note date was one day off.

Recording in a Rush

When you, or someone recording on your behalf, are standing in line to record, this is a great time to take just a few seconds to double check some important aspects of the documents. Check the legal description to make sure it is correct (i.e. lot number is correct) and, if it is an “Exhibit A,” that the “Exhibit A” is actually attached. Also, make sure that the notary block is properly filled out and that all signatures are notarized. Lastly, look to see if you are recording the documents in the correct county. Trust me, recording in the wrong county is a nightmare.

These are just some of the issues that we see on a weekly basis that can be prevented by taking a little time on the front end. Clearing up these issues 6 months after closing is an unpleasant experience and costs you time and money.



Small Details Lead to Big Problems in Bankruptcy Court

Part 2

By Robert Crabill, Title Attorney
& Risk Control Manager

When the lender seeks to enforce its lien after the borrower seeks protection in bankruptcy court, the bankruptcy trustee will review the documents to see if the lender is properly secured. When this happens, seemingly small details can become major problems for lenders.

In one situation, the reasons the bankruptcy trustee sought to invalidate the deed of trust are again based on alleged deficiencies with the documents themselves. A deed of trust was signed by a husband and wife to secure a \$420,000 note. The note was executed solely by the husband. The date on the note was blank. The deed of trust and note were both recorded at the same time. In one section of the deed of trust, the husband and wife are described collectively as “Borrower.” On the first page of the deed of trust the husband and his wife are listed as the borrower. The note requires only the husband to sign as borrower.

The bankruptcy trustee argued that the deed of trust was invalid for two reasons. First, the deed of trust did not identify the underlying obligation as there was no date listed on the note. Second, the deed of trust improperly listed husband and wife as borrowers and only the husband signed the note.

In this case, the Bankruptcy Court examined the deed of trust and noted the provision defining the note contained an unfilled blank where the note date would usually appear. As the note itself was also undated, the Court found these references consistent. In this situation, the lack of a date was acceptable and not contradictory because the date was missing from both documents.

The court also went further and noted that “the Deed of Trust provides the proper lender information, the correct amount of money lent pursuant to the Note, the same date the last payment is due under the Note, the same reference to a loan number and same MIN [mortgage identification number].”

When considering whether the inclusion of the wife in the definition of borrower would invalidate the deed of trust, the Bankruptcy Court looked at a provision in the definition section. This provision indicates words may be defined in other sections of the document. This deed of trust is a standard Fannie Mae/Freddie Mac form that specifically addresses situations where only one spouse executes the note and both execute the deed of trust. Taking these sections together, the Bankruptcy Court found that the terms of the deed of trust and note were consistent and not grounds to invalidate the lien.

The bankruptcy court order has been appealed and Investors Title is currently awaiting the result. Whatever decision is ultimately made, the analysis used by the Bankruptcy Court gives a good roadmap of the details that can be scrutinized to determine whether a lender holds a valid security instrument that will survive a bankruptcy trustee’s challenge.

Continued on page 4.

This next claim is an example of where the lender's security was found to be valid and a potentially large claim avoided. This claim also provides insight into the essential information required for a valid security instrument.

The facts are as follows. The deed of trust defined the "Note" as "the promissory note signed by Borrower and dated _____[this section was left blank]." Once again the bankruptcy trustee argued that the omission of the note date in the deed of trust invalidated the security instrument. The bankruptcy court went through the deed of trust and noted that it did contain "the proper lender information, the correct amount of money lent pursuant to the Note; the same date the last payment is due under the Note; the signature of the same person on both the Note and the Deed of Trust; and the same reference to a minimum interest rate, maximum percentage amount the interest rate can increase at one time, and the maximum deviation that the interest rate can change from the initial interest rate." In addition, the note . . . references a "Security Instrument of even date herewith." The security instrument and note were both dated the same day.

Taking all of this information together, the court found the deed of trust accurately identified the underlying obligation and provided a valid lien for the lender. This ruling saved Investors Title from a large claim. The analysis used by the court also shows the information that needs to be accurately contained in the note and deed of trust.

When documents fail to adequately secure a lender, the claims may be large. Litigating these matters in bankruptcy court can be costly even when the lender's security is upheld. Taking a small amount of time to review documents to ensure accurate, complete information is the best defense in these situations. Consistently examining the key points identified in this article will go a long way toward minimizing this type of claim. An unfilled blank, an incorrect date, or misidentified borrower can all lead to claims. Attention to detail is worth the effort and well worth the money.



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Investors Trust Company

Each month, the Investors Trust Company provides an article related to trust and investment services. See below for more information about the Investors Trust Company.

Implied Reversionary Interests

The North Carolina Court of Appeals has ruled that, when transferring property, a testator must specially grant a reversionary interest to named beneficiaries because courts will not imply one. That holding came in a case that developed after Joseph Cannon died in 1939, survived by his wife and three children. Before his death, Cannon had executed a Will and two codicils that left many of his assets to various family members. Under the first codicil, Cannon directed his executors to transfer his bank stock to Citizens Bank and Trust Company (Citizens) as trustee, with instructions to hold the stock in trust for the benefit of ten named charitable entities. The codicil also specified that Citizens was to distribute the trust income to each of the named beneficiaries to promote "cheer at Christmas Time" for 99 years. If a charity ceased to exist, the codicil allowed the trustee to select another charitable recipient. The codicil failed, however, to specify how the property was to be distributed after those 99 years, so the bank (the parent company of Citizens) filed a petition seeking judicial guidance in July 2007. In the petition, the bank argued, *inter alia*, that it needed to know how the trust assets would ultimately be distributed so it could administer the trust appropriately. All of Cannon's children had died by the time the petition was filed, so notice of the litigation was sent to their known

representatives—the executors or administrators of their respective estates—as well as to the charitable institutions. But the lower court could not find anyone willing to re-open the estate of Anne Cannon Stouffer, so it ruled that potential beneficiaries under her Will could be represented by the other parties in the litigation who had substantially similar interests—a concept known as virtual representation. The lower court ultimately concluded that Cannon's codicil had created a wholly charitable trust, and that the property should be distributed to the charities that were still in existence at the end of the 99-year term or to other charitable entities that either the trustee could select or a court could name under the doctrine of *cy pres*. In reaching that outcome, the court concluded that the codicil had not specifically said that the property would revert to Cannon's beneficiaries at the end of the term, and without that language, the law generally presumes that the testator did not intend to create a reversionary interest. Accordingly, once the 99 years pass, the property should be distributed either to the surviving charities or to other charitable institutions. The appellate court agreed, and affirmed.

—*First Charter Bank v. American Children's Home*, No. COA09-1232, N.C. Ct. App. 5/4/10

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RESPA ROUNDUP NEWSLETTER

September 2010

Topics include:

VA Circular

Payments to subordinate lien holders on HUD-1

Click [here](#) or visit www.hud.gov/respa

ALTA 22.1-06

The ALTA Location endorsements are designed to provide the insured with assurance that particular types of improvements are located at a specified street address. In addition to these assurances, the ALTA 22.1-06 assures the insured that the land has the same location and dimensions as shown on a specified map found in the public records.

Requirements

In order to issue the ALTA 22.1-06, a copy of a recorded plat or recorded survey showing the land to be insured must be provided. The legal description contained in Schedule A must be consistent with the land shown on the plat or survey. A copy of the plat or survey must be attached to the endorsement.

ALTA ENDORSEMENT FORM 22.1-06 (Location and Map)

This endorsement is made a part of the Policy to which it is attached.

The Company insures against loss or damage sustained by the Insured by reason of the failure of (i) a _____ (description of improvement), known as _____ (street address), to be located on the Land at Date of Policy, or (ii) the map, if any, attached to this policy to correctly show the location and dimensions of the Land according to the Public Records.

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