



# CHICAGO TITLE INSURANCE COMPANY

<b><u>TOPIC:</u></b>	<b><u>Foreclosure and Deeds in Lieu – 2010:</u></b> <b><u>Recent Legislation, Cases, and Issues in Foreclosure</u></b> <b><u>Proceedings</u></b>
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## INTRODUCTION

This manuscript focuses only on recent changes affecting the foreclosure process walking step-by-step through the procedure. A few of the most critical acts with provisions permeating various parts of the foreclosure process are the Mortgage Lending Act, the S.A.F.E. Mortgage Licensing Act, the Federal Housing and Economic Recovery Act of 2008, and the Emergency Program to Reduce Home Foreclosures Act,

In 2008, under the Mortgage Lending Act, North Carolina imposed significant additional licensing, registration and reporting requirements on mortgage brokers, mortgage lenders, mortgage servicers, and others who might be involved in the mortgage lending or foreclosure process. These were, in turn, significantly amended again in 2009 (effective July 31, 2009) by the S.A.F.E. Mortgage Licensing Act (H1523) entitled “An Act to Rewrite the North Carolina Mortgage Lending Act in Order to Conform to the Requirements of Federal Law” (Session Law 2009-374, House Bill 1523) in order to bring the regulatory requirements into conformity with the Housing and Economic Recovery Act of 2008, Public Law 110-289, Title V, enacted by Congress and signed into law on July 30, 2008. The key relevant provisions of the 2009 statute (replacing substantially similar provisions in the 2008 act, N.C. Gen. Stat. § 53-243.11 and Subsection (n) of G.S. § 53-243.12 which had been effective for foreclosure proceedings filed on or after January 1, 2009) are discussed below relating to the 45-day notice provision and the foreclosure suspension on notice from the Commissioner of Banks (herein “Commissioner”) to the Clerk. Additional debt collection procedures and requirements were enacted as well through various statutory amendments over the last 3 years including N.C. Gen. Stat. Chapter 58, Article 70; Chapter 45, Article 10, Mortgage Debt Collection and Servicing Act; S.A.F.E. Mortgage Licensing Act in 2009; and N.C. Gen. Stat. Chapter 53, Article 19B, replacing Article 19A, the North Carolina Mortgage Lending Act.

The Emergency Program to Reduce Home Foreclosures Act (N.C. Gen. Stat. Chapter 45, Article 11) was enacted as 2008 N.C. Sess. Laws 226, 2007 N.C. HB 2623, which became effective November 1, 2008; and expires October 31, 2010 (unless later extended by the NC

Legislature). The Act focused on mortgage lenders and servicers on “subprime loans” defined under N.C. Gen. Stat. § 45-101(4) of the Act as “rate spread home loans” originated between January 1, 2005, and December 31, 2007, more clearly defined under N.C. Gen. Stat. 24-1.1F(A)(7). This Act requires 45-days’ notice to the borrowers, notice of foreclosures to the Commissioner, and the ability to suspend the foreclosure proceedings.

The Consumer Economic Protection Act of 2009 (S974), became effective for foreclosures, debt collection activities undertaken, and actions filed on or after October 1, 2009. This act would require postponement by the Clerk of proceedings on owner-occupied residential foreclosures if there is a “reasonable likelihood” of resolution based on additional findings required at the hearing, amending N.C. Gen. Stat. § 45-21.16 and adding new § 45-21.16C, and modified bonds on appeal.

## **OVERVIEW OF NEW RULES AND CURRENT RISKS**

### **1. Substitution of Trustee**

N.C. Gen. Stat. § 45-10(b) allows for substitution of a *missing* trustee on a deed of trust

### **2. Servicemembers’ Civil Relief Act**

Pursuant to Title II, Section 2201 *et seq.* of the Federal Housing and Economic Recovery Act of 2008 (Public Law 110-289), 50 U.S.C.A. 303 has been amended for a temporary extension of the periods from 90 days to 9 months after the termination of the servicemember’s military service, effective for the period from July 30, 2008, until December 31, 2010 (if not further extended). These rights are in addition to the state provisions under N.C. Gen. Stat. § 42-45.2, discussed in Item 12 below. (Also Homeowners Assistance Program at: <http://hap.usace.army.mil/>)

### **3. Reverse Mortgages – Events of Default, 90-Day Notice, Limited Liability of Borrower**

Since this mortgage vehicle has become increasingly popular, and both borrowers and their children and heirs are now having to wrestle with them, the below critical provisions are significant to remember. Reverse mortgages can only be made by the North Carolina Housing Finance Agency or a bank, savings institution, or credit union (or subsidiary thereof) pursuant to N.C. Gen. Stat. § 53-258; and they must register with the Commissioner of Banks. The list of approved agencies is on-line at: <http://www.nccob.org/NCCOB/Mortgage/ReverseMortgage/>

In order to initiate a foreclosure, 90 days’ notice is required under N.C. Gen. Stat. § 53-268. Special calculation of the payments, fees, and payoffs are governed under N.C. Gen. Stat. § 53-262--including total of all disbursements, a recalculation fee for a change in payment options, advances (taxes, assessments, insurance) not reimbursed, deferred closing costs, and accrued interest--reduced by payments by the borrower, but *no penalty for prepayment*. In addition, the borrower’s liability is very limited under N.C. Gen. Stat. § 53-263 (see “Anti-Deficiency – Special Case: Reverse Mortgage” at Item #19 below). Shared appreciation or shared value provisions are allowed under N.C. Gen. Stat. § 53-270.1, but only with very limited caps and any payoff may trigger the right to an appraisal to validate these amounts.

Even the events triggering defaults are limited under N.C. Gen. Stat. § 53-267 to one or more of the following:

- (1) The borrower fails to maintain the residence as required by the contract.
- (2) The borrower sells or otherwise conveys title to the home to a third party.
- (3) The borrower dies and the home is not the principal residence of the surviving borrower.
- (4) The home is not the principal residence of at least one of the borrowers for a period of 12 consecutive months for reasons of physical or mental illness.
- (5) For reasons other than physical or mental illness, the home ceases to be the principal residence of the borrower for a period of 180 consecutive days and is not the principal residence of another borrower under the loan, without prior written permission from the lender.
- (6) The borrower fails to pay property taxes, insurance premiums, and assessments under G.S. 53-261.

#### **4. 30-Day Letter**

Effective April 1, 2008, pursuant to 2007 N.C. Sess. Laws 351, 2007 N.C. HB 1374, the detailed 30-day notice and written statement of balance under N.C. Gen. Stat. § 45-21.16(c)(5a) has been expanded to include *all* fees and expenses.

#### **5. 45-Day Letter -- N.C. Gen. Stat. §§ 53-244.111(22), 45-91 and 45-101 et seq.**

Effective July 31, 2009, replacing substantially similar predecessor N.C. Gen. Stat. § 53-243.11(n), and effective for foreclosure proceedings filed on or after January 1, 2009, and before July 31, 2009), N.C. Gen. Stat. § 53-244.111(22) provides as follows:

##### **N.C. Gen. Stat. § 53-244.111. Prohibited acts.**

In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any residential mortgage loan transaction:

- (22) For a person acting as a mortgage servicer to fail to mail, at least 45 days before foreclosure is initiated, a notice addressed to the borrower at the borrower's last known address with the following information:
  - a. An itemization of all past due amounts causing the loan to be in default.
  - b. An itemization of any other charges that must be paid in order to bring the loan current.
  - c. A statement that the borrower may have options available other than foreclosure and that the borrower may discuss the options with the mortgage lender, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development (HUD).
  - d. The address, telephone number, and other contact information for the mortgage lender, the mortgage servicer, or the agent for either of them who is authorized to attempt to work with the borrower to avoid foreclosure.
  - e. The name, address, telephone number, and other contact information for one or more HUD-approved counseling agencies operating to assist borrowers in North Carolina to avoid foreclosure.

- f. The address, telephone number, and other contact information for the consumer complaint section of the Office of the Commissioner of Banks.

In addition, effective November 1, 2008, and expiring October 31, 2010 (unless later extended by the NC Legislature), for foreclosure of a subprime loan originated between January 1, 2005, and December 31, 2007, on the primary residence of a borrower, a 45-day notice prior to foreclosure must be provided to the borrower pursuant to N.C. Gen. Stat. § 45-102, as follows:

[A> AT LEAST 45 DAYS PRIOR TO THE FILING OF A NOTICE OF HEARING IN A FORECLOSURE PROCEEDING ON A PRIMARY RESIDENCE, MORTGAGE SERVICERS OF SUBPRIME LOANS SHALL SEND WRITTEN NOTICE BY MAIL TO THE LAST KNOWN ADDRESS OF THE BORROWER TO INFORM THE BORROWER OF THE AVAILABILITY OF RESOURCES TO AVOID FORECLOSURE, INCLUDING: <A]

[A> (1) AN ITEMIZATION OF ALL PAST DUE AMOUNTS CAUSING THE LOAN TO BE IN DEFAULT. <A]

[A> (2) AN ITEMIZATION OF ANY OTHER CHARGES THAT MUST BE PAID IN ORDER TO BRING THE LOAN CURRENT. <A]

[A> (3) A STATEMENT THAT THE BORROWER MAY HAVE OPTIONS AVAILABLE OTHER THAN FORECLOSURE AND THAT THE BORROWER MAY DISCUSS AVAILABLE OPTIONS WITH THE MORTGAGE LENDER, THE MORTGAGE SERVICER, OR A COUNSELOR APPROVED BY THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. <A]

[A> (4) THE ADDRESS, TELEPHONE NUMBER, AND OTHER CONTACT INFORMATION FOR THE MORTGAGE LENDER, THE MORTGAGE SERVICER, OR THE AGENT FOR EITHER OF THEM WHO IS AUTHORIZED TO ATTEMPT TO WORK WITH THE BORROWER TO AVOID FORECLOSURE. <A]

[A> (5) THE NAME, ADDRESS, TELEPHONE NUMBER, AND OTHER CONTACT INFORMATION FOR ONE OR MORE HUD-APPROVED COUNSELING AGENCIES OPERATING TO ASSIST BORROWERS IN NORTH CAROLINA TO AVOID FORECLOSURE. <A]

[A> (6) THE ADDRESS, TELEPHONE NUMBER, AND OTHER CONTACT INFORMATION FOR THE CONSUMER COMPLAINT SECTION OF THE OFFICE OF COMMISSIONER OF BANKS. <A]

Additional information must be filed by the mortgage servicer with the AOC and the State Home Foreclosure Prevention Project under the authority of the Commissioner of Banks under N.C. Gen. Stat. § 45-104. Most importantly, as a result of this submission, the Commissioner may extend or suspend foreclosure proceedings in a given case.

**6. Foreclosure Suspension by Commissioner of Banks – N.C. Gen. Stat. §§ 53-244.117, 45-94 & 45-21.16B, 45-106**

Pursuant to N.C. Gen. Stat. § 53-244.117, effective July 31, 2009, replacing substantially similar predecessor N.C. Gen. Stat. 53-243.12 effective for foreclosure proceedings filed on or after January 1, 2009 and before July 31, 2009, the Commissioner of Banks can, on its own action, suspend a foreclosure proceeding.

**N.C. Gen. Stat. § 53-244.117. Foreclosure suspension**

In the event the Commissioner shall have evidence that a material violation of law has occurred in the origination or servicing of a loan then being foreclosed or then delinquent and in threat of foreclosure, and that the putative violation would be sufficient in law or equity to base a claim or affirmative defense that would affect the validity or enforceability of the underlying contract or the right to foreclose, then the Commissioner may notify the clerk of superior court, and the clerk shall suspend foreclosure proceedings on the mortgage for 60 days from the date of the notice. In the event that the Commissioner notifies the clerk, the Commissioner shall also notify the servicer, if known, and provide an opportunity to cure the violation or provide information to the Commissioner to rebut the evidence of the suspected violation. If the violation is cured or the information satisfies the Commissioner that no material violation has occurred, the Commissioner shall notify the clerk so that the foreclosure proceeding may be resumed. The authority granted to the Commissioner in this section is in addition to any powers or authority granted to the Commissioner under Chapter 45 of the General Statutes.

Under N.C. Gen. Stat. § 45-21.16B, the Clerk must suspend the foreclosure proceeding for 60 days upon receiving the Commissioner's notice. If the Clerk's suspension order is entered prior to the hearing, then upon termination of suspension, the trustee must provide a new 10-day notice to proceed with the foreclosure. If the Clerk's suspension order is entered *after* the order to sell but before the upset bid period expires, then upon termination of the suspension, the trustee does not have to have to notice and appear at another hearing, but can simply go back to publication and sale.

In addition, pursuant to the State Home Foreclosure Prevention Project, effective November 1, 2008, and expiring on October 31, 2010 (unless later extended by the NC Legislature), for foreclosure of a subprime loan originated between January 1, 2005, and December 31, 2007, on the primary residence of a borrower:

[A> SECTION 45-105. EXTENSION OF FORECLOSURE PROCESS. <A]

[A> THE COMMISSIONER OF BANKS SHALL REVIEW INFORMATION PROVIDED IN THE DATABASE CREATED BY G.S. 45-103 TO DETERMINE WHICH SUBPRIME LOANS ARE APPROPRIATE FOR EFFORTS TO AVOID FORECLOSURE. IF THE COMMISSIONER REASONABLY BELIEVES, BASED ON A FULL REVIEW OF THE LOAN INFORMATION, THE MORTGAGE SERVICER'S LOSS MITIGATION EFFORTS, THE BORROWER'S CAPACITY AND INTEREST IN STAYING IN THE HOME, AND OTHER APPROPRIATE FACTORS, THAT FURTHER EFFORTS BY THE STATE HOME FORECLOSURE

PREVENTION PROJECT OFFER A REASONABLE PROSPECT TO AVOID FORECLOSURE ON PRIMARY RESIDENCES, THE COMMISSIONER SHALL HAVE THE AUTHORITY TO EXTEND ONE TIME UNDER THIS ARTICLE THE ALLOWABLE FILING DATE FOR ANY FORECLOSURE PROCEEDING ON A PRIMARY RESIDENCE BY UP TO 30 DAYS BEYOND THE EARLIEST FILING DATE ESTABLISHED BY THE PRE-FORECLOSURE NOTICE. IF THE COMMISSIONER MAKES THE DETERMINATION THAT A LOAN IS SUBJECT TO THIS SECTION, THE COMMISSIONER SHALL NOTIFY THE BORROWER, MORTGAGE SERVICER, AND THE ADMINISTRATIVE OFFICE OF THE COURTS. <A]

[A> SECTION 45-107. FORECLOSURE FILING. <A]

[A> (A) FOR THE DURATION OF THE PROGRAM AUTHORIZED BY THIS ARTICLE, FORECLOSURE NOTICES FILED ON SUBPRIME LOANS ON OR AFTER NOVEMBER 15, 2008, SHALL CONTAIN A CERTIFICATION BY THE FILING PARTY THAT THE PRE-FORECLOSURE NOTICE REQUIRED BY G.S. 45-102 AND THE PRE-FORECLOSURE INFORMATION REQUIRED BY G.S. 45-103 WERE PROVIDED IN ACCORDANCE WITH THIS ARTICLE AND THAT THE PERIODS OF TIME ESTABLISHED BY THE ARTICLE HAVE ELAPSED. <A]

[A> (B) THE CLERK OF SUPERIOR COURT OR OTHER JUDICIAL OFFICER MAY HAVE ACCESS TO THE PRE-FORECLOSURE DATABASE TO CONFIRM INFORMATION PROVIDED IN SUBSECTION (A) OF THIS SECTION. A MATERIALLY INACCURATE STATEMENT IN THE CERTIFICATION SHALL BE CAUSE FOR DISMISSAL WITHOUT PREJUDICE OF ANY FORECLOSURE PROCEEDING ON A PRIMARY RESIDENCE INITIATED BY THE MORTGAGE SERVICER AND FOR PAYMENT BY THE FILING PARTY OF COSTS INCURRED BY THE BORROWER IN DEFENDING THE FORECLOSURE PROCEEDING. <A]

**7. Notice of Hearing & Initiation of Foreclosure – N.C. Gen. Stat. §§ 45-21.16, 45-107 et seq.**

In addition, pursuant to the State Home Foreclosure Prevention Project, effective November 1, 2008, and expiring on October 31, 2010 (unless later extended by the NC Legislature), for foreclosure of a subprime loan originated between January 1, 2005 and December 31, 2007, on the primary residence of a borrower, and during the pendency of this Project, the requirements for the Notice of Hearing to be filed under N.C. Gen. Stat. § 45-21.16 must include the following:

[A> (C2) IN ANY FORECLOSURE FILED ON OR AFTER NOVEMBER 15, 2008, WHERE THE UNDERLYING MORTGAGE DEBT IS A SUBPRIME LOAN AS DEFINED IN G.S. 45-101(4), THE NOTICE REQUIRED BY SUBSECTION (B) OF THIS SECTION SHALL CONTAIN A CERTIFICATION BY THE FILING PARTY THAT THE PRE-FORECLOSURE NOTICE AND INFORMATION REQUIRED BY G.S. 45-102 AND G.S. 45-103 WERE PROVIDED IN ALL MATERIAL RESPECTS AND THAT THE PERIODS OF TIME ESTABLISHED BY ARTICLE 11 OF THIS CHAPTER HAVE ELAPSED. <A]

The above is a 5<sup>th</sup> finding of fact required of the Clerk under N.C. Gen. Stat. § 45-21.16(d), i.e. the Clerk must enter a finding that (V) THAT THE UNDERLYING MORTGAGE DEBT IS NOT A SUBPRIME LOAN AS DEFINED IN G.S. 45-101(4), OR IF THE LOAN IS A SUBPRIME LOAN

UNDER G.S. 45-101(4), THAT THE PRE-FORECLOSURE NOTICE UNDER G.S. 45-102 WAS PROVIDED IN ALL MATERIAL RESPECTS, AND THAT THE PERIODS OF TIME ESTABLISHED BY ARTICLE 11 OF THIS CHAPTER HAVE ELAPSED.

Effective April 1, 2008, 2007 N.C. Sess. Laws 351, 2007 N.C. HB 1374, added the following requirements to the notice of hearing provisions of N.C. Gen. Stat. § 45-21.16, (conforming to the detailed 30-day notice and written statement of balance under N.C. Gen. Stat. § 45-21.16(c)(5a)) to include *all* fees and expenses. Under subsection (5b), the holder (or servicer acting on the holder's behalf) must verify in the notice of hearing that they have complied with all requests for information from the borrower pursuant to N.C. Gen. Stat. § 45-93 (discussed under Item #17 hereafter). And under subsection (7), the following additional notices to the debtor are required:

[A] A. A STATEMENT THAT IF THE DEBTOR DOES NOT INTEND TO CONTEST THE CREDITOR'S ALLEGATIONS OF DEFAULT, THE DEBTOR DOES NOT HAVE TO APPEAR AT THE HEARING AND THAT THE DEBTOR'S FAILURE TO ATTEND THE HEARING WILL NOT AFFECT THE DEBTOR'S RIGHT TO PAY THE INDEBTEDNESS AND THEREBY PREVENT THE PROPOSED SALE, OR TO ATTEND THE ACTUAL SALE, SHOULD THE DEBTOR ELECT TO DO SO. <A]

[A] B. A STATEMENT THAT THE TRUSTEE, OR SUBSTITUTE TRUSTEE, IS A NEUTRAL PARTY AND, WHILE HOLDING THAT POSITION IN THE FORECLOSURE PROCEEDING, MAY NOT ADVOCATE FOR THE SECURED CREDITOR OR FOR THE DEBTOR IN THE FORECLOSURE PROCEEDING. <A]

[A] C. A STATEMENT THAT THE DEBTOR HAS THE RIGHT TO APPLY TO A JUDGE OF THE SUPERIOR COURT PURSUANT TO G.S. 45-21.34 TO ENJOIN THE SALE, UPON ANY LEGAL OR EQUITABLE GROUND THAT THE COURT MAY DEEM SUFFICIENT PRIOR TO THE TIME THAT THE RIGHTS OF THE PARTIES TO THE SALE OR RESALE BECOME FIXED, PROVIDED THAT THE DEBTOR COMPLIES WITH THE REQUIREMENTS OF G.S. 45-21.34. <A]

[A] D. A STATEMENT THAT THE DEBTOR HAS THE RIGHT TO APPEAR AT THE HEARING AND CONTEST THE EVIDENCE THAT THE CLERK IS TO CONSIDER UNDER G.S. 45-21.16(D), AND THAT TO AUTHORIZE THE FORECLOSURE THE CLERK MUST FIND THE EXISTENCE OF: (I) VALID DEBT OF WHICH THE PARTY SEEKING TO FORECLOSE IS THE HOLDER, (II) DEFAULT, (III) RIGHT TO FORECLOSE UNDER THE INSTRUMENT, AND (IV) NOTICE TO THOSE ENTITLED TO NOTICE. <A]

[A] E. A STATEMENT THAT IF THE DEBTOR FAILS TO APPEAR AT THE HEARING, THE TRUSTEE WILL ASK THE CLERK FOR AN ORDER TO SELL THE REAL PROPERTY BEING FORECLOSED. <A]

[A] F. A STATEMENT THAT THE DEBTOR HAS THE RIGHT TO SEEK THE ADVICE OF AN ATTORNEY AND THAT FREE LEGAL SERVICES MAY BE AVAILABLE TO THE DEBTOR BY CONTACTING LEGAL AID OF NORTH CAROLINA OR OTHER LEGAL SERVICES ORGANIZATIONS. <A]

The Consumer Economic Protection Act of 2009 (S974), became effective for foreclosures, debt collection activities undertaken, and actions filed on or after October 1, 2009. This act requires postponement by the Clerk of proceedings on owner-occupied residential foreclosures if there is a “reasonable likelihood” of resolution based on additional findings required at the hearing (amending N.C. Gen. Stat. § 45-21.16 and adding new § 45-21.16C, discussed below), and modified bonds on appeal (N.C. Gen. Stat. § 45-21.16(d1)).

### **8. Proof of Holdership**

Proof of holdership is hotly contested issue, such as in the MERS cases across the nation. Another example is the recent case of US Bank v Ibanez, Massachusetts Land Court Case #08 MISC 384283 & 386755, in which the court denied US Bank’s ability to foreclosure because they could not produce the original note or satisfactory evidence of holdership (Oct.14.2009)

### **9. Due Diligence**

Due diligence of the foreclosure trustee in locating and serving the borrowers and owners is also a continuing hot issue in foreclosure defense. N.C. Gen. Stat. § 45-21.16(a).

### **10. Opportunity for Parties to Resolve the Delinquency – Hearing, Affidavit and/or Continuance**

For foreclosure actions filed on or after October 1, 2009, the Consumer Economic Protection Act of 2009 (S974), added N.C. Gen. Stat. § 45-21.16C, as follows:

[A> SECTION 45-21.16C. OPPORTUNITY FOR PARTIES TO RESOLVE FORECLOSURE OF OWNER-OCCUPIED RESIDENTIAL PROPERTY. <A]

[A> (A) AT THE COMMENCEMENT OF THE HEARING, THE CLERK SHALL INQUIRE AS TO WHETHER THE DEBTOR OCCUPIES THE REAL PROPERTY AT ISSUE AS HIS OR HER PRINCIPAL RESIDENCE. IF IT APPEARS THAT THE DEBTOR DOES CURRENTLY OCCUPY THE PROPERTY AS A PRINCIPAL RESIDENCE, THE CLERK SHALL FURTHER INQUIRE AS TO THE EFFORTS THE MORTGAGEE, TRUSTEE, OR LOAN SERVICER HAS MADE TO COMMUNICATE WITH THE DEBTOR AND TO ATTEMPT TO RESOLVE THE MATTER VOLUNTARILY BEFORE THE FORECLOSURE PROCEEDING. THE CLERK'S INQUIRY SHALL NOT BE REQUIRED IF THE MORTGAGEE OR TRUSTEE HAS SUBMITTED, AT OR BEFORE THE HEARING, AN AFFIDAVIT BRIEFLY DESCRIBING ANY EFFORTS THAT HAVE BEEN MADE TO RESOLVE THE DEFAULT WITH THE DEBTOR AND THE RESULTS OF ANY SUCH EFFORTS. <A]

[A> (B) THE CLERK SHALL ORDER THE HEARING CONTINUED IF THE CLERK FINDS THAT THERE IS GOOD CAUSE TO BELIEVE THAT ADDITIONAL TIME OR ADDITIONAL MEASURES HAVE A REASONABLE LIKELIHOOD OF RESOLVING THE DELINQUENCY WITHOUT FORECLOSURE. IN DETERMINING WHETHER TO CONTINUE THE HEARING, THE CLERK MAY CONSIDER (I) WHETHER THE MORTGAGEE, TRUSTEE, OR LOAN SERVICER HAS OFFERED THE DEBTOR AN OPPORTUNITY TO RESOLVE THE FORECLOSURE THROUGH FORBEARANCE, LOAN MODIFICATION, OR OTHER COMMONLY ACCEPTED RESOLUTION PLAN APPROPRIATE UNDER THE CIRCUMSTANCES, (II) WHETHER THE MORTGAGEE, TRUSTEE, OR LOAN SERVICER



HAS ENGAGED IN ACTUAL RESPONSIVE COMMUNICATION WITH THE DEBTOR, INCLUDING TELEPHONE CONFERENCES OR IN-PERSON MEETINGS WITH THE DEBTOR OR OTHER ACTUAL TWO-PARTY COMMUNICATIONS, (III) WHETHER THE DEBTOR HAS INDICATED THAT HE OR SHE HAS THE INTENT AND ABILITY TO RESOLVE THE DELINQUENCY BY MAKING FUTURE PAYMENTS UNDER A FORECLOSURE RESOLUTION PLAN, AND (IV) WHETHER THE INITIATION OR CONTINUANCE OF GOOD FAITH VOLUNTARY RESOLUTION EFFORTS BETWEEN THE PARTIES MAY RESOLVE THE MATTER WITHOUT A FORECLOSURE SALE. WHERE GOOD CAUSE EXISTS TO CONTINUE THE HEARING, THE CLERK SHALL ORDER THE HEARING CONTINUED TO A DATE AND TIME CERTAIN NOT MORE THAN 60 DAYS FROM THE DATE SCHEDULED FOR THE ORIGINAL HEARING. NOTHING IN THIS PART SHALL LIMIT THE AUTHORITY OF THE CLERK TO CONTINUE A HEARING FOR OTHER GOOD CAUSE SHOWN. <A]

### **11. Deed in Lieu During Pending Foreclosure**

An attempted deed in lieu during a pending foreclosure proceeding, not actually delivered to or accepted by the lender, was not effective to forestall the foreclosure. *Mosler v. Druid Hills*, 681 S.E.2d 456; 2009 N.C. App. LEXIS 1370 (2009). The decision was ultimately decided on the procedural basis of failing to comply with N.C. Gen. Stat. § 45-21.34 procedure to appeal on equitable grounds (the merger of title). However, the foreclosure was allowed to proceed, which was also consistent with the trial court's original finding that there was no merger of title because no delivery and acceptance of the attempted deed in lieu.

### **12. Notice of Sale – N.C. Gen. Stat. §§ 45-21.17 & 45-21.16A**

In 2007, the North Carolina Legislature through S.L. 2007-353 had already addressed and mandated the need for additional notices to tenants in possession of property in foreclosure, depending on the rental size, as set forth below. These provisions are applicable to foreclosure proceedings initiated on or after October 1, 2007, and apply to residential rental agreements entered into or renewed on or after that date. N.C. Gen. Stat. § 45-21.16A(b) now includes the following additional requirements in the contents of a notice of sale:

[A> (B) IN ADDITION TO THE REQUIREMENTS CONTAINED IN SUBSECTION (A) OF THIS SECTION, THE NOTICE OF SALE OF RESIDENTIAL REAL PROPERTY WITH LESS THAN 15 RENTAL UNITS SHALL ALSO STATE ALL OF THE FOLLOWING: <A]

[A> (1) THAT AN ORDER FOR POSSESSION OF THE PROPERTY MAY BE ISSUED PURSUANT TO G.S. 45-21.29 IN FAVOR OF THE PURCHASER AND AGAINST THE PARTY OR PARTIES IN POSSESSION BY THE CLERK OF SUPERIOR COURT OF THE COUNTY IN WHICH THE PROPERTY IS SOLD. <A]

[A> (2) ANY PERSON WHO OCCUPIES THE PROPERTY PURSUANT TO A RENTAL AGREEMENT ENTERED INTO OR RENEWED ON OR AFTER OCTOBER 1, 2007, MAY, AFTER RECEIVING THE NOTICE OF SALE, TERMINATE THE RENTAL AGREEMENT UPON 10 DAYS' WRITTEN NOTICE TO THE LANDLORD. THE NOTICE SHALL ALSO STATE THAT UPON TERMINATION OF A RENTAL AGREEMENT, THE TENANT IS LIABLE FOR RENT DUE UNDER THE RENTAL AGREEMENT PRORATED TO THE EFFECTIVE DATE OF THE TERMINATION. <A]

N.C. Gen. Stat. § 45-21.17(4) was revised to include the additional service requirement:

[A] IF THE PROPERTY IS RESIDENTIAL AND CONTAINS LESS THAN 15 RENTAL UNITS, THE NOTICE OF SALE SHALL ALSO BE MAILED TO ANY PERSON WHO OCCUPIES THE PROPERTY PURSUANT TO A RESIDENTIAL RENTAL AGREEMENT BY NAME, IF KNOWN, AT THE ADDRESS OF THE PROPERTY TO BE SOLD. IF THE NAME OF THE PERSON WHO OCCUPIES THE PROPERTY IS NOT KNOWN, THE NOTICE SHALL BE SENT TO "OCCUPANT" AT THE ADDRESS OF THE PROPERTY TO BE SOLD. <A]

In addition, a new section was added to Article 5 of Chapter 42 of the N.C. General Statutes as follows:

[A] SECTION 42-45.2 EARLY TERMINATION OF RENTAL AGREEMENT BY MILITARY AND TENANTS RESIDING IN CERTAIN FORECLOSED PROPERTY. <A]

[A] ANY TENANT WHO RESIDES IN RESIDENTIAL REAL PROPERTY CONTAINING LESS THAN 15 RENTAL UNITS THAT IS BEING SOLD IN A FORECLOSURE PROCEEDING UNDER ARTICLE 2A OF CHAPTER 45 OF THE GENERAL STATUTES MAY TERMINATE THE RENTAL AGREEMENT FOR THE DWELLING UNIT AFTER RECEIVING NOTICE PURSUANT TO G.S. 45-21.17(4) BY PROVIDING THE LANDLORD WITH A WRITTEN NOTICE OF TERMINATION TO BE EFFECTIVE ON A DATE STATED IN THE NOTICE THAT IS AT LEAST 10 DAYS AFTER THE DATE OF THE NOTICE OF SALE. UPON TERMINATION OF A RENTAL AGREEMENT UNDER THIS SECTION, THE TENANT IS LIABLE FOR THE RENT DUE UNDER THE RENTAL AGREEMENT PRORATED TO THE EFFECTIVE DATE OF THE TERMINATION PAYABLE AT THE TIME THAT WOULD HAVE BEEN REQUIRED BY THE TERMS OF THE RENTAL AGREEMENT. THE TENANT IS NOT LIABLE FOR ANY OTHER RENT OR DAMAGES DUE ONLY TO THE EARLY TERMINATION OF THE TENANCY. <A]

### **13. Orders of Possession – N.C. Gen. Stat. 45-21.19**

Effective for foreclosure proceedings initiated on or after October 1, 2007, the provisions of N.C. Gen. Stat. § 45-21.29, Orders of Possession, were amended to coincide with the above changes regarding notice to residential rental tenants and the possibility of termination of their leases, changing the requirement of N.C. Gen. Stat. § 45-21.29(k)(5) to require: “(5) Ten days' notice has been given to the party or parties who remain in possession at the time application is made, [D] and <D] [A] OR, IN THE CASE OF RESIDENTIAL PROPERTY CONTAINING 15 OR MORE RENTAL UNITS, 30 DAYS' NOTICE HAS BEEN GIVEN TO THE PARTY OR PARTIES WHO REMAIN IN POSSESSION AT THE TIME THE APPLICATION IS MADE. <A]”

See also Rights of Tenants (Item #14 below) and the requirements of the notice of sale to tenants under Item #12 above.

### **14. Tenants in possession**

In addition to the provisions of N.C. Gen. Stat. §§ 45-21.16A(b), 45-21.17(4) 45-21.29(k)(5) and 42-45.2 discussed above, the federal “Protecting Tenants At Foreclosure Act of 2009,” signed and effective May 20, 2009 (Public Law 111-22, Title VII), provides that for rental

properties foreclosed on or after May 20, 2009, but before December 31, 2012 (sunset if not extended by Congress), a “bona fide” tenant shall receive at least 90 days notice before they may be evicted. Bona fide tenants are defined as those having no relationship to the landlord. The Act is not intended to override state or municipal law which provides for longer notice periods. Specifically the act provides, in relevant part:

Sec. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

- (a) In General.--In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to—
- (1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and
  - (2) the rights of any bona fide tenant, as of the date of such notice of foreclosure—
    - (A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or
    - (B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1), except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.
- (b) Bona Fide Lease or Tenancy.--For purposes of this section, a lease or tenancy shall be considered bona fide only if—
- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;
  - (2) the lease or tenancy was the result of an arms-length transaction; and
  - (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.
- (c) Definition.--For purposes of this section, the term "federally-related mortgage loan" has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 ([12 U.S.C. 2602](#)).

Additional provisions regarding tenants in Section 8 housing are provided in the Act.

### **15. Surplus Proceeds**

Actions for surplus proceeds are based on lien priority of the claimant; thus, a former subordinate mortgage holder which had erroneously satisfied its deed of trust, and only entered a reinstatement *after* expiration of the upset bid of the prior foreclosed lien, had no lien at the time the rights vested and was not entitled to share in surplus proceeds. Branch Banking & Trust Co. v. Shiphof (In re Shiphof), 192 N.C. App. 696, 666 S.E.2d 497 (2008). The continued dilemma of bifurcated priority under Dalton Moran Shook Inc. v. Pitt Dev. Co.,

113 N.C. App. 707 , 440 S.E. 2d 585 (1993), and the necessity for lien claimants to file the action for surplus proceeds (West Durham Lumber Co. v. Meadows, 179 N.C. App. 347, 635 S.E. 2d 301 (2006)) and, therefore, the difficulty of lenders anticipating credit bids continues to recur.

## **16. Bankruptcy**

Deficient credit bid was found to be a preference under 11 U.S.C. § 547(b), *In re Villarreal*, 413 B.R. 633 (Bankr. S.D. Tex. 2009; *as compared to BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), 11 U.S.C. § 548, in which the court presumed a pre-petition public foreclosure sale would bring the same price as a Chapter 7 liquidation sale, so it was not a fraudulent conveyance.

## **17. Other Proceedings**

The Mortgage Debt Collection and Servicing Act, Article 10 of Chapter 45, was adopted as 2007 N.C. Sess. Laws 351, 2007 N.C. HB 1374. The Act mandates notice of fees, handling of escrow accounts, transfers of servicing and requires detailed statements of accounting upon request by the borrower, including principal, interest, charges, fees, copy of the note and current holder, N.C. Gen. Stat. § 45-93. As noted earlier, the notice of hearing must specifically address that all such requests for information have been honored (or action to be taken if not done) and the Clerk must specifically address this issue at the hearing under N.C. Gen. Stat. § 45-21.16 (discussed above). In addition, with regard to foreclosures specifically, effective April 1, 2008, N.C. Gen. Stat. § 45-89, Remedies, provides as follows:

[A> IN ADDITION TO ANY EQUITABLE REMEDIES AND ANY OTHER REMEDIES AT LAW, ANY BORROWER INJURED BY ANY VIOLATION OF THIS ARTICLE MAY BRING AN ACTION FOR RECOVERY OF ACTUAL DAMAGES, INCLUDING REASONABLE ATTORNEYS' FEES. THE COMMISSIONER OF BANKS, THE ATTORNEY GENERAL, OR ANY PARTY TO A HOME LOAN MAY ENFORCE THE PROVISIONS OF THIS SECTION. WITH THE EXCEPTION OF AN ACTION BY THE COMMISSIONER OF BANKS OR THE ATTORNEY GENERAL, AT LEAST 30 DAYS BEFORE A BORROWER OR A BORROWER'S REPRESENTATIVE INSTITUTES A CIVIL ACTION FOR DAMAGES AGAINST A SERVICER FOR A VIOLATION OF THIS ARTICLE, THE BORROWER OR A BORROWER'S REPRESENTATIVE SHALL NOTIFY THE SERVICER IN WRITING OF ANY CLAIMED ERRORS OR DISPUTES REGARDING THE BORROWER'S HOME LOAN THAT FORMS THE BASIS OF THE CIVIL ACTION. THE NOTICE MUST BE SENT TO THE ADDRESS AS DESIGNATED ON ANY OF THE SERVICER'S BILLS, STATEMENTS, INVOICES, OR OTHER WRITTEN COMMUNICATION, AND MUST ENABLE THE SERVICER TO IDENTIFY THE NAME AND LOAN ACCOUNT OF THE BORROWER. FOR PURPOSES OF THIS SECTION, NOTICE SHALL NOT INCLUDE A COMPLAINT OR SUMMONS. NOTHING IN THIS SECTION SHALL LIMIT THE RIGHTS OF A BORROWER TO ENJOIN A CIVIL ACTION, OR MAKE A COUNTERCLAIM, CROSS-CLAIM, OR PLEAD A DEFENSE IN A CIVIL ACTION. A SERVICER WILL NOT BE IN VIOLATION OF THIS ARTICLE IF THE SERVICER SHOWS BY A PREPONDERANCE OF EVIDENCE THAT: <A]

[A> (1) THE VIOLATION WAS NOT INTENTIONAL OR THE RESULT OF BAD FAITH;  
AND <A]

[A> (2) WITHIN 30 DAYS AFTER DISCOVERING OR BEING NOTIFIED OF AN ERROR, AND PRIOR TO THE INSTITUTION OF ANY LEGAL ACTION BY THE BORROWER AGAINST THE SERVICER UNDER THIS SECTION, THE SERVICER CORRECTED THE ERROR AND COMPENSATED THE BORROWER FOR ANY FEES OR CHARGES INCURRED BY THE BORROWER AS A RESULT OF THE VIOLATION. <A]

**18. Anti-deficiency on some nontraditional and rate spread home loans (N.C. Gen. Stat. § 45-21.38A) and Reverse Mortgages (N.C. Gen. Stat. § 53-268)**

The 2009 Legislature added the following new anti-deficiency provision regarding only those limited nontraditional mortgage loans and rate spread home loans, as defined therein, effective October 1, 2009, and applicable to actions filed on or after that date.

[A> SECTION 45-21.38A. DEFICIENCY JUDGMENTS ABOLISHED WHERE MORTGAGE SECURED BY PRIMARY RESIDENCE. <A]

[A> (A) AS USED IN THIS SECTION, THE TERM "NONTRADITIONAL MORTGAGE LOAN" MEANS A LOAN IN WHICH ALL OF THE FOLLOWING APPLY: <A]

[A> (1) THE BORROWER IS A NATURAL PERSON. <A]

[A> (2) THE DEBT IS INCURRED BY THE BORROWER PRIMARILY FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES. <A]

[A> (3) THE PRINCIPAL AMOUNT OF THE LOAN DOES NOT EXCEED THE CONFORMING LOAN SIZE FOR A SINGLE FAMILY DWELLING AS ESTABLISHED FROM TIME TO TIME BY FANNIE MAE. <A]

[A> (4) THE LOAN IS SECURED BY: (I) A SECURITY INTEREST IN A MANUFACTURED HOME, AS DEFINED IN G.S. 143-145, IN THE STATE THAT IS OR WILL BE OCCUPIED BY THE BORROWER AS THE BORROWER'S PRINCIPAL DWELLING; (II) A MORTGAGE OR DEED OF TRUST ON REAL PROPERTY IN THE STATE UPON WHICH THERE IS LOCATED AN EXISTING STRUCTURE DESIGNED PRINCIPALLY FOR OCCUPANCY OF FROM ONE TO FOUR FAMILIES THAT IS OR WILL BE OCCUPIED BY THE BORROWER AS THE BORROWER'S PRINCIPAL DWELLING; OR (III) A MORTGAGE OR DEED OF TRUST ON REAL PROPERTY IN THE STATE UPON WHICH THERE IS TO BE CONSTRUCTED USING THE LOAN PROCEEDS A STRUCTURE OR STRUCTURES DESIGNED PRINCIPALLY FOR OCCUPANCY OF FROM ONE TO FOUR FAMILIES THAT, WHEN COMPLETED, WILL BE OCCUPIED BY THE BORROWER AS THE BORROWER'S PRINCIPAL DWELLING. <A]

[A> (5) THE TERMS OF THE LOAN: (I) PERMIT THE BORROWER AS A MATTER OF RIGHT TO DEFER PAYMENT OF PRINCIPAL OR INTEREST; AND (II) ALLOW OR PROVIDE FOR THE NEGATIVE AMORTIZATION OF THE LOAN BALANCE. <A]

[A> (B) EXCEPT AS PROVIDED IN SUBDIVISION (6) OF SUBSECTION (C) OF THIS SECTION, THIS SECTION APPLIES ONLY TO THE FOLLOWING LOANS: <A]

[A> (1) A LOAN ORIGINATED ON OR AFTER JANUARY 1, 2005, THAT WAS AT THE TIME THE LOAN WAS ORIGINATED A RATE SPREAD HOME LOAN AS DEFINED IN G.S. 24-1.1F. <A]

[A> (2) A LOAN SECURED BY THE BORROWER'S PRINCIPAL DWELLING, WHICH LOAN WAS MODIFIED AFTER JANUARY 1, 2005, AND BECAME AT THE TIME OF SUCH MODIFICATION AND AS A CONSEQUENCE OF SUCH MODIFICATION A RATE SPREAD HOME LOAN. <A]

[A> (3) A LOAN THAT WAS A NONTRADITIONAL MORTGAGE LOAN AT THE TIME THE LOAN WAS ORIGINATED. <A]

[A> (4) A LOAN SECURED BY THE BORROWER'S PRINCIPAL DWELLING, WHICH LOAN WAS MODIFIED AND BECAME AT THE TIME OF SUCH MODIFICATION AND AS A CONSEQUENCE OF SUCH MODIFICATION A NONTRADITIONAL MORTGAGE LOAN. <A]

[A> (C) THIS SECTION DOES NOT APPLY TO ANY OF THE FOLLOWING: <A]

[A> (1) A HOME EQUITY LINE OF CREDIT AS DEFINED IN G.S. 45-81(A). <A]

[A> (2) A CONSTRUCTION LOAN AS DEFINED IN G.S. 24-10(C). <A]

[A> (3) A REVERSE MORTGAGE AS DEFINED IN G.S. 53-257 THAT COMPLIES WITH THE PROVISIONS OF ARTICLE 21 OF CHAPTER 53 OF THE GENERAL STATUTES. <A]

[A> (4) A BRIDGE LOAN WITH A TERM OF 12 MONTHS OR LESS, SUCH AS A LOAN TO PURCHASE A NEW DWELLING WHERE THE BORROWER PLANS TO SELL HIS OR HER CURRENT DWELLING WITHIN 12 MONTHS. <A]

[A> (5) A LOAN MADE BY A NATURAL PERSON WHO MAKES NO MORE THAN ONE LOAN IN A 12-MONTH PERIOD AND IS NOT IN THE BUSINESS OF LENDING. <A]

[A> (6) A LOAN SECURED BY A SUBORDINATE LIEN ON THE BORROWER'S PRINCIPAL DWELLING, UNLESS THE LOAN WAS MADE CONTEMPORANEOUSLY WITH A RATE SPREAD HOME LOAN OR A NONTRADITIONAL MORTGAGE LOAN THAT IS SUBJECT TO THE PROVISIONS OF THIS SECTION. <A]

[A> (D) IN ADDITION TO ANY STATUTORY OR COMMON LAW PROHIBITION AGAINST DEFICIENCY JUDGMENTS, THE FOLLOWING SHALL APPLY TO THE FORECLOSURE OF MORTGAGES AND DEEDS OF TRUST THAT SECURE LOANS SUBJECT TO THIS SECTION: <A]

[A> (1) FOR MORTGAGES AND DEEDS OF TRUST RECORDED BEFORE JANUARY 1, 2010, THE HOLDER OF THE OBLIGATION SECURED BY THE FORECLOSED MORTGAGE OR DEED OF TRUST SHALL NOT BE ENTITLED TO ANY DEFICIENCY JUDGMENT AGAINST THE BORROWER FOR ANY BALANCE OWING ON SUCH OBLIGATION IF: (1) THE REAL PROPERTY ENCUMBERED BY THE LIEN OF THE MORTGAGE OR DEED OF TRUST BEING FORECLOSED WAS SOLD BY A

MORTGAGEE OR TRUSTEE UNDER A POWER OF SALE CONTAINED IN THE MORTGAGE OR DEED OF TRUST; AND (II) THE REAL PROPERTY SOLD WAS, AT THE TIME THE FORECLOSURE PROCEEDING WAS COMMENCED, OCCUPIED BY THE BORROWER AS THE BORROWER'S PRINCIPAL DWELLING. <A]

[A> (2) FOR MORTGAGES AND DEEDS OF TRUST RECORDED ON OR AFTER JANUARY 1, 2010, THE HOLDER OF THE OBLIGATION SECURED BY THE FORECLOSED MORTGAGE OR DEED OF TRUST SHALL NOT BE ENTITLED TO ANY DEFICIENCY JUDGMENT AGAINST THE BORROWER FOR ANY BALANCE OWING ON SUCH OBLIGATION IF: (I) THE REAL PROPERTY ENCUMBERED BY THE LIEN OF THE MORTGAGE OR DEED OF TRUST BEING FORECLOSED WAS SOLD AS A CONSEQUENCE OF A JUDICIAL PROCEEDING OR BY A MORTGAGEE OR TRUSTEE UNDER A POWER OF SALE CONTAINED IN THE MORTGAGE OR DEED OF TRUST; AND (II) THE REAL PROPERTY SOLD WAS, AT THE TIME THE JUDICIAL OR FORECLOSURE PROCEEDING WAS COMMENCED, OCCUPIED BY THE BORROWER AS THE BORROWER'S PRINCIPAL DWELLING. <A]

[A> (E) THE COURT MAY, IN ITS DISCRETION, AWARD TO THE BORROWER THE REASONABLE ATTORNEYS' FEES ACTUALLY INCURRED BY THE BORROWER IN THE DEFENSE OF AN ACTION FOR DEFICIENCY IF: (I) THE BORROWER PREVAILS IN AN ACTION BROUGHT BY THE HOLDER OF THE OBLIGATION SECURED BY THE FORECLOSED MORTGAGE OR DEED OF TRUST TO RECOVER A DEFICIENCY JUDGMENT FOLLOWING THE FORECLOSURE OF A LOAN TO WHICH THIS SECTION APPLIES; AND (II) THE COURT RULES THAT THE HOLDER OF THE OBLIGATION SECURED BY THE FORECLOSED MORTGAGE OR DEED OF TRUST IS NOT ENTITLED TO A DEFICIENCY JUDGMENT UNDER THE PROVISIONS OF THIS SECTION. THE AMOUNT OF ATTORNEYS' FEES TO BE AWARDED SHALL BE DETERMINED WITHOUT REGARD TO THE PROVISIONS OF THE LOAN DOCUMENTS, THE PROVISIONS OF G.S. 6-21.2, OR ANY STATUTORY PRESUMPTION AS TO THE AMOUNT OF SUCH ATTORNEYS' FEES. <A]

### **19. Anti-Deficiency – Special Case: Reverse Mortgage**

(See discussion of foreclosure special provisions at Item #3 above.)

Reverse mortgages are classic “anti-deficiency” by their nature. This is critical to address, especially in the event the elderly borrower moves to a nursing home or at the death of the borrower(s) when the heirs and devisees are making decisions about how to handle the deceased parent’s residence. The debt is matured and the heirs and devisees may not want to undertake a new personal liability which is not subject to the anti-deficiency cap, given falling property values in recent economic conditions. Bottom line: *A refinance should not be an automatic assumption.* N.C. Gen. Stat. § 53-263. Limits on borrowers' liability, provides as follows:

- (a) When a reverse mortgage loan becomes due, if the borrower mortgaged one hundred percent (100%) of the full value of the house then the amount owed by the borrower shall not be greater than (i) the fair market value of the house, minus sale costs, or (ii) the outstanding balance of the loan, whichever amount is less.

- (b) If the borrower mortgaged less than one hundred percent (100%) of the full value of the house, the amount owed by the borrower shall not be greater than (i) the outstanding balance of the loan, or (ii) the percentage of the fair market value, minus sale costs, as provided in the contract, whichever amount is less.
- (c) The lender shall enforce the debt only through the sale of the property and shall not obtain a deficiency judgment against the borrower.

**20. Borrower (or affiliate) purchasing at foreclosure of senior lien; junior liens not extinguished**

See the cases of Dixieland Realty Co. v. Wysor, 272 N.C. 172, 158 S.E. 2d 7 (1967), citing and reaffirming Jones v. Kingsey, 55 N.C. 463 (1856), To the effect:

Where the owner of mortgaged premises, who has given a junior mortgage thereon, purchases the property upon a sale under a senior mortgage, the rule is that his purchase will not defeat the junior mortgage but will operate for the benefit of it in the same way as a discharge or transfer of the mortgage to himself would have done.

**21. FHA “anti-flipping” seasoning requirement – temporary waiver**

FHA issued an announcement on January 15, 2010, “HUD TAKES ACTION TO SPEED RESALE OF FORECLOSED PROPERTIES TO NEW OWNERS -- *Measure to help bring stability to home values and accelerate sale of vacant properties,*” on-line at: [http://portal.hud.gov/portal/page/portal/HUD/press/press\\_releases\\_media\\_advisories/2010/HUD\\_No.10-011](http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUD_No.10-011) . FHA, implementing the Obama administration’s Neighborhood Stabilization Program, desires to encourage the purchase, renovation and sale of distressed properties and to allow potential FHA purchasers to participate in the purchases. So, effective beginning February 1, 2010, and for a year thereafter, FHA will waive the former requirement that a seller have held the property for at least 90 days (with a few exceptions) in order for a buyer to qualify for an FHA loan, under 24 C.F.R. § 203.37a(b)(2), under certain conditions. The existing exceptions still apply. But the waiver will apply to other situations so long as, among other things:

- a. Arms length contract with the proposed purchaser, with no identity of interest between the parties;
- b. The seller holds title and is either an individual or an established legitimately formed and operated LLC, corporation or trust;
- c. The property’s history within a 12-month timeframe does not reveal any previous flipping activity;
- d. The property was marketed openly through MLS, auction, FSBO, and
- e. If the proposed price exceeds the seller’s acquisition price by 20% or more, it is
  - 1. justified by second appraisal evaluating legitimate renovations and repairs by seller or other sufficient explanation
  - 2. substantiated by independent detailed inspection (not just of the repairs and renovations, but the entire structure)



A more detailed listing of the various exemptions and their implementation dates beginning with the original regulation, and changes in 2006, 2008, 2009 and now 2010, is available on-line at: <http://www.hud.gov/offices/hsg/sfh/waivpropflip2010.pdf>

## **22. Fannie Mae anti-flipping “seasoning” requirement**

Investor-purchasers of REO property from Fannie Mae foreclosures and deeds in lieu are starting to see the following provision in their contracts (via addendum) and their deeds:

*"Grantee herein shall be prohibited from conveying captioned property to a bona fide purchaser for value for a sale prices of greater than (\$\_\_\_\_\_ = 120% of sales price) for a period of one hundred [sic] and eighty (180) days from the date of this deed. Grantee shall also be prohibited from encumbering subject property with a security interest in the amount greater than (\$\_\_\_\_\_ = 120% of sales price) for a period of one hundred and eighty (180) days from the date of this deed. These restrictions shall run with the land and are not personal to grante."*

Some samples have added the provision that the above terminates on foreclosure of any mortgage or deed of trust.

As noted by one commentator:

*"The purpose of this language is to prevent investors from 'low-balling' the price they offer to FannieMae for the property and then re-selling the property at a much higher price, with simple cosmetic repairs. They are concerned about being defrauded into selling the property for less than it is worth, buyers being defrauded into buying the property for more than it is worth and lenders being defrauded into loaning money on a property that does not support the value of the loan. Unfortunately, this impairs the honest investor, who legitimately upgrades the property and its value, from being able to re-sell the property in less than 6 months."*

See Gusman, Nancy "FEDERAL REGULATIONS: How Long Must You Hold Property Before Re-Selling!" November 23, 2009, on-line at: <http://www.reislink.net/federal-regulations-require-you-to-hold-property-for-a-period-of-time-before-re-selling/>

The consensus of published title insurance bulletins is that, if the contract with or the deed from Fannie Mae contain this provision, and if the proposed re-sale falls within the prohibited terms (exceeding 120% of sales priced from Fannie Mae and within 180 days of that sale), then the prohibition applies unless waived in writing by Fannie Mae. Closing attorneys should be cautious in reviewing the contract, which will presumably include a Fannie Mae form "Real Estate Purchase Addendum" and assuring that if the term is contained in the contract it should be consistent with the deed delivered at closing. This should also be clearly discussed with the client-purchaser at or before closing.

## TITLE INSURANCE – POST-FORECLOSURE

### Limitations of relying on existing loan policy:

1. Definition of “loss” under the loan policy, and timing of policy liability differ because it is a *loan* policy rather than an owner’s policy. Thus, the liability is only after the final liquidation of all loan collateral, and only up to the balance of the loan or the loan policy, whichever is greater. (Exact calculation depends on the particular type of policy – 1992 or 2006 ALTA form)
2. Effective date is time of original deed of trust or any endorsement for later modification. So foreclosure proceeding and intervening matters are *not* covered.
3. The Insured under the loan policy includes the original named lender, its successors and assigns, i.e. assignees of the obligation. However, often the purchaser at foreclosure is a special purpose entity to whom the high bidder lender has assigned the *bid*. Thus, that SPE is *not* an “insured” under the loan policy.

### Benefits of obtaining a new owner’s policy:

1. Review and certification by an attorney post-foreclosure as a doublecheck of title.
2. Any intervening matters, discrepancies in the foreclosure itself, could be addressed specifically.
3. Coverage would extend through matters affecting title that were not otherwise excluded, such as matters not known to or suffered, assumed or agreed to by the purchaser-insured who is likely the lender or affiliated SPE.
4. Owner’s coverage, which is significantly more beneficial than loan coverage, to wit:
  1. A loss under an owner’s policy is triggered at first loss (rather than, as under the loan policy, pending complete liquidation of loan collateral and exhaustion of collection efforts).
  2. Owner’s coverage is not limited to the loan balance plus costs (the definition of “loss” under the loan policy) but up to owner’s policy coverage amount, if higher.

## DEEDS IN LIEU OF FORECLOSURE

This is a very brief overview of an extremely complex area of law. Many significant and well-researched articles are available and Chicago Title counsel will be happy to discuss deed in lieu of foreclosure (DIL) issues with any attorney whose client is contemplating entering into one. Given that these are a significant part of the real estate market in these economic times, below is a basic outline of the structures, risks, and concerns of title insurers.

### **Title Insurance Information**

NOTE: AN ATTORNEY FINDING A DEED IN LIEU OF FORECLOSURE IN THEIR CHAIN OF TITLE WITHIN THE 4 YEAR STATUTE OF LIMITATIONS ON FRAUDULENT CONVEYANCES SHOULD CLEARLY DISCLOSE THIS TO THEIR PROPOSED TITLE INSURER ON THE NEW TRANSACTION. (*See* Chapter 39, Article 3A, the Uniform Fraudulent Transfer Act, of the North Carolina General Statutes)

The key information title insurers usually need to know when the DIL was so recent would be:

1. comparison of outstanding balance forgiven and value of the property to see if this was egregious or makes sense.
2. information about the borrower-grantors indicating that they were not under duress or undue influence, have vacated the property, and though financially distressed, were not rendered insolvent by the DIL (which goes back to (1)).
3. possession of the property -- since presumably the borrower-grantor is no longer in possession, which gives some comfort that they intended and are fully aware they have given up their title, not just "signed some papers" for the lender. (*But, see*, the Fannie Mae "Deed-for-Lease" program discussed below.)
4. no intervening liens -- or know that these have to be addressed, even if they were subordinate to the deed of trust because they are not extinguished by the DIL, as compared to a foreclosure.

### **Benefits**

- No foreclosure costs.
- Decreases or eliminates deficiency of borrower.
- Borrower may salvage somewhat better credit rating.
- May be tax consequences (IRS Publ. 544 & IRS Publ. 4681).

### **Structures**

Property may be deeded:

1. directly back to holder of the debt; or
2. to a special purpose entity for purpose of holding the debt open for a period, if there are intervening risk matters, mechanics' lien claimants, substantial unsecured creditors or possibility of imminent bankruptcy with question of valuation which might be construed as a preference or fraudulent conveyance.

## **Documentation**

- Estoppel affidavit.
- Deed – including tax stamps for the full consideration, i.e. debt forgiven as consideration for the deed in lieu (even if not all of the debt). The question of whether the title of the beneficiary merges with the fee ownership under the deed in lieu is a question of fact. Therefore, it is important for the deed to be specific about the issue, clearly identifying if it is to maintain the deed of trust lien outstanding until satisfied, or if the deed is intended to implicitly cancel the deed of trust. *See Branch Banking & Trust Co. v. Home Federal Sav. & Loan Asso.*, 85 N.C. App. 187, 354 S.E.2d 541 (1987). A non-merger endorsement may be available on request of the closing attorney if the deed in lieu of foreclosure is clear that the deed of trust is to remain outstanding.
- Cancellation of personal liability debt (all or portion).
- Satisfaction or release of the lien from the property should be made a matter of record immediately if that satisfaction or release is the intention of the deed in lieu. However, it is conceivable in some circumstances that the lender may need to maintain the deed of trust open and enforceable against the property (effectively non-recourse as to the portion of the personal liability discharged) in the event it is necessary to foreclose on the property to clear subordinate liens or in the event of debtor bankruptcy. Again, the deed should be specific in this respect.

## **Title Insurance Requirements**

- Warranty Deed from \* to \* reciting a fair and adequate consideration, a portion of which is satisfaction of the indebtedness evidenced by the deed of trust recorded in Book \*, page \*.
- Satisfactory evidence or estoppel affidavit/indemnity that deed to proposed owner in lieu of foreclosure of deed of trust recorded in Book \*, page \*, was given for adequate consideration and free of fraud or duress, that grantor was not insolvent or rendered insolvent by the transaction and has surrendered possession of the Land, and that the aforesaid deed of trust has been canceled of record.

## **Special Case: Fannie Mae “Deed-for-Lease” (D4L) program**

On November 5, 2009, Fannie Mae announced the “Deed-for-Lease” (D4L) program (on-line information at: <https://www.efanniemae.com/sf/servicing/d4l/>), allowing borrowers desiring to enter into a lease and to stay in possession of properties after a deed-in-lieu of foreclosure, for up to 12 months under certain limited conditions, including:

### **Borrower & Loan Eligibility:**

- The mortgage loan is a first lien mortgage loan secured by a one- to four-unit property. All property types are eligible. Second lien mortgage loans are not eligible.
- The mortgage loan is not guaranteed or insured by a federal agency (FHA, HUD, VA, or Rural Development).
- The borrower resides in the property as a primary residence or has leased the property to a tenant who uses the property as a primary residence. Second homes or vacation homes are not eligible.
- At least three payments have been made since origination or since the last modification.

- At the time of the referral to Fannie Mae for the D4L, the borrower is not 12 or more payments past due on the mortgage loan.
- The borrower is not involved in an active bankruptcy proceeding and is not a party to litigation involving the subject property or the mortgage loan.
- The occupant of the property (i.e., the borrower or the borrower's tenant) has verifiable income. Occupants with no source of income are not eligible.

Property Eligibility:

- Marketable title is able to be conveyed (a title insurance policy is required).
- If there are subordinate liens secured against the subject, lien releases can be obtained.
- There are no zoning or homeowner's association (HOA) rental limitations that would prohibit a D4L.
- Repairs required to make the property habitable are deemed to be in an acceptable amount based on the property value.
- The property is in compliance with local rules and laws or can be brought into compliance within 30 days.
- The property is not within a target area for any corporate, government or community neighborhood stabilization plan which may need the property as part of the plan for purposes other than residential.
- The rental income from the property is anticipated to cover ongoing maintenance and management costs.

Occupant Eligibility:

- The occupant's income is sufficient to cover rental payments of not more than 31 percent of gross income. If the rental payment is greater than 31 percent of the occupant's monthly gross income, a lease will not be offered.
- Inspection of the property indicates that the occupants have been keeping the property in good condition.
- The occupant agrees to be responsible for regular maintenance, to keep the property in good condition, and to permit marketing of the property for sale.
- The number of occupants is appropriate for the home and in compliance with local laws and homeowner association rules.
- If pets are present, renter's insurance is obtained if required.
- The occupants signing the lease must agree to a credit review and all occupants over the age of 18 must have an acceptable background check including receiving clearance from the Office of Foreign Assets Control ("OFAC").
- There are no signs or reports of illegal activities conducted at the property.
- The property is to be used as a primary residence.

## HOT ISSUES IN NORTH CAROLINA REAL ESTATE LOAN: FORECLOSURE

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, 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 Homes Affordable program: [makinghomeaffordable.gov/index.html](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: <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/>.

### **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 removed the streets! Announced in late August 2009, the NC Attorney General joined with the U.S. Justice and Treasury departments, FBI, FTC, HUD, other federal agencies and states’ attorney generals 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:**

The red flags continue to include *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 [http://www.fbi.gov/hq/mortgage\\_fraud.htm](http://www.fbi.gov/hq/mortgage_fraud.htm) and the FBI’s 2008 Mortgage Fraud Report, [http://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, (<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 [www.nccob.org/online/cts/complaintonline.aspx](http://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), <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) - [http://www.fbi.gov/hq/mortgage\\_fraud.htm](http://www.fbi.gov/hq/mortgage_fraud.htm) and the FBI’s 2008 Mortgage Fraud Report - [http://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 says 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>.

### **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.