November 2007

Chicago Title EXAMINER

VOLUME 1 / ISSUE 3

Tales From the Vault - Claims Stories

THE ERRONEOUS CONVEYANCE -- Re-recordings, corrections, certified copies

Including the wrong legal description on a document (i.e. other property owned by the grantor than the intended property) or lack of an adequate legal description (as reviewed under the "four corners" of the document, G.S. 39-1.1, G.S. 47-18 and G.S. 47-20 & the annotations thereunder) clearly is NOT a "minor" or "clerical" error, whether in the original document signed by the parties (under many bankruptcy cases & the recent unreported case of In re foreclosure of Hudson, 642 S.E.2d 485; 2007 N.C. App. LEXIS 689 (2007)) or a purported "re-recording" under G.S. 47-36.1 (Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990)).

Two critical examples:

(1) G.S. 47-14 speaks to the authority and responsibility of the register of deeds to record documents, but it does not make any document recorded legally effective to pass title or affect priority. A recorded document copy certified by a register of deeds under G.S. 47-31 is no longer a "certified copy" once an attorney attempts to mark or deface it, even if a subsequent register accepts and records it under G.S. 47-14. An attorney "markup" is no more than a defacement of what was once a true certified copy. The minor errors statute, G.S. 47-36.1, requires an actual "original instrument," not a certified copy.

(2) A true correction of an erroneous conveyance of other property of a seller includes (a) conveyance back of the erroneous property from the original grantee (and spouse, if any) to the original grantor, if the original grantor owned the property, (b) release of the erroneous property from the lien of the original buyer's deed of trust, (c) conveyance by the seller of the correct property to the buyer, (d) submission of the correct property to the lender's lien, whether by modification or by new deed of trust signed and (e) clearing of any other title defects which may have attached because of the erroneous conveyance and title being erroneously vested in the incorrect party. Each of these documents must be signed by the actual parties, not just the attorney because these are not minor clerical errors under G.S. 47-36.1, i.e., these are true correction documents in the traditional legal sense we all understood prior to the "minor errors" statute.

Your job just got easier!

Chicago Title EXAMINER
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POSTAGE

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CALENDAR OF EVENTS

December 6
CTIC Customer Coffee
Coffee Affair / Morehead City

December 12
CTIC Customer Coffee
Island Brews / Southport

January 9
CTIC Customer Coffee
Island Brews / Southport

February 4
Chicago Title CLE Seminar
The Crest Center / Asheville

February 5
Chicago Title CLE Seminar
Gaston College - East Campus / Belmont

February 6
Chicago Title CLE Seminar
Marriott SouthPark / Charlotte

February 7
Chicago Title CLE Seminar
Rock Barn Golf & Spa Club / Conover

February 13
CTIC Customer Coffee
Island Brews / Southport

February 14
CTIC Customer Coffee
Coffee Affair / Morehead City

February 19
Chicago Title CLE Seminar
Hilton Hotel / Greenville

February 20
Chicago Title CLE Seminar
UNCW Exec Dev Ctr / Wilmington

February 21
Chicago Title CLE Seminar
Hilton RTP / Raleigh

February 22
Chicago Title CLE Seminar
Sheraton Four Seasons / Greensboro

GOOD FUNDS

AVOIDING WOODEN NICKELS IN THE 21ST CENTURY

CTIC UNDERWRITING TEAM

By now anyone even remotely involved in real property transactions is well aware of the crash of numerous (161 at last count) subprime lenders and some subsequent funding failures. While the market slows, Congress discusses potential reforms, and financial talking heads opine on whether we have hit the bottom, the closing attorney is left to ponder whether or not the funds on the closing table are any good. I am sure more than a few closing attorneys have spent some sleepless nights worrying about this issue. In this climate it is essential that the closing attorney be familiar with the requirements of the Good Funds Settlement Act (N.C.G.S. Chapter 45A, hereinafter the "Good Funds Act") and the North Carolina Ethics Opinions relating to funding issues. The following is a review of the basics of this Act and some relevant Ethics Opinions.

The Good Funds Act became effective on October 1, 1996, mainly in response to problems that occurred following the closing of Abbey Financial in the early 1990s. Many of Abbey Financial's checks were dishonored and some unlucky attorneys were left to deal with shortfalls in their trust accounts. The Good Funds Act sought to avoid these problems by establishing rules and definitions regarding when a settlement agent could safely disburse funds.

Under the Good Funds Act the settlement agent cannot disburse until the deed, deed of trust, mortgage or other applicable loan documents are recorded and the settlement agent has verification that the required closing funds are deposited in his or her trust or escrow account. N.C.G.S. § 45A-4. The Act further explains that "the settlement agent shall not cause a disbursement of settlement proceeds unless those settlement proceeds are collected funds." N.C.G.S. § 45A-4. "Collected Funds" are defined as -

Funds deposited and irrevocably credited to a settlement agent's account used to fund the disbursement of settlement proceeds which account is a trust account, escrow account, or an account held by a company or its subsidiary which is licensed and supervised by the North Carolina Commissioner of Banks. N.C.G.S. § 45A-3(7).

The key is that the funds are to be irrevocably credited to the settlement agent's account. The trouble is determining at exactly what point a deposit is irrevocable and becomes "collected funds". Waiting for the check to clear the payor's bank is not acceptable within the timeframe necessary for the conveyance of real property. Under N.C.G.S. § 45A-4 the Good Funds Act recognizes this issue and provides that -

Notwithstanding that a deposit made by a settlement agent to its trust or escrow account does not constitute collected funds, the settlement agent may cause a disbursement of settlement proceeds from its trust or escrow account in reliance on that deposit if the deposit is in one or more of the following forms:

(1) A certified check;

(2) A check issued by the State, the United States, a political subdivision of the State, or an agency or instrumentality of the United States, including an agricultural credit association;

(3) A cashier's check, teller's check, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government;

(4) A check drawn on the trust account of an attorney licensed to practice in the State of North Carolina;

(5) A check or checks drawn on the trust or escrow account of a real estate broker licensed under Chapter 93A of the General Statutes;

(6) A personal or commercial check or checks

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WHAT'S INSIDE!

SOAP BOX

Deborah Duerson

Commercial Underwriter

Deborah has worked in the title industry for 12 years and comes from a background of handling title and closings of deals in Indiana, from which she relocated to Charlotte two years ago. She works on many of the more complicated commercial transactions in the Charlotte office of Chicago Title (including the Piedmont Town Center transaction featured in Chicago Title Insures), and she is able to understand and communicate with attorneys and paralegals about complex real estate title issues. Her experience and natural dedication to customer service have contributed to the strength of Chicago Title's commercial department, and her co-workers find her great to work with.

A Tip of the Hat from Customers:

"A big Texas "Thank You" for all of your work on the Charlotte and Spartanburg closings. We couldn't have done it without you. You went the extra mile." Nancy P. Patterson with Fidelity National Title Agency, Inc.

"Deborah, great job on those two complicated commitments." Richard Arfa

"Deborah, I really appreciate your accessibility and response in connection with this matter. You have been a pleasure to work with throughout this process." Peter McLean III, Kennedy Covington

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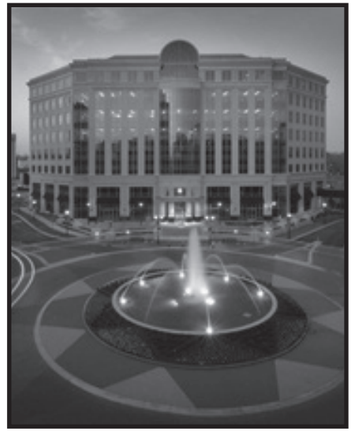
CHICAGO TITLE INSURES

Charlotte Office insures $171,000,000 sale of Piedmont Town Center!

On October 18, 2007, Piedmont Town Center in Charlotte was sold to Principal Real Estate Investors, LLC of Des Moines, Iowa for $171,000,000. The seller was Crescent Resources, LLC of Charlotte, represented by attorneys at Robinson, Bradshaw & Hinson, P.A. Principal was represented locally by attorneys at Mayer Brown. A loan with Metropolitan Life Insurance Company is also being insured. The sale included the retail, office and parking components of the high-profile mixed use development near SouthPark, which currently includes the restaurants Del Frisco's and Oceanaire.



HANDY STATUTES

NCGS 41-2.5

Tenancy by the entirety in mobile homes

NCGS 153A-335

Subdivision defined (county) – exemption from regulation

NCGS 160A-376

Subdivision defined (city) – exemption from regulation

NCGS 55D-26

Real property records - name change, merger, consolidation, or conversion for any entity

NCGS 10B-41(a)

Simplified notarial acknowledgment – individual or any entity

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PRACTICE PITFALLS

....and how to avoid them

Tenancy by the Entirety – Partition
One Exception to the Statutory Tenancy by the Entirety Presumption

- Undivided interest in real property is owned by one spouse as a tenant in common with another or others (other than his or her spouse) and there is a partition deed, either pursuant to judicial proceeding or by a voluntary exchange of deeds, naming the husband and wife as grantees - the cross deeds or order of partition conveying the property to the husband and wife must specify if a tenancy by the entirety is to be created. (NCGS Section 39-13.5.)

- The tenant in common spouse must join in the cross deed vesting title in the husband and wife.

- Note: In above situation, remember that one of the spouses was already vested with an ownership interest - no unity of time or title needed to create a tenancy by the entirety in reliance solely upon statutory presumption.

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in an aggregate amount not exceeding five thousand dollars ($5,000) per closing if the settlement agent making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the settlement agent's trust or escrow account;

(7) A check drawn on the account of or issued by a mortgage banker licensed under Article 19A of Chapter 53 of the General Statutes that has posted with the Commissioner of Banks a surety bond in the amount of at least three hundred thousand dollars ($300,000). The surety bond shall be in a form satisfactory to the Commissioner and shall run to the State for the benefit of any settlement agent with a claim against the licensee for a dishonored check

Understanding and recognizing the above forms of deposits is essential for the closing attorney. The definitions section of the Good Funds Act (N.C.G.S. § 45A-3) is helpful by providing the following:

(3) "Cashier's check" means a check that is drawn on a bank, is signed by an officer or employee of the bank on behalf of the bank as drawer, is a direct obligation of the bank, and is provided to a customer of the bank or acquired from the bank for remittance purposes.

(4) "Certified check" means a check with respect to which the drawee bank certifies by signature on the check of an officer or other authorized employee of the bank that (i) the signature of the drawer on the check is genuine and the bank has set aside funds that are equal to the amount of the check and will be used to pay the check or (ii) the bank will pay the check upon presentment.

(16) "Teller's check" means a check provided to a customer of a bank or acquired from a bank for remittance purposes, that is drawn by the bank, and drawn on another bank or payable through or at a bank.

Additional definitions are provided under the Uniform Commercial Code (Cashier's Check - N.C.G.S. § 25-3-104(g); Teller's Check – N.C.G.S. § 25-3-104(h); Certified Check – N.C.G.S. § 25-3-409(d)). Whether or not a lender is a HUD approved lender, which qualifies them as an acceptable financial institution under N.C.G.S. § 45A-4(3), can be checked at http://www.hud.gov./ll/code/llslcrit.html.

Noticeably absent from the Good Funds Act is any direct reference to wire transfers. Fortunately, wire transfers were identified as "collected funds" in RPC 191. This Ethics Opinion was adopted prior to the enactment of the Good Funds Act, but was later (January 24, 1997) revised to remove inconsistencies between the opinion and the Act. It addresses whether an attorney may ethically immediately disburse funds provisionally credited to the attorney's trust account. RPC 191 recognizes that lag time caused by waiting for checks to clear and be collected funds would result in inconvenience, delay and potential harmful affects on the economy. It weighed this inconvenience factor against the reliability of various financial institutions and determined that certain financial institutions, such as those identified under the Good Funds Act, have a low risk of unreliability. As a result, the Opinion ruled "a lawyer may immediately disburse against collected funds, such as cash or wired funds, and may immediately make disbursements from his or her trust account in reliance upon provisional credit extended by the depository institution for funds deposited into the trust account in one or more of the forms set forth inN.C.G.S. § 45A-4."

It is extremely important to note two matters addressed by RPC 191 in addition to the above ruling. First, if an attorney disburses funds in reliance on provisional credit in a form that is not prescribed by the Good Funds Act under N.C.G.S. § 45A-4, then that disbursement constitutes misconduct whether the deposit is ultimately honored or dishonored. Second, once an attorney learns that a deposit in a form prescribed by the Good Funds Act has been dishonored, to avoid misconduct he or she must immediately act to protect the property of the attorney's other clients by personally paying the amount of the failed deposit or securing payment from sources other than the trust account or other clients. Most attorney's malpractice policies include an exception for losses resulting from disbursement of funds that were not irrevocably credited and thus prevent coverage in this situation. In addition, Closing Protection Letters issued by title insurance companies include an exclusion for "loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension".

A second Ethics Opinion, RPC 232, also was revised to comply with the Good Funds Act. The opinion addresses disbursement of funds in reliance upon the deposit of a mortgage company's check and an agreement with that company's institutional lender purporting to render that check certified under the Uniform Commercial Code. The agreement provides the closing attorney with instructions and upon completing specified events, the closing attorney receives from the federally-insured lender a transaction code to be manually noted on the proceeds check. This transaction code purportedly rendered the check "certified". The opinion refers to Good Funds Act for guidance.

In conclusion, the use of collected funds is the safest method in making disbursements. In the real world, this means requiring wire transfers. While wires can be reversed, such occurrences are rare and would not result in a violation of the Good Funds Act or RPC 191. Various experts recommend setting up a special account to receive wires and then immediately transferring the funds to another trust account. The theory being that the wire cannot be reversed if the funds are no longer in the account. Another recommendation is to contact your bank and set up a block so that a reversal cannot occur without your authorization.

If provisionally credited funds must be used at a closing, then only use those forms approved by N.C.G.S. § 45A-4 and stay alert to news/bulletins regarding lenders and confirm their qualifications on government websites.

LEGISLATIVE CORNER

Beginning with deeds of trust registered on or after April 1, 2008, the mortgage broker who originates a loan must be named on the face of a deed of trust if the lender provides that information to the closing attorney in their closing instruction, pursuant to revised GS 45A-4(b) & 5(b).

House Bill 313 is on-line at: http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=H313