Chicago Title EXAMINER

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CHICAGO TITLE TAKES #1 MARKET SHARE POSITION

In 2010, Chicago Title took over the #1 position in market share in North Carolina with 24.89%.

This achievement would not have been possible without the support from you, our customers. We are grateful for our relationships and the faith you put in us to handle both your residential and commercial transactions.

Thank you many times over for helping us achieve our goal!

DEBBIE BRITTAIN
VP, NORTH CAROLINA STATE MANAGER

What's Inside?

2010 YEAR END MARKET SHARE

COMPANY	2010 PREMIUMS	20010 % MKT SHARE	2010 CLAIMS PAID	% Claims Pd to Prem Written	2009 Yr End PREMIUMS	2009 Yr End % MKT SHARE	2009 Yr End CLAIMS PD	% Claims Pd to Prem Written	Mkt Share % Change 2009 to 2010	2008 Yr End PREMIUMS	2008 Yr End % MKT SHARE	2008 Yr End CLAIMS PD	% Claims Pd to Prem Written	Mkt Share % Change 2008 to 2010
CHICAGO TITLE	24,064,030	24.89%	4,751,835	20%	23,314,416	20.69%	2,843,049	12%	4.20%	22,251,078	17.68%	6,233,989	28%	7.21%
INVESTORS TITLE	23,235,951	24.03%	4,246,014	18%	27,117,258	24.07%	5,119,551	19%	-0.04%	29,686,079	23.59%	10,232,884	34%	0.45%
FIRST AMERICAN	14,715,771	15.22%	6,943,673	47%	21,885,944	19.43%	4,614,226	21%	-4.21%	22,117,353	17.57%	3,654,541	17%	-2.35%
FIDELITY NATIONAL	12,236,426	12.66%	3,676,484	30%	14,920,802	13.24%	3,171,853	21%	-0.59%	22,160,958	17.61%	5,269,361	24%	-4.95%
STEWART TITLE	10,585,279	10.95%	2,165,086	20%	14,465,942	12.84%	4,198,931	29%	-1.89%	12,367,875	9.83%	3,222,911	26%	1.12%
OLD REPUBLIC	5,779,202	5.98%	2,107,420	36%	6,791,706	6.03%	2,220,610	33%	-0.05%	7,881,088	6.26%	1,646,789	21%	-0.28%
NORTH AMERICAN TITLE	2,463,648	2.55%	38,823	2%	1,517,998	1.35%	8,677	1%	1.20%	283,941	0.23%	-	0%	2.32%
COMMONWLTH TITLE	2,294,619	2.37%	643,058	28%	1,119,463	0.99%	194,744	17%	1.38%	691,351	0.55%	671,439	97%	1.82%
SOUTHERN TITLE	1,004,859	1.04%	220,201	22%	1,382,422	1.23%	257,714	19%	-0.19%	2,164,553	1.72%	378,919	18%	-0.68%
WFG NATIONAL TITLE	300,912	0.31%	76,033	25%	-	0.00%	-	#DIV/0!	0.31%	-	0.00%	-	#DIV/0!	0.31%
ENTITLE INSURANCE CO	5,880	0.01%	-	0%	-	-	-	#DIV/0!	0.01%	-	0.00%	-	#DIV/0!	0.01%
ATTORNEYS' TITLE FUND	-	0.00%	-	#DIV/0!	148,556	0.13%	-	0%	-0.13%	223,191	0.18%	-	0%	-0.18%
UNITED GENERAL	-	0.00%	-	#DIV/0!	-	0.00%	-	#DIV/0!	0.00%	6,032,706	4.79%	4,657,591	77%	-4.79%
TOTALS	96,686,577		24,868,627		112,664,507		22,629,355			125,860,173		35,968,424		

Change in Total Prem 2008 to 20010: (29,173,596)
Change in Total Claims Pd 2008 to 2010: (11,099,797)

Note: Chicago Title totals include Ticor, Ticor of Florida and Security Union figures previously reported as separate line items in 2008 and 2009.
Fidelity National totals include Lawyers Title figures previously reported as a separate line item in 2008 and 2009.

SOURCE: NORTH CAROLINA DEPARTMENT OF INSURANCE FOR YEAR ENDING DECEMBER 31, 2010

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Leasehold Endorsements

(NOTE: THE ENTIRE DISCUSSION BELOW IS SUBJECT TO THE TERMS AND CONDITIONS OF THE POLICY(IES) AND ENDORSEMENT(S))

Leasehold policies originated in 1975 and were put in place to cover the most simplistic of issues. As title insurance policies and coverage evolved, the American Land Title Association (ALTA) eventually added the ALTA 13 endorsement to its repertoire. The ALTA 13 exists in two forms, the ALTA 13-06 and ALTA 13.1-06. Very recently there have been some additional cosmetic and clarifying changes to these forms, but they have not been certified by the North Carolina Land Title Association as of yet, and so are not in use in North Carolina. The coverage is fundamentally very similar to, if not the same as, what it was before.

Both owner and lender can obtain coverage through this endorsement. The ALTA 13-06 is the owner version, while loan policies are endorsed via the ALTA 13.1-06. The improvements of the ALTA 13 over the previous leasehold policies are dramatic and give far more protection (and specificity of definition) than has been provided previously. The major improvements are enumerated as follows:

a) Leasehold Improvements made by the Tenant – Leasehold improvements are defined and included in the Valuation provision.
b) Valuation – Valuation includes the remaining lease term and any tenant leasehold improvements existing on the date of eviction. The value of any remaining rent no longer required to be paid under the Lease agreement is taken into account.
c) Additional Items of Loss – Subject to the conditions of the policy and endorsement, the following matters are included in computing loss or damage:
    i. Cost of removing and relocating personal property;
    ii. Rent or damages the Insured may be obligated to pay to someone other than the lessor in the lease;
    iii. Amount of rent that must be paid to the lessor after an eviction, pursuant to the terms of the lease;
    iv. Fair market value, at the time of eviction, of the Insured in any lease or sublease made by the tenant as lessor;
    v. Reasonable costs incurred to secure a replacement leasehold; and,
    vi. Cost incurred for leasehold improvements, less salvage value, if said leasehold improvements are not substantially complete at time of eviction.
d) Lawful Deprivation – "Evicted" and "Eviction" are defined to include the lawful deprivation of the tenant's right of possession or the lawful prevention of the tenant's specified use of the land or improvements (both as provided for in the lease). In addition, if the tenant cannot fully possess the property, the policy recognizes the insured will incur damages.
e) Note: NO COVERAGE is provided for loss of business income.

One question that arises almost every time an ALTA 13 is requested is "How much insurance should you get?" The ALTA 13 endorsements demonstrate the difficulty of answering this question. As such, the endorsement eliminated the coinsurance from the 1992 policy (which was eliminated from the 2006 policy in whole, such that the ALTA 13's elimination of the provision is no longer needed). Most methods of valuation focus on the length of the lease and then add the value of the improvements. For example, a lease term of 25 years or less could be valued at 10 times the annual gross rentals. A lease term of 25 to 49 years could be valued at 20 times the annual gross rentals. Longer leases are often given full value of the improved fee estate. The endorsements do not require a specific method of valuation for determining the amount of coverage, so the Insured can (and should) consider all factors in determining the amount of coverage to purchase.

Options to Purchase (in a lease) and Installment Land Contracts

While not often requested, options to purchase contained in a lease CAN be insured (subject to requirements and conditions). The policy insures the holder of the option that the option to purchase is valid and enforceable and that the rights of the holder are vested, all subject to the terms of the option agreement and the holder's compliance with the terms thereof. However, if the option is exercised, as a practical matter, the proceeds of the sale must be used to pay all liens on the property in order of their priority, even if subsequent to the option when it is exercised. The policy covers expenses necessary in a judicial determination or defense of the validity and enforceability of the option. However the policy does not cover any expenses required to enforce the option and obtain a transfer of title.

This all became a little more complicated recently, as the North Carolina General Assembly enacted two new statutes covering options to purchase executed with lease agreements (N.C.G.S. §47G) and contracts for deed (a.k.a. installment land contracts) (N.C.G.S. § 47H). I recommend that everyone take the time to read both of them, as they are reasonably short. The statutes have already caused some debate and put all real estate practitioners who are asked to draft transactions of this nature on edge. Title companies are examining the statutes to determine what new requirements they must create to be able to insure the interests, so that the customers are given the same (or similar) level of coverage previously afforded and described in the previous paragraph.

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Proposed Ethics Opinion May Limit Force-Placed Title Insurance

If you have not considered 2011 FEO 4, a proposed ethics opinion currently in committee at the North Carolina State Bar, and you are a practicing real property attorney, now is the time to do so. With certain changes, this ethics opinion may give the practicing attorney a real opportunity to take back some professional independence with regard to the choice of the title insurer that is in the best interest of the client and not the client's realtor, mortgage broker or banker.

We at Chicago Title are in full support of the proposed opinion and have suggested in written comments to the State Bar Ethics Committee that the proposal is a good idea but needs to be broadened to be effective. Our comments were well received in the Ethics Committee hearing on April 21, 2011 and the measure was sent back to sub-committee for re-consideration in light of our remarks and others. The proposal should come back to the Ethics Committee at its next scheduled meeting this summer.

We have included our mark-up of the proposed opinion below and we ask that each of you take time to consider it and to submit comments to the State Bar Ethics Committee. Of the three comments submitted at the April 21st meeting, all were from title companies and not a single attorney submitted remarks. If you are weary of having your livelihood threatened because you choose to determine what title insurer may be in the best interest of your clients, now is your opportunity take some action that may affect some real changes. Your comments may be submitted via email to Suzanne Lever (slever@ncbar.gov) at the State Bar.

In a similar vein, please also consider Senate Bill 519 pending in the North Carolina Legislature entitled An Act to Protect Consumers by Requiring Buyer's Choice of Title Insurer and Settlement Agent. This bill is limited in scope to a sale by a mortgagee who takes title via foreclosures but underscores the importance to the consumer of having the ability to make informed decisions as to title insurers and closing attorneys.

Proposed 2011 Formal Ethics Opinion 4 (Revisions requested by Chicago Title, as underlined below)
Participation in Reciprocal Referral ~~Agreement~~ Arrangement - January 20, 2011

Proposed opinion rules that a lawyer may not participate in a reciprocal referral ~~agreement~~ arrangement with a ~~broker~~ real estate Referring Party, mortgage lender or mortgage Referring Party (hereinafter "Referring Party") who either has an ownership interest in a title insurance agency or is an agent, affiliate or employee of an entity that has an ownership interest in a title insurance agency.

Inquiry #1:

Attorney has a relationship with ~~Broker~~ Referring Party who, over time, has referred many real estate closings to Attorney's office. Attorney desires to maintain this working relationship with ~~Broker~~ Referring Party. ~~Broker~~ Referring Party has an ownership interest in Title Insurance Agency. Attorney is aware of ~~Broker's~~ Referring Party's ownership interest.

~~Broker~~ Referring Party asks that Attorney procure title insurance with Title Insurance Agency on each transaction referred to Attorney by ~~Broker's~~ Referring Party's office. ~~Broker~~ Referring Party receives compensation for ~~brokerage~~ Referring Party's services and as a shareholder of Title Insurance Agency.

Guided by ~~Broker's~~ Referring Party's referral, Client engages Attorney to represent him at a real estate closing. Client desires title insurance protection or is required to procure title insurance for the lender's protection.

May Attorney acquire Client's title insurance from Title Insurance Agency?

Opinion #1:

Yes, so long as it is in the best interest of the client and is not due to a reciprocal referral arrangement.

The choice of the title insurer in a real estate transaction is the province of the attorney, acting in the best interest of the client and in consultation with the client. The is true whether or not a Referring Party has secured the consent of the client to use its affiliated title agency which shall not relieve the attorney of the obligation to act in the best interest of the client. It is appropriate for the attorney, in choosing a title insurer, to consider among other things the fees charged for title insurance, the financial stability of the insurer and/or title insurance underwriter, the attorney's past experience with a title insurer particularly where the attorney's relationship with the insurer may prove beneficial to the client, the willingness of the title insurer to provide coverage regarding title matters and the ability of the insurer to meet the needs of the client with regard to the transaction.

Attorney may not enter in to a "reciprocal referral ~~agreement~~ arrangement" with ~~Broker~~ Referring Party. A reciprocal referral arrangement is

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defined as any arrangement, either express or implied, written or oral, in which a Referring Party agrees to refer clients to the attorney with the expectation, between the attorney and the Referring Party, that the attorney will reciprocate by sending title insurance business to a title insurance agency affiliated with the Referring Party, even in situations in which insurance through other title insurers may be in the best interest of the client.

The Illinois State Bar Association recently addressed such arrangement in Ill. State Bar Assn., Advisory Op. No. 10-02 (October 2009). The Illinois Bar Association considered whether a lawyer could agree to exclusively use a particular title insurance company in order to continue to receive referrals from its affiliated real estate company. The association concluded that such an exclusive relationship: (1) will inevitably impair the lawyer's ability to provide truly independent professional judgment; (2) is an improper provision of a thing of value for recommendation of the lawyer's services; and (3) creates a conflict that a reasonable lawyer would likely conclude imposes a material limitation on the representation of real estate clients.

We agree with that the arrangement outlined in the fact scenario is prohibited under the Rules of Professional Conduct. Such an arrangement would impair Attorney's ability to provide independent professional judgment in violation of Rules 2.1 and 5.4(c). In addition, the arrangement amounts to an improper payment for referrals in violation of Rule 7.2(b). Finally, such an arrangement creates a ~~nonconsentable~~ conflict of interest between the lawyer and the client which is not subject to waiver. See Rule 1.7.

~~Attorney may only acquire Client's title insurance from Title Insurance Agency if it is in Client's best interest. If Attorney is aware of other title insurance options that are more suitable or economical for Client's needs, Attorney may not procure the insurance from Title Insurance Agency. If the title insurance offered by Title Insurance Agency is a good fit for Client, there is no ethical prohibition on Attorney procuring the insurance from Broker's agency despite the fact that Attorney has a regular and ongoing working relationship with Broker provided, as stated previously, there is not an agreement to refer clients to Attorney in exchange for procuring insurance from Title Insurance Agency.~~

Inquiry #2:

Upon becoming aware of another lawyer participating in a reciprocal referral ~~agreement~~ arrangement such as the one described above, is Attorney under an ethical obligation to report and refer the same to the State Bar?

Opinion #2:

Rule 8.3(a) requires a lawyer to inform the State Bar if the lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer. Attorney should communicate his concerns to the other lawyer and recommend that the lawyer contact the State Bar for an ethics opinion as to his continuing participation in the reciprocal referral ~~agreement~~ arrangement. After this communication, if Attorney believes that the lawyer has continued his participation in the reciprocal referral ~~agreement~~ arrangement, Attorney must report the lawyer to the State Bar.

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Practice Pitfalls...and how to avoid them

BEWARE THE DEFECTIVE DEVELOPMENT

As we have discussed in our seminars in 2005 through 2011, we continue to receive calls and claims about defective developments. Even when tacking to a prior policy, it is very important for the current closing attorney to review the development documents - restrictions, plats and easements especially. Some of the recurring problem situations which can and have caused devastating problems for your clients include:

1. Multiple replats of the same "dirt" such that the legal description itself may be in error, or prior plats encumber the lot with significant sewer or drainage easements, setbacks, landfill areas, buffer zones or conservation areas, or even dedicate the "dirt" as common area!

2. Declarations that do not comply with the Planned Community Act in significant ways.

3. Condominium plats and declarations with fatal defects, such as failing to include appropriate detailed elevations and plans, engineer's "as built" certification, location of all units on the platted common areas, percentage interests of the owners, amendments to add later phases, or inclusion of entire property in initial plat without identifying areas "to be developed" for future units. This can be a significant problem, obviously, for a future potential purchase of these "to be developed" areas when those rights were not clearly reflected and retained.

4. Inadequately formed or capitalized owners' association.

5. Outstanding capital improvements, special assessments or even regular assessments due to the owners' association. Owners' associations are having a difficult time with units in default or foreclosure, forcing the "viable" owners to shoulder most of the financial loan of maintaining the developments.

6. Actions by the owners' association in conformity with the declarations, which can only be found in a search of the association and development names - such as amendments to declarations (tightening setbacks, use restrictions) or even easements, conveyances (condemnations) or mortgages of the development property.

Your client relies on you to assure they are receiving a deed to the intended property with a currently marketable title. Most of the significant claims we have received were for the above basic fundamental defects, very obvious on the face of the instruments either showing on the prior policies, clearly referenced in the documents of title found in the search or referenced in either, if reviewed.

The time, aggravation and financial cost of obtaining all owners' and their lenders' cooperation, documenting the curative action, and delays in refinances or even lost sales in interim are enormous!

So, BEWARE THE DEFECTIVE DEVELOPMENT! Protect your client and yourself by reviewing the documents on your title opinion - from your own search and any policy to which you tack.

For more information, go to: www.northcarolina.ctt.com --> Legal --> Bulls, Bulletins, Articles and Forms --> and search under "Restrictions and Plats"

A Social Networking Aside

Google "social networking for business," and you come back with a mere 157,000,000 results in 0.33 seconds. Try "is social networking bad for business," and you get 40,700,000. Finally, if you input "is social networking good for business," you get almost 75,000,000 results. Whether it's good, bad, or neither, it is a HUGE part of the road ahead. (For reference, searching "royal wedding" got almost a quarter of a billion hits.)

Almost invariably in our dealings with individuals in North Carolina, the topic of social networking is met with skepticism. The medium is ripe with problems for attorneys and the mere suggestion of potential impropriety is enough to keep the majority of attorneys away from Facebook, Twitter, and the like. On your personal "page," it's VERY easy to blur the lines between personal and professional. And for attorneys who recognize that the practice of law is as much a business as it is a profession, this can be very good, or VERY, VERY BAD. Our recommendations are as follows:

1) Maintain a separate presence for your personal life and professional life. While the lines can be blurred (as many bars are very tightly knit and collegial) it is imperative to keep the two separate. Have a separate professional page for your business, firm, or organization;

2) If you have skepticism about your ability to differentiate between personal and professional postings or information, have another individual who reviews your ideas. (Filtering systems can save you a world of trouble.);

3) Do not use social networks to dispense legal advice, make offhand comments, disparage situations, or discuss clients or ongoing litigation. There are more articles than we're comfortable with making their way around about lawyers that took things a little too far, and the ABA is extremely familiar with it. See: http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/

4) Use common sense. It is hard to configure the free marketing tools provided by Facebook and Twitter into an "AAA" marketing page; it is not supposed to be that. Facebook allows you to show the human side of the business. Make sure that you are only taking that "human" side acceptably far;

5) Limit the administration of your account(s) to just a few people who you are completely sure are capable of determining what is appropriate. Both Facebook and Twitter allow the dissemination of information quickly and publicly. Links to your professional web page, articles, or frankly anything else on the web is possible. There are multiple URL shortening programs to allow you to not send or use links that are scores of characters long.

Whether we want it to be here or not, it has arrived. Social networking is free, easy, and quick. It grants the ability to its users to reach anyone in the world. A simple link, say www.facebook.com/CTICNC, can get you to pictures, articles, information, and more. How you present, maintain, and monitor that simple link is imperative to the successful integration of your business into the online world. As with anything free, easy, and quick, you must be extremely diligent to protect your reputation from the downfalls that any relaxed and unconstrained approach to it can create.

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In the past the recording of a memorandum of option was controlled by N.C.G.S. §47-119, but now §47G-2(d) is specific for a transaction of this nature. The option itself (not the minimum requirements for recordings of memorandum) is much more detailed in its layout and much more specific in its necessities:

N.C.G.S.47G-2(b) Contents. – An option contract shall contain at least all of the following:

(1) The full names and addresses of all the parties to the contract.
(2) The date the contract is signed by each party.
(3) A legal description of the property to be conveyed subject to an option to purchase.
(4) The sales price of the property to be conveyed subject to an option to purchase.
(5) The option fee and any other fees or payments to be paid by each party to the contract.
(6) All of the obligations that if breached by the purchaser will result in forfeiture of the option.
(7) The time period during which the purchaser must exercise the option.
(8) A statement of the rights of the purchaser to cure a default, including that the purchaser has the right to cure a default once in any 12 month period during the period of the covered lease agreement.
(9) A conspicuous statement, in not less than 14 point boldface type, immediately above the purchaser's signature, that the purchaser has the right to cancel the contract at anytime until midnight of the third business day following execution of the option contract or delivery of the contract, whichever occurs last.

Installment land contracts (known as "contracts for deed" in the statute) are now specifically codified in their effect and requirements. They, too, must be evidenced on record by either the document itself or a memorandum of such (see N.C.G.S. § 47H-2 (d)). What's even more impressive is the extensive list of information that must be included in the contract itself:

N.C.G.S. §47H-2(b) b) Contents. – A contract for deed contract shall contain at least all of the following:

(1) The full names and addresses of all the parties to the contract.
(2) The date the contract is signed by each party.
(3) A legal description and the physical address of the property conveyed.
(4) The sales price of the property conveyed.
(5) Any charges or fees for services included in the contract separate from the sale price.
(6) The amount of the purchaser's down payment.
(7) The principal balance owed by the purchaser, which is the sum of the amounts stated in subdivisions (4) and (5) of this subsection, less the amount stated in subdivision (6) of this subsection.
(8) The amount and due date of each installment payment and the total number of installment payments.
(9) The interest rate on the unpaid balance, if any, and the method of determining the interest rate.
(10) A conspicuous statement of any pending order of any public agency or other matters of public record adversely affecting the property, provided the seller has actual knowledge of the pending order or matter.
(11) A statement of the rights of the purchaser to cure a default.
(12) A statement setting forth the obligation of each party who is responsible for making repairs to the property, the payment of taxes, hazard insurance premiums, flood insurance premiums, homeowner association dues, and other charges against the property from the date of the contract.
(13) A provision that the purchaser has the right to accelerate or prepay any installment payments without penalty; unless the property is encumbered by a deed of trust as permitted by G.S. 47H 6 and the loan secured by the property contains a prepayment penalty, in which case the contract may specify that the purchaser will compensate the seller for the prepayment penalty.
(14) A description of conditions of the property that includes whether the property, including any structures thereon, has water, sewer, septic, and electricity service, whether the property is in a floodplain, whether anyone else has a legal interest in the property, and whether restrictive covenants prevent building or installing a dwelling. If restrictive covenants are in place that affect the property, a copy of the restrictive covenants shall be made available to the purchaser at or before the execution of the contract.
(15) A statement indicating the current amount of any real estate taxes and/or homeowner association dues, or special assessments required to be paid on the property, and the amount of such taxes, dues, or assessments that are delinquent. To the extent these amounts are not known at the time the contract is executed, a reasonable estimate shall be given.
(16) If the property being sold is encumbered by a deed of trust, mortgage, or other encumbrance evidencing or securing a monetary obligation which constitutes a lien on the property, and the seller is not a licensed general contractor within the meaning of Chapter 87 of the General Statutes, or a licensed manufactured home dealer within the meaning of Article 9A of Chapter 143 of the General Statutes, a statement of the amount of the lien, and the amount and due date, if any, of any periodic payments.
(17) A conspicuous statement, in not less than 14 point boldface type, immediately above the purchaser's signature, that the purchaser has the right to cancel the contract at any time until midnight of the third business day following execution of the contract, or delivery of the contract, whichever occurs later.

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The clear intent of the statutes (§47G, but especially §47H) is to provide as much protection for the Grantee of the option or contract for deed as possible. Gone (hopefully) are the days of vague and ambiguous contracts that result in eviction or dispossession and lead to valid questions of the equitable right of redemption, the necessity for proper landlord/tenant law application, and the ability and requirements of getting post-"termination" title insurance.

N.C.G.S. § 47G-4 and §47H-3 provide that a purchaser's rights "cannot be forfeited unless a breach has occurred in one for more of the purchaser's express obligations…" (Both Statutes, Emphasis Added). §47G provides a right to cure once every 12 months, while §47H allows for the rights as defined in §47H(b).

Both statutes also require a notice of default and intent to forfeit be delivered by hand or by any manner under N.C.G.S. §1A-1, Rule 4. While §47G-5 requires that the notice contain the nature of the default, the amount of the default (if financial), the date after which the contract will be forfeited if uncured, and the contact information for the seller (or seller's attorney), §47H-4 goes a little further:

> (a) The notice of default and intent to forfeit shall contain all of the following:
> (1) The name, address, and telephone number of the seller and the seller's agent or attorney giving the notice, if any.
> (2) A description of the contract, including the names of the original parties to the contract for deed.
> (3) The physical address of the property.
> (4) A description of each default under the contract on which the notice is based.
> (5) A statement that the contract will be forfeited if all defaults are not cured by a date stated in the notice which is not less than 30 days after the notice of default and intent to forfeit is served or any longer period specified in the contract or other agreement with the seller.
> (6) An itemized statement of, or to the extent not known at the time the notice of default and intent to forfeit is given or recorded, a reasonable estimate of, all payments of money in default, and, for defaults not involving the failure to pay money, a statement of the action required to cure the default.
> (7) Any additional information required by the contract for deed or other agreement with the seller.

After the previous two sections, the installment land contract statute (§47H) goes off on its own. §47H-5 requires that the seller provide an account statement once a year for the term of the contract. This statement must include: the amount paid; the remaining amount owed; the number of payments remaining; the amounts paid to taxing authorities, if paid or collected by the seller or the purchaser; the amounts paid to insure the property on the purchaser's behalf, if collected by the seller; if the property has been damaged and the seller has received insurance proceeds, an accounting of the proceeds applied to the property; and if the property is encumbered by a lien or mortgage pursuant to §47H 6, the outstanding balance of the loan that is secured by the property.

§47H-6 goes even further to discourage the use of such a vehicle for conveyance as a contract for deed. If the property is not free from monetary obligations, then the only chance a seller has to enter into a contract for deed is if one of these three conditions is met (§47H-6(a)):

> (1) It was agreed to by the purchaser, in writing, as a condition of a loan obtained to make improvements on the property.
> (2) It was placed on the property by the seller prior to the execution of the contract for deed if the seller is a licensed general contractor within the meaning of Chapter 87 of the General Statutes, a licensed manufactured home dealer within the meaning of Article 9A of Chapter 143 of the General Statutes, or a licensed real estate broker within the meaning of Chapter 93A of the General Statutes, provided that the general contractor, manufactured home dealer, or real estate broker continues to make timely payments on the outstanding mortgage or encumbrance.
> (3) It was placed on the property by the seller prior to the execution of the contract for deed, if the seller is not a licensed general contractor within the meaning of Chapter 87 of the General Statutes, a licensed manufactured home dealer within the meaning of Article 9A of Chapter 143 of the General Statutes, or a licensed real estate broker within the meaning of Chapter 93A of the General Statutes, if the lien is attcched only to the property sold to the purchaser under the contract for deed, adn the seller continues to make timely payments on the outstanding mortgage or encumbrance.

Also, if such a monetary encumbrance exists, the buyer must be notified by a separate document, at or before the execution of the contract, exactly like this: THIS PROPERTY HAS EXISTING LIENS ON IT. IF THE SELLER FAILS TO MAKE TIMELY PAYMENTS TO THE LIEN HOLDER, THE LIEN HOLDER MAY FORECLOSE ON THE PROPERTY, EVEN IF YOU HAVE MADE ALL YOUR PAYMENTS. That is, 14-point type, boldface, and all capital letters must be used (§47H-6(b)). Violation of any of section §47H-6 allows the purchaser to seek damages or rescission of the contract and refund of all money paid (§47H-6(c)).

Finally, in both §47G and §47H, the North Carolina General Assembly has added a further deterrent (either to the use of these methods of conveyance or to failing to follow the directions specifically, depending on your viewpoint) in the inclusion of N.C.G.S. §75-1.1 and categorizing such a violation as an unfair trade practice. §47G and §47H also allow for actions to be brought: for damages; to render the transaction void; and declaratory or equitable relief. (Note: the statutes do exempt individual homeowners selling their primary residences from the purview of N.C.G.S. §75-1.1).

While this is not a comprehensive look at the new statutes, it does give North Carolina practitioners more clarity (and work) when advising sellers who wish to engage in non-traditional sale transactions.

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News You Can (& Should) Use

With the significant change in composition of the NC Legislature, expect a HUGE legislative agenda in 2011 including (among many other things):

- amendments regarding Good Funds Settlement Act
- recording fees
- recording satisfactions of deeds of trust
- memoranda of contract
- equity lines
- future advances
- tax carve-outs on newly divided parcels
- substantial probate code changes
- commercial real estate broker liens
- buyer's choice on REO closings
- disputed earnest money
- homeowners' association (planned community and condominium) governance and enforcement

In addition, there has been a barrage of new ALTA Endorsements for your commercial and residential policies - from revisions to ALTA 9's (Restrictions, Encroachments, Minerals), ALTA 13's (leasehold) and ALTA 14's (future advance) to new forms for severable improvements, and construction loans.

Tales from the Vault -- Claims Stories

Our March 2007 Newsletter article, Practice Pitfalls, began: "All owners of property must be the grantor of deed of trust, even if not same as the borrower. Fundamental, right?" However, this basic concept continues to prove not to be so self-evident and "fundamental", as evidenced by several recent claims.

Deed of trust was signed by Company, referencing an obligation of Company, but property was owned by Husband and Wife who only signed a hypothecation addendum, not the deed of trust itself. So this was not indexed by the Register of Deeds and was not identified in a later title update for additional financing. Of course, the later financing was signed by the owners, Husband and Wife.

Deed of trust was signed by Joe and wife, Jane, but notation indicated that Jane was signing solely to subject/subordinate her marital interest to the lien of the deed of trust securing only Joe's debt. Unfortunately, the property was held as tenancy-by-entireties, so more than Jane's "marital interest" was at stake - i.e. her actual ownership as a tenant-by-entirety.

Deed of trust was signed by the appropriate parties, but the notarial certificate (probably filled in by a software system for just the borrower) failed to include acknowledgments for all of the signers. Usually the non-borrower spouse is the omitted name in the acknowledgment.

The key issues the closing and drafting attorney must address are:

1. Who are all of the owners of all of the property?
2. Make sure that all owners (and spouses) sign the deed of trust itself (not just a rider or addendum).
3. Make sure that all of the signers' executions are acknowledged before a notary who completes a correct notarial certificate
4. If any owners are signing who are not borrowers, make sure to clearly and accurately reflect:
    a. Their interest being subjected to the lien of the deed of trust, and
    b. That the note is only from the borrower(s) and not all "Grantors", and
    c. Other identifying information of the obligation secured, such as the note date and amount.

Happy Closings!