

Effective Cancellation of an Equity Line Deed of Trust

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Introduction

A recurring pitfall for the closing attorney, and hence a recurring problem for the title insurer, is obtaining cancellation of the seller's equity line deed of trust incident to the sale of the real property which secured the equity line. The unfortunate reality is that, often, after the closing attorney tenders what is intended to be a payoff of the equity line, the seller, who still possesses equity line checks, continues to access the equity line of credit. The equity line lender, perhaps inadvertently, perhaps with the idea that they are providing convenient service to the seller by keeping the account open, continues to accept such drafts. When the seller, at some later point, is unable to pay on the account, the lender seeks to enforce the debt against the real property which originally secured the debt. Of course, the real property is now owned by another party, is security under a new deed of trust for the new owner's debt and that new mortgage is insured as a first lien by the title insurance company. The equity line lender begins foreclosure under the equity line deed of trust, and the new lender and owner make a claim under their title insurance policies.

Such a scenario has played itself out now repeatedly, despite efforts by lenders and title insurance companies to provide the closing attorney with instruction on how to successfully payoff and cancel the equity line deed of trust.

Statutory Provisions

Article Nine of Chapter 45 of the General Statutes defines an equity line of credit as:

an agreement in writing between a lender and a borrower for an extension of credit pursuant to which:

- (1) At any time within a specified period not to exceed 15 years the borrower may request and the lender is obligated to provide, by honoring negotiable instruments drawn by the borrower or otherwise, advances up to an agreed amount;
- (2) Any repayments of principal by the borrower within the specified period will reduce the amount of advances counted against the aggregate limit; and
- (3) The borrower's obligation to the lender is secured by a mortgage or deed of trust relating to real property which mortgage or deed of trust shows on its face the maximum principal amount which may be secured at any one time and that it secures an equity line of credit governed by the provisions of this Article. N.C. Gen. Stat. § 45-81(a).

With regard to satisfaction of an equity line deed of trust, the statute provides: [a]t any time when the balance of all outstanding sums secured by a mortgage or deed of trust pursuant to the provisions of this Article is zero, the lender shall, **upon the request of the borrower**, make written entry upon the security instrument showing payment and satisfaction of the instrument; provided, however, that such security instrument **shall**

remain in full force and effect for the term set forth therein absent the borrower's request for such written entry. (emphasis added.) N.C. Gen. Stat. § 45-81(c).

The language of the statute is clear that the borrower's request is necessary to accomplish satisfaction of the equity line instrument, and that payment of the account down to a zero balance does not automatically prompt satisfaction. The statute does not, however, establish any other criteria for the contents of such request or the form it should take.

It is the author's suggestion that the closing attorney should send a written statement on behalf of the mortgagor to the equity line lender along with the payoff check instructing the lender to mark the note and deed of trust paid and satisfied and to return both documents for cancellation of record. It is further suggested that particular attention should be given to the necessity of timely follow-up with the equity line lender, if the satisfied note and deed of trust are not received in a reasonable period of time. The claims experience of this title insurer has been that none of the prior equity line accounts were accessed shortly after the closing, but rather several months and even a year or more after closing. In such cases, loss could have been prevented had there been timely follow-up made by the closing attorney.

Sample Forms

Despite, or perhaps because of the lack of particular language provided in the statute for cancellation letters, samples of cancellation letters which would be sufficient under the statute to request satisfaction of the equity line deed of trust are reproduced here for the reader's convenience. Please note, however, that the following two letters -- one from the seller to the attorney and lender, and one from the attorney to the lender -- do not and are not intended to create or establish standards which, if not met, would allow a lender who receives payment of an equity line to consider the payment only a paydown and not a payoff. In fact, the author is aware of situations where far less was done relative to the payoff of an equity line deed of trust, yet the actions of the closing attorney were deemed to be sufficient to meet the requirements of the statute.

Nevertheless, the recurring problems with equity line deeds of trust demonstrate that attorneys are well-served by specifically calling the lender's attention to the payoff when it is made. Also, the position has been successfully argued that N.C. Gen. Stat. § 45-81(c) is not the sole method by which a lender becomes obligated to cancel an equity line deed of trust. Accordingly, our reprinting of these sample letters is only for the purpose of example and convenience.

Sample #1 Letter from Seller to Closing Attorney and Lender

Re: Account No.

Deed of Trust recorded in Book , page , County Registry

Property Address

I (We), the Seller of the above-described property do hereby direct, authorize and request [name of bank], my equity line lender, to close out my equity line account effective immediately. I do further agree that I have not written any checks/drafts from my equity line account since [date] and will not write any more against my equity line account. I do

further agree to indemnify and hold harmless [name of law firm], the new lender, the buyer and the title insurance company for any loss as a result of my equity line being used subsequent to the date of this agreement or for checks/drafts being honored by my equity line lender despite my canceling of my equity line.

This the ____ day of _____, 1993.

_____(SEAL)

Sworn to and subscribed before me this
the ____ day of _____, 1993

Notary Public

Sample #2 Letter from Closing Attorney to Lender

Re: Account No.

Deed of Trust recorded in Book , page , County Registry

Property Address

Enclosed you will find our trust account check in the amount of \$_____, representing payment in full for the above-referenced loan. Note: If this loan is an equity line, the account is to be closed and no more checks or drafts shall be accepted by you since the payoff was quoted to this firm or after receipt of this check. This is not to be construed as a payment or payoff of this account.

Please forward to our office the original Note and Deed of Trust marked "Paid in Full and Fully Satisfied," dated and signed, so that we may have the lien removed from public record.

Conclusion

The reader should note that the North Carolina Bankers Association approved a form for canceling equity lines of credit which was drafted by the North Carolina Task Force on Residential Loan Closings. Copies of that form are available from the author, and it is suggested that mortgage lenders will be glad to provide samples of "approved" cancellation letters for use by closing attorneys. Whatever form or letter is used, such use will be a vast improvement to the practice of forwarding a "naked" payoff check to an equity line lender and assuming the proper steps will be taken towards cancellation of the equity line.