We have all been in situations where we wish we could fast forward the hands of time. Long road trips, sitting in the dentist’s chair, sitting at a dance recital in an un-air conditioned auditorium on a 95 degree day (personal experience). In the case of Wachovia Bank National Association v. Superior Construction Corporation (2010 WL 1655494), the court held that you can fast forward time with respect to a contractor’s date of first furnishing via the execution of a partial lien waiver. Here the owner of the property entered into a construction contract with Superior Construction as the general contractor. The owner also entered into a loan transaction with Wachovia, and a deed of trust was recorded on May 19, 2005. Thereafter, Superior filed a claim of lien and alleged that it first furnished labor or materials to the project on April 22, 2005. Obviously this date is important because the April date of first furnishing would give Superior’s lien priority over Wachovia’s deed of trust. Wachovia filed a declaratory judgment action seeking judicial determination that its lien was prior to any claim by Superior.

The facts showed that when Superior sought its first two payments for work on the project it submitted a partial lien waiver at the same time. The waiver stated in part, Superior does “waive, relinquish, surrender and release any and all lien, claim, or right to lien on the above said described project and premises, arising under and by virtue of the mechanics’ lien laws of the State of North Carolina on account of any labor performed or the furnishing of any material to the above described project and premises up to and including the 31st day of May, 2005.”

The owner of the property (as substituted plaintiff for Wachovia) argued that the effect of the language whereby Superior waived all rights through May 31, 2005 was to give Wachovia’s deed of trust priority over Superior’s claim. Superior contended that when it signed the lien waivers and accepted partial payment, the payment merely reduced the amount payable by the amount received and did not alter the date of first furnishing. Superior argued that the effect of altering the date of the first furnishing would undermine the “certainty and security” afforded to a contractor by the mechanics’ lien statute. The court disagreed, stating that “if a party chooses lawfully to change its position on a hierarchy of liens, by contractual waiver or otherwise, the party still remains certain and secure of its new position.” Additionally Superior argued that a subordination form should have been used by Wachovia in this instance.

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Fast Forward (cont. from page 1):

While a subordination form would have served the intended purpose, the court found no authority requiring use of a subordination form.

Ultimately the court held that it must “construe the waivers to mean what on their face they purport to mean” and that the waivers clearly provide that in exchange for consideration Superior waived “any and all lien, claim or rights to liens” under North Carolina law for work through May 31, 2005. The court acknowledged that the effect of the partial waiver under their interpretation is to change the date of first furnishing, and found “while such a result may seem harsh, the wording of the contract clearly demonstrates the parties’ intent to achieve such a result.”

It must be noted that the decision in this case does not carry any precedential value. It was not heard on the appellate level but was decided by a Special Superior Court Judge for Complex Business Cases. It is not, however, unreasonable to think this decision will act as persuasive authority for other cases at the trial court level.

What does the decision in this case mean for you as the attorney handling the closing of a loan where construction is already in progress? You may find that contractors and their attorneys may spend more time haggling over the language of partial or interim lien waivers in an effort ensure the date of first furnishing remains unchanged. In some cases, contractors may refuse to sign any lien waiver form when there is work yet to be performed. In either case if you have any question about the effect of a partial or interim lien waiver or the insurability of a transaction involving ongoing construction, please contact a title attorney to discuss. As was pointed out in the case, a properly executed subordination of lien form would also give priority to the lender’s deed of trust without altering the date of first furnishing. Such a form, if drafted properly, would not affect the contractor’s priority as against lienholders other than the one specifically intended. The North Carolina Land Title Association Form 3, Owner/Contractor Affidavit, Indemnity and Lien Subordination Agreement (Construction in Process or Immediately Contemplated) is a form I would recommend for this situation. The form can be found on our website at http://nc.invtitle.com/resource/forms/.

ADDITIONAL NOTE – In Re Beckhart

Many of you are familiar with the cases coming out of the Eastern District Bankruptcy Court where deeds of trust are held to be unenforceable or invalid due to defects within the recorded instrument. The scariest of these cases in my opinion is In Re Head Grading (353 B.R. 122) where the date of note as defined in the deed of trust was off by one day from the date of the actual note. With the case of In Re Beckhart (2010 WL 1416807) it seems at first blush the pendulum may be swinging back in favor of the drafter. I would encourage you, however, to be wary because on closer review it appears Beckhart has a very specific set of facts. In Beckhart the sufficiency of the description of the obligation secured was at issue because (a) the date of the note was left blank in the body of the deed of trust and (b) the deed of trust did not specifically state that the husband was the only maker on the note. The Court found neither of these defects fatal. As it turned out the date of the actual note was also left blank so the description in the deed of trust was consistent. Additionally, the Court found that the deed of trust form itself (standard Fannie/Freddie single family form) specifically contemplated a situation in which one of the persons listed as a borrower on the instrument would not actually be a maker on the note. But what is only briefly mentioned in the facts of the case and not addressed in the analysis at all is that an actual copy of the note is attached as an exhibit to the recorded deed of trust. Presumably the court’s analysis would be the same if the note was not attached because it is not referenced as a factor in the decision, but one can see how the facts could be distinguished in a later case.

What is very clear to me is how important it is for the closing attorney to closely scrutinize the deed of trust prior to recordation. I know that loan packages continue to arrive later and later but a couple of extra minutes could save a large headache down the road. Double-check the names of the grantors (especially corporate entities), the description of the note obligation (make sure there is a note obligation referenced because I have seen deeds of trust that contain no reference to a note obligation at all), the legal description, and the notary acknowledgment. All of these matters can be potential land mines if the borrower goes into default and subsequently files bankruptcy.

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**NC Fun Facts**

Southport, NC holds an annual 4th of July Festival that dates back to colonial times! For more information on event activities, visit [http://www.nc4thofjuly.com/](http://www.nc4thofjuly.com/)
The North Carolina Court of Appeals has ruled that trustees cannot be totally relieved of their duty to provide trust accountings to named beneficiaries. The case arose after Lawrence Wilson, Jr., created two irrevocable trusts in 1992, one for each of his two children. Wilson named his father (the grandfather of the beneficiaries) as the initial trustee of both trusts. The instruments also provided that no trustee would “be required by any law, rule or regulation to prepare or file… reports with any court or beneficiary….”

In September 2007, the beneficiaries filed suit, alleging that their father had assumed the management of the trusts from their grandfather and had improperly invested its assets in his personal business ventures that declined in value. As part of the litigation, the plaintiffs sought a full accounting from the date the trust was created until the trial court issued a final order. Following a hearing in April 2008, the court concluded that state law allowed the settlor to waive the trustee’s duty to provide information to beneficiaries. It ultimately issued a summary judgment in favor of the defendants, and the children appealed. The appellate court reversed and agreed with a Nebraska decision that “a trust without accountability is a contradiction in terms.”

The North Carolina court acknowledged that, under the state’s Uniform Trust Code, trustees are not automatically required to “keep qualified beneficiaries reasonably informed about the trust administration,” but that such information must generally be provided after a beneficiary’s request. Besides, according to the Court, all trustees have a duty to act in good faith, and assessing the nature of a trustee’s action can only be determined by access to the trusts’ records. Accordingly, the Court concluded, “the information sought by Plaintiffs was reasonably necessary to enforce their rights under the trust, and could not legally be withheld.”

--Wilson v. Wilson, No. COA09-325, N.C. Ct. App. 3/16/10

This information is provided for informational purposes only and does not constitute legal advice.
Effective May 12, 2010, the North Carolina Land Title Association has made revisions to the lien waiver and affidavit forms introduced last year. The forms are available for download in PDF or Fillable PDF versions from the Investors Title website: http://nc.invtitle.com/resource/forms/. The changes are briefly outlined below for your convenience.

**NCLTA Form 1 – OWNER AFFIDAVIT AND INDEMNITY AGREEMENT (No Recent Improvements and No Executory Contracts for Improvements)**

- The form has been revised to include an additional certification by the owner that no work has been performed prior to 120 day lien period that will or may be completed post-closing. The title of the form has been revised to reflect this certification.
- The instruction page has been revised to add paragraph #4 as to the additional certification. The new paragraph includes an example of such an executory contract.

**NCLTA Form 2 – OWNER/CONTRACTOR AFFIDAVIT, WAIVER OF LIENS AND INDEMNITY AGREEMENT (Construction Recently Completed)**

- The form has been revised to add basic waiver language to the signature page in the event the signature page is separated from the body of the form.
- Additional signature blocks have been added.
- A typo in Paragraph 3 referring to Ch. 83 instead of Ch. 87 of the NC General Statutes has been fixed.

**NCLTA Form 3 – OWNER/CONTRACTOR AFFIDAVIT, INDEMNITY AND LIEN SUBORDINATION AGREEMENT (Construction in Process or Immediately Contemplated)**

- Subordination language has been added to the signature page of the form in the event the signature page is separated from the body of the form.
- Additional signature blocks have been added.
- Paragraph 2 of the instruction page has been revised to clarify that this form cannot be used to obtain owner’s title insurance over mechanics’ liens. The spacing in the title of the form has also been adjusted to make the statement “Lender Coverage Only” more visible.
- A typo in Paragraph 3 referring to Ch. 83 instead of Ch. 87 of the NC General Statutes has been fixed.

**NC Forms**

A number of practice forms are available on the Investors Title NC specific website. To view a list of forms visit nc.invtitle.com/resource center/forms or click here:

http://nc.invtitle.com/resource/forms/

Forms available include: NCLTA Lien Waivers, Affidavit of Satisfaction, Corrective Affidavit, Preliminary Title Form, Final Opinion Forms, Declaration of Intent, Subordination Agreement, and many more.
Fraud and forgery claims are frequently received by title insurance companies. It is a given that the attorney in private practice is dependent upon his or her clients to sustain the practice. Over time relationships are built and some clients even become friends. Those clients become well known to the attorneys’ staff as well. Those types of relationships are important to the business and should be encouraged. But when that relationship causes the client to ask the attorney and staff to vary their normal procedures, the prudent attorney or paralegal will tactfully explain to the client and staff that the procedures are in place to protect everyone involved in the transaction (even the client), and cannot be varied for expediency.

Increasingly attorneys and paralegals who choose to stray from their normal procedures to accommodate the needs or desires of the client become victims of the client’s wrongdoing. The most common of these problems arises when documents are notarized in the attorneys’ office by the attorney or a member of the staff, after the documents are executed in another location by a party who is not present when the documents are notarized. Later, when business or personal matters deteriorate for the client, the attorney may learn that the notarization provided to the client as a “favor” or because of an “emergency,” becomes a persuasive piece of evidence in support of a fraud or forgery claim by the person whose signature was notarized in absentia.

ALTA 6-06 ENDORSEMENT

This endorsement insures a lender against loss or damage resulting from the invalidity, unenforceability or impairment of priority of the lien of the insured mortgage caused by provisions in the insured mortgage for changes in the rate of interest. The endorsement reads as follows:

The Company insures against loss or damage sustained by the Insured by reason of:

1. The invalidity or unenforceability of the lien of the Insured Mortgage resulting from its provisions that provide for changes in the rate of interest.

2. Loss of priority of the lien of the Insured Mortgage as security for the unpaid principal balance of the loan, together with interest as changed in accordance with the provisions of the Insured Mortgage, which loss of priority is caused by the changes in the rate of interest.

"Changes in the rate of interest", as used in this endorsement, shall mean only those changes in the rate of interest calculated pursuant to the formula provided in the Insured Mortgage at Date of Policy.

This endorsement does not insure against loss or damage based upon:

1. usury, or

2. any consumer credit protection or truth in lending law.