# THE NC CONNECTION


AN INVESTORS TITLE COMPANY PUBLICATION


## The Equity Line Edition

## Cancelling the Equity Line of Credit: Things Just Got Clearer


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A recurring pitfall for the closing attorney, and hence a recurring problem for the title insurer, over the past several years has been obtaining cancellation of an equity line deed of trust incident to the sale or refinance of the real property which secured the equity line. The unfortunate reality was that, often, after the closing attorney tendered what was intended to be a payoff of the equity line, the borrower, who still possessed equity line checks, continued to access the equity line of credit. If the payoff letter instructing the bank to close the equity line was not signed by the borrower, the banks took the position that they were not required to, and indeed could not, close the equity line under the express terms of N.C. Gen. Stat. § 45-81(c) and the case of *Raintree Realty and Construction v. Kasey*, 116 N.C. App. 340, 447 S.E. 2nd 823 (N.C. App. 1994) affirmed per curiam 341 N.C. 195, 459 S.E. 2nd 273 (N.C. 1995). Instead, the bank would often send advertising material and even checks to the equity line borrowers encouraging them to continue to use the equity line account.

> **"A recurring pitfall for the closing attorney… has been obtaining cancellation of an equity line..."**

Some borrowers, unable to avoid the temptation, succumbed to the enticements of the bank, thereby creating a lien with an existing balance with priority over the lien of the refinanced or new Deed of Trust and/or even the ownership rights of the purchaser at the transaction. When the seller, at some later point, was unable to pay on the account, the lender would seek to enforce the debt against the real property which originally secured the debt. Of course, the real property was now owned by another party and/or was security under a new deed of trust, and that new mortgage was insured as a first lien by the title insurance company. The equity line lender began foreclosure under the equity line deed of trust, and the new lender and owner made a claim under their title insurance policies.

Such a scenario has played itself out 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. Title underwriters and attorneys have longed for clarifying legislation to provide the parties with better means to prevent these issues. This past fall, the legislature finally provided some relief with the passage of a revised Article 9 to Chapter 45 of the General Statutes. Key provisions of the new Article are discussed below.

Under § 45-82.3, authorized persons as defined in § 45-81(1), including closing attorneys

*(Continued on page 2)*

## In This Issue:

## Cancelling the Equity Line of Credit... (cont. from page 1)

disbursing funds in connection with the sale of, or a new loan secured by, property then encumbered by an existing equity line security instrument, may block future advances on an equity line by submitting a Notice Regarding Future Advances to the lender holding the equity line deed of trust. Any advances made by the lender following one complete business day after receipt of the notice by the lender will not be secured by the equity line deed of trust, except in certain limited circumstances defined in § 45-82.3 (c). A legally sufficient form is set out in § 45-82.3(e) and linked here.

**"A closing attorney… may forward a Request to Terminate an Equity Line of Credit to the lender..."**

At the same time that the closing attorney sends the Notice Regarding Future Advances to the lender, under § 45-82.3(f) the closing attorney must give a copy of the Notice Regarding Future Advances to the borrower with a Notice to Borrower substantially similar to the sample linked here.

Under § 45-82.2, a closing attorney who is disbursing funds in connection with the sale of, or a new loan secured by, property then encumbered by an existing equity line security instrument, may forward a Request to Terminate an Equity Line of Credit to the lender holding the equity line deed of trust. Upon receipt of the Request, § 45-82.2(a) requires the lender must:

(i) terminate the borrower's right to obtain advances under the borrower's equity line of credit; (ii) apply all sums subsequently paid by or on behalf of the borrower in connection with the equity line of credit to the satisfaction of the equity line of credit and other sums secured by the related equity line security instrument; and (iii) when the balance of all outstanding sums secured by the related equity line security instrument becomes zero, satisfy the related equity line security instrument as a matter of public record pursuant to G.S. 45-37.

**"The new statutes… provide a 'safe' procedure for the attorney seeking to block an equity line. "**

§ 45-82.2(b) provides a legally sufficient form for the Request which is linked here.

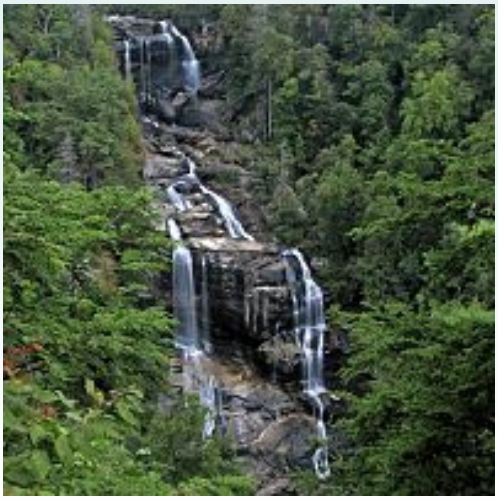
§ 45-82.2(d) provides that the closing attorney shall give a copy of the request to the borrower accompanied by a notice that in a form substantially similar to the sample linked here.

The new statutes discussed herein together with the forms contained in the statutes provide a "safe" procedure for the attorney seeking to block an equity line prior to a closing, and for closing and satisfying an equity line at closing. Accordingly, all attorneys performing real estate closings in North Carolina need to read these new provisions thoroughly and to conform their practices to the procedures outlined therein. In this manner, attorneys, new purchasers, lenders and title companies may avoid the "surprises" and the unpleasantness associated with the title claims which result when equity lines of credit are not properly closed.

## NC FUN FACTS

**Whitewater Falls** is the highest waterfall in the eastern United States. The series of waterfalls and cascades are found as part of the Whitewater River in North Carolina and South Carolina. Over the 2.4 mile (3.9 km) course of the river on the two falls, the Whitewater River drops 1071 ft. (330.5 m.).

Upper Whitewater Falls - the taller of the two falls (411 ft, 127 m.), is located in Jackson County and Transylvania County, North Carolina.




## My Equity Line was a Lien on the Property I Sold?

By Carol Hayden, Esq., Claims Counsel

Joe DiFault sold property to Innocent Anna. At closing, the sales proceeds were used to pay off Joe's first mortgage, and to pay off an equity line deed of trust in favor of Easy Internet Bank. Joe received $5,000 in equity from the sale of his property. The certifying attorney certified that both deeds of trust were paid off at closing, but not yet cancelled of record. Our policy did not take exception for the uncancelled deeds of trust, because we knew the payoffs had been sent.

FAST FORWARD THREE YEARS: Innocent Anna gets a notice of foreclosure from the substitute trustee for Easy Internet Bank. The bank claims that Joe's equity line is in default, that $80K is owed on the loan, and that the bank has a first lien on the property. Innocent Anna (if she has an owner's policy!) immediately submits a claim to her title insurer, who begins an investigation. This is one of the MOST common title insurance claims, and the result of the investigation can go in several directions:

Best-Case Scenario: The certifying attorney has a copy of Easy Internet Bank's payoff letter in their file, a copy of the settlement statement is provided, showing that the payoff was made, there is also proof of payment in the attorney's file, and a written request, signed by Joe, had been sent to the lender with the proper payoff, requesting that the equity line account be closed, and the deed of trust cancelled of record. In the investigation, it is uncovered that Joe received some new equity line checks in the mail, three months after closing, and immediately began to use them. When asked about the new draws on his old equity line, Joe replies that he thought the equity line was now just unsecured. Since the statutory provisions of NCGS, Chapter 45, Article 9 were followed, the claims adjuster is able to convince Easy Internet Bank to cancel the deed of trust of record, and only pursue Joe under the note.

**"Unclosed equity lines continue to be one of the most persistent title insurance claims."**

Worst-Case Scenario: It is uncovered that the certifying attorney got the payoff letter from Easy 30 days prior to closing, without having sent a block letter. Joe had run up the equity line a few days prior to closing. When the payoff was sent to Easy Internet Bank, it was insufficient to bring the balance down to zero, so Easy Internet Bank was not required, under the statute, to cancel the deed of trust or close the equity line, since it had not been paid in full. The title insurer might have to purchase Easy Internet Bank's note in order to cancel the deed of trust and protect Innocent Anna. The title insurer will then pursue Joe DiFault under the Note and/or under the warranties of title that Joe made in his deed to Innocent Anna. (If Innocent Anna did not have an owner's policy, her lender might be protected, and the title insurer would only have to subordinate the equity line to her loan – she might still be on the hook when she sells the property!)

New Protections & Practice Tips: Unclosed equity lines continue to be one of the most persistent title insurance claims; however, Article 9 of Chapter 45 of the North Carolina General Statutes was revised by Session Law 2011-312 to provide more certainty in getting accurate payoffs and to prevent additional advances from being secured by the equity line deed of trust, if proper notices are sent. The new procedures no longer require that block letters and requests to close an equity line be signed by the borrower. An Authorized Person may make the requests, as long as proper notices are sent to both the Lender and the Borrower. The most pertinent changes include:

- an Authorized Person (including the closing attorney) can make the request that a Lender terminate an equity line of credit. §45-82.2
- an Authorized Person (including the closing attorney), when requesting payoff letters, can give notices to the equity line Lender that future advances will be unsecured. §45-82.3

To prevent horror stories for purchasers, such as the one experienced by Innocent Anna, familiarize yourself with the new provisions of Article 9 of Chapter 45 and help prevent claims which can be costly for all parties involved.

NC CONTENT ONLY

# Investors Title Insurance Company

# ON-DEMAND EDUCATION

### WHAT IS IT?

An online-based portal through which continuing education (CLE/CPE) credit may be earned.

### HOW DO I CREATE AN ACCOUNT?

Go to nc.invtitle.com/ondemand and follow the link to the course portal. Select "Register" on the top menu to create an account.

### HOW MUCH DOES IT COST?

Free to create an account. Non-Credit Courses = $0 (Free)
Credit Courses = $25 (Pay online with a credit card.)

### HOW IS MY CREDIT HANDLED?

Please review the "Credit FAQs" section provided on the portal.

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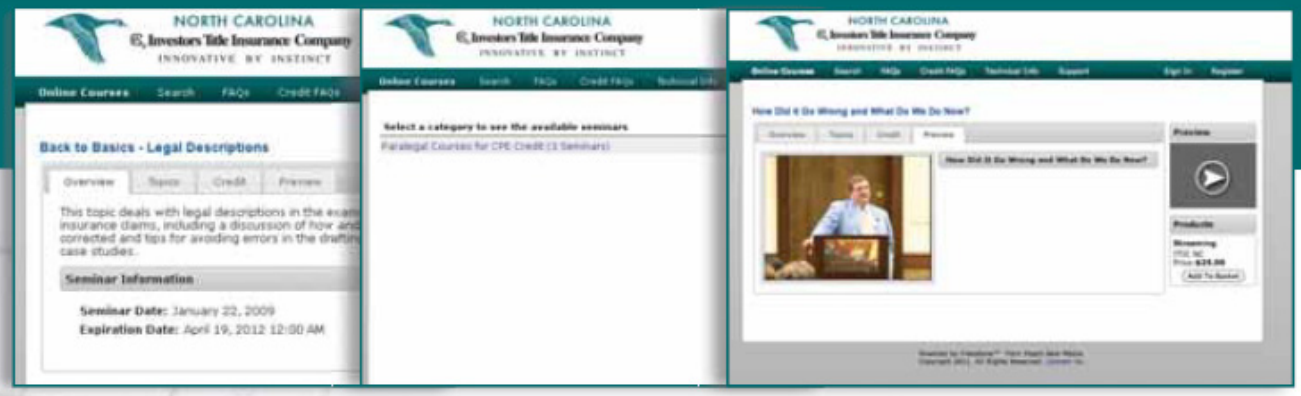


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# MEET OUR MARKETING MANAGERS

## Lou Ann Craven

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Lou Ann Craven is the Marketing Manager for the Durham/ Chapel Hill markets and the Wilmington and Shallotte markets, covering a total of 13 counties in North Carolina for Investors Title Insurance Company. Lou Ann has been with Investors Title since February 2006. For more than 15 years prior to joining Investors Title, she was a real estate paralegal with the law firm of Kenneth R. Embree and William G. Harriss where she handled all areas of the real estate practice, including title work and closings.



### In re Raney

Determining testamentary capacity is generally based on the facts and circumstances of each case, and a recent case from the North Carolina Court of Appeals proves that point. The litigation developed after Mary Rose Raney died in September 2007. Raney and her husband of 68 years had executed reciprocal Wills in 1987 that ultimately left all of their property equally to their two children, Betty Meadows, the Propounder, and John Raney, the Caveator. In August 1996—two months before Mr. Raney's death and three days after he had suffered a stroke—the Raneys executed a deed, which the couple "purportedly signed," that gave most of the couple's real estate to their daughter. Mr. Raney died in October 1996, and two months later, Mrs. Raney changed her Will, the provisions of which largely mirrored the deed that the couple had executed giving most of the couple's property to their daughter. When Mrs. Raney died in 2007, a caveat proceeding was filed. The trial revealed conflicting evidence of Mrs. Raney's testamentary capacity and undue influence. One witness testifying for the Caveator, for example, said that Mrs. Raney was concerned about people "playing football in the hallways of [her] nursing home." There was also evidence that she was being medicated for shingles with a drug that could have had a variety of side affects. But several witnesses testified that Mrs. Raney was competent. Ultimately, a jury concluded that she lacked the necessary capacity to execute her Will, prompting her daughter to appeal. But the appellate court, in a 25-page opinion, upheld the lower court's decision, ruling that, while there was conflicting evidence, "the jury verdict was not against the greater weight of the evidence," so that verdict should be sustained.

--*In re Raney,* No. COA10-1480, N.C. Ct. App. 9/6/11

The above article is for informational purposes only and does not constitute legal advice.