THE NC CONNECTION

AN INVESTORS TITLE COMPANY PUBLICATION

North Carolina is Still a Title Theory State:

Countrywide Home Loans v. Reed, No. COA11-769

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Click here for Ryan's bio.

Investors Title Company
INNOVATIVE BY INSTINCT

If you have been paying attention, you can understand why someone might pause for a moment before answering the question as to whether or not North Carolina is a title theory state. What do I mean by title theory? In North Carolina, the trustee named in a deed of trust holds legal title to the real property granted therein as security for the note obligation. Once the debt is paid off, the deed of trust is cancelled and title reverts to the borrower. If the borrower defaults, the trustee is given the power to sell the property pursuant to the provisions of the deed of trust and Ch. 45 of the North Carolina General Statutes.

> **"...the trustee named in the deed of trust holds legal title..."**

Over the last decade or so, we have seen a slow erosion of certain elements related to title theory. In 2003, the North Carolina Legislature enacted NCGS 39-6.6 which provides that the trustee under a deed of trust is not a necessary party to a subordination agreement. At its most basic, the subordination is simply a contract for priority, and it seems proper to allow the parties to agree without joinder of the trustee who simply holds title for the lender's benefit. In 2009, NCGS 45-10 was amended to add subsection (b) to the existing statute. This new subsection provides that, "If the name of a trustee is omitted from an instrument that appears on its face to be intended to be a deed of trust, the instrument shall be deemed to be a deed of trust, the owner or owners executing the deed of trust and granting an interest in the real property shall be deemed to be the constructive trustee or trustees of record for the secured party or parties named in the instrument, and a substitution of trustee may be undertaken under subsection (a) of this section." No trustee, no problem. Finally, in 2011, NCGS 45-10 was again amended to add a subsection (c) which provides that if the trustee named in the deed of trust was the same party as the beneficiary, the instrument shall still

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be deemed a deed of trust. In the same session, Law NCGS 45-45.3 was enacted which provides, among other things, that a trustee does not have to join in a release of property from the lien of the deed of trust unless the instrument provides otherwise and that a trustee is not a proper party in many civil actions involving the property.

Don't get me wrong. As a title insurance underwriter, all of these changes make my life just a little easier. My only observation is that the passage of these statutes does seem to be contrary to certain fundamental characteristics of a title theory jurisdiction, but don't let that fool you — title theory is alive and well in North Carolina.

In Countrywide Home Loans v. Reed, Margaret Smith and her daughter and son-in-law, Judy and Troy Reed, purchased a home. The deed named the grantees as Margaret D. Smith and Troy D. Reed and wife, Judy C. Reed joint tenants with right of survivorship. In order to purchase the home, Margaret Smith executed a promissory note and deed of trust to Countrywide. Neither Troy nor Judy Reed signed the note or deed of trust in their individual capacities. Margaret Smith passed away, and the loan went into default.

Countrywide filed a reformation action against the Reeds seeking to have them made obligors on the original deed of trust to reflect the intent of the parties. The Reeds counterclaimed and sought injunctive relief. Both parties filed summary judgment motions alleging they were entitled judgment as a matter of law. The trial court granted Countrywide's motion and declared the following:

1. Prior to her death, Margaret Smith owned a one-half undivided interest in the property that was encumbered by the deed of trust;
2. The other one-half undivided interest was owned by Troy and Judy Reed as Tenants by the Entireties; it was not encumbered;
3. Upon death, Margaret Smith's interest vested in Troy and Judy Reed, subject to the deed of trust, pursuant to the right of survivorship;
4. Troy and Judy Reed own the property in fee simple absolute; subject to the deed of trust on the one-half undivided interest.

The Reeds appealed the order granting summary judgment for Countrywide contending that the deed of trust "did not survive Mrs. Smith's death." On appeal, the Court found that it "must determine whether the deed of trust severed the joint tenancy, such that

only a portion of the property owned … was encumbered, or whether the deed of trust did not sever the joint tenancy …"

The Court found that NC is a title theory state and that the conveyance of the legal title to the land as security for the debt triggered the provisions of NCGS 41-2(a). NCGS 41-2(a) states that "Upon conveyance to a third party by less than all of three or more joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created among the third party and the remaining joint tenants..." Therefore, the act of mortgaging the property severed the joint tenancy, and Mrs. Smith became a tenant in common with the Reeds. (It doesn't really make a difference to the analysis, but I would argue that, since you only had two parties to the deed as the tenancy by the entirety, it should be considered a single party as opposed to

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NC FUN FACTS

The Museum of the Alphabet is a museum located in Waxhaw, NC. This museum exhibits all of the world's alphabets. Alphabetical and language exhibits include: ancient Egypt (stamp your name in Hieroglyphics!), Rome, Greece, Turkey, Russia, Mongolia, China, Japan, Korea, the Arabic world and its derivatives, the Cherokee language and others.[1] To learn more, visit the museum's website at:

www.jaars.org/museum/alphabet/index.htm

Photo: http://www.jaars.org/museum/alphabet/index.htm

[1]http://www.roadsideamerica.com/tip/6200

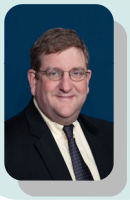
North Carolina is Still a Title Theory State... continued from page 2

two separate parties.) As a result, the Court found the trial court to be correct in finding that the deed of trust did not constitute a lien on the one-half interest owned by the Reeds as tenants by the entirety but held the trial court incorrect in concluding that upon Margaret Smith's death the Reeds owned the property in fee simple absolute.

Unintended Consequences of the Mortgage

What does all this mean for the title examiner? If you are reviewing a title where the property is held as joint tenants with right of survivorship, you have to look to see if the property was mortgaged and by whom. In the unlikely event the property was mortgaged by less than all of the joint tenants, the property will not pass to the remaining joint tenants by survivorship. It makes no difference that the trustee did not seek to enforce the mortgage. The act of conveying the title to the trustee is enough to sever the joint tenancy. The property will pass through the estate of the deceased party. Obviously this could lead to a dispute among family members and subject the property to claims against the deceased's estate. These issues would not have arisen if the property had been held as joint tenants with right of survivorship at the time of death.

The Countrywide case does have a very specific set of facts. Less than all of the joint tenants conveyed their interest to the trustee under the Deed of Trust. Surely, the lender intended to have 100 percent of the interest as security for the loan. The case does not address whether the result would be the same in the event all joint tenants joined in the conveyance to the trustee. NCGS 41-2 only talks about severance when less than all of the joint tenants convey their interest. That certainly makes perfect sense when the property is transferred or conveyed to a third party in the normal sense, but a mortgage is a unique situation. The interest is conveyed, but the right of redemption is retained. In addition, the Court of Appeals, in their opinion, did state the following: "In this case, North Carolina is a title theory state, and thus a mortgage is a conveyance. Mrs. Smith severed the joint tenancy when she, as the sole obligor on the deed of trust, filed the deed of trust encumbering the property." This language of the opinion can be viewed as either a simple restatement of the facts or could potentially stand for the proposition that if all joint tenants had conveyed their interest the joint tenancy would not have been severed by the conveyance to the trustee. I don't know how the Court would ultimately decide that issue. As always, I would encourage you to consult with your title insurer in the event you are reviewing a title where joint tenants with right of survivorship have mortgaged the property, and one of them has now passed away.



The Goal: Making New Mechanics' Lien Procedures User-Friendly

by Steve Brown, VP-Title Attorney
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Click here for Steve's bio.

Since the new mechanics' lien law was ratified in July 2012, many attorneys have expressed concerns about whether the effect of the new law will place any "additional burdens" on closing attorneys and their staffs. As most of you are aware, the new law (which can be found at the link set forth at the end of this article) is scheduled to go into effect on April 1, 2013. Accordingly, there is a relatively short time for everyone to learn the substance of the new law and to adjust to new procedures required by the new law.

Since the passage of the law this summer, title insurance companies have been working cooperatively through the North Carolina Land Title Association (NCLTA) to digest the new law, develop educational programs to meet the needs of attorneys and their staffs, and develop relatively uniform "user-friendly" forms and procedures. (Each title company will still have to develop their own underwriting guidelines.) As a result of these efforts, a CLE program has been developed for use by all of the title companies to assist attorneys in the first step of the educational process -- to learn the substantive provisions of the new law and the effect that it will have on the closing process. Investors Title will be presenting this program at its Fall Gathering Seminar.

In addition, NCLTA forms are being developed. The NCLTA is working with the Real Property Section of the NCBA and the Realtors Association to make changes in the

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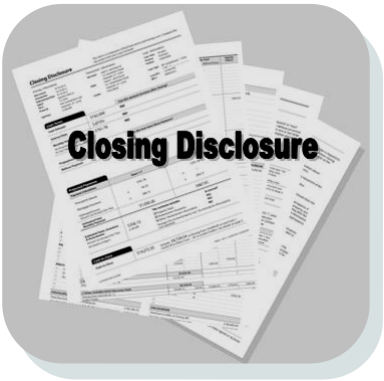
The Goal... continued from page 3

Offer to Purchase and Contract which intend to make it easier for attorneys to learn who the Mechanics' Lien Agent is on a given property. Finally, title companies are working to develop a central registry for lien agents to make the whole lien agent process as "user-friendly" for attorneys, lenders, builders, suppliers, and trade contractors as possible.

As these efforts progress, more education will be offered with respect to the processes and forms which will facilitate implementation of the new law. Investors Title is already planning a series of seminars for attorneys and paralegals in the Winter and Spring of 2013 across the state to insure that everyone is ready when the new law goes into effect. Throughout, the goal of all these preparations is to make the new procedures "user-friendly" for all parties who will utilize the procedures.

http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S42v6.pdf

Role of NC Closing Attorney Being Challenged



Did you know that your role as a closing attorney in North Carolina is being challenged by the Consumer Financial Protection Bureau?

- Did you know the HUD-1 settlement statement is being replaced by the "Closing Disclosure?"
- Do you believe that providing the settlement statement/closing disclosure is the role of the lender?
- Do you want to be questioned about errors in a settlement statement closing disclosure that you did not prepare or provide to the borrower?
- Do you want to provide all the information needed to complete the closing disclosure to the lender to provide to the borrower?

If you answered "no" to any of these questions, then you have until November 6th to have your voice heard!

On July 9th, The Consumer Financial Protection Bureau (CFPB) published the Integrated Mortgage Disclosure Rule that will combine the final TILA disclosure and HUD-1 Settlement Statement into a single document called the "Closing Disclosure." Elements of the proposed rule will have a direct impact on attorneys closing loans in North Carolina.

Under the proposed rule, the lender, not the settlement agent/closing attorney, will provide the new Closing Disclosure. The CFPB is considering an alternative that would allow a settlement agent/closing attorney to provide the new Closing Disclosure. They need to hear from you concerning this alternative.

The proposed rules require the new Closing Disclosure and all related documents to be maintained in electronic machine readable format (XML). Do you know how to produce an XML document? How would this impact you? How would you comply with the requirement? What would it cost you to comply?

Closing software will require significant upgrades or replacement to accommodate the new disclosures, staff will require training, and internal documents will require reprogramming. Is your software maintenance agreement up to date? Does it cover future upgrades or replacements? If not, what will it cost you? How much will it cost you to train your staff?

The consumer must receive the new Closing Disclosure 3 days prior to closing. If changes to the new Closing Disclosure are required, the closing will be delayed. What will your clients expect from you? Will you have to have a "pre-closing" to answer consumer questions? How will this impact your staffing, scheduling, and volume?

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Role of Closing Attorney Being Challenged cont. from page 4

To learn more specifics on these and other important issues in the proposed rules, please see the attached summary of key provisions of the rules.

What should you do? Express your concerns by November 6th!

Your voice counts — the comment period ends on November 6, 2012. Talk to your colleagues and get the word out. Submit comments to the Consumer Financial Protection Bureau to influence the way these rules will impact your practice, and ultimately, your clients. Comments that are concise, personal, understandable, and factual will have more impact with the CFPB. Include data on both the implementation costs and operational costs to your practice that may result in higher closing costs to your clients. Consider telling a story based on a real life scenario and express your opinion on how these proposed rules may negatively impact your client. Explain what you would like to see in the new rules, but be specific.

When should you comment? Now! Where do I submit comments? Link Below!

The comment period for the proposed rules closes on November 6th, 2012, so don't wait to make your opinion heard. Comments can be submitted at http://www.regulations.gov/#!submitComment;D=CFPB-2012-0028-0353.

To get you started, we have supplied you with a draft comment letter which was prepared by ALTA. To avoid the appearance of a form letter, personalize this letter by adding your opinions and suggestions and submit it to the CFPB on your firm's letterhead.

Tips for creating your comments:

- Tell your story, as a North Carolina attorney, and explain what you have seen happen at the closing table.
- Be specific and use examples to support the role of the North Carolina attorney at a closing.
- Think about the types of questions clients might ask you with the new forms.
- Be concise – but express your concerns fully.
- Remember the CFPB is concerned with consumer protection, and attorneys are in the consumer protection business.
- Remember that since there are very few approved attorney states, you need to speak up about the importance of an attorney at the closing table.
- Your opinion matters – Don't be afraid to say what you think.

The proposed rule can be found at https://federalregister.gov/a/2012-17663. For more information on the proposed rules, and to see the new disclosure forms, visit the CFPB's website at http://www.consumerfinance.gov/knowbeforeyouowe/.

Timeline for Implementation of Proposed Rules

Integrated Mortgage Disclosure Rules

Comment period ends November 6, 2012.
Final rules are expected early 2nd quarter 2013.
Implementation date is anticipated to be 12-18 months after final rules.

Investors Title Insurance Company has dedicated significant resources to understanding the issues facing the approved attorneys in North Carolina and is working diligently to help mitigate the impact on the approved attorney system. We believe working with our approved attorneys is vital to navigate through these regulatory changes.

In the coming days, weeks, and months, we will be:

- Providing detailed information on the substantive issues surrounding this topic.
- Working with you and other interested parties to develop practical solutions.
- Advocating to maintain and advance the interests of the approved attorney system in NC.

Best Escrow Practices Series

Volume 3: Wires, ACH Transactions, and Positive Pay

By Holly Simmons, Esq.

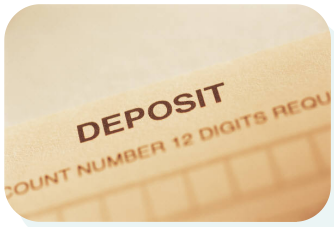
In this series, we are focusing on guidelines to maintain a secure and clean escrow account. In Volume #1 of this series, we reviewed the concepts of controls and segregation of duties. Volume #2 covered best practices for checks and receipts.

If you haven't established online banking for wires and escrow account, there's more room for error when transmitting wire requests via fax. It's not uncommon for a closing attorney to fax a payoff request and later realize (often 30 or more days) that the faxed wire request was never transmitted to the bank. The closing attorney then becomes responsible for any additional interest accrued as a result of the delayed payment.

Wires

The following are recommended best practices for initiating and transmitting wires:

1. Use Dual or Triple Controls. This is the golden rule of wire transmission. Dual control means that one individual or group of individuals initiates a wire and a second person or group of persons approves/releases the wire. The majority of reported wire fraud cases are from settlement agents that did not have dual controls.
2. Establish Wire Limits. Wire limits can be established with your banking administrator and be adjusted as needed by the proper authority. The wire limits should be set based on your amount of E&O coverage and the type of escrow transactions you service.
3. Use Security Tokens. Use tokens for all online transactions to provide an additional layer of authentication. Many banks now offer security tokens for online business accounts. The tokens will change codes every 30 to 60 seconds, and the user inputs the code displayed on the token.
4. Transmit wires from standalone computer. If you use online banking, all of your banking should be done from a standalone computer that is not tied to your network or email system. It should also have the latest spyware and virus protection programs.
5. Use Strong Passwords. Create a password for your online banking with at least 10 characters that includes a combination of characters, numbers and mixed case letters. You should also never store your password in a place that is visible or easily accessed by others.
6. Helpful Hints:
    a) Deposit slips may have a transcode included in the account number...best not to use them. After confirming the routing number, use a cancelled check if wiring to a customer's checking account.
    b) When originating wires online, use abbreviations where possible. For example use "ESC" instead of ESCROW. If the wire is too long, the receiving bank will need to abbreviate and may charge additional fees.



ACH Transactions

The Automated Clearing House (ACH) is an electronic network for financial transactions. ACH FUNDS ARE NOT THE SAME AS WIRED FUNDS. There is a distinction between "wired funds," which are generally available funds under state title insurance requirements, and ACH transfers, which may not be. They are both electronic transfers of funds, but they are distinctly different. Wired funds are managed by the Federal Reserve System. ACH transactions are governed by rules

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Best Escrow Practices Series continued from page 6

Volume 3: Wires, ACH Transactions, and Positive Pay

By Holly Simmons, Esq.

established by NACHA (National Automated Clearing house), a private financial industry trade association. Different NACHA Operating Rules apply to consumer ACH and business ACH transactions.

1. First, they may be subject to unilateral recall by the Payor for a period of time after deposit into an account.
2. Second, they may be used to make unauthorized withdrawals from an account. The only things a person needs to attempt an ACH transfer out of your escrow or operating account are your account number and the bank routing number.

Best Practices for ACH

- Have your bank or banking administrator block all ACH transactions from your main operating escrow account.
- If you need to facilitate ACH transactions, set up a separate account to receive and transmit funds via ACH.

Positive Pay

Bank Positive Pay assists in creating, transmitting, and researching the check records that you send to the bank. The software is installed at your location and works in conjunction with your accounting package. It protects against check fraud for altered and counterfeit checks.

Here's how it works:

- ABC Firm issues approximately 50 checks each Friday. After the checks are cut, ABC Firm transmits to their bank, a list of the checks that they issued (check number and dollar amount). This list is imported into the Bank's computer.
- Later, when the checks are presented to the Bank for payment, the Bank matches each check presented against ABC's previously transmitted lists. If the presented checks' numbers and amounts appear on a previously submitted list, the check is sent through for payment. If both items do not match, the check is not cleared and ABC Firm is alerted.

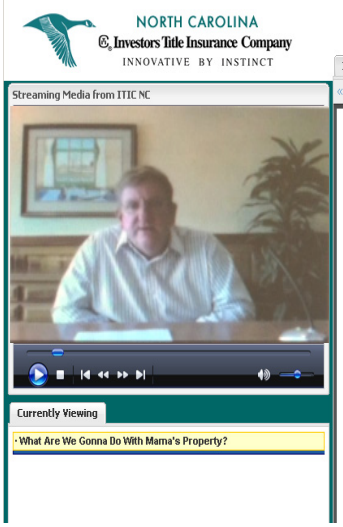
If you're using the Investor's Title's iTracs service, you will automatically receive positive pay for each day's transmission.

Additional Disbursement Controls

1. Never disburse until you have a zero balance and never force balance a ledger.
2. Ask your software provider how to use key security features. Most require a separate Administrator tool.
3. Have all disbursement instructions in writing, especially for seller or borrower proceeds.

New On-Demand CLE/CPE Course Available!!!

What are We Gonna to Do with Mama's Property?



Course Title: What are We Gonna Do with Mama's Property?

Course Available: Now!

Course Content: Title attorneys regularly receive questions regarding the handling of transferring properties held by trusts or being administered in estates. Learn the "ins and outs" of the legal and practical requirements for those transactions and what the title company will need to know and see in order to insure those transactions.

Credit Available: CLE and CPE

Cost: $25

Click here to access On-Demand content.

Investors Trust Company

Dayton v. Dayton

In an unusual case, the North Carolina Court of Appeals has upheld a trial court's ruling that the missing owner of a life insurance policy died as a result of an accident, thereby doubling the benefits payable under the policy. The case developed when Kathy Dayton filed suit in January 2010 seeking to have her son Douglas declared dead. Douglas had not communicated with anyone since June 2004, and his mother sought a court order declaring him dead so she could collect the proceeds from his life insurance policy as his sole, intestate beneficiary. The policy provided $50,000 of basic coverage, but that coverage doubled if Douglas died because of an accident. The trial court issued an order in December 2010 declaring an "'accidental death,'" and ordering Baltimore Insurance Company to pay Dayton $100,000.

The trial court later affirmed its decision in an order issued in April 2011. The insurance company appealed arguing, inter alia, that there was no proof that Douglas had died by accident. The appellate court affirmed on procedural grounds. In essence, the Court said, there were several court orders issued in this matter, but the first order of the trial court, decided in December 2010, was a final judgment—it was not an interlocutory decision under N.C. Gen. Stat. Section 28C-11(a)—and the company had 10 days under state law to make a motion to amend the court's decision. When the company failed to make such a motion, the appellate court concluded, it waived its ability to challenge the outcome.

--Dayton v. Dayton, No. COA11-1216, N.C. Ct. App. 5/15/12

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