



Carolina Update

NCLTA's Exclusive Report to its Members

Contents

- 2**
New NCLTA Officers Elected
- 2**
Welcome New Members
- 3**
2009 NCLTA Convention Update
- 4**
Thank You to Our Sponsors
- 5**
Unforgiving Mistakes: [Beaman v. Head and Its Progeny](#)
- 10**
Around the State
- 10**
Loss Prevention and Education Occupy September Executive Committee Meeting
- 11**
2009 Legislative Update
- 15**
NCLTA Committees Appointed for 2009-2010
- 17**
NCLTA Annual Report
- 17**
Convention Calendar
- 18**
Convention Manuscripts Order Form

President's Message

By Carolyn Snipes



In October, I had the privilege of representing NCLTA at the 2009 ALTA Annual Convention at The Breakers Resort in Palm Beach, Florida. The weather was beautiful and the sight of the waves crashing on the beach

was spectacular, as expected. But for much of the time, I merely saw the beach through the conference room windows. I anticipated the call of the beach would be too tempting to resist; however, I found each meeting interesting and relevant to our work in North Carolina. I was motivated to hear more of what ALTA is working on for our industry.

Despite our differences with other states, ALTA's importance to us is significant. Its overriding goals are as meaningful here as elsewhere. The unified message of the convention was to encourage each title professional to educate policy makers about our industry. I'm certain that each of you have endeavored to explain to your family and friends exactly what you do and what is (and is not) title insurance. Often times when I attempt this, I am met with blank stares and a quick subject change. This is certainly an expected response at the dinner table with family, but not acceptable when the conversation is with your state or Congressional representative.

Ideally, policy makers and consumers would have a basic idea of what title insurance is and what value it provides. Unfortunately, because we do not generally deal directly with our insured owners unless there is a claim on our policy, the general public just doesn't

understand our product. Likewise, policy makers have little exposure to our business. This lack of knowledge is a dangerous thing. If consumers and policy makers don't understand our product, they cannot see the value we provide. The last thing that we want is for consumers and policy makers to perceive our industry as valueless.

Education is the key to achieving advocacy goals. A fine example is SB 803, the proposed changes to the mechanics' lien law. We were initially met with strong resistance to the proposed legislative changes. But as David Ferrell, our lobbyist, and the members of our Legislative Committee speak to policy makers and other interested groups and educating them about our role in the closing process and the underwriting challenges involved, the resistance is abating and we are seeing support grow.

I challenge each of you to educate your representatives, family and friends. We must advocate not just for our customers but for ourselves as well. The title industry provides an important service and we must let everyone know about it.

Another key focus of the ALTA convention was the work the Governmental Affairs Committee is doing in Congress on the Consumer Financial Protection Act (CFPA). During the convention, ALTA was successful in lobbying for the passage of an amendment to the proposed bill to exempt title insurance from the CFPA. This is a major coup for our industry and comes as a result of the Committee's hard work to educate the members of Congress.

continued on page 19

Carolina Update is the official publication of the North Carolina Land Title Association. It is distributed quarterly to title insurance company members, attorney members, and other persons interested in the title insurance industry. Readers are encouraged to submit articles to the newsletter. The opinions and statements of guest writers do not necessarily reflect the policies or opinions of NCLTA.

North Carolina Land Title Association
1500 Sunday Drive
Suite 102
Raleigh, NC
27607-5151
(919) 861-5584
(919) 787-4916 Fax
www.nclta.org

Editorial Committee Chair
Matt Powers

Executive Staff
Nicole Shore
Executive Director
nshore@firstpointresources.com

Michelle Eggleston
Membership Services
meggleston@firstpointresources.com

©2010. NC Land Title Association. All rights reserved.

Welcome New Attorney Members

Stephen E. Coble
Coble Law Firm
3333-E Wrightsville Ave.
Wilmington, NC 28403
New Hanover
Phone: (910) 791-0016
Fax: (910) 791-0046
Email: scoble@coblelawfirm.com
www.coblelawfirm.com

Daniel A. Merlin
Johnston, Allison & Hord, PA
1065 E. Morehead St.
Charlotte, NC 28204
Mecklenburg
Phone: (704) 332-1181
Fax: (704) 376-1628
Email: dmerlin@jahlaw.com
www.jahlaw.com

Robert Ramseur
Ragsdale Liggett, PLLC
2840 Plaza Place, Suite 401
Raleigh, NC 27612
Wake
Phone: (919) 881-2207
Fax: (919) 781-1604
Email: bramseur@rl-law.com

Chrystal N. DeHart Raper
Blanco, Tackabery & Matamoros, PA
110 South Stratford Rd., 5th Floor
Winston-Salem, NC 27104
Forsyth
Phone: (336) 293-9037
Fax: (336) 293-9030
Email: cnd@blancolaw.com
www.blancolaw.com

Michael L. Wilson
Johnson, Allison & Hord, PA
1065 E. Morehead St.
Charlotte, NC 28204
Mecklenburg
Phone: (704) 332-1181
Fax: (704) 376-1628
Email: mwilson@jahlaw.com
www.jahlaw.com



Left to right: Carolyn Snipes, Kim Rosenberg, Jim Gale, Matt Powers, Taby Cruden, Candice Williams and Ryan Wainio

New NCLTA Officers Elected

During the September 19, 2009, annual business meeting of the North Carolina Land Title Association at Wild Dunes Resort, the membership elected the following officers to serve on the Executive Committee:

President

Carolyn Snipes
Fidelity National Title Insurance Co.
Asheville

Vice President

Tabatha Cruden
Lawyers Title Insurance Co.
Raleigh

Treasurer

Ryan Wainio
Investors Title Insurance Co.
Chapel Hill

Secretary

Matthew Powers
Morehead Title Co.
Raleigh

The Attorney Section re-elected James Gale, Smith Moore Leatherwood, Raleigh, as its Representative. Candice Williams, The Title Company of North Carolina, Charlotte, will remain on the Executive Committee as Immediate Past President. Kimberly Rosenberg, Attorneys Title division of First American Title Insurance Co., will serve as General Counsel.

2009 NCLTA Convention: Red Flags and Red Herrings

Despite initial concerns that the economic downturn would affect the 2009 NCLTA annual convention attendance at Wild Dunes Resort on the Isle of Palms, SC, attendance was very strong with just short of 100 attendees. Although not an all-time record, the attendance was very close in total numbers to the attendance three years ago when the Association held its 2006 annual convention at Wild Dunes, and only 12 people shy of last year's convention attendance in Asheville.

The speaker topics dovetailed nicely with each other, but the terms "red flag" and "red herring" surfaced frequently. Chris Vaughn's talk on "Contractor Liens and Related Problems" began with references to the NCLTA's legislative initiative to change the rights of lien claimants under Article 2 of Chapter 44A, the "Hidden Mechanics' Lien" (covered in David Ferrell's Legislative Update) and the problems caused by the CMBS market which has shifted "the fundamental way in which housing inventory is brought to market." He also mentioned the new title affidavits that were discussed by a panel presentation the following morning and provided a variety of strategies to defeat a claim of lien on real property.

ALTA representative, Jack Rattikin, visited South Carolina with his wife, Laura, from Fort Worth, Texas. He described "The new ALTA" under Kurt Pfothenauer and the Association's new policy licensing initiative. He reminded NCLTA members of the RESPA changes that will go into effect on January 1, 2010. ALTA had obtained four "Frequently Asked Questions (FAQs)" updates that NCLTA has posted on its Web site at www.nclta.org/interest.html. Rattikin also warned NCLTA about the federal legislation to establish a Consumer Financial Protection Agency (CFPA) single regulator for all financial products with broad powers. ALTA is attempting to carve title insurance out of this legislation.

Neale Johnson investigated North Carolina's Insured Closing Protection Letter (NC CPL), its history, legal use, coverage, claims, and subrogation. North Carolina's current CPL form dates from 2003. Johnson also pointed out a title insurer's exposure in the

absence of coverage and suggested improvements to North Carolina's CPL which he believes lacks some basic protections: no policy limit, no marshalling requirement, no overlap between the policy and the CPL limit, no exclusion for collusion or matters known to the lender, no exclusion for negligence of the lender, and no effective contractual limitations.

New to both the Charlotte School of Law and NCLTA, Professor Phyllis Craig-Taylor provided a fresh approach to the "2009 Case Law Update," noting that, among the 60 cases she studied, that foreclosures were an active area as was zoning and takings.

In her usual amusing style, Margaret Burnham reviewed various contractual problems, providing editorial comments and practice tips to try to strengthen the drafting of real estate contracts. She began by noting that most attorneys use "go-bys"—or templates of language. However, she pointed out the NC State Bar's proposed ethics opinion (2008 FEO 14, published July 23, 2009) attempts to address "the legal question of what work product is covered by federal copyright laws."

NCLTA Lobbyist David P. Ferrell provided a quick but comprehensive update on North Carolina legislation affecting the title industry and real estate law (*see related article on page 11*). Real Property Section Council Chair Robert B. Hobbs, Jr., reviewed several projects



Above: Saturday's speaker on "Contractual Conundrums," Margaret Burnham (left) and daughter Caitlin share a laugh.

Above top: Friday morning's convention speakers (left to right) are Jack Rattikin, Phyllis Craig-Taylor, Chris Vaughn and Neale Johnson.

continued on page 4



2009 NCLTA Convention: Red Flags and Red Herrings

continued from page 3

by the Council, including several with which the Council has worked with NCLTA: Loss Prevention, Legislation, Standardized Forms, Consumer Protection, Ethics, Foreclosure Prevention Project, and Minimizing Indexing Standards.

A panel, consisting of NCLTA Executive Committee members Taby Cruden, Kim Rosenberg, and Chris Burti, reviewed the new lien affidavit forms, situations that give rise to claim and claim problems, the need for change to Chapter 44A's "Hidden Mechanics Lien," and how the new lien waiver forms address current claims and current law.

Despite a very rainy Friday afternoon, the golfers were able to finish their tournament and prizes were awarded that evening during the banquet by Denise Lee of Guaranty Title who gallantly served as golf chair. Following an extensive luau buffet, "Deja Vue," the popular band that played at the 2008 Convention in Asheville came back to give us another evening of energetic dancing fun. Those attendees who stayed over on Saturday were treated to a return of sunshine and a perfect day on the beach or in Charleston.

Convention manuscripts may be ordered using the form on [page 18](#).



Golf Chair Denise Lee presents golf prizes while Deja Vue band members prepare to entertain the crowd.



Thank You to Our Sponsors!

Golf Tournament

Pendergrass Law Firm, LLC

Welcome Reception

SoftPro Corporation

Breakfasts & Refreshment Breaks

Horack Talley, Pharr & Lowdnes, P.A.

Roberts & Stevens, P.A.

Binders

Carruthers & Roth

Friday Receptions

Johnston, Allison & Hord, P.A.

Smith Moore Leatherwood, LLP

Musical Entertainment

Nelson Mullins Riley & Scarborough, LLP

reQUIRE Release Tracking

Speakers

Boxley, Bolton, Garber & Haywood, LLC

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP

Nexsen Pruet, PLLC

Roberson, Haworth & Reese, PLLC

Simplifile

Ward and Smith, P.A.

Williams Mullen, P.A.

Wishart, Norris, Henninger & Pittman, PA

Wyrick, Robbins, Yates & Ponton, LLP

Registration Packets

White & Allen, P.A.



Unforgiving Mistakes: Beaman v. Head and Its Progeny

Margaret Shea Burnham, Benjamin Kahn, David Pokela, of Nexsen Pruet, PLLC, Greensboro, NC

October 2009—Recently, there has been a spate of bankruptcy decisions in the Eastern District of North Carolina involving real estate documentation errors. This article looks at Beaman v. Head and the cases that followed in its wake. What lesson is there to learn? Real estate documentation mistakes can be unforgiving and incurable in bankruptcy.

Background: Black Letter Law on “Property of the Estate”

In order to understand the impact of bankruptcy on title issues, a little black letter bankruptcy law is necessary. “The filing of a debtor’s petition in bankruptcy creates an estate comprised of the property listed in 11 U.S.C. § 541(a)...” Universal Cooperatives, Inc. v. FCX, Inc., 853 F.2d 1149, 1153 (4th Cir. 1988). Section 541 of the Bankruptcy Code creates and defines property of the estate. As stated by the Fourth Circuit:

The act of filing a petition for relief under an applicable chapter of the Bankruptcy Code commences a bankruptcy case and creates an estate consisting of “all legal or equitable interests of the debtor in property as of the commencement of the case.” Upon the filing of a petition, the debtor’s interests in property vest in the bankruptcy estate, and the debtor surrenders the right to dispose of or otherwise control the estate property. In re Osborn, 176 B.R. 217, 219 (Bankr. E.D. Okla. 1994). The bankruptcy trustee, as representative of the bankruptcy estate, has exclusive authority to use, sell or lease property of the estate. 11 U.S.C. § 323(a), 363(b)(1).

Richman v. Garza, 117 F.3d 1414, 1997 WL 360644, *1 (4th Cir. 1997) (per curiam) (unpublished).

Pursuant to § 541, property of the estate includes all legal or equitable interests of the debtor in property. 11 U.S.C. § 541. While Congress is conferred the exclusive right to establish uniform bankruptcy laws, the bankruptcy courts will look to non-bankruptcy law to determine property rights. See e.g. In re

Merritt Dredging Company, Inc., 839 F.2d 203, 206 n. 1 (4th Cir. 1988) (citing seminal case of Butner v. United States, 440 U.S. 48, 54, 99 S.Ct. 914, 917-918, 59 L.Ed.2d 136 (1979)); and FCX, 853 F.2d at 1153. As explained by the Fourth Circuit,

[d]espite [§ 541’s] broad definition of those interests of the debtor that become property of the estate, ... , neither § 541(a), nor any other Bankruptcy Code provision, answers the threshold questions of whether a debtor has an interest in a particular item of property and, if so, what the nature of that interest is... The estate under § 541(a) succeeds only to those interests that the debtor had in property prior to the commencement of the bankruptcy case... The existence and nature of a debtor’s, and hence the estate’s, interest in property must be determined by resort to nonbankruptcy law, ...either federal law, ...or... state law.

FCX, 853 F.2d at 1153 (citations omitted) (citing, inter alia, Moody v. Amoco Oil Co., 734 F.2d 1200, 1213 (7th Cir. 1984) (“[W]hatever rights a debtor has in property at the commencement of the case continue in bankruptcy—no more, no less.”)).

While state law determines the property rights of the estate, the Bankruptcy Code confers certain rights upon a bankruptcy trustee. A bankruptcy trustee (and through 11 U.S.C. § 1007, a Chapter 11 debtor-in-possession “DIP”) is deemed, as of the petition date, to have the rights of: (1) a judicial lien creditor with a perfected judgment lien on all assets of the debtor; and (2) a bona fide purchaser for value (“BFP”) of real property without regard to the trustee’s actual knowledge of any outstanding claim against the real property.¹ 11 U.S.C. § 544. These avoidance powers are the main tools of a trustee in avoiding unperfected claims against property of the estate. However, while the trustee’s status as a BFP or judicial lien creditor is bestowed by federal law, the effect of that status with respect to other claims in any particular property of the estate is

continued on page 6

Unforgiving Mistakes: Beaman v. Head and Its Progeny

continued from page 5

determined by state law. *See e.g., Mahaffey*, 91 F.3d 131, 1996 WL 383922, *3-*4; and *Suggs*, 355 B.R. at 527.

Beaman v. Head: “Bad Facts Make Bad Law”

On September 15, 2006, the United States Bankruptcy Court for the Eastern District of North Carolina issued its opinion in Beaman v. Head, 353 B.R. 122 (Bankr. E.D.N.C. 2006) (Doub, J.), in which the court held that a simple error in the date reference in a North Carolina deed of trust will render the deed of trust unenforceable.

In Beaman, Ruby Lee Head (“Mrs. Head”) was the holder of a July 29, 1998, note in the original principal amount of \$180,515.75. *Id.* at 123. The note was executed by the debtor, Head Grading Co., Inc. (“Head”). *Id.* Mrs. Head also was the holder of a deed of trust, listing Head as the grantor and Mrs. Head as the beneficiary. *Id.* The deed of trust purported to secure the principal amount of \$180,515.75, and provided that it was given as security for a “Promissory Note of even date herewith.” *Id.* Unfortunately, the deed of trust was dated July 28, 1998, the day before the date of the note. *Id.*

On April 5, 2005, Head filed a bankruptcy petition under Chapter 7, and the bankruptcy trustee filed an action to avoid the deed of trust as unenforceable due to the discrepancy in the date between the note and the deed of trust. *Id.*

The bankruptcy court granted the trustee’s motion for summary judgment and held that the deed of trust was unenforceable. The court observed that “North Carolina law requires deeds of trust to specifically identify the debt referenced therein.” (*Id.*) (citing In re Foreclosure of Deed of Trust of Enderle, 110 N.C. App. 773, 431 S.E.2d 549 (1993) (holding that, where deed of trust misidentified the grantor as the obligor pursuant to the underlying debt, the deed of trust was unenforceable)). The court further cited Seventeen South Garment Company, Inc. v. Centura Bank, 145 B.R. 511, 515 (E.D.N.C. 1992) (holding that a Uniform Commercial Code (“UCC”) financing statement filed in the trade name of a corporation, rather

than its legal name, was unenforceable), for the proposition that “[c]larity and certainty in lien perfection requirements are lost if equitable exceptions are created which permit trade names when the ‘equities’ so dictate.” *Id.* at 124.

The bankruptcy court concluded that “[w]hile it is likely that the deed of trust was meant to identify the note dated July 29, 1998, it did not properly and specifically identify the obligation secured.” *Id.* Mrs. Head did not appeal the ruling, and the Judgment became final.

The record in the case shows that Mrs. Head did not assert any affirmative defenses or counterclaims. In order to consider what defenses and claims might have been available, it is important to understand the status of a Chapter 7 trustee in bankruptcy with respect to property of the estate. With respect to any property of the estate—either real or personal—the trustee has the status of a judicial lien creditor as of the commencement of the case. 11 U.S.C. § 544(a)(1). With respect to real property only, the trustee has additional standing as a bona fide purchaser (“BFP”) of such real property at the time of the commencement of the case. 11 U.S.C. § 544(a)(3). These distinctions are important because, typically, a lien creditor’s rights may be subject to equitable liens, while a BFP would take free and clear of equitable liens.

Interestingly, the court in Beaman referred to the trustee’s powers as a lien creditor, rather than as a BFP. This may have been intentional by the court because, a BFP potentially could have been charged with inquiry notice due to the recordation of the deed of trust even with its error. *See e.g., Commercial Bankruptcy Litigation* §10:3, n. 12 (citing, *inter alia, In re Bertholet Enterprises*, 88 B.R. 9, 11-12 (Bankr. D.N.H. 1988) (recording of mortgage instrument, although improper in form, was nevertheless sufficient to give constructive inquiry notice to the trustee); and In re Seaway Express Corp., 105 B.R. 28, 32 (Bankr. 9th Cir. BAP 1989, *aff’d*, 912 F.2d 1125 (9th Cir. 1990) (constructive notice to the trustee will remove the claim from the purview of section 544(a)(3))).

continued on page 7

Unforgiving Mistakes: Beaman v. Head and Its Progeny

continued from page 6

As stated above, the deed of trust holder did not raise any potential defenses that could have been used against the trustee as a lien creditor. Generally, the trustee's status as a lien creditor is subject to equitable liens to the extent such equitable liens would have priority under state law. See Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988) (where an intervening judgment creditor could not establish BFP status, the grantee of erroneous deed was entitled to a constructive trust and reformation that related back to the date of the original conveyance, and therefore possessed a superior interest in the property). Mrs. Head did not assert the rights to reformation and a constructive trust. While the court in the Eastern District of North Carolina had ruled in a preference avoidance action that reformation is not a defense to such an avoidance claim,² the trustee's attempt to avoid a preferential transfer is subject to an entirely different statutory basis and analysis than a trustee's attempt to avoid a deed of trust as a lien creditor whose rights are subject to such equitable interests. Nevertheless, as discussed below, subsequent cases have indicated that the defenses of reformation and assertion of an equitable lien likely would not have been successful in Beaman.

In re Law Developers: More Pain for the Draftsman

After Beaman, the United States Bankruptcy Court for the Eastern District of North Carolina considered the previously unaddressed defenses of reformation and constructive trust. In the Chapter 11³ case of In re Law Developers, LLC, 404 B.R. 136 (Bankr. E.D.N.C. 2008) (Leonard, J.), the draftsman similarly found no forgiveness. In this case, the defect was a problem in the legal description in the deed of trust. As the court pointed out, an "inadvertent draftsman's error" caused the legal description to reference the wrong lot number. Id. at 138. The opinion sets for the following facts:

- a note was signed on January 12, 2006, in the amount of \$194,500 to The Bank of Currituck (id.);
- "the legal description" was identified as lot 43 of Cedarwood Village (id.);

- the parties acknowledged the intended legal description was lot 17 ("as shown on page one of the deed of trust") (id.);
- the court observes that, "[i]n this case, the deed of trust refers to BOTH lots 17 and 43..." (id. at 138 and 139) (apparently, the legal description on page two of the deed of trust refers incorrectly and solely to lot 43, but the deed of trust refers to lot 17 on page one, presumably in the address line on the first page of the standard deed of trust form); and
- lot 43 had previously been sold by the debtor on November 3, 2006, which was after the recording of the deed of trust by The Bank of Currituck, but prior to the debtor's bankruptcy petition on February 14, 2008, (id. at 138) (the opinion does not explain how this sale occurred with a deed of trust on record purporting to grant a lien to The Bank of Currituck in lot 43— was there a release deed by The Bank of Currituck?).

The court found the deed of trust was invalid under North Carolina law because it was "not clear from the face of the document which parcel of land is intended to be encumbered by the deed of trust." Id. at 138 (citing Overton v. Boyce, 289 N.C. 291,293, 221 S.E.2d 347 (1976) ("A deed purporting to convey an interest in land is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which the land by be identified with certainty."); and Duckett v. Lyda, 223 N.C. 356, 358, 26 S.E.2d 918 (1943), for the proposition that "[t]he description contained in the deed of trust must be 'either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers.'") The court, looking at the face of the deed of trust, found that it could not decipher the "clear" intent of the land to be encumbered.

Having determined that the deed of trust was void as written, the Court considered the plea to reform the deed, but denied reformation in its case due to the bankruptcy debtor's status as an intervening judicial lien creditor pursuant to 11 U.S.C. § 544(a)(1). In so holding, the court

continued on page 8

Unforgiving Mistakes: Beaman v. Head and Its Progeny

continued from page 7

found that the debtor-in-possession, as an intervening lien creditor, was not charged with inquiry or constructive notice of the existing lien.⁴

In re Easthaven Marina Group, LLC: A Lucky Mistake

In re Easthaven Marina Group, LLC, 2009 W.L. 703383 (Bankr. E.D.N.C. March 13, 2009) (unpublished) (Leonard, J.), is a factually-specific exception to the harsh results in Beaman and Law Developers. In Easthaven, there was a \$9,000,000 note executed, delivered and dated on March 2, 2007. The deed of trust was, unfortunately, dated March 1, 2007, and refers to a note dated March 1, 2007 (the Beaman opinion was handed down September 15, 2006). The name of the borrower was the other problem. The entity's legal name was "SHM Marina Group, LLC" (the correct name appears on the deed of trust), but the note referred to the "common name" of "Scotts Hill Marina Group, LLC" (which the court observed was "not a legal entity").

After this initial closing, SHM Marina Group, LLC, conveyed the property to David White, "SUBJECT TO" the \$9,000,000 deed of trust which also included assumption language. White then formed Easthaven Marina Group, LLC, and conveyed the land to his new LLC, again "SUBJECT TO" the prior deed of trust.

Naturally, the opinion starts off with the Beaman decision. The court went on to cite two other cases for the proposition that a deed of trust in the wrong name is, not surprisingly, invalid. The court then discussed the issues of reformation in the context of a bankruptcy filing, and comes to a similar conclusion as reached in Beaman and Law Developers.

Yet, after concluding the deed of trust was void and reformation not available, the court dusted off the estoppel doctrine and found that it was a good save for the flawed note and deed of trust. The court noted that Easthaven cannot be allowed to challenge the mortgage when the very deed by which Easthaven (and White in the prior conveyance) took title was "SUBJECT TO" the mortgage it was later trying to avoid. Moreover, those later deeds also were recorded in the chain of title.⁵

Although this looks like a big victory for the flawed document to prevail, the court concluded the opinion by pointing out that:

- the principal of debtor, White, was in part to blame for the error in the original documents because White used the "common" but "incorrect" name of his company in the purchase agreement; and
- "no creditors" would benefit from avoidance of the deed of trust—rather, a ruling in debtor's favor "would simply shift the beneficial equity interest in the debtor from [the holder of the mortgage] to the debtor, in complete disregard of a transaction all acknowledge was to have the opposite result."

All in all, a lucky mistake, based on the unusual facts, provided the relief to the draftsman.

Den-Mark Properties, LLC: A Mistake That Was Hard to Defend

In Den-Mark Properties, LLC v. SunTrust Bank and Southland Associates, Inc., 2009 W.L. 917963 (Bankr. E.D.N.C. March 27, 2009) (unpublished) (Doub, J.), the bank made a loan to be secured by a second deed of trust. The facts were pretty simple. The borrower (and debtor) was Den-Mark LLC. The second deed of trust was executed by Den-Mark Construction, Inc. Den-Mark Construction did not have title to the land described in the deed of trust.

The bank raised the following arguments:

- unjust enrichment to the borrower/debtor if the deed of trust is invalid
- scrivener's error
- mutual mistake
- reformation
- execution by alter ego
- execution by third party acting as agent

While this is a good checklist of arguments to make when you find yourself in the position of having a deed of trust executed by the wrong party, the court found the flaw fatal. The bottom line was the party executing the

continued on page 9

Unforgiving Mistakes: Beaman v. Head and Its Progeny

continued from page 8

second deed of trust did not have record title. The court discussed reformation issues and declined to reform the deed of trust.

In re Rose: Redemption at Last for the Draftsman

There are not a lot of bankruptcy cases where the flawed document beats a challenge by a trustee. As in Law Developers, this case, In re Rose, 2009 W.L. 2226658 (Bankr. E.D.N.C. July 20, 2009) (unpublished) (Leonard, J.), involved an ambiguous legal description due to a typo in a block number—two of three references in the deed of trust properly described the land as lots 20 and 21 of “block 96” and a third reference mistakenly referred to “block 98.” Luckily for the holder of the deed of trust (and its title insurer) (and the draftsman), and unlike the debtor in Law Developers, the debtor did NOT own, and never had owned, any parcel of land in “block 98.”

Surprisingly, the court was sympathetic to the typographical error. The court made the following points:

- “if notice existed which would have alerted a potential bona fide purchaser to an error in the deed of trust, then the trustee is prohibited from taking free and clear of liens”
- thus the question is: would the hypothetical BFP have a duty to examine?
- the court then summarized the duty of a title searcher: “[t]he law contemplates that a purchaser will examine each recorded deed and other instrument in his chain of title and charges him with notice of every fact affecting his title which an accurate examination of the title would disclose”
- “[a] deed of trust and any documents referenced therein are inherently part of a chain of title”
- “every other document falling within the required scope of the title search becomes a permissible extrinsic reference [for interpreting a latent ambiguity]”
- likewise, the title examination extends not just to notice in the “index” but also the contents of each instrument in the chain
- the next conclusion was that each “instrument in the chain” refers even to *satisfied* deeds of trust [since when??]
- but happily the title searcher now sees that there must have been a typo since all of the other references are to “block 96”—and such a typo “could not be ignored”
- the “diligent” title searcher then turns to the grantee index and learns that the grantor never owned any lots in “block 98”—putting all the world on notice of something “amiss”

The opinion then quotes from the Affidavit of Frank Martin that a “reasonably prudent searcher would discount the reference to Block 98 as a minor typographical error, resolvable through other documents available upon examination of the chain of title, thus providing constructive notice of the valid lien on the subject property.”

The court also relied upon a 10th circuit case, Hamilton v. Washington Mutual Bank (In re Colon), 563 F.3d 1171 (10th Cir. 2009) which was exactly on point (typo of lot 29 instead of lot 79). Amazingly, the Hamilton case also relied upon the information contained in two satisfied deeds of trust to confirm the mistake.

So now you know: Be sure to check satisfied deeds of trust in your title search [or at least when you need evidence to prove a mistake is a mistake].

Can You Reconcile In re Rose and Law Developers?

Judge Leonard (who wrote both opinions) explained the distinction between the error with respect to the lot number in Law Developers, which error was fatal, and the error in the lot number in In re Rose, which was overcome, as follows:

This result [In re Rose] differs from the holding in Law Developers, which at first blush appears indistinguishable. In Law Developers, the debtor was a developer who owned multiple properties in a development known as Cedarwood Village. The subject deed of trust in Law Developers also contained an inadvertent draftsman’s error. The legal description of the property

continued on page 10

Membership Dues

NCLTA membership fees are currently due for 2010.

If you have not remitted payment, please do so as soon as possible.

Loss Prevention and Education Occupy September Executive Committee Meeting

The NCLTA Executive Committee met on Thursday, September 17, 2009, at The Boardwalk Inn for its quarterly meeting. In addition to the regular agenda items, discussion focused on various educational activities, including the November 18, 2009, NC Bar Association CLE program on HUD-1 statements and attorney audits, and the status of loss prevention efforts.

The Association's second *amicus* brief in the Johnson v. Schultz case had been filed and oral argument presented by Rob McNeill of Horack Talley Lowndes and Pharr, Charlotte, before the North Carolina Supreme Court on September 8, 2009. Technical questions have arisen regarding aspects of the NC State Bar's FEO concerning attorney audits, and the Loss Prevention Committee was seeking to respond to these either through contacting the State Bar as well as developing forms that address client confidentiality disclosures and indemnity agreements.

The Executive Committee postponed updating the 2008 *Study Guide* until at least Spring 2010 as it was premature to include recent changes, such as RESPA issues, attorney audits and new lien forms.

Around the State

Hugh C. Talton, Jr., has joined **Attorneys Title, div. of FATIC**, as Title Counsel and Client Development Manager for Eastern North Carolina. He practiced real estate law for over 25 years before moving over to the title insurance side. Talton is located in a new Attorneys Title office opening at 710 Arendell Street, Suite 203, Morehead City, NC 28557, phone 800-222-4502, email htalton@attorneysitle.com.

NCLTA Secretary *Matthew J. Powers* of **Morehead Title Company** has been re-appointed to a second four-year term on the Secretary of State's Electronic Recording Council (ERC).

Unforgiving Mistakes: Beaman v. Head and Its Progeny

continued from page 9

encumbered was identified as Lot 43, when the intention was to encumber Lot 17. This court found that the deed of trust, as written, was void under North Carolina law for failure to adequately describe the encumbered property. [citation omitted] The distinction between Law Developers and the present case [In re Rose] is critical: the debtor in Law Developers owned both properties. Therefore, had a bona fide purchaser examined the chain of title, the ambiguity would remain. That deed of trust could have been intended to encumber either Lot 43 or 17, and nothing referenced or found in the chain of title resolved the ambiguity.

Id. at *3. You are best advised to proof your legal descriptions and not rely on any equitable doctrines to save you from a scrivener's error in bankruptcy.

1 While the trustee is not charged with any actual knowledge the trustee may have regarding pre-existing claims in real property, a trustee's status as a BFP is subject to whatever constructive notice is imposed by state law. See In re Mahaffey, 91 F.3d 131, 1996 WL 383922, *3-*4 (4th Cir. 1996) (unpublished); and In re Suggs, 355 B.R. 525, 527 (Bankr. M.D.N.C. 2006) (finding that trustee's status as BFP is subject to constructive notice, and that, under North Carolina law, a lis pendens filed of record pre-petition defeated trustee as BFP).

2 Callaway v. Miller (In re Nunn), Bankr. Case No. 04-02158-8 JRL, Adversary Proceeding No. 05-00036-8 JRL (January 13, 2006) (on appeal).

3 Based upon the court's rationale in Law Developers, it is even more likely that a court will refuse to reform a deed in a Chapter 7 case, than in a Chapter 11 case due to the fact that, unlike a Chapter 7 trustee, the knowledge of the pre-petition debtor may be imputed to a debtor-in-possession pursuant to the holding in In re Hartman Paving, Inc., 745 F.2d 307 (4th Cir. 1984).

4 The court distinguished seemingly contradictory and binding Fourth Circuit precedent in Hartman Paving with respect to the debtor-in-possession's status of a BFP, with which precedent the court clearly disagreed.

5 The parties did not argue that, and the court did not address why, the recording of those later deeds did not create constructive notice that would have rendered the rights of the later-intervening trustee as a hypothetical judgment lien creditor and/or BFP subject to reformation with respect to the incorrect date **and** the incorrect name on the note.

2009 Legislative Update

David P. Ferrell, Vandevanter Black, LLP, Raleigh, NC

The General Assembly adjourned the 2009 legislative session on Tuesday, August 11, 2009, a six-month session dominated by the recession and the state's budget issues. The eventual \$19 billion spending plan included about \$2 billion in cuts, more than \$1 billion in federal stimulus money, and nearly \$1 billion in higher taxes and fees. Lawmakers gave final approval to 578 bills and 33 resolutions this year, according to Gerry Cohen of the Bill Drafting Section. The legislature will convene the 2010 legislative session on Wednesday, May 12, 2010.

This article contains a summary of the legislation of interest from the 2009 legislative session and issues that may be studied before the beginning of the 2010 legislative session. The statutory changes described in this article are effective now unless an effective date is provided. For more information about legislation described in this article, contact NCLTA Lobbyist David Ferrell at dferrell@vanblk.com or (919) 754-1171. Information is also available on the General Assembly's Web site: www.ncga.state.nc.us.

“Hidden” Mechanic’s Liens

NCLTA's top legislative priority for 2009 was legislation to address the “hidden” or “secret” mechanic's lien problem in North Carolina. At the request of NCLTA, **Senate Bill 803, Protect Third Party Purchasers for Value**, was introduced in the Senate by Senate Majority Leader Tony Rand (D-Cumberland). The original version of Senate Bill 803 provided that a claim of lien on real property granted by Chapter 44A would not be effective against real property owned by purchasers for a valuable consideration, including trustees under deeds of trust, unless the claim of lien is filed on the land records prior to the transfer of the property. Senate Bill 803 would also increase the penalty for providing a false lien waiver from a Class 1 misdemeanor to a Class H felony.

After the bill was introduced, many construction-related groups came out in opposition to our bill. Steve Brown of Investors Title and NCLTA lobbyist David Ferrell met numerous times with various construction-related groups who expressed concern with our bill. We also met with various legislators

to explain the “hidden” mechanic's lien problem for title insurance companies, and possible solutions. Many legislators agreed there is a problem that needs to be addressed, but there were varying opinions about the best way to address the problem. We revised Senate Bill 803 to provide for a “notice of commencement” that would be filed with the Register of Deeds by any party claiming a mechanic's lien. The notice would provide notice that the party had a lien, and would ensure that their claim is dealt with before closing.

As the crossover deadline at the legislature approached, the construction-related groups requested we agree not to move the bill this session but agree to study the issue between the 2009 and 2010 legislative sessions. Our bill sponsor Senator Rand agreed, and therefore, the legislature included the “hidden” mechanic's lien study in the 2009 Studies Bill, **House Bill 945**. The study would include issues related to mechanic's liens on real property in North Carolina, including the State's current laws regarding mechanic's liens on real property, ways to address hidden liens to protect third-party purchasers for value and lenders in real estate transactions, and any other issues the Commission deems relevant to the study. We will work with the study committee to request that they study the “hidden” mechanic's lien issue.

Railroad Corridor Management

House Bill 116, Railroad Corridor Management, is a bill concerning management and protection of railroad corridors in North Carolina, as recommended by the House Select Committee on a Comprehensive Rail Service Plan for North Carolina. During the study committee meetings, the NCLTA suggested changes to the draft legislation, which were adopted, to address NCLTA's concerns, primarily dealing with abandoned corridors and the recording of railroad maps. The recommendations of the study committee were introduced in House Bill 116. House Bill 116 passed the House but was not enacted into law this session. The bill is eligible for consideration in the 2010 legislative session.



continued on page 12

Provisions of Interest in House Bill 116:

Abandonment of RR Corridor: The bill would amend N.C. Gen. Stat. § 1-44 to provide that on or after January 1, 2010, a railroad (RR) will not abandon a right-of-way unless the RR first records a certificate of abandonment in the register of deeds office for the county where the right-of-way is located. There will no longer be a “presumption of abandonment” after January 1, 2010. This proposed provision is not to be construed to revive or affect a previously abandoned right-of-way or corridor. The bill clarifies that a RR is not to be found to have abandoned a right-of-way that is held in fee. The bill provides that current law regarding presumption of abandonment of a RR right-of-way remains in effect until January 1, 2010.



Railroad Corridor Maps: The bill would enact new N.C. Gen. Stat. § 136-199 authorizing RRs to file railroad corridor maps with the NCDOT Rail Division. These maps will be available to the public over the Internet. The bill would require any RR corridor maps that are filed must be conspicuously stamped or marked, “For Informational Purposes Only, Pursuant to N.C. Gen. Stat. § 136-199.” The bill would require a

RR company that files corridor maps to file a notice of the filing of the corridor maps with the register of deeds in the county where the RR property is located, and the notice will be referenced under the name of the RR. The bill would require the RR to send a copy of the filed railroad corridor maps to the North Carolina Society of Surveyors.

Other Changes: The bill would modify many of the city and county permitting and approval processes for development, open space, and other development processes where a RR right-of-way is included or affected. The modifications include requiring notice to the RR, the RR would have 60 days to approve or disapprove the use, inclusion, etc., and in some circumstances the RR would have final say or approval for any use or inclusion.

Encroachments: Another issue of importance to the NCLTA is the NC RR’s requiring

landowners believed to be encroaching in the railroad right of way to pay a license fee and sign a license in order to maintain the alleged encroachment. Although the NC RR took the initial position that they would not consider addressing the encroachment issue in this committee, we continued to lobby legislators about the need to address this issue as a part of the study committee’s work. We worked with Representatives Barnhart (R-Cabarrus) and Steen (R-Rowan) who were interested in the issue, and ultimately with Representative Steen poised to run an amendment on this issue, the NC RR agreed to address the issue. The NC RR Board of Directors unanimously adopted a new policy on how to deal with encroachers which provides that in most cases they will not charge a license fee and in some cases will pay the landowner if a structure must be moved.

Partitions Sales of Real Property

There were four (4) separate bills introduced in the House and identical bills introduced in the Senate to amend various issues and procedures in the partition sales of real property process. Each arose from and was recommended by the Partition Sales of Real Property Study Committee, which met before the 2009 legislative session. Of the four bills, two were enacted into law and two were not. The following bills **were** enacted into law:

House Bill 581, Partition Sales/Extend Report & Answer Times, extends the deadline from 60 days to 90 days for the commissioners in a partition action to report back to the court on their proposed division of the land. The bill extends the deadline for responding to a summons in a partition action from 10 days to 30 days. The bill requires that a petition include written notice reasonably calculated to make the respondent aware that the respondent has the right to seek advice of an attorney; that free legal services may be available from Legal Aid of North Carolina or other legal services organizations; and that the court has the discretion to order payment of reasonable attorneys’ fees as costs. The bill provides that an order confirming the partition sale of real property becomes final and effective 15 days after entry of the order or when the clerk denies a motion for revocation, whichever

2009 Legislative Update

continued from page 12

occurs later. The bill also amends N.C. Gen. Stat. § 46-28.1 to provide that an order confirming the partition or sale of real property may be appealed within 10 days of the date the order becomes final and effective. **Effective: October 1, 2009. Session Law 2009-362.**

House Bill 578, Partition Sales/Comms, Sellers, Buyers, provides that in situations where notice by publication is utilized, the notice shall include a description of the property which includes the street address, if any, or other common designation for the property, if any, and may include the legal description of the property.

The bill revises N.C. Gen. Stat. § 46-22, Sale in lieu of partition as follows (new language is underlined and deleted language is shown as ~~strikethrough~~):

(a) Subject to G.S. 46-22.1(b), the court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties, after having considered evidence in favor of actual partition and evidence in favor of a sale presented by any of the interested parties.

(b) In determining whether an actual partition would cause “Substantial” substantial injury” to any of the interested parties, the court shall consider the following:

(1) Whether means the fair market value of each cotenant’s share in an in-kind partition actual partition of the property would be materially less than the share of amount each cotenant in the money equivalent that would be obtained would receive from the sale of the whole, whole.

(2) Whether and if an in-kind division actual partition would result in material impairment of the any cotenant’s rights.

(b1) The court, in its discretion, shall consider the remedy of owelty where such remedy can aid in making an actual partition occur without substantial injury to the parties.

(c) The court shall specifically find the facts make specific findings of fact and conclusions of law supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section.”

The bill allows interested parties to a partition proceeding to agree to mediate the partition action. The bill codifies the current practice of granting owners credit for their existing interest in land when bidding on a partition sale. The bill establishes a procedure for conducting an independent appraisal of the property in certain circumstances. **Effective: October 1, 2009, and applies to partition actions filed on or after that date.**

The remaining two (2) bills opposed by the NCBA Real Property Section and the NCLTA were **not** enacted into law this session. These bills would have, among other things, created a “buyout option” which would allow nonpetitioning cotenants to purchase the petitioner’s interest in the property, if the court determines the property cannot be partitioned in-kind (physical division); change the current purely economic “substantial injury” test to determine when a court should order a partition sale into a multiple factor test that also considers noneconomic factors; prohibit a court from charging attorneys’ fees against a nonpetitioning cotenant who contests the partition or sale of a property by appearing in person in court; require the court to order an independent appraisal if any party to the partition proceedings petitions the court to revoke its order of confirmation and order a withdrawal of the offer based upon the grounds that the amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

State Budget Bill

The following are provisions of interest from the State budget bill, **Senate Bill 202, Appropriations Act of 2009**: (a) increases the filing fee of a foreclosure action under a power of sale in a deed of trust or mortgage to \$150 (currently \$75); (b) increases the filing fee for a deed of trust to \$28.00 (currently \$22.00), a portion of which will be remitted by the counties to the State Emergency Management Fund; (c) requires the Register of Deeds to collect

continued on page 14

a \$5.00 fee from the grantor for every deed filed, in addition to the current filing fee (\$12.00).

Home Foreclosure Relief

The legislature enacted several bills aimed at curbing mortgage fraud and assisting those facing foreclosure, including to abolish deficiency judgments where the mortgage is secured by a primary residence and is a nontraditional mortgage loan (House Bill 1057 – Session Law 2009-441); to modify and update the statutory requirements, definitions, and regulations that apply to rate spread home loans and high-cost home loans (House Bill 1222, Session Law 2009-457); and to enact the Consumer Economic Protection Act of 2009 to assist those facing foreclosure (Senate Bill 974 – Effective: October 1, 2009).

Bills of Interest Enacted into Law

Senate Bill 405, Real Property Sales Information. “To facilitate the accurate appraisal of real property for taxation”, the following information must be included in each deed conveying property: (1) the name and mailing address of each grantor and grantee, and (2) a statement regarding whether the property includes the primary residence of a grantor. The bill specifies that (1) failure to comply with this section does **not** affect the validity of a duly recorded deed, and (2) the statute does not apply to deeds of trust, deeds of release, or similar instruments. The bill amends N.C. Gen. Stat. § 105-228.32 to provide that it is the duty of the person presenting an instrument for registration to the register of deeds to report the correct amount of tax due. **Effective: January 1, 2010. Session Law 2009-454.**

Senate Bill 586, File Lis Pendens for Certain Erosion Actions, requires the filing of a notice of lis pendens for actions seeking injunctive relief regarding sedimentation and erosion control for any land-disturbing activity that is subject to the requirements of Article 4 of Chapter 113A of the General Statutes. **Effective: October 1, 2009. Session Law 2009-269.**

Senate Bill 600, Condemnation of Conservation Easements, enacts a procedure for the condemnation by a public condemnor of property encumbered by a conservation easement. **Effective: October 1, 2009. Session Law 2009-439.**

Senate Bill 764, Real Estate/Settlement Agent Embezzlement, clarifies that a settlement agent is guilty of embezzlement in instances even if it cannot be shown that the funds were embezzled from a particular person or entity. **Effective: December 1, 2009. Session Law 2009-348.**

Senate Bill 1017, Enhance Protections Against Identity Theft, provides that a register of deeds or clerk of court may remove from an image or copy of an official record placed on a register of deeds’ or clerk of court’s Internet Web site a person’s social security or drivers license number contained in that official record. Registers of deeds and clerks of court may apply optical character recognition technology or other reasonably available technology to official records placed on Internet Web sites in order to, in good faith, identify and redact social security and drivers license numbers. **Effective: June 26, 2009. Session Law 2009-355.**

Bills of Interest Not Enacted into Law In 2009

House Bill 1182, Relocation of Easements, would authorize the clerk of superior court to determine in a special proceeding whether an easement should be relocated. The bill was not approved by the House before the “crossover” deadline, and should not be eligible for consideration during the 2010 legislative session.

House Bill 1268, Eminent Domain, would place a referendum on the 2009 ballot to amend the North Carolina Constitution to prohibit the taking of private property by eminent domain except for a public use, which would not include taking property in order to convey an interest in the property for economic development. The bill is not subject to the “crossover” deadline and is eligible for consideration in the 2010 legislative session.

House Bill 1356, Commercial Real Estate Broker Lien Act, provides for a lien against real property for commercial real estate brokers. The bill did not meet the “crossover” deadline, but was sent to the Legislative Research Commission and may be studied before the 2010 legislative session. Therefore, if the issue is studied, it may be eligible for consideration during the 2010 legislative session.

NCLTA 2009-2010 Committees

Annual Convention

Tabatha L. Cruden, Chair

Lawyers Title Insurance Corporation
Commonwealth Land Title Insurance Company
421 Fayetteville St., Suite 215
Raleigh, NC 27601
(919) 861-6984
tcruden@ltic.com

Deborah Brittain (Sponsorship)

Chicago Title Insurance Company
1201 Marshall Farm Street
Wake Forest, NC 27587
(919) 453-0332
debbie.brittain@ctt.com

Danita Minor

Fidelity National Title Insurance Company
112 Sir Walter Raleigh St.
Manteo, NC 27954
(252) 473-2281
dhminor@fnf.com

Editorial/Newsletter

Matthew James Powers, Chair

Morehead Title Company
4030 Wake Forest Rd, Suite 201
Raleigh, NC 27609
(919) 424-8315
mpowers@moreheadtitle.com

Education

Sara A. Boshart, Chair

Fidelity National Title Insurance Company
Lawyers Title Insurance Corporation
Commonwealth Land Title Insurance Company
421 Fayetteville Street, Suite 215
Raleigh, NC 27601
(919) 757-2263
sboshart@fnf.com

Forms

Ryan Wainio, Chair

Investors Title Insurance Company
121 N. Columbia St.
Chapel Hill, NC 27515
(919) 968-2200
rwainio@invtitle.com

Tabatha L. Cruden

Lawyers Title Insurance Corporation
Commonwealth Land Title Insurance Company
421 Fayetteville St., Suite 215
Raleigh, NC 27601
(919) 861-6984
tcruden@ltic.com

Nancy Short Ferguson

Chicago Title Insurance Company
230 N. Eugene Street
Greensboro, NC 27401
(336) 665-1314
nancy.ferguson@ctt.com

Legislative

Stephen B. Brown, Sr., Chair

Investors Title Insurance Company
121 N. Columbia St.
Chapel Hill, NC 27515
(919) 968-2200
sbrown@invtitle.com

Michael Burt

Morehead Title Company
1805 East Boulevard
Charlotte, NC 28203
(704) 716-1230
mburt@moreheadtitle.com

Chris Burti

Statewide Title
110 Arlington Blvd.
Greenville, NC 27858
(252) 321-0050
chris@statewidetitle.com

Nancy Short Ferguson

Chicago Title Insurance Company
230 N. Eugene Street
Greensboro, NC 27401
(336) 665-1314
nancy.ferguson@ctt.com

Nick Long

The Title Company of North Carolina
Forum 1 Building
8601 Six Forks Road, Suite 400
Raleigh, NC 27615-2965
(919) 676-5341
nlong@tcnc.biz

continued on page 16

Hugh Talton

Attorneys Title, a division of
First American Title Insurance Company
150 Fayetteville Street, Suite 510
Raleigh, NC 27601
(919) 861-1430
htalton@attorneystitle.com

Loss Prevention

Kimberly B. Rosenberg, Chair

Attorneys Title, a division of
First American Title Insurance Company
150 Fayetteville Street, Suite 150
Raleigh, NC 27601
(919) 828-4692
kbrosenberg@attorneystitle.com

Jane Barkley

Stewart Title Guaranty Company
10115 Kinsey Avenue, Suite 190
Huntersville, NC 28078
(704) 947-3755
jbarkley@stewart.com

Nancy Short Ferguson

Chicago Title Insurance Company
230 N. Eugene Street
Greensboro, NC 27401
(336) 665-1314
nancy.ferguson@ctt.com

Carolyn Snipes

Fidelity National Title Insurance Company
1 West Pack Square, Suite 301
Asheville, North Carolina 28801
(828) 281-4500
carolyn.snipes@fnf.com

Membership

Denise Lee, Chair

Guaranty Title
1000 St. Albans Drive, Suite 400
Raleigh, NC 27609
(919) 595-0603
dlee@guarantytitledllc.com

Linda Gregory

Neuse Financial Services, Inc.
4300 Six Forks Rd., Suite 200 (27609)
PO Box 29635
Raleigh, NC 27626-0635
(919) 716-7771
Linda.gregory@firstcitizens.com

Nominating/Awards

Candice E. Williams, Chair

The Title Company of North Carolina
214 N. Tryon Street; Suite 4110
Charlotte, NC 28202
(704) 342-4278
cwilliams@tcnc.biz

Carolyn Snipes

Fidelity National Title Insurance Company
1 West Pack Square, Suite 301
Asheville, North Carolina 28801
(828) 281-4500
carolyn.snipes@fnf.com

Kimberly B. Rosenberg

Attorneys Title, a division of
First American Title Insurance Company
150 Fayetteville Street, Suite 150
Raleigh, NC 27601
(919) 828-4692
kbrosenberg@attorneystitle.com

Regulatory

Nick Long, Chair

The Title Company of North Carolina
Forum 1 Building
8601 Six Forks Road, Suite 400
Raleigh, NC 27615-2965
(919) 676-5341
nlong@tcnc.biz

Nancy Short Ferguson

Chicago Title Insurance Company
230 N. Eugene Street
Greensboro, NC 27401
(336) 665-1314
nancy.ferguson@ctt.com

ALTA Liaisons

Dottie Black

Fidelity National Title Insurance Company
125 Applecross Road, Suite 1
Pinehurst, NC 28374
(910) 687-1001
dbblack@fnf.com

Beth Falgout

Investors Title Insurance Company
120 N. Franklin Street , Unit One
Suites 201 & 203
Rocky Mount, NC, 27804
(252) 985-5800
bfalgout@invtitle.com

Convention Calendar

NCBA 2010 Real Property Section Convention

May 7-8, 2010
Carolina Inn
Pinehurst, NC

NCLTA 2010 Annual Convention

September 16-18, 2010
Hilton Garden Inn
Kitty Hawk, NC
<http://hiltongardeninn.hilton.com/en/gi/hotels/index.jhtml?ctyhocn=ORFKHGI>

2010 ALTA Annual Convention

October 13-16, 2010
Manchester Grand Hyatt
San Diego, CA
www.alta.org/meetings/meeting.cfm?meeting=SAM2010Ann

NCLTA 2011 Annual Convention

September 15-17, 2011
The Grove Park Inn Resort & Spa
Asheville, NC
www.grovesparkinn.com

NCLTA 2012 Annual Convention

September 13-15, 2012
Wild Dunes Resort
Isle of Palms, SC
www.wilddunes.com

NCLTA Annual Report

Penney De Pas, MA, CAE

For 2009, the number of Underwriter members declined from 13 to 11 due to company consolidations and the number of Agencies declined to 8 from 14 due to economic restrictions. Branch memberships and Directory Listings also reflected consolidation with branches declining to 71 from 78 and directory listings declining to 33 from 46 the previous year. The Association has 89 attorney members, down from 93. Associate and Honorary memberships held steady.

The slowing in the real estate economy was reflected in the number of Study Guides sold (six) compared to 20 for the previous year. Minor revisions to ALTA forms were submitted to and approved by the North Carolina Department of Insurance.

In 2004 NCLTA suffered a severe year-end loss of \$23,500, and a “going concern” note by our independent CPA firm. In the subsequent three years, the association increased its revenues to a point that as of 12/31/07, NCLTA had \$98,513 in total net assets. However, in 2008, NCLTA hired two law firms—one to prepare an *amicus* brief and the other to render an opinion about potential anti-trust issues with information sharing, reducing the net assets to \$70,222 by the end of 2008. In addition, the Association has been proactive on the legislative front, first with the Railroad Corridor legislation and subsequently with the Hidden Mechanics Lien legislation, triggering two special assessments of nearly \$100,000 for government relations funding—the second one based on a market share and split only among title underwriters. NCLTA also had prepared a followup *amicus* brief for oral argument before the NC Supreme Court on September 8, 2009. As of the July 31 financial statement, the Association had spent \$60,000 of the special assessment with \$38,000 remaining and had net assets of \$82,000 without the special assessment and convention monies included.

The NCLTA Web site, www.nclta.org, was updated in 2009 with the new NCLTA Lien Forms and sample Commitment language, RESPA FAQs updates, and a Federal/State Legislator/Regulator Relationship Survey.



Manchester Grand Hyatt, San Diego, California, is the site of ALTA's upcoming 2010 Annual Convention.

Convention Manuscripts Available

The following manuscripts from the 2009 convention held at Wild Dunes Resort are available for the price of copying, shipping and handling.

Please send me the 2009 Convention manuscripts:

No. _____ "How did we get here? How do we get out of here? Contractor's Liens and Related Problems" – Christopher J. Vaughn @ \$12.50

No. _____ "Closing Protection Letters in North Carolina: Selected Coverage Issues and Improvements to the North Carolina Form CPL" – Neale T. Johnson @ \$12.50

No. _____ "Case Law Update" – Phyliss Craig-Taylor @ \$12.50

No. _____ "Contractual Conundrums" – Margaret Burnham @ \$12.50

No. _____ "2009 North Carolina Legislative Update" – David P. Ferrell @ \$12.50

No. _____ "North Carolina Bar Association – Real Property Section Update" – Robert B. Hobbs, Jr. @ \$12.50

No. _____ Entire Package – One of each manuscript listed above @ \$65

Total = \$ _____ enclosed.

Please make checks payable to "NCLTA" and enclose with your order. Mail to:

NCLTA, 1500 Sunday Drive, Suite 102, Raleigh, NC 27607-5151.

Name _____

Company _____

Mailing Address _____

City, State, Zip _____

Phone _____ Fax _____

Email _____

For office use only: NCLTA 100-3300

Customer # _____ Order # _____ Check # _____ [] C [] P



President's Message

continued from page 1

This amendment is just one step in the task of keeping governance of our title insurance industry in North Carolina by the State without the additional layer of federal oversight.

One major ALTA initiative discussed that applies specifically to title insurance companies and agents alike is the new licensing policy. In North Carolina, the insurance jackets we use are all ALTA policies. ALTA has provided the jackets and form endorsements to the industry for years without regard to whether the company or agent using the jackets was a member of ALTA. The expense involved in creation and revision of the forms is substantial. Therefore, ALTA is implementing a licensing program for its forms. If you are a member of ALTA, the license is free of charge.

If you are not a member of ALTA, the licensing fee is \$195 per year. You should have already received from ALTA a letter with a free ALTA membership through the end of 2009 along with a notice of the new program. Shortly after the beginning of the year, you will receive an invoice with two options. You may join ALTA as a paying member and receive the license for free, or you must pay the \$195.00 fee to continue to use the forms. ALTA is solely responsible for this program. Neither NCLTA nor the underwriters have any role whatsoever in the assessment, collection or enforcement of the licensing program.

Finally, the highlight of the convention for me was the Keynote Speaker, Hernando de Soto. Mr. de Soto discussed the importance of the United States' land recording system. It is a system we take for granted. He compared a U.S. citizen to the fish that doesn't understand it is in water. We live in a country where a piece of land is represented by a deed. That deed and the governmental system of validation and recordation create trust that allows for the transfer and mortgage of property. It is the formal property system that takes land and converts it to capital. This is not the case in much of the rest of the world. For example, in his book *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere Else*, Mr. de Soto states that approximately 4.7 million Egyptians chose to build their homes illegally due at least in part

to the 77 bureaucratic procedures, 31 agencies and five to fourteen years it takes to obtain the legal right.

Mr. de Soto did an excellent job illustrating the stark differences between a society with a comprehensive, formalized property system and one without. I certainly cannot do his lecture justice, but I can highly recommend his book. His words and experience are just further proof of the significant impact the title system, and our role as an industry in assuring title, are vital to the economy of this country.



Hernando de Soto

I also like to think of the system in North Carolina as special and better than the system in other states. Although some may call it hometown bias, my experience at the ALTA convention just underscored my perception that we have a great industry here. Certainly there is always room for refinement and innovation, but the core of the North Carolina way does a great service to consumers. Thank you for your commitment to our system and for the good work you do to provide real value to the North Carolina way.

As 2010 begins, it is with excitement that I look forward to another successful NCLTA year. Best wishes to you and your family.

Join Us in Kitty Hawk!

**September 16-18, 2010
Hilton Garden Inn**



CLE content is in the works—if you have speaker or topic suggestions please let Vice President and Convention Chair, Tabby Cruden, know as soon as possible at tcruden@ltic.com.

You may make your accommodation reservations now by calling (252) 261-1290. Please reference NCLTA to secure the discounted Convention rate. Room rates range from \$169-\$199 depending on your room type selection.

New HUD-1 Check List:

- My software provider has all of the new HUD-1 changes in place that I need.
- I've updated all of my reports and documents that will be affected.
- My staff is trained on the new HUD-1 regulations and forms.
- I've notified my lenders that my firm is ready to accept the new GFE.
- My lenders have sent me their new closing instruction formats.
- I am confident that we are ahead of the competition in closing on the new HUD-1.



**SoftPro is ready,
and we've got the
solution for you.**

BE PREPARED Call SoftPro at **800-848-0143** to learn more.