Contractual Conundrums

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This paper is intended to present some drafting lessons and tips that arise in real estate contracts. It isn't an exhaustive search but instead covers some recent issues of particular interest to the author. It covers an assortment of conundrums encountered in real property ethics, case law, statutes and contracts.

1. Contract "go bys" – going, going, gone? Proposed (Revised) 2008 FEO 14 (7/23/09)

A recent ethics inquiry to The North Carolina State Bar involved the use of another attorney's work product. The issue focused on whether a lawyer could use another attorney's written work without attribution. Although the inquiry specifically involved a brief filed with the court, the same rule would apply to drafting deeds, deeds of trust, leases, purchase agreements and any other real estate contracts.

The most recent draft of Proposed (Revised) 2008 FEO 14, published July 23, 2009, is attached hereto as Exhibit A. This version of the opinion rules it is not an ethics violation not to attribute excerpts from the work product of another lawyer placed in the public domain. The revised proposed opinion carves out from the opinion the legal question of what work product is covered by federal copyright laws. After the initial publication of the opinion, the State Bar Ethics Committee received feedback from Susan Freya Olive, Esq., an intellectual property lawyer, about the issue of federal copyright law. Her letter, reprinted with permission, is attached hereto as Exhibit B. Because the issue is not fully resolved, you are advised to follow developments regarding proposed opinion 2008 FEO 14.

2. Consideration: what is in a buck?

The recent case which most captured my attention (and fear) is McLamb v. T.P. Inc., 173 N.C. App. 586, 619 S.E.2d 577 (2005), disc. rev. den., 360 N.C. 290, 627 S.E.2d 621 (2006).

In McLamb, the key facts were:

- Plaintiffs desired to purchase lots at a subdivision to be developed by defendant;
- Plaintiffs executed "Reservation Agreements" which the court interpreted as option contracts;
- Plaintiffs paid a deposit of $500 per lot "as consideration";
- The deposit was fully refundable if plaintiff requested a cancellation or the deposit was transferred to the purchase contract as a credit toward the purchase price at closing;
- Defendant later informed plaintiffs it was unable to obtain necessary permits to develop the project and terminated the reservation/option contracts;
- Plaintiffs sued for specific performance; and
- Although a sample reservation/option contract was not reprinted in the opinion, the court concluded "nothing in the reservations actually required

(the developer) to develop the property upon which plaintiffs' lots were to be located or to convey such lots to plaintiffs."

The court's first conclusion was that the reservation/option contracts did not actually constitute offers to sell. Thus, there could be no breach.

Instead of ending the opinion there, the court proceeded to analyze the nature of the consideration. The court attempted to distinguish an option contract from a purchase agreement by explaining that an option is "a contract by which the owner agrees to give another the exclusive right to buy property at a fixed price within a specified time."

[Editorial Note: In my practice, there is no practical distinction between an "option" and a purchase contract as the typical deal is to have a purchase contract with a free "look-see" period in which the earnest money is fully refundable if the buyer terminates prior to the end of the negotiated due diligence period.]

The court was vexed by the fact that the $500 deposit was fully refundable and, if the closing occurred, the $500 was to be applied as a credit to the purchase price.

[Editorial Note: In my practice, the first question after "how much" to pay for the land is "how much" earnest money deposit will be required and is it refundable/applicable? The earnest money deposit is considered "funny money" because the buyer usually gets it (all) back if the buyer walks. A different story emerges if the buyer needs to extend the original due diligence period – then you see negotiated penalties for longer due diligence periods which are frequently non-refundable but still applicable.]

In plaintiffs' support:

- $500 cited "as consideration";
- $500 actually paid; and
- "Plaintiffs … lost the benefit of the use of that money during the interim time period … [and] Defendant received the benefit of the use of this money to enable it to … both receive and/or qualify for financing and to earn interest …"

The court does not explain how options are different than purchase agreements or other contracts; likewise, the court does not address the practice of reciting "in consideration of $10.00 and other valuable consideration" as adequate consideration. In a stinging rebuke of contracts with fully refundable deposits, the court cited a case which held that "consideration which may be withdrawn on a whim is illusory consideration which is insufficient to support a contract." The supporting authorities were two covenants not to compete cases. The court

distinguished money paid as a deposit toward the purchase price and money paid for the option itself. The court cited many N.C. authorities for this proposition. The court did not indicate if it would have ruled differently if the option had recited "$10.00 and other valuable consideration."

Another recent case considered the issue of consideration for an easement. An adjacent property owner was challenging the easement granted by a common grantor and noted that the easement recited $10.00 paid but the plaintiff challenged whether the $10.00 was in fact paid. The court wasn't the least bit interested:

> Notwithstanding the recital of consideration in the easement deed, and assuming *arguendo* that no consideration was paid, there is no legal requirement that a deed be supported by consideration: '[A] deed in proper form is good and will convey the land described therein without any consideration....'

D.E.F. of Hickory, LLC v. Honeycutt, ____N.C. App. ____, 673 S.E.2d 166 (2009).

In a recent covenant not to compete case, Hejl v. Hood, Hargett & Associates, Inc., ____ N.C. App. ____, 674 S.E.2d 425 (2009), the court looked at the consideration issue in the context of general contract law. In that case, the consideration was $500 (actually paid). The court also looked with disfavor on "illusory" consideration. The court was persuaded by the fact that that the plaintiff accepted the $500 at the time. The court declined to mediate the adequacy of the consideration:

> Our Courts have not evaluated the *adequacy* of the consideration. Rather, the parties to a contract are the judges of the adequacy of the consideration. 'The slightest consideration is sufficient to support the most onerous obligation, the inadequacy, ... is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.

Id.

Practice Tips:

1. Recite the standard "$10.00 and other valuable consideration" (See Exhibit C).

2. Pay a certain nominal amount as nonrefundable option money for the option itself (See Exhibit C)

3. Add a paragraph that a nonrefundable deposit will be made if requested by the Seller (See Exhibit C).

4. Recite "other valuable consideration":

- the expense of due diligence
- the expense of re-zoning
- the expense of designing a site plan/obtaining permits and approvals (See Exhibit C).

5. Note: The NC Bar Association/Real Property Section/NC Board of Realtors, Inc. have discontinued the joint Option to Purchase form (for former version, see Exhibit D); the Bar form provided a choice for the option money to be applied to the purchase price or not and provided if the option was not exercised, the option money would be retained by the seller.

3. What did you intend? Agreements to agree.

A recent case, Augusta Homes, Inc. v. Feuerstein, ____ N.C. App. _____, ___ S.E.2d _____ (2009) (2009 WL 2501399) is the latest pronouncement on agreements to agree. The facts are a bit peculiar as they involved the sale of a lot with a condition that the buyer must later use the seller/builder to construct the home (details to be determined...). The case spans 3 buyers: buyer 1 was the original buyer who bought the lot subject to an option in favor of the seller/builder to buy it back if an agreement on the home purchase was not agreed upon by a certain date; buyer 2, the defendants in this case, bought the lot from buyer 1 when buyer 1 could not sell their existing home – this sale to buyer 2 was subject to a side agreement that required buyer 2 to use the same builder as with buyer 1; and buyer 3 bought the lot from buyer 2 with no obligation with respect to the builder.

The defendants never could reach an agreement with the seller/builder on the price for a custom home. The defendants argued that the builder condition in the contract was an "agreement to agree." The defendants gave as examples, the following open terms left to be negotiated:

- final size of home
- whether or not to include a basement, elevator or pool
- terms of the builder's warranty
- procedure for change orders
- payment terms
- dispute/claims procedure

The court decided all these terms were not essential -- "only conditions of construction to be negotiated and agreed upon at a later date, per the Agreement."

Apparently the court believed the defendants were just looking for a way out. The court stated that the "Defendants were not trapped by the Agreement in surprise

contractual obligations that they never intended..." Plus, the court jabbed at the defendants for flipping the house to buyer 3 less than 5 months after acquiring it at a substantial increase in price and "kept the profit." [The opinion mentions that the defendants paid $560,000 and offered it back to the seller/builder for $700,000, but did not disclose what buyer 3 paid.]

See also JDH Capital, LLC v. Flowers, 2009 NCBC 4 (3/13/09)(2009 WL 649161)(complicated facts but thorough analysis of problems with agreements to agree and interplay with quantum meruit in the alternative to an agreement).

4. What is enough of a writing?

A. The Tyrrell County Rule

In East Camp, L.L.C. v. Spruill, _____ N.C. App. _____ 677 S.E.2d 14 (2009), the court considered whether a letter agreement for "all the till able acreage owed by [Plaintiff]" satisfied the Statute of Frauds. Relying on established case law regarding patent ambiguity versus latent ambiguity, the court found the description was only latently ambiguous and, therefore, the trial court should have let in extrinsic evidence.

The court cited as authority the proposition that "[a] memorandum or note is, in its very essence, an informal and imperfect instrument," quoting Lane v. Coe, 262 N.C. 8, 12, 136 S.E.2d 269, 272-73 (1964), Hopefully more complimentary things would have been said if the writing had been drafted by an attorney.

The court was not troubled by the absence of the rent provision in the writing: "North Carolina is among a minority of jurisdictions that does not require that the memorandum state the consideration given by the party seeking to enforce the contract."

B. Joint Venture Rule

In a case with rather specific facts, the North Carolina Business Court addressed the rules for determining who had authority to bind a joint venture. In Azalea Garden Board & Care, Inc. v. Vanhoy, ___NCBC ___ (06 CVS 0948) (2009) (2009 WL 690207) the court held for a writing to bind a joint venture, the party seeking to enforce the contract must show either that the party who executed the writing was acting on behalf of the joint venture or that the joint venture ratified the writing.

Although the facts are not likely to be repeated, the rationale would generally apply to require proper execution of a real estate contract and verification that the party executing the party has the requisite authority to do so.

Practice Tip: A simple corporate, partnership or LLC resolution, itself properly executed by all the necessary parties, is all you normally need.

C. Not quite enough (or "what were they thinking?")

In B & F Slosman v. Sonopress, Inc., 148 N.C. App. 81, 557 S.E.2d 176 (2001), rev. den., 355 N.C. 283, 560 S.E.2d 795 (2002), the North Carolina Court of Appeals held that a lease "negotiation summary" was not enough to satisfy the Statute of Frauds. Unbelievably, the tenant was allowed to move into a plant with no signed lease. The tenant was paying $36,481.97 per month with no written lease! The court also pointed out another fatal flaw that there was no evidence that the party who signed the lease negotiation summary had authority (the "purchasing manager" for defendant).

[Editorial Note: This exact problem occurs when a real estate manager signs a "non-binding" letter of intent for a lease, but that same person doesn't have authority to sign a "binding" lease.]

5. Miscellaneous drafting errors

A. Deed error

1. Deed Error: wrong legal description

In Drake v. Hance, ____ N.C. App. _____, 673 S.E.2d 411 (2009), the sellers sought reformation of a deed in which they alleged erroneously included a vacant lot along with a residential lot.

The court first outlined the parol evidence rule, citing settled law that permits parol evidence to "explain" an ambiguous term.

The court then looked at what facts were necessary to justify reforming the deed. The main proof was that the vacant lot was not adjacent to the recorded lot. The closing attorney "improperly" prepared the deed (the purchase contract contained the correct legal description). When the error was discovered, the closing attorney then made "repeated" efforts to correct the deed. The defendants, apparently based on the "free lunch" theory, did not agree to fix the deed but did not contest the error at the time they learned of it. The trial court found the closing attorney's testimony to be "**exceptionally persuasive**"! And, in a move likely inspired to avoid litigation costs, the defendant's two mortgage companies each released the vacant lot from the deed of trust.

See also Taylor v. Miller, ____ N.C. App. _____, 671 S.E. 2d 70 (2008)(deed reformation in context of domestic matter).

2. Deed/Deed of Trust error: missing "Exhibit A"

In Noel Williams Masonry, Inc. v. Vision Contractors of Charlotte, Inc., 103 N.C. App. 597, 406 S.E.2d 605 (1991), the Court of Appeals gave a gift to all real property lawyers who have ever had the misfortune to omit an "Exhibit A." Here the deed of trust failed to include an Exhibit A. Later, borrower defaulted and contractors filed liens.

After the liens, the lender discovered the error and re-recorded its deed of trust with an Exhibit A attached. The fight that ensued was a priority battle which the lender won. The court agreed with the trial court that the re-recording related back. The contractors liens did not trump the faulty deed of trust because none of the contractors did a title search to check lien status and thus no faith was placed on lien priority when the contractors' work was furnished.

B. Easement

In a landmark case for drafting errors, Swaim v. Simpson, 343 N.C. 298, 469 S.E.2d 553 (1996), the court was unforgiving in its narrow interpretation of an access easement. In the per curiam decision, the court refused to allow utilities within the access easement since the party was granted only an "access" easement.

Practice Tip: Never ever draft an access easement without including utilities.

C. Lease

A recent dispute over a billboard provides lots of lease drafting pointers. In Fairway Outdoor Advertising v. Edwards, ___ N.C. App. ____, 678 S.E.2d 765 (2009), the Court of Appeals considered 3 issues:

1. If the lease doesn't specify, what amount of holdover rent must tenant pay?
2. What is a reasonable time period for a tenant to remove its improvements?
3. When a tenant is entitled to remove its alterations, must tenant remove "all" of its alterations?

1. Holdover rent

After poking at the defendants for pursuing a claim for "unjust enrichment," the court addressed the issue as "an action to recover reasonable compensation from a holdover tenant."

The court cited prior authority for the election a landlord must make:

> Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to *recover reasonable compensation* for the use of the property, or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy.

Id., quoting Coulter v. Capitol Finance Co., 266 N.C. 214, 217, 146 S.E.2d 97, 100 (1966)(emphasis added).

As to the amount of rent, the rule is:

> [i]n the absence of evidence that the rental value of the leased property has increased or diminished since negotiation of the rent at the time of agreement to lease, that negotiated rental rate will determine the rate at which the holdover must pay for his continued use and occupation. Either party may, however, introduce evidence that independently establishes that the reasonable value is greater or lower than the previous rental rate, and recovery will be extended or limited to that measure.

Id., quoting Restatement (Second) of Property: Landlord & Tenant Section 14.5, comment a (1977).

Because the plaintiff provided no evidence and the defendants only put in evidence of "gross income" derived from the use of the billboard, the court "presumed" the reasonable rent to be the negotiated rent under the expired lease. The court pointed out that the defendants did accept one payment after the expiration of the lease in the amount of the rent under the expired lease.

2. Reasonable time

On the second issue, the court cited a Supreme Court case:

> what is [a] "reasonable time" is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case....
>
> The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as [a] matter of law....
>
> If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated and such that a definite legal rule can not be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences can not be reasonably drawn from them that the question ever becomes one of law.

Id., quoting Claus – Shear Co. v. Lee Hardware House, 140 N.C. 552, 554-55, 53 S.E.2d 433, 434-35 (1906)(citations omitted).

Surprisingly, the court did not order sanctions on this issue as the court pointed out that the plaintiff filed a Declaratory Judgment action the day after the lease expired and tried to remove the billboard within two weeks of losing the DJ action. The current lawsuit was filed by plaintiff within two weeks of being blocked from removing the billboard.

3. What improvements must be removed by tenant?

This issue was one of first impression. The court held that:

> when ... a lease agreement grants the lessee the right to remove "all structures, equipment and materials," but does not require the lessee to remove all of them or to restore the property to the same condition as at the beginning of the lease, the lessor may not require the lessee to choose between removing all or removing none.

Id. This ruling is significant because the opinion does not suggest its impact is limited to billboards!

[Editorial Note: This issue is frequently addressed in ground leases and so ground lease forms would be a good source of language to consider for this kind of provision.]

D. Options

A pitfall in drafting options is failure to address the time period. In Lefever v. Taylor, ____ N.C. App. ___, ___ S.E.2d ____ (2009) (2009 WL 2177323), the parties entered into a real estate purchase contract. The contract provided it was contingent upon a right of first refusal in favor of buyer to purchase certain additional lots.

In this case, two problems occurred:

1. The contract had no time period for the right of first refusal; and
2. The deed, prepared by defendant-seller, according to plaintiff-buyer, erroneously contained a one-year time period.

The court was sympathetic to plaintiff-buyer, but held that, in absence of a contract provision with a time period, the issue was ultimately left to the party drafting the deed.

The court did not agree with plaintiff-buyer's argument that in the absence of a time period, that a thirty-year time period was implied under N.C. Gen. Stat. § 41-29.

As an aside, the court took time to chastise the attorney for the seller for changing the deed after it had been reviewed by buyer's counsel without calling attention of the latest change to buyer's counsel:

"[I]f there is any "injustice" in this case, it was the failure of defendant's counsel to behave in the manner that plaintiffs' counsel had come to expect based upon his many years of law practice, in accordance with the professional courtesy and cooperation normally extended from one member of the bar to another."

6. Bankruptcy: Dating documents

One of the closing responsibilities that may have been taken for granted in the past is the duty to oversee the dating of documents. Recently, the Bankruptcy Court for the Eastern District of North Carolina, in Beaman v. Head, 05-02729-8 RDD (9/15/06), tossed out a deed of trust because it was not dated the same date as the note. The court relied upon the reference in the deed of trust that it secured a note "of even date herewith." See Exhibit E for a detailed analysis of the case prepared by Benjamin A. Kahn and David S. Pokela, reprinted with permission. Attached to Exhibit E is a copy of the opinion by Judge Randy Doub.

Practice Tip: Add this requirement (or assumption) to your form opinion letter to banks, especially for those loans where you are local counsel and not the party overseeing execution and dating of loan documents.

7. Other bankruptcy cases on documentation errors

While the scope of this paper is limited to contractual conundrums, there are always a few bankruptcy cases that address real estate issues of concern. In addition to the Beaman v. Head opinion, some noteworthy opinions follow:

A. "Feeling the Love" opinions

1. In re Rose, 08-00080-8-JRL (EDNC July 20, 2009)

There are not a lot of bankruptcy cases where the flawed document beats a challenge by a Trustee. This case involves an ambiguous legal description due to a typo in a block number – two of three references in the deed of trust properly describe the land as lots 20 and 21 of "block 96" and a third reference mistakenly refers to "block 98." Luckily for the holder of the deed of trust (and its title insurer)(and the draftsman), the debtor did NOT own 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 acknowledges that this result seems a bit contradictory to Law Developers (see below).

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].

2. In re Easthaven Marina Group, LLC (08-00221-8-JRL)(EDNC 3/13/09)

This case is, in part, an exception to the harsh result of Beaman v. Head. In Easthaven, there is a $9,000,000 note executed, delivered and dated on 3/2/07. The deed of trust to secure the note was, sadly, dated 3/1/07 (Beaman's opinion was handed down 9/15/06) and the deed of trust refers to a note dated March 3/1/07. The name of the borrower was the other problem. The entity's legal name was "SHM Marina Group, LLC" (correct name appears on the deed of trust), but the note referred to the "common name" of "Scotts Hill Marina Group, LLC" ("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 (outside the scope of this paper).

Yet, after concluding the deed of trust was void and reformation not available, the court dusts off the estoppel doctrine and found that it is 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.

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."

B. Fatal flaws: not feeling the love

1. Den-Mark Properties, LLC v. SunTrust Bank and Southland Associates, Inc. (08-00196-8-RDD)(EDNC 3/27/09)

In Den-Mark, 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 second deed of trust did not have

record title. The court discussed reformation issues and declined to reform the deed of trust (but that is outside the scope of this paper).

2. In re Law Developers, LLC (08-00965-8-JRL)(EDNC 6/24/08)

This is another case with a problem legal description. As the court pointed out, an "inadvertent draftsman's error" caused the legal description to reference the wrong lot number. From there, the facts are less than clear:

- a note was signed on 1/12/06 in the amount of $194,500 to The Bank of Currituck
- "the legal description" is identified as lot 43 of Cedarwood Village (pp 1-2)
- the parties acknowledge the intended legal description was lot 17 ("as shown on page one of the deed of trust")
- the opinion (p.3) says "[i]n this case, the deed of trust refers to BOTH lots 17 and 43…" [then why does it say earlier in the opinion that the legal is lot 43?]
- lot 43 was sold by the debtor on 11/3/06 [was there a release deed by The Bank of Currituck?]

The Court found the deed of trust was invalid. The Court looking at the face of the deed could not decipher the "clear" intent of the land to be encumbered. However, there was no effort to have the title searcher look to see if there was something of record to explain the error (see In re Rose, *infra*). Also, the plea to reform was also denied.

The best explanation of how to distinguish Law Developers from In re Rose is the opinion of Judge Leonard (who wrote both opinions):

> 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 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.

In re Rose, *infra.* This is all we have to distinguish the two cases. You are best advised to proof your legal descriptions and not rely on any bankruptcy doctrines to save you from a scrivener's error.

8. Correction "Affidavits"

Since October 1, 2008, North Carolina has had a complete re-write of the old NCGS § 47-36.1 procedure giving attorneys the authority to re-record documents with "obvious typographical" or other minor errors in deeds or other recorded instruments of record. The new statute provides for a "corrective affidavit" to be recorded. Fortunately and unfortunately, they are not the same:

	"old" 47-36.1	"new" 47-36.1 (eff 10/1/08)
Errors covered	Typographical or other minor error	Typographical or other minor error
Method	Re-record original (no acknowledgment)	Record an Affidavit (identify in title as "corrective" or "scrivener's" affidavit for indexing purposes)(must be notarized for a "sworn" Affidavit)
Original	Needed original; error to be "clearly set out on face" with signed statement of explanation	Not needed; optional to attach copy (does not need to be certified)
"Notice"	from time instrument re-recorded	from time Affidavit is recorded
Relation Back	Not specified apart from "notice"	Not specified apart from "notice"
Who can file	Parties who signed the original OR the attorney who drafted (no advice given on who had authority if drafting attorney not indicated on face of instrument)	No limit on who can file; no requirement for "drafting attorney" to execute (or even the parties)
Other methods to correct errors	Not specified but certainly other methods not excluded	Any other method permitted by statute

There were only a couple of annotations before the re-write and none since the re-write. The statute was always limited to "minor" errors in the nature of a "typographical" error. The Court of Appeals in Green v. Crane, 96 N.C.App. 654, 386 S.E.2d 757 (1990) made it clear that omission of a legal description was not the kind of minor error contemplated by § 47-36.1. See also Moelle v. Sherwood, 148 U.S. 21, 13 S.Ct. 426, 37 L.Ed. 350 (1893)(under Neb. Law, alteration of deed to add land not effective without a new conveyance); In re Hudson, 182 N.C. App. 499, 642 S.E.2d 485 (2007)("the deed did not include a description of the real property at the time of execution, and such description was later added to the deed without [seller's] consent or knowledge").

For a sample Affidavit of Correction, see Exhibit F (reprinted with permission of Chicago Title Insurance Company). For a sample Reaffirmation, Re-execution and Reacknowledgement of Previously Recorded Instrument, see Exhibit G (reprinted with permission of Chicago Title Insurance Company).

9. Time is of the essence clause

This topic will always come up in drafting tips, although there is really nothing "new" about it.

The most recent case is Phoenix L.P. of Raleigh v. Simpson, ____ N.C. App. ____, 673 S.E.2d 800 (2009). A summary of the facts is as follows:

- 10/1/95 plaintiff and defendant entered into a 5 year lease;
- Lease had a "call" option in which plaintiff had an option to purchase and a "put" option in which defendant had an option to require plaintiff to purchase the property;
- Closing was to take place within 180 days following exercise of the option;
- The contract provided "time is of the essence";
- 9/13/00 defendant executed the "put" option to require plaintiff to purchase;
- 3/13/01 was the closing deadline;
- Due diligence revealed "environmental problems";
- 12/21/01 the defendant communicated to plaintiff that the defendant's own environmental report revealed likely dry cleaning solvent contamination and indicating that the defendant intended to enter the property in the N.C. Dry Cleaning Solvent Act program;
- [almost 3 years go by];
- 8/18/04 plaintiff's attorney wrote to defendant inquiring about the status of the property;
- 9/23/04 defendant informed plaintiff that the property had been listed for sale; and
- 1/21/05 defendant entered into contract to sell the property to a third party.

The court had no difficulty determining that the "time is of the essence" clause was waived. Based on the waiver, the court then examined the timetable to close, citing the long-recognized principle that, absent a binding time is of the essence clause, the parties are allowed a "reasonable time" to perform.

The court concluded that a jury question existed as to whether the lapse of time before plaintiff sought to close was reasonable.

The courts also apply the same rules to "pre-closing" conditions in a contract. For example, in Harris v. Stewart, ____ N.C. App. ____, 666 S.E.2d 804 (2008), rev. den., 363 N.C. 373, 678 S.E.2d 663 (2009), the contract had a contingency for an appraisal. The appraisal provision had a completion date but the provision did not contain a "time is of the essence" clause. The court found that a 5 day delay beyond the stated completion date was not unreasonable.

10. Survival clause

The Court of Appeals in Sunset Beach Development, LLC v. AMEC, Inc., ____ N.C. App. ___, 675 S.E.2d 46 (2009), considered the effect of a survival clause in a real estate contract.

The general rule in interpreting contract provisions is that the contract provisions merge into the deed at closing

> Generally, a contract for the sale of land is not enforceable when the deed fulfills all the provisions of the contract, since the executed contract then merges into the deed ... However, it is well recognized that the intent of the parties controls whether the doctrine of merger should apply.

Biggers v. Evangelist, 71 N.C. App. 35, 38, 321 S.E.2d 524, 526 (1984). rev. den., 313 N.C. 327, 329 S.E.2d 384 (1985).

In Sunset Beach, the contract contained the following survival clause in the section entitled "Representations and Warranties of Seller": "Seller's representations and warranties shall survive closing."

The court was not impressed with the buyer's lack of due diligence but held that there were sufficient facts to preclude summary judgment for the seller. However, the court limited its holding to only those facts covered by seller's representations and warranties, which expressly included environmental matters. Because the issue of wetlands was covered elsewhere in the contract, the court did not extend the "survival" clause to those additional issues. The court interpreted the provision like "time is of the essence" - - holding that such a clause might apply to different provisions in the contract (such as a pre-closing condition or a closing deadline).

Practice Tip:

Although the court did not mention this, the survival clause quoted did not include a time limit. It is the author's experience that it is more typical to find a survival clause with a deadline, usually expressed in a number of "months" and hotly negotiated. A more typical clause in a commercial context is as follows:

> Except as otherwise specifically provided in this [Section ___] hereof, the representations and warranties set forth in this Section shall survive Closing for a period of _____ (____) months (the "Survival Period"). In the event Purchaser has not given notice to Seller of a claim based on breach of a representation or warranty set forth in this Section within the Survival Period, Purchaser agrees that Seller shall be fully released and discharged from any liability whatsoever arising out of the representations and warranties contained in this Contract. In the event

that Purchaser has knowledge prior to the consummation of the sale of the Property that any representation or warranty of Seller is materially untrue or incorrect, Purchaser shall have the right, as its sole and exclusive remedy, to either terminate this Contract and obtain a refund of the Earnest Money, or, alternatively, to close and take title to the Property subject to the truth of the applicable matter, in which case Purchaser shall be deemed to have waived any claim against Seller based on the representation or warranty being untrue.

11. Mitigation of damages clause

One of the time honored principles of real property laws *used to be* the duty of a landlord to mitigate damages when a tenant breached a lease. That was all changed with Sylva Shops L.P. v. Hibbard, 175 N.C. App. 423, 623 S.E.2d 785 (2006). See also Kotis Properties, Inc. v. Casey's Inc., 183 N.C. App. 617, 645 S.E.2d 138 (2007) (following Sylva Shops).

Prior to Sylva Shops, the established common law was that a landlord had a duty to mitigate damages. See, e.g., Isbey v. Crews, 55 N.C. App. 47, 284 S.E.2d 534 (1981). This duty was so engrained it did not need to be in the lease – it was implied. See, e.g., Chapel Hill Cinemas, Inc. v. Robbins, 143 N.C. App. 571, 547 S.E.2d 462 (2001).

In Sylva Shops, the lease expressly provided to the contrary:

> [Landlord] shall have no obligations to mitigate Tenant's damages by reletting the Demised Premises.

The court had no difficulty finding that a shrewd landlord, who thinks to add this provision to the boiler plate in a *commercial* lease is entitled to enforce it. The court noted that a different result might occur if the waiver of a right was accomplished through "inequality of bargaining power."

The court then noted that the defendant did not argue that the lease provision was obtained as a result of such inequality of bargaining power. Indeed the court quoted the defendants that "[n]obody was holding a gun to [our] head."

[Editorial Note: Just when is there equality of bargaining power? In my experience, either the shopping center has the leverage or the anchor tenant – rarely is it "equal"].

Practice Tip: If you represent a tenant and the shopping center landlord seeks to negotiate out the duty to mitigate, a compromise position is to acknowledge that the shopping center landlord is faced with other locations to lease and that it has no greater duty to lease the vacated premises than it does to lease out its other locations:

Landlord agrees to make equal efforts to market the Demised Premises together with its other vacant properties in an effort to mitigate Tenant's damages. Landlord shall neither favor nor disfavor the Demised Premises in the marketing of the space to potential tenants. Further, Landlord shall not be required to enter into a lease for the Demised Premises at a rate below fair market rent or with a tenant that does not meet Landlord's standards for economic viability which shall be judged in a commercially reasonable standard.

12. Emerging issues involving "short sales"

A. short sale agreements

a. Who is negotiating with the bank? is that party regulated?

b. What representations/warranties are being made? are they accurate? (is mortgage federally insured? if so, what additional layer of representations/ warranties?)

c. What disclosures need to be made?

d. Who does the attorney represent?

e. Deficiencies and Senate Bill 819 (attached hereto as Exhibit H) (is deficiency due in full? new Note to be executed? deficiency waived? deficiency amount compromised? is there a taxable event?)

f. What junior lien/equity line exists? what will happen with that lien? will senior lender let any proceeds go to junior lender?

g. N.C. Gen. Stat. Section 14-423, 424 (engaging in debt adjusting, including "foreclosure assistance", constitutes a Class 2 misdemeanor)

B. "subject to" sales

a. What does the deed of trust provide? (is the provision an optional breach? must sale be reported to lender?)

b. HB 1708 (attached hereto as Exhibit I)

C. forms

a. NC Bar Association/Real Property Section/NC Association of Realtors, Inc./Form 2-A-14 (1/2009)(Exhibit J)

b. Sample Short Sale Agreement (Exhibit K)

Exhibits

A. Proposed (Revised) 2008 FEO 14 (reprinted with permission of The North Carolina State Bar)

B. Letter dated April 23, 2009 from Susan Freya Olive, Esq. entitled "Copyright & The Works of Attorneys: Comments on FEO 2008-14" (reprinted with permission of Susan Freya Olive)

C. Sample "Consideration" language (including "independent consideration")

D. Sample NC Bar Association/Real Property Section/NC Association of Realtors, Inc. Form No. 8 (2002) ("Option to Purchase") (no longer an approved form)(reprinted with permission)

E. Memorandum entitled "North Carolina Real Property and Bankruptcy Law Alert" by Benjamin A. Kahn and David S. Pokela regarding the case Beaman v. Head. A copy of the opinion is attached to the Memorandum (reprinted with permission)

F. Corrective or Scrivener's Affidavit (reprinted with permission of Chicago Title Ins. Co.)

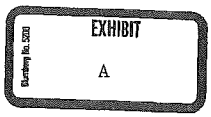
G. Reaffirmation, Re-execution and Reacknowledgement of Previously Recorded Instrument (reprinted with permission of Chicago Title Ins. Co.)

H. draft of Senate Bill 819 (not enacted)

I. draft of House Bill 1708 (not enacted)

J. NC Bar Association/Real Property Section/NC Association of Realtors, Inc. Form 2-A-14 ("Short Sale Addendum") (reprinted with permission)

K. sample Short Sale Agreement



Proposed (Revised) 2008 Formal Ethics Opinion 14,
Attribution When Using Written Work of Another
July 23, 2009

Proposed opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract or pleading excerpts from a legal brief, contract or pleading written by another lawyer and placed into the public domain.

Inquiry #1:

Lawyer A submitted a brief to the trial court that contained eight pages, verbatim, from an appellate brief previously drafted and filed by Lawyer B in an unrelated case. Lawyer B does not work for Lawyer A's firm. Lawyer A did not credit Lawyer B for the copied portion of the brief, or obtain Lawyer B's permission to incorporate the eight pages, entirely unchanged, into his own brief. Lawyer A added references to additional relevant case law. Lawyer A properly cited all court opinions, legal treatises and published or copyrighted works upon which he had relied. The only pre-existing writings included within his brief without attribution were the relevant legal arguments submitted by Lawyer B in an earlier appeal.
Did Lawyer A violate any Rule of Professional Conduct through his unattributed use of eight pages of Lawyer B's brief?

Opinion #1:

No. It is not dishonest or unethical for a lawyer to incorporate excerpts from the written work of another lawyer in a brief or other written document without attribution. No opinion is expressed, however, on the legal question of whether a lawyer has intellectual property rights in the lawyer's written works including briefs, pleadings, discovery, and other legal documents.

Lawyers often rely upon and incorporate the work of others when writing a brief, whether that work comes from a law firm brief bank, a client's brief bank or a brief that the lawyer finds in a law library or posted on a listserv on the Internet. By its nature, the application of the common law is all about precedent, which invites the re-use of arguments that have previously been successful and have been upheld. It would be virtually impossible to determine the origin of the legal argument in many briefs. Moreover, the utilization of the work of others in this context furthers the interests of the client by reducing the amount of time required to prepare a brief and thus reducing the charge to the client. *See* RPC 190 (1994). It also facilitates the preparation of competent briefs by encouraging lawyers to use the most articulate, carefully researched and comprehensive legal arguments.

When using the work of another, the lawyer must still provide competent representation. Rule 1.1. This means that the lawyer must verify any citations in the excerpt to insure that the content and interpretation of caselaw, statute, and secondary sources is correct.

Although consent and attribution are not required, if a lawyer uses, verbatim, excerpts from another's brief and the lawyer knows the identity of the author of the excerpt, it is the better, more professional practice, for the lawyer to include a citation to the source.

Inquiry #2:

If Lawyer B, or another lawyer, learns that Lawyer A submitted a brief to the court that contained verbatim portions of a brief previously drafted and filed by Lawyer B, does the lawyer have a duty to report Lawyer A to the State Bar?

Opinion #2:

No. *See* opinion #1 above.

Inquiry #3:

Lawyer A's law firm maintains a "brief bank," consisting of memoranda of law and briefs previously written by members of the firm and filed with trial or appellate courts. Is it a violation of the Rules of Professional Conduct for Lawyer A to use, verbatim, a portion of a memorandum or brief contained in the brief bank without attribution?

Opinion #3:

No. *See* opinion #1 above.

Inquiry #4:

Is it a violation of the Rules of Professional Conduct for Lawyer A to sign his name to a brief, written by an associate at Lawyer A's direction and under Lawyer A's supervision, without including the associate's name on the brief?

Opinion #4:

No, so long as Lawyer A does not charge the client for work he did not perform.

Inquiry #5:

Is it a violation of the Rules of Professional Conduct for Lawyer A to copy, verbatim and without attribution, clauses from a contract, pleading, discovery request or other similar document prepared by someone else for use in a similar document that Lawyer A is preparing for a client?

Opinion #5:

No. It is not dishonest or misleading to incorporate such clauses in similar documents, without consent of the author or attribution. *See* opinion #1 above.

Inquiry #6:

May a law firm distribute a "canned" newsletter to its clients that is obtained from a commercial publishing company without disclosing that the lawyers in the law firm did not actually author the material?

Opinion #6:

No. If the content of a newsletter is portrayed as the original work of the firm's lawyers, the distribution of the newsletter under the law firm's name, without disclosing the true authorship of the material contained in the newsletter, is misleading and a violation of Rule 7.1(a).

EXHIBIT

B

Olive & Olive, P.A.
Protecting Intellectual Property Since 1957

CELEBRATING
50 YEARS
OF EXCELLENCE

April 23, 2009

COPYRIGHT & THE WORKS OF ATTORNEYS
Comments on FEO 2008-14

FEO 2008-14 holds, among other things, that: "Upon filing with a court, a brief enters the public domain; a lawyer should have no expectation of retaining intellectual property rights in the brief." Relying on that statement of what apparently was believed to be the law, FEO 2008-14 held that attorneys are free to copy the pleadings of others, even copying as much as eight pages verbatim, and need not attribute the copied material nor obtain permission to use it.

We respectfully suggest that the quoted statement of the law is not accurate, and that the opinion should be withdrawn and reconsidered.

Copyright is governed by federal, not state law

Copyright is a creature of the United States Constitution and of Federal law. The foundation is in Article I, Sec. 8, Cl. 8 of the Constitution: *The Congress shall have power... To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.* The implementation is in Title 17 of the U.S. Code.

The copyright laws expressly preempt state law with respect to "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright." 17 U.S.C. Sec. 301(a).

Copyrighted works ordinarily may not be copied or used as the basis for other works without the consent of the copyright owner

Stated in its simplest form, copyright is the right of a person to prevent others from copying that person's creative work. Among other things, the owner of copyright is given the exclusive right to do (and to authorize) each of the following:

> to *reproduce* the work by any means, including paper copies, recordings, or otherwise;
>
> to *prepare derivative works* based on the original creative work (for instance, revised editions, translations into foreign languages, movies based on books, posters made from oil paintings, songs based on poems, etc.); and
>
> to *distribute copies or recordings* of the work to the public by any means, including sale, lease or rental.

17 U.S.C. Sec. 106 (1)-(3).

500 Memorial St. • Post Office Box 2049 • Durham, NC 27702
Phone: 919-683-5514 • www.oliveandolive.com

Legal documents, including pleadings and contracts, ordinarily are protected by copyright if they are original and creative

Copyright covers "original works of authorship" in virtually any medium. 17 U.S.C. Sec. 102. Copyright protects not only such "literary" and "artistic" properties as poems, books, paintings, and sculptures, but also typical business documents such as sales and training manuals, advertising, and other printed materials.

Commentators generally agree that pleadings and other legal documents are *prima facie* subject to copyright protection. For example, the leading treatise on the subject says:

> There appear to be no valid grounds why legal forms such as contracts, insurance policies, pleadings and other legal documents should not be protected under the law of copyright.

1-2 *Nimmer on Copyright* § 2.18[E]. No court, so far as we are aware, has held that legal documents, *per se*, fall outside the scope of copyright law.

Even though legal documents concededly fall within the general class of documents that can be protected by copyright, there also is consensus that not all legal documents will qualify for copyright protection. In order to be protected, the particular legal writing under consideration must be reviewed to ensure that it qualifies for copyright protection. Works of authorship are protected only if they are both *original*—that is, actually written by the claimant, not copied from someone else's work—and *creative*—not dictated by functional requirements or longstanding practices that eliminate doubt as to how the work will be written and arranged (for example, telephone white pages are alphabetically arranged by surname, followed by street, followed by phone number). The amount of creativity required, however, is "minimal." *Feist Pubs., Inc. v Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991).

Thus, if a lawyer has simply looked at the AOC's Summons and filled in the blanks, the resulting completed Summons will be neither original nor creative. A pleading such as a brief or complaint, however, is much more likely to contain protectable content. Two lawyers, given the same set of facts and law, are unlikely to draft their pleadings in the same way, even if they each have the same ultimate goal (winning a damage award for breach of contract, for example). The *ideas*, in other words, may be the same, but the *expression* of those ideas will be different. Copyright protects the expression, not the ideas.

No notice of copyright or other formalities are required, and the absence of formalities does not inject an otherwise copyright-protected work into the public domain

Although in the "olden days," authors had to include a copyright notice on their written works in order to prevent that work from going into the public domain, that requirement was removed from the Copyright Act effective March 1, 1989, as part of the United States' adherence to an international copyright treaty. 17 U.S.C. Sec. 104. Since 1989, no notice of any kind has been required, and there are special "savings" provisions that can recapture the copyright for at least many works that were previously published without a copyright notice. Today, copyright comes into existence and begins protecting a work as soon as it is created and saved, whether in printed or electronic or other recorded form, without regard to registration or notices.

Most—but not all—commentators believe that an attorney who copies substantial portions of the copyrighted work of another attorney, without permission, is liable for infringement

The question whether attorney work product is protected by copyright law, and if so, to what extent, has not been the subject of any definitive Supreme Court decision. However, the issue has been the subject of several law review articles over the past few years, including one by Judge Stanley Birch, Jr. of the Eleventh Circuit (Birch, S., "Copyright Protection for Attorney Work Product: Practical and Ethical Problems," 10 J. INTELL. PROP. L. 255 (2003)) and another by Professor Ralph Clifford of New England School of Law (Clifford, R., "Intellectual Property Rights in Attorney's Work Product," 3 SNESL L.R. 1 (2008)). Both conclude that in most cases, the author's creative work is protected by copyright and belongs exclusively to the attorney author or the law firm that employs the attorney, and that unconsented copying of the work by another attorney would constitute copyright infringement. An article in the NEW YORK LAW JOURNAL by Ken Adams, who consults and frequently speaks on contract drafting issues, came to the same conclusion. (Adams, K., "Copyright and the Contract Drafter," NYLJ (Aug 23, 2006)).

Opinion is not unanimous, and those who suggest that attorneys should be free to copy legal documents created by others primarily base their arguments on a section of the Copyright Act permitting the "fair use" of copyright works. 17 U.S.C. Sec. 107. Assistant Professor Davida Isaacs of Northern Kentucky University's law school, for example, argues that even though legal documents may be protected by copyright, the use at least of pleadings should be permitted under fair use principles. (Isaacs, D., "The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents," U.Mo.LJ (2006)).

No controlling authority holds that filing a pleading with a court injects it into the public domain

Contrary to the suggestion of 2008 Formal Ethics Opinion No. 14, no court has ever held (so far as we are aware) that legal pleadings other than judicial opinions enter the public domain and lose their copyright protection simply because they are filed in a court case or in some other public record. In fact, there is no controlling authority by the Supreme Court, the Fourth Circuit, or any North Carolina federal court, holding that any document loses its copyright protection and enters the public domain simply as a result of being filed with a public agency.

We now have litigated three cases in which the question arose as to whether the North Carolina Public Records Act (or other precedent) might be construed to give third parties an unrestricted right to reproduce otherwise copyrighted materials filed with or generated by state agencies. No precedential ruling supporting such a stance anywhere in the country has yet been found by any of the firms that have searched for one.

The closest case to even suggesting such a possibility that had been located was a Florida case, holding that the Florida Public Records law reflected a decision by the State of Florida to dedicate government works to the public (a decision that is, indeed, open to state governments) and that therefore a local government employee could not assert a personal copyright in work created in the course of his governmental duties. *Microdecisions Inc. v Skinner*, 889 So.2d 871 (Fl.Dist.Ct.App. 2004). Most lawyers are not, of course, State employees, so that even if works of State employees were considered to be in the public domain, that same rationale would not apply to private practitioners.

The U.S. 2nd Circuit Court of Appeals and the South Carolina Supreme Court both reached an opposite conclusion: individuals may be able to obtain a copy of public documents pursuant to FOIA or other public records acts, but further dissemination of those copies is subject to the control of the copyright owner. *County of Suffolk, NY v First Amer. Real Est. Solutions*, 261 F.3d 179 (2nd Cir. 2001); *Seago et al. v. Horry County, Opin. No. 26505 (S.C. 2008).*

The penalties for copyright infringement are severe

Not all legal pleadings are the subject of copyright registrations. If a work has been registered, however, then its owner is entitled, if successful in infringement litigation, to recover not less than $750 or more than $30,000, unless the infringement was willful, in which case the damages can increase to $150,000—and those amounts are per work that has been infringed. Unregistered works have no special statutory damages provision, but the successful litigant is entitled to recover all profits earned by the infringer as a result of use of the work. If a complaint in a personal injury case is found to have infringed, then it is possible that the successfully litigating copyright owner would be entitled to recover much or all of the infringer's fees earned from the case in which the complaint was filed. There also are criminal penalties for infringement if the value of the copy if $1000 or more. Many legal documents have such a value, at least based on the time spent or saved in drafting them.

Conclusion

Blanket statements that legal pleadings enter the public domain once they are filed with a court are not supported by any clear authority, and the weight of authority is to the contrary. While it is certainly not the case that every use of one lawyer's pleadings by another will constitute federal copyright infringement, it is important to realize that federal copyright liability is a very real possibility when copying takes place, and that this is an area in which federal law will pre-empt state administrative regulations. It is perhaps far-fetched, but certainly possible, that the State Bar itself could be named as a defendant and held liable for inducing or contributing to infringement, by promulgating an opinion saying that, "[u]pon filing with a court, a brief enters the public domain; a lawyer should have no expectation of retaining intellectual property rights in the brief."

Quite aside from the legality problems, suggesting that less experienced attorneys prey upon the competently drafted pleadings of their more experienced colleagues without disclosing that fact to clients, in order to present a better competitive face to clients and falsely pretend to possess drafting experience that in fact they do not have, is inconsistent with normal State Bar practice, including the rationale of Opinion #6 that says law firms cannot pass off a newsletter written by another entity as though it were their own even if they have the consent of the copyright owner.

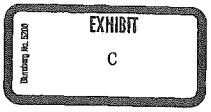
For these reasons, it is unwise for the State Bar to pronounce that one lawyer is free to copy the work of another, regardless of whether that work has been filed with a court, when pre-emptive Federal law may ultimately decide to the contrary.

Respectfully submitted,

S. F. Olive

Susan Freya Olive

SFO/s



Sample "Consideration" language
(including "independent consideration")

NOW, THEREFORE, for and in consideration of **Ten and No/100 Dollars ($10.00) and other good and valuable consideration,** including the cost to be incurred by Purchaser of:

- **due diligence inspections;**
- **re-zoning; and**
- **engineering and design work for a site plan to determine if the subject property is suitable for the Purchaser's intended use,**

[if the contract is for an extension of the original contract: "and in further consideration of the benefit to Seller of the Purchase Agreement being extended instead of terminated"], the receipt and sufficiency of which are acknowledged, **and intending to be legally bound,** Seller and Purchaser hereby agree as follows:

1. Independent consideration:

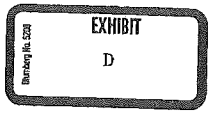
Option A: add a provision for $100 non-refundable earnest money

OR

Option B: Simultaneous with the execution and delivery of this Agreement, Purchaser shall deliver a payment of One Hundred and No/00 Dollars ($100.00) to Seller as independent consideration for this Agreement (**"Independent Consideration"**). Notwithstanding Purchaser's rights under this Agreement to terminate this Agreement and in connection therewith to receive back any deposit which is specified as *refundable* to Purchaser, the Independent Consideration shall not be refundable and shall not be applicable to the purchase price at Closing. Purchaser shall be in default under this Agreement due to a breach of this provision only if Purchaser fails to cure such breach after thirty (30) days prior written notice by Seller to Purchaser.

2. Other than the Independent Consideration set forth above, any earnest money deposit paid in connection with this Agreement is either fully refundable or applicable to the purchase price at Closing.

3. **All consideration recited herein is adequate to the parties.** Seller acknowledges that Purchaser is relying on the adequacy of the consideration as an inducement to continue to incur the expenses set forth above during the due diligence period.



[Form - no longer on approved form]

OPTION TO PURCHASE

Mail/Box after recording to: _____

This instrument was prepared by: _____

Brief description for the Index: _____

This OPTION TO PURCHASE ("Option") is granted on _____ by _____ the "Seller", to _____, the "Buyer."

Seller, intending to bind Seller, Seller's heirs, successors and assigns, in consideration of the sum of _____ Dollars ($_____) (the "Option Money") paid to Seller by Buyer, receipt of which is acknowledged, grants to the Buyer, Buyer's heirs, successors, assigns or representatives, the exclusive right and option to purchase all of that certain parcel of land, together with all improvements located thereon (collectively, the "Property"), in the City of _____, County of _____, State of North Carolina, and more particularly described as follows:

Street Address: _____ Zip Code _____

Legal Description: _____

_____

on the terms and conditions set forth below:

1. Option Period: This Option shall exist and continue from the date hereof until _____ on _____ ("Option Period"). In order to preserve the full legal rights of Buyer, a notice hereof should be recorded; and this Option (excluding Exhibit A) may be recorded as a legally binding Notice of the Option. **TIME IS OF THE ESSENCE WITH RESPECT TO THE OPTION PERIOD AND EXERCISE.**

2. Exercise: At any time during the Option Period, Buyer may exercise this Option by giving Seller a written notice thereof signed by the Buyer, which exercise is effective upon ~~(a) hand~~ delivery, (b) completed facsimile transmission, or (c) prepaid deposit of the notice with an overnight commercial delivery service or in certified mail, return receipt requested, at the following address:

Seller: _____

_____

_____

Phone: _____ Fax: _____

Seller requests, but does not require a copy be sent to: _____

_____

_____

Phone: _____ Fax: _____

3. Contract Upon Exercise: Upon exercise of this Option, the terms of purchase and sale shall be as set forth on the completed standard "Offer to Purchase and Contract," or "Vacant Lot Offer to Purchase and Contract", which is attached as Exhibit A ~~and incorporated herein by reference~~.

4. Application of Option Money: If this Option is exercised, the Option Money shall _____ shall not _____ be applied to the purchase price at closing. If this Option is not exercised, the Option Money shall be retained by Seller.

5. Entry: During the Option Period, Buyer and those reasonably designated by Buyer may, with reasonable advance notice to Seller, enter the Property to inspect, survey and appraise the Property. Buyer shall be responsible for the repair of any damage done to the Property during any such entry.

6. Other Conditions: _____

_____

THE NORTH CAROLINA ASSOCIATION OF REALTORS®, INC. AND THE NORTH CAROLINA BAR ASSOCIATION MAKE NO REPRESENTATION AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISIONS OF THIS FORM IN ANY SPECIFIC TRANSACTION. IF YOU DO NOT UNDERSTAND THIS FORM OR FEEL THAT IT DOES NOT PROVIDE FOR YOUR LEGAL NEEDS, YOU SHOULD CONSULT A NORTH CAROLINA REAL ESTATE ATTORNEY BEFORE YOU SIGN IT.

IN WITNESS WHEREOF, the Seller has caused the due execution of the foregoing as of the day and year first above written.

_____ (Entity Name)

By: _____
Title: _____

By: _____
Title: _____

By: _____
Title: _____

USE BLACK INK ONLY

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

SEAL-STAMP

USE BLACK INK ONLY

State of North Carolina - County of _____

I, the undersigned Notary Public of the County and State aforesaid, certify that _____ personally appeared before me this day and acknowledged the due execution of the foregoing instrument for the purposes therein expressed. Witness my hand and Notarial stamp or seal this _____ day of _____, 20__.

My Commission Expires: _____

_____
Notary Public

SEAL-STAMP

USE BLACK INK ONLY

State of North Carolina - County of _____

I, the undersigned Notary Public of the County and State aforesaid, certify that _____ personally came before me this day and acknowledged that he is the _____ of _____, a North Carolina or _____ corporation/limited liability company/general partnership/limited partnership (strike through the inapplicable), and that by authority duly given and as the act of each entity, he signed the foregoing instrument in its name, on its behalf as its act and deed. Witness my hand and Notarial stamp or seal this _____ day of _____, 20__.

My Commission Expires: _____

_____
Notary Public

SEAL-STAMP

USE BLACK INK ONLY

State of North Carolina - County of _____

I, the undersigned Notary Public of the County and State aforesaid, certify that _____

_____

_____

Witness my hand and Notarial stamp or seal this _____ day of _____, 20__.

My Commission Expires: _____

_____
Notary Public

The foregoing Certificate(s) of _____ is/are certified to be correct. This instrument and this certificate are duly registered at the date and time and in the Book and Page shown on the first page hereof.

_____ Register of Deeds for _____ County

By: _____ Deputy/Assistant - Register of Deeds

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NORTH CAROLINA REAL PROPERTY AND BANKRUPTCY LAW ALERT

FROM: Benjamin A. Kahn -- Bankruptcy and Creditors' Rights Practice Group
David S. Pokela – Real Estate Practice Group

DATE: September 19, 2007

RE: Eastern District of North Carolina Opinion Rules Simple Date Error on Deed of Trust Renders the Deed of Trust Unenforceable in Bankruptcy Court

---

On September 15, 2006, the United States Bankruptcy Court for the Eastern District of North Carolina issued its opinion in Beaman v. Head, Bankruptcy Case No. 05-02729-8 RDD, Adversary Proceeding No. D-05-00316-8-AP, 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. A copy of the Beaman opinion is attached hereto.

In Beaman, Ruby Lee Head was the holder of a July 29, 1998 Promissory Note (the "Promissory Note") in the original principal amount of $180,515.75. The Promissory Note was executed by the debtor, Head Grading Co., Inc. ("Head"). Mrs. Head also was the holder of a North Carolina Deed of Trust (the "Deed of Trust"), listing Head as the Grantor and Mrs. Head as the beneficiary. 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." Unfortunately, the Deed of Trust was dated July 28, 1998, the day before the date of the Promissory Note.

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 Promissory Note and the Deed of Trust.

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." (Beaman, p. 3 (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."

NPGBO1:773528.3

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." 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 the Beaman case. 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 under the unusual facts in this case, a BFP would 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))).

However, since the trustee's status as a BFP would not have been helpful in this case, there were 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 Arnett v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988) (where an intervening judgment creditor could not establish BFP status, the holder of erroneous deed of trust was entitled to reformation and a constructive trust, and therefore possessed a superior interest in the property). In this case, Mrs. Head could have asserted the rights to reformation and a constructive trust. While the court in the Eastern District of North Carolina has ruled in a preference avoidance action that reformation is not a defense to such an avoidance claim,[1] 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. While there certainly is no guarantee that the defenses of reformation and assertion of an equitable lien would have been successful in Beaman, it appears that the court was not asked to address these potentially viable defenses.

[1] 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).

In sum, while the case in Beaman produces a difficult result for holders of deeds of trust in North Carolina, the interplay between the Bankruptcy Code and North Carolina law in this area remains somewhat uncertain and is subject to additional defenses as discussed herein.

SO ORDERED.

SIGNED this 15 day of September, 2006.

Randy D. Doub
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

IN RE:	CASE NO.
HEAD GRADING CO., INC.	05-02729-8-RDD
DEBTOR	
STEPHEN L. BEAMAN, TRUSTEE	
Plaintiff	ADVERSARY PROCEEDING NO.
v.	D-05-00316-8-AP
RUBY LEE HEAD	
Defendant	

MEMORANDUM OPINION AND ORDER
ALLOWING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A complaint was filed in this adversary proceeding by Stephen L. Beaman, chapter 7 trustee for Head Grading Co., Inc, to avoid a lien held by the defendant, Ruby Lee Head. The matter before the court is the trustee's motion for summary judgment. A hearing was held in Wilson, North Carolina on September 7, 2006.

Head Grading Co., Inc. filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on April 5, 2005. Mr. Beaman was appointed to administer the estate as trustee, pursuant to 11 U.S.C. § 704. As trustee, Mr. Beaman has authority to seek avoidance of a lien in property held by the debtor pursuant to 11 U.S.C. § 544(a).

This court has jurisdiction over the parties and subject matter of these proceedings pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Eastern District of North Carolina on August 3, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) which this court may hear and determine.

The parties stipulated to the following facts. The dispute between the parties arises from the granting of a deed of trust from the debtor to Mrs. Ruby Lee Head, dated July 28, 1998, in the amount of $180,515.75. This deed of trust would create a lien on an approximately 33 acre tract of land in Wayne County, North Carolina. The language in the deed of trust provides that the deed of trust was given as security for a "Promissory Note of even date herewith." The actual note presented and held by Mrs. Head, which refers to the two parties to the deed of trust and to the amount referenced in the deed of trust, is dated July 29, 1998. There is no note dated July 28, 1998 in existence. The deed of trust dated July 28, 1998 did not make reference to future advances.

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). In making this determination, conflicts are resolved by viewing all facts and all reasonable inferences in the light most favorable to the non-moving party. United

States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962). Because there is no genuine issue of material fact in this matter, and the issue to be decided is a matter of law, a ruling on the motion for summary judgment is appropriate in this matter.

North Carolina law requires deeds of trust to specifically identify the debt referenced therein. In In re Foreclosure of Deed of Trust of Enderle, 110 N.C. App. 773, 431 S.E.2d 549 (1993), the deed of trust referenced security of a debt owed by the grantor of the deed of trust. In fact, the debt was owed by a party other than the grantor. The court, quoting Walston v. Twiford, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958), held that "because the deed of trust did not properly 'identify the obligation secured,' it is invalid." Enderle, 110 N.C. App. at 775, 431 S.E.2d at 550. In Putnam v. Ferguson, 130 N.C. App. 95, 502 S.E.2d 386 (1998), the court again relied upon the rule of law stated in Walston and Enderle in finding that a deed of trust given by a grantor that does not specifically reference the obligor of the debt secured was invalid, where the obligor and grantor were different parties.

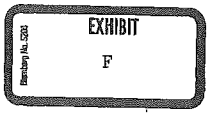
In Seventeen South Garment Company, Inc. v. Centura Bank, 145 B.R. 511(E.D.N.C. 1992), the district court affirmed the order of the bankruptcy court avoiding a lien pursuant to 11 U.S.C. § 544(a). The court found that the use of a trade name, rather than the corporate name, in a financing statement was not sufficient to properly perfect the security interest therein described. "Clarity and certainty in lien perfection requirements are lost if equitable exceptions are created which permit trade names when the 'equities' so dictate." Seventeen South Garment Co., Inc., 145 B.R. at 515 (citing Pearson v. Salina Coffee House, Inc., 831 F.2d 1531, 1536 (10th Cir. 1987).

In Enderle and Putnam, the deed of trust referenced the wrong obligor of the debt owed. In this case, there is no issue regarding the parties involved with respect to the debt owed and the security given.

However, there is an issue regarding the date stated in the deed of trust and the date on the note produced. The deed of trust dated July 28, 1998, refers to an instrument "of even date herewith." The note held by Mrs. Head is dated July 29, 1998. While 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. As noted in Seventeen South Garment Co., Inc., the "clarity and certainty in lien perfection requirements" would be lost if the court were to allow exceptions to the general rule created by the North Carolina courts regarding the specificity with which the obligation secured by a deed of trust must be identified. Pursuant to 11 U.S.C. § 544, the lien of Ruby Lee Head under the deed of trust is unenforceable against the trustee, as a hypothetical lien creditor who obtains a perfected lien against the property on the date the petition was filed, and should be avoided on the grounds that the lien was not properly perfected prior to the bankruptcy petition filing. Accordingly, Mr. Beaman's motion for summary judgment is **ALLOWED**. A separate judgment shall be entered consistent with this Memorandum Opinion and Order.

SO ORDERED.

END OF DOCUMENT



CORRECTIVE OR SCRIVENER'S AFFIDAVIT FOR NOTICE OF TYPOGRAPHICAL OR OTHER MINOR ERROR

[N.C.G.S. 47-36.1]

Prepared by: _____

Each undersigned Affiant, jointly and severally, being first duly sworn, hereby swears or affirms that the _____ (name or type of instrument) recorded on _____ (date) in Book _____, Page _____, _____ County Registry, by and between _____ _____ (original parties) contained typographical or minor error(s); and this Affidavit is made to give notice of the below corrective information:

Affiant is knowledgeable of the agreement and the intention of the parties in this regard. Affiant is the (check one)

_____ Drafter or preparer of the previously recorded instrument
_____ Closing attorney for transaction involving the previously recorded instrument
_____ Attorney for grantor/mortgagor named above in the previously recorded instrument
_____ Owner of the property described in the previously recorded instrument
_____ Other (Explain: _____)

A copy of the previously recorded instrument (in part or in whole) (___) is / (___) is not attached.

_____ Signature of Affiant
Print or Type Name:_____

_____ Signature of Affiant
Print or Type Name:_____

State of _____ County of _____

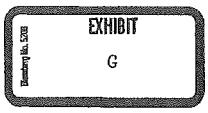
Signed and sworn to (or affirmed) before me, this the _____ day of _____, 20___.

My Commission Expires:

_____ _____
Notary Public

(Affix Official/Notarial Seal)

Revised February 15, 2009



REAFFIRMATION, RE-EXECUTION AND REACKNOWLEDGMENT OF PREVIOUSLY RECORDED _____ (*name or type of instrument*)

Prepared by: _____

The undersigned hereby reaffirms and reacknowledges the terms and conditions of that certain _____ _____ (name or type of original instrument being reaffirmed and reacknowledged) recorded on _____ (date) in Book _____, Page _____, _____ County Registry, by and between _____ [original parties], which terms and conditions are incorporated herein by reference as if fully set forth.

The undersigned hereby acknowledges that the purpose for the recording of this reaffirmation, re-execution and reacknowledgment of said instrument is:

To the extent not inconsistent herewith, the undersigned hereby ratifies and reaffirms the terms, conditions and conveyances contained in the above-referenced instrument incorporated herein by reference.

IN WITNESS WHEREOF, the undersigned has duly executed this instrument, this the _____ day of _____, 20____.

_____ (Entity Name)

By: _____
Print/Type Name: _____
Title: _____

_____ (SEAL)
Print/Type Name: _____

_____ (SEAL)
Print/Type Name: _____

State of _____ County of _____

I certify that the following person(s) personally appeared before me this day , each acknowledging to me that he or she signed the foregoing document _____ _____ [insert name(s) of principal(s)].

Date: _____

_____
Notary Public

My Commission Expires: _____

(Affix Official/Notarial Seal)

October 6, 2008

EXHIBIT H

General Assembly of North Carolina

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PRINTABLE VERSION

<< Previous: S818 Next: S820 >>

Senate Bill 819 (= H1057)

2009-2010 Session

Abolish Certain Deficiency Judgments.

Text	Fiscal Note
Filed [HTML]	-
Edition 1 [HTML]	-

Status: Ref To Com On Judiciary II on 03/25/2009

Sponsors

Primary: Fletcher L. Hartsell, Jr.;

Co: N/A

Attributes: Public;

History

Date	Chamber	Action
03/24/2009	Senate	Filed
03/25/2009	Senate	Ref To Com On Judiciary II

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2009-2010 Session

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Not enacted

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

S 1

SENATE BILL 819

Short Title:	Abolish Certain Deficiency Judgments.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 25, 2009

A BILL TO BE ENTITLED

AN ACT TO ABOLISH DEFICIENCY JUDGMENTS WHERE THE MORTGAGE IS SECURED BY PRIMARY RESIDENCE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2B of Chapter 45 of the General Statutes is amended by adding a new section to read:

"**§ 45-21.38A. Deficiency judgments abolished where mortgage secured by primary residence and foreclosed under power of sale.**

In all sales of real property secured by a primary residence by mortgagees or trustees under powers of sale contained in any mortgage or deed of trust, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust, or obligation secured by the same."

SECTION 2. Article 2B of Chapter 45 of the General Statutes is amended by adding a new section to read:

"**§ 45-21.38B. Deficiency judgments abolished where mortgage secured by primary residence and made on or after January 1, 2010.**

In all sales of real property secured by a primary residence, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust, or obligation secured by the same. This section applies regardless of whether the real property is sold under a power of sale or as a result of court action. This section applies to mortgages made on or after January 1, 2010."

SECTION 3. Article 2B of Chapter 45 of the General Statutes is amended by adding a new section to read:

"**§ 45-21.38C. Severability.**

The provisions of this Article shall be severable, and if any phrase, clause, sentence, or provision is declared to be unconstitutional or otherwise invalid or is preempted by federal law or regulation, the validity of the remainder of this section shall not be affected thereby."

SECTION 4. This act is effective when it becomes law.

EXHIBIT I

General Assembly of North Carolina

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PRINTABLE VERSION

<< Previous: H1707 Next: H1709 >>

House Bill 1708

2007-2008 Session

"Subject To " Real Estate Transactions.

Text	Fiscal Note
Filed [HTML]	-
Edition 1 [HTML]	-
Edition 2 [HTML]	-

Status: Re-ref Com On Judiciary I (Civil) on 05/21/2007

Sponsors

Primary: Stam; Ross;

Co: N/A

Attributes: Public; Text has changed;

Vote History

Date	Subject	RCS #	Aye	No	NV	Exc. Abs.	Exc. Vote	Total	Result
05/08/2007 5:29PM	Second Reading	[H] - 379	114	0	3	3	0	114	PASSED

Viewing Last 1 Vote(s) *View All Votes*

History

Date	Chamber	Action
04/18/2007	House	Filed
04/19/2007	House	Passed 1st Reading
04/19/2007	House	Ref To Com On Judiciary I
05/07/2007	House	Reptd Fav Com Substitute
05/07/2007	House	Cal Pursuant Rule 36(b)
05/07/2007	House	Placed On Cal For 5/8/2007
05/08/2007	House	Passed 2nd & 3rd Reading
05/09/2007	Senate	Rec From House
05/09/2007	Senate	Ref To Com On Judiciary II (Criminal)
05/21/2007	Senate	Withdrawn From Comm
05/21/2007	Senate	Re-ref Com On Judiciary I (Civil)

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2007-2008 Session

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Not enacted

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H 2

HOUSE BILL 1708
Committee Substitute Favorable 5/7/07

Short Title: "Subject to" Real Estate Transactions. (Public)

Sponsors:

Referred to:

April 19, 2007

A BILL TO BE ENTITLED

AN ACT TO REGULATE "SUBJECT TO" REAL ESTATE TRANSACTIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 75 of the General Statutes is amended by adding a new Article to read:

"Article 6.

"Regulation of "Subject to" Real Estate Transactions.

"**§ 75-120. Definitions.**

As used in this Article, the following terms mean:

(1) Covered person. – Any person, whether acting as a principal, or as an agent or employee of the principal, who advertises, initiates, or structures a purchase of covered property by means of a covered transaction, provided it does not include a person acting as a real estate broker as provided by Article 1 of Chapter 93A of the General Statutes or a licensed attorney acting subject to the provisions of Chapter 84 of the General Statutes.

(2) Covered property. – Residential real property located in the State containing not more than two dwelling units, at least one of which is, or in the last two months has been, occupied as the owner's principal residence, and that is encumbered by a mortgage or deed of trust containing a due on sale clause.

(3) Covered real estate seminar. – Any seminar, course, materials, or similar commercial educational program concerning covered transactions.

(4) Covered transaction. – Any transaction, however denominated or structured, by which a covered person purchases or contracts to purchase covered property encumbered by a mortgage or deed of trust that will not be extinguished at the time title to the covered property

passes from the owner to the covered person or any nominee of the covered person.

(5) Due on sale clause. – A contract provision that authorizes a lender, at its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the loan is sold or transferred without the lender's prior consent.

(6) Person. – An individual, a corporation, limited liability company, business trust, estate, trust, joint venture, partnership, association, or any other entity with the capacity to hold title to real property.

(7) Purchase. – The acquisition of an interest in covered property, however denominated or structured.

(8) Subject to. – Taking either legal or equitable title to real property without extinguishing the lien of an existing deed of trust or mortgage.

"**§ 75-121. Certain real estate transactions regulated.**

No covered person shall engage in a covered transaction without the express consent of the mortgagee or the beneficiary of the preexisting deed of trust, except as enumerated in G.S. 75-127. A real estate transaction in which the original mortgage or deed of trust is extinguished pursuant to G.S. 75-123 at the time title to the covered property passes from an owner to a person or any nominee of a person is not a covered transaction.

"**§ 75-122. Right to cancel.**

(a) The seller in a covered property transaction may cancel the transaction by notifying the covered person and the settlement agent in writing at any time prior to midnight of the third day after the date of execution of the documents evidencing the covered transaction, in a manner consistent with 12 C.F.R. Part 226 (Regulation Z) of the federal Truth-In-Lending Act.

(b) Notice of cancellation need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the seller not to be bound by the covered transaction.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed and postage prepaid.

"**§ 75-123. Extinguishment of mortgage or deed of trust.**

The extinguishment of a mortgage or deed of trust on a covered property may be accomplished by any of the following:

(1) Satisfaction in full of the outstanding indebtedness on the covered property with evidence of satisfaction from the lender recorded in the county registry.

(2) Release of the covered property by the lender as security of the outstanding indebtedness with evidence of the release from the lender recorded in the county registry.

(3) Assumption of the outstanding indebtedness on the covered property by another person with the consent of the lender and a release of liability of the mortgagor by the lender with evidence of the lender's

consent to the assumption and release of the mortgagor's liability furnished to the mortgagor.

"**§ 75-124. Notice requirements.**

Prior to the execution of a contract in which a covered person enters into a covered transaction, the covered person shall provide to the owner of the covered property the following statement in at least 12-point bold-faced type:

"Your current mortgage loan, deed of trust, or mortgage contains a due on sale clause which obligates you to inform your lender at any time you transfer your home. If you transfer your home, you must notify your lender of this proposed transaction, and your lender has the right to make you pay the entire amount of your loan due at the time of the transfer. Before signing this contract, you should check with your lender to see if the lender will consent in writing not to enforce the provisions of the due on sale clause.

Once you have received the consent of your lender and if you enter into this contract, you may cancel this contract at any time prior to midnight of the third day after the date of the contract. To cancel, you must notify the covered person who is _____ and the settlement agent who is _____ in writing no later than midnight of the third day after the date of the contract. Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed and postage prepaid. Notice of cancellation need not take a particular form and is sufficient if it indicates by any form of written expression your intention not to be bound by the contract."

"**§ 75-125. Deceptive advertising prohibited.**

No person shall advertise in any medium that the person will "take over payments", "buy your house," or use other language which, to a reasonable person, would imply that the person will pay an indebtedness in accordance with its terms, and then enter into a real estate transaction for the purchase of covered property in which the person fails to expressly agree to pay the indebtedness secured by the covered property or to extinguish the mortgage or deed of trust in accordance with G.S. 75-123.

"**§ 75-126. Covered real estate seminars.**

(a) A person conducting a covered real estate seminar shall provide a copy of this Article as part of its materials. The Article shall be printed in full in at least 12-point bold-faced type.

(b) A person conducting a covered real estate seminar shall not instruct any person to engage in any practice prohibited by this Article.

"**§ 75-127. Exclusions.**

This Article shall not apply to any of the following:

(1) Any covered transaction exempted from the preemption provisions of the due on sale clause prohibitions pursuant to 12 U.S.C. § 1701j-3(d).

(2) Any covered transaction between a relocating employee and an employer or its agent or contractor, or between the employer or its agent or contractor and a buyer of a relocating employee's home pursuant to an employer's relocation policy.

"**§ 75-128. Violations.**

A violation of this Article shall constitute a violation of G.S. 75-1.1."

SECTION 2. This act becomes effective October 1, 2007, and applies to contracts for covered transactions entered into on or after that date.

SHORT SALE ADDENDUM

Property Address:_____

The additional provisions set forth below are hereby made a part of the Offer to Purchase and Contract ("Contract") for the Property between Buyer: _____
and Seller: _____.

1. **Short Sale Defined.** For purposes of this Contract, a "Short Sale" is a sale where: (i) the Purchase Price is or may be insufficient to enable Seller to pay the costs of sale, which include but are not limited to the Seller's closing costs and payment in full of all loans or debts secured by deeds of trust on the Property due and owing to one or more lender(s) and/or other lienholders ("Lienholders"), (ii) Seller does not have sufficient liquid assets to pay the costs of sale, and (iii) the Lienholders agree to release or discharge their liens upon payment of an amount less than the amount secured by their liens with or without the Seller being released from any further liability.

2. **Contingency.** This Contract is contingent upon Seller obtaining Short Sale approval from Lienholders effective through Closing ("Lienholders' Approval") in an amount which will enable Seller to close and convey title in accordance with the Contract. Seller shall use best efforts to obtain Lienholders' Approval and shall reasonably cooperate in the Short Sale process by providing such documentation as may be required. Buyer and Seller understand that Lienholders' Approval may take several weeks or months to obtain, and neither the Seller nor any real estate agent representing Seller or Buyer can guarantee the timeliness of Lienholders' review, approval or rejection. If Lienholders reject the Short Sale, then either party may terminate this Contract by written notice to the other party and all Earnest Money shall be returned to Buyer.

3. **Notice of Lienholders' Approval and Buyer's Right to Terminate.** Seller agrees to provide Buyer with written notice of Lienholders' Approval. Buyer may terminate the Contract at any time prior to receipt of the Lienholders Approval by written notice to Seller, and, in such event all Earnest Money shall be returned to Buyer.

4. **No Guarantee of Lienholders' Approval.** Buyer and Seller understand that:
   - No Lienholder is required or obligated to accept a Short Sale
   - Lienholders may require some terms of the Contract be amended in exchange for approval of a Short Sale
   - Buyer and Seller are not obligated to agree to any of Lienholders' proposed terms
   - **NEITHER THE BUYER, THE SELLER, THE SETTLEMENT AGENT NOR THE BROKERS IN THIS TRANSACTION HAVE ANY CONTROL OVER LIENHOLDERS' APPROVAL, OR ANY ACT, OMISSION OR DECISION BY ANY LIENHOLDERS IN THE SHORT SALE PROCESS.**

5. **No Repairs.** Buyer acknowledges that Seller may not be financially able to make any repairs to the Property that Buyer may request. This acknowledgement shall not affect any rights that Buyer may have under the Contract to terminate the Contract as a result of any election Seller may make not to make repairs.

6. **Other Offers.** Buyer and Seller understand that additional offers may be received by the Seller's Agent, which must be presented to the Seller pursuant to North Carolina law. Such offers may be accepted by the Seller as backup contracts and forwarded to Lienholders for review and approval. Buyer and Seller are advised to seek advice from an attorney to determine their rights and obligations.

7. **Foreclosure.** Seller represents that to the best of Seller's knowledge, a foreclosure proceeding ☐ has not ☐ has been filed with respect to the Property. Further, if during the Short Sale process a foreclosure proceeding is filed, the Seller shall disclose such foreclosure filing to the Buyer. Buyer and Seller understand that if Closing does not occur before the completion of a foreclosure of the Property, Seller will lose all rights and interest in the Property. In such event, the Contract shall be void, and all Earnest Money shall be returned to Buyer. Seller and Buyer acknowledge that if a real estate agent involved in the transaction contemplated by the Contract knows or reasonably should know that a foreclosure proceeding with respect to the Property has been filed, the agent is required by law to disclose it to the Buyer as a material fact.

Buyer initials _____ _____ Seller initials _____ _____

8. **Tax Consequences and Advice.** Seller is advised to seek advice from an attorney, a certified public accountant or other professional regarding the credit, legal and tax consequences of a Short Sale.

IN THE EVENT OF A CONFLICT BETWEEN THIS ADDENDUM AND THE OFFER TO PURCHASE AND CONTRACT OR THE VACANT LOT OFFER TO PURCHASE AND CONTRACT, THIS ADDENDUM SHALL CONTROL.

THE NORTH CAROLINA ASSOCIATION OF REALTORS®, INC. AND THE NORTH CAROLINA BAR ASSOCIATION MAKE NO REPRESENTATION AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION OF THIS FORM IN ANY SPECIFIC TRANSACTION. IF YOU DO NOT UNDERSTAND THIS FORM OR FEEL THAT IT DOES NOT PROVIDE FOR YOUR LEGAL NEEDS, YOU SHOULD CONSULT A NORTH CAROLINA REAL ESTATE ATTORNEY BEFORE YOU SIGN IT.

Buyer:_____(SEAL) Date_____

Buyer:_____(SEAL) Date_____

Seller:_____(SEAL) Date_____

Seller:_____(SEAL) Date_____

Exhibit K
[Sample Form]

SHORT SALE AGREEMENT

THIS SHORT SALE AGREEMENT is made and entered this _____ day of _____, 20___, by and between _____(1)_____ and ____(1)_____, residents of _____(2)_____ County, North Carolina ("Borrower") and _____, a North Carolina chartered banking corporation ("Bank").

RECITALS:

A. Borrower executed a Promissory Note payable to Bank in the original principal amount of $___(3)____ under date of _____(4)_____, 20___ (the "Note"). The Note was secured by a Deed of Trust to _____(5)_____, Trustee and Bank as beneficiary recorded in Book __6__, Page _7___, ____8_____ County Registry (the "Deed of Trust"). The Deed of Trust encumbers property located at _____(9)_____, North Carolina (the "Property").

B. Borrower has accepted a contract from a qualified purchaser and wishes to sell the Property for the sales price of $_____(10)___,which price is not sufficient to pay the indebtedness owed Bank (approximately $___(11)____ as of _____(12)_____, 20____). Borrower has requested Bank to consent to the sale and release the Property from the Deed of Trust. Bank has agreed to release the Property upon fulfillment of certain conditions set forth below.

NOW, THEREFORE, Borrower and Bank agree as follows:

1. Bank agrees to release the Property from the Deed of Trust upon complete fulfillment of the following conditions:

a) Receipt of all net proceeds from the closing attorneys' trust account in the amount of not less than $____(13)____. **[define net proceeds in terms of what closing costs and expenses may be deducted from gross sales price per agreement with Bank].**

b) Execution and delivery of a Promissory Note from Borrower in the amount of $_____(14)_____ (the "New Note") in form and substance attached hereto as Exhibit "A". **[attach new Note].**

c) Execution and delivery of this Agreement by Borrower and Bank.

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d) Closing and disbursement of all net proceeds on or before _____(15_)_____, 200____.

2. Subsequent to closing and fulfillment of the above conditions, Bank will forward to Borrower IRS Form 1099C in an amount equal to the difference between the balance of principal, interest and other fees due to Bank as of the closing date less the amount of the new Note and net proceeds from closing to the Bank.

3. Borrower acknowledges that it has no claim, cause of action, offset, defense or counterclaim against Bank, its officers, directors, employees, agents or representatives, including with respect to the administration, servicing or funding of the loan or any of the relationships or matters involving the Borrower or the Guarantor for the amounts owed on the Note or the obligations secured by the Deed of Trust and Borrower does waive, remise, release, relinquish, satisfy, acquit and discharge Bank from such defenses, setoffs, claims, controversies, counterclaims and causes of action, whether known or unknown through the closing date. Borrower acknowledges that on the date of execution and delivery of the New Note, Bank will have given full and adequate consideration for the New Note.

IN WITNESS WHEREOF, Borrower and Bank have caused this Agreement to be executed the day and year first above written:

BORROWER:

_____

BANK:

_____
[Name of Bank]

By: _____

Print Name: _____

Title: _____

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EXHIBIT "A"

New Note

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