



Foreclosure Hearings for Clerks of Superior Court

November 21 - 22, 2024

School of Government, Chapel Hill, NC

Room 2401

Thursday, November 21

- 9:15 a.m.** *Check-In Opens*
- 9:30 a.m.** **Welcome and Introductions**
Meredith Smith
Associate Professor of Public Law and Government, School of Government
- 10:00 a.m.** **The Clerk's Role and the Players in a Foreclosure (1.5 hrs CLE)**
Meredith Smith
- 11:30 a.m.** *Break*
- 11:45 a.m.** **The Clerk's Findings: Holder of a Valid Debt (.75 hr CLE)**
Meredith Smith
- 12:30 p.m.** *Lunch (provided by SOG)*
- 1:15 p.m.** **The Role of the Attorney Substitute Trustee (.75 hr CLE)**
Meredith Smith
- 2:00 p.m.** *Break*
- 2:15 p.m.** **Loan Securitization and the Role of the Servicer (1 hr CLE)**
Meredith Smith
- 3:15 p.m.** **The Clerk's Findings: Default and Right to Foreclose (.5 hr CLE)**
Meredith Smith
- 3:45 p.m.** *Break*
- 3:55 p.m.** **The Clerk's Findings: Notice (.5 hr CLE)**
Meredith Smith
- 4:30 p.m.** *Recess for the day*

Friday, November 22

- 9:00 a.m.** *Recap*
- 9:15 a.m.** **The Clerk's Findings: Home Loans (.5 hr CLE)**
Meredith Smith
- 9:45 a.m.** **Home Loan Certificates and the Role of the NC Housing Finance Agency (.75 hr CLE)**
Mary Holder
Manager, Foreclosure Prevention Programs, NC Housing Finance Agency
- 10:30 a.m.** *Break*
- 10:45 a.m.** **The Clerks's Findings: The Servicemembers Civil Relief Acts and G.S. 45-21.12A (1.5 hrs CLE)**
Meredith Smith
Nicole Brinkley, Deputy Legal Counsel, NC Administrative Office of the Courts
- 12:15 p.m.** *Lunch (provided by SOG)*
- 1:00 p.m.** **Panel Discussion: Conducting a Foreclosure Hearing (1 hr CLE)**
Michelle Ball, Clerk of Superior Court & Ex Officio Judge of Probate, Johnston County
Mark J. Kleinschmidt, Clerk of Superior Court & Judge of Probate, Orange County
Lisa A. Smith, Assistant Clerk of Superior Court, Rutherford County
Nicole Brinkley
Meredith Smith, Moderator
- 2:00 p.m.** *Break*
- 2:15 p.m.** **Mock Hearing (1.25 hrs CLE)**
Meredith Smith
- 3:30 p.m.** *Adjourn*

This program will have **10.00** hours of instruction.

2024 Foreclosure Hearings for Clerks of Superior Court

About the Speakers

Michelle Ball, a North Carolina State Bar Certified Paralegal and Johnston County native, was elected as the Johnston County Clerk of Superior Court in 2014. Prior to serving as the clerk, she worked at the law firm of Spence & Spence, P.A., for twenty-two years. Her duties and responsibilities included residential and commercial real estate transactions, guardianships and estates, civil litigation and condemnations. Clerk Ball is a graduate of Barton College (formerly Atlantic Christian College), where she was an Undergraduate Fellow, earning a B.A. degree in English with concentrations in Business and Commercial Art. As a member of the Conference of Clerks of Superior Court, Clerk Ball chairs the Resource Committee and is a member of the Legislative and Technology Committees. Most recently, she served on the COVID-19 Task Force's Subcommittee for Innovation and Technology. Clerk Ball is a member of the National College of Probate Judges and the North Carolina Guardianship Association. She was appointed to the Chief Justice's Rules Advisory Commission for a term ending December 31, 2023.

Nicole Brinkley serves as Deputy Legal Counsel in the Office of General Counsel at the N.C. Administrative Office of the Courts. In this role, Nickie regularly advises clerks of superior court and other judicial officials and staff on a variety of general civil, special proceeding, and estate matters. Prior to joining the NCAOC Office of General Counsel in 2018, she served as an assistant clerk in Wake County and worked in private practice in the areas of plaintiff's personal injury and family law.

Mary Holder has more than 30 years of experience in the mortgage industry and housing. She is currently the Manager of the State Home Foreclosure Prevention Project (SHFPP) at the NC Housing Finance Agency. She started working on the project in 2008 at the NC Commissioner of Banks. Her role with SHFPP involves overseeing foreclosure filings and contract administration for housing counseling and legal services. In addition to her foreclosure prevention role, Mary oversees sub-recipient grant reporting compliance and financial statement reviews. Mary has also managed various areas of loan servicing, including bankruptcy, collections, foreclosure, payoffs, mortgage cancellations, and REO.

Mark Kleinschmidt is currently the Clerk of Superior Court in Orange County. He was first elected to that position in 2018. Prior to becoming Clerk, he practiced law for 18 years in both state and federal courts across North Carolina mostly with the Center for Death Penalty Litigation and the firm Tin Fulton Walker and Owen. He teaches trial advocacy as an adjunct professor at the UNC School of Law and is a member of the faculty of UNC's Paralegal Certificate Program where he teaches Trusts, Wills, and Estates. He also has past lives that include 5 years as a high school studies teacher, and 15 years as a local elected municipal official.

Lisa Smith is a new Research Analyst with the UNC School of Government. Her primary focus will be teaching and advising Clerks of Superior Courts and their staff in estate and special proceeding matters. She will also be involved with updates to chapters within the Clerk of Superior Court Manual Series. She previously worked as a Deputy CSC, Assistant CSC and CSC for a combined 20

years in Rutherford County. She worked as a procedural helpdesk specialist with the Administrative Office of the Courts for over 7 years. She retired from the judicial branch in 2023.

Meredith Smith, Albert and Gladys Hall Coates Distinguished Term Associate Professor of Public Law and Government, joined the School of Government in 2013. Previously, she was an associate with the law firm of McGuireWoods LLP in Charlotte, where she practiced with the real estate, corporate, and restructuring and insolvency groups on matters related to a wide range of issues including commercial loan modifications, foreclosures, bankruptcy, corporate governance, mergers and acquisitions, commercial leasing, and real estate purchase and sale contracts. Smith earned a B.A. in political science and Spanish, with distinction, from the University of North Carolina at Chapel Hill and a law degree, *cum laude*, from Georgetown University School of Law, where she was a member of the *American Criminal Law Review*.

N.C.G.S. Chapter 45: Selected Statutes

Article 2: Right to Foreclose or Sell under Power

Article 2A: Sales under Power of Sale

Article 2B: Injunctions; Deficiency Judgments

Article 11: Emergency Program to Reduce Home Foreclosures

Article 2. Right to Foreclose or Sell under Power

§ 45-4. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.

When the mortgagee in a mortgage, or the trustee in a deed in trust, executed for the purpose of securing a debt, containing a power of sale, dies before the payment of the debt secured in such mortgage or deed in trust, all the title, rights, powers and duties of such mortgagee or trustee pass to and devolve upon the executor or administrator or collector of such mortgagee or trustee, including the right to bring an action of foreclosure in any of the courts of this State as prescribed for trustees or mortgagees, and in such action it is unnecessary to make the heirs at law of such deceased mortgagee or trustee parties thereto. (1887, c. 147; 1895, c. 431; 1901, c. 186; 1905, c. 425; Rev., s. 1031; C.S., s. 2578; 1933, c. 199.)

§ 45-5. Foreclosures by representatives validated.

In all actions which were brought or prosecuted prior to the fourth day of March, 1905, for the foreclosure of any mortgage or deed in trust by any executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgagee were duly made parties and regular and orderly decrees of foreclosure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee was a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee is estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust. (1905, c. 425, s. 2; Rev., s. 1032; C.S., s. 2579.)

§ 45-6. Renunciation by representative; clerk appoints trustee.

The executor or administrator of any deceased mortgagee or trustee in any mortgage or deed of trust heretofore or hereafter executed may renounce in writing, before the clerk of the superior court before whom he qualifies, the trust under the mortgage or deed of trust at the time he qualifies as executor or administrator, or at any time thereafter before he intermeddles with or exercises any of the duties under said mortgage or deed of trust, except to preserve the property until a trustee can be appointed. In every such case of renunciation the clerk of the superior court of any county wherein the said mortgage or deed of trust is registered has power and authority, upon proper proceedings instituted before him, as in other cases of special proceedings, to appoint some person to act as trustee and execute said mortgage or deed of trust. The clerk, in addition to recording his proceedings in his book of orders and decrees, shall record a separate instrument, as required by G.S. 161-14.1, containing the name of the substituted trustee or mortgagee, with the register of deeds of said county. (1905, c. 128; Rev., s. 1038; C.S., s. 2580; 1991, c. 114, s. 5; 2011-246, s. 1.)

§ 45-7. Agent to sell under power may be appointed by parol.

All sales of real property, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, appointed orally or in writing by such mortgagee or trustee, whether such writing

has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale. (1895, c. 117; Rev., s. 1035; C.S., s. 2581; 1967, c. 562, s. 2.)

§ 45-8. Survivorship among donees of power of sale.

In all mortgages and deeds of trust of real property wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred. (1885, c. 327, s. 2; Rev., s. 1033; C.S., s. 2582; 1967, c. 562, s. 2.)

§ 45-9. Clerk appoints successor to incompetent trustee.

When the sole or last surviving trustee named in a will or deed of trust dies, removes from the county where the will was probated or deed executed and/or recorded and from the State, or in any way becomes incompetent to execute the said trust, or is a nonresident of this State, or has disappeared from the community of his residence and his whereabouts remains unknown in such community for a period of three months and cannot, after diligent inquiry be ascertained, the clerk of the superior court of the county wherein the will was probated or deed of trust was executed and/or recorded is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings had under this section prior to January 1, 1900, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the State, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings. (1869-70, c. 188; 1873-4, c. 126; Code, s. 1276; 1901, c. 576; Rev., s. 1037; C.S., s. 2583; 1933, c. 493.)

§ 45-10. Substitution of trustees in mortgages and deeds of trust.

(a) In addition to the rights and remedies now provided by law, the noteholders may, in their discretion, substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee or a holder or owner of any or all of the obligations secured thereby, by the execution of a written document properly recorded pursuant to Chapter 47 of the North Carolina General Statutes. An attorney who serves as the trustee or substitute trustee shall not represent either the noteholders or the interests of the borrower while initiating a foreclosure proceeding. Notwithstanding this restriction, an attorney may serve as the trustee in a foreclosure proceeding while simultaneously representing the noteholders on unrelated matters and others within the attorney's firm may also continue to represent the noteholders on unrelated matters. Additionally, an attorney who has as trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as counsel to the noteholders.

(b) If the name of a trustee is omitted from an instrument that appears on its face to be intended to be a deed of trust, the instrument shall be deemed to be a deed of trust, the owner or owners executing the deed of trust and granting an interest in the real property shall be deemed to be the constructive trustee or trustees of record for the secured party or parties named in the

instrument, and a substitution of trustee may be undertaken under subsection (a) of this section. However, no such constructive trustee shall have the authority or power to take any of the following actions without the consent and joinder of the holders or owners of a majority in amount of the obligations secured by the deed of trust: (i) effect a substitution of trustee, (ii) effect the satisfaction of the deed of trust, (iii) release any property or any interest therein from the lien of the deed of trust, or (iv) modify or amend the terms of the deed of trust. Any substitute trustee named under the authority of subsection (a) of this section shall succeed to all the rights, titles, authority, and duties of the trustee under the terms of the deed of trust without regard to the limitations imposed by this subsection on the authority of a constructive trustee.

(c) If the trustee named in a deed of trust is also the beneficiary named in that deed of trust, the instrument shall be deemed to be a deed of trust, and any substitute trustee named under the authority of subsection (a) of this section shall succeed to all the rights, titles, authority, and duties of the trustee under the terms of the deed of trust.

(d) In this section, the term "noteholders" means the holders or owners of a majority in the amount of the indebtedness, notes, bonds, or other instruments evidencing a promise to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon. (1931, c. 78, ss. 1, 2; 1935, c. 227; 1943, c. 543; 1967, c. 562, s. 2; 1975, c. 66; 1985, c. 320; c. 689, s. 14; 2009-176, s. 1; 2011-312, s. 2; 2017-206, s. 6.)

§ 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.

When any person, firm, corporation, county, city or town holding a lien on real property upon which there is a subsequent or prior lien created by a mortgage, deed of trust or other instrument, the mortgagee or trustee therein named being dead or having otherwise become incompetent to act, files a written application with the clerk of the superior court of the county in which said property is located, setting forth the facts showing that said mortgagee or trustee is then dead or has become incompetent to act, the said clerk of the superior court, upon a proper finding of fact that said mortgagee or trustee is dead or has become incompetent to act, shall enter an order appointing some suitable and competent person, firm or corporation as substitute trustee upon whom service of process may be made, and said substitute trustee shall thereupon be vested with full power and authority to defend any action instituted to foreclose said property as fully as if he had been the original mortgagee or trustee named; but the substitute trustee shall have no power to cancel said mortgage or deed of trust without the joinder of the holder of the notes secured thereby. Said application shall not be made prior to the expiration of 30 days from the date the original mortgagee or trustee becomes incompetent to act. (1941, c. 115, s. 1; 1967, c. 562, s. 2.)

§ 45-12. Repealed by Session Laws 1973, c. 1208.

§ 45-13. Repealed by Session Laws 1981, c. 599, s. 12.

§ 45-14. Acts of trustee prior to removal not invalidated.

If any such trustee who has been substituted as provided in G.S. 45-10 or in G.S. 45-11 shall have performed any functions as such trustee and shall thereafter be removed as provided in G.S. 45-10 to 45-17, such removal shall not invalidate or affect the validity of such acts insofar as any purchaser or third person shall be affected or interested, and any conveyances made by such trustee before removal if otherwise valid, shall be and remain valid and effectual to all intents and purposes, but if any trustee upon such hearing is declared to have been wrongfully removed, he shall have his right of action against the substituted trustee for any compensation that he would have received in case he had not been wrongfully removed from such trust. (1931, c. 78, s. 5; 1941, c. 115, s. 3.)

§ 45-15. Registration of substitution constructive notice.

The registration of such paper-writing designating a new trustee under G.S. 45-10 or under G.S. 45-11 shall be from and after registration, constructive notice to all persons, and no appeal or other proceedings shall be instituted to contest the same after one year from and after such registration. (1931, c. 78, s. 6; 1941, c. 115, s. 4.)

§ 45-16: Repealed by Session Laws 2012-18, s. 1.2, effective July 1, 2012.

§ 45-17. Substitution made as often as justifiable.

The powers set out in G.S. 45-10 and in G.S. 45-11 may be exercised as often and as many times as the right to make such substitution may arise under the terms of such section, and all the privileges and requirements and rights to contest the same as set out in G.S. 45-10 to 45-17 shall apply to each deed of trust or mortgage and to each substitution. (1931, c. 78, s. 8; 1941, c. 115, s. 5.)

§ 45-18. Validation of certain acts of substituted trustees.

Whenever before January 1, 1979, a trustee has been substituted in a deed of trust in the manner provided by G.S. 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, has not been registered as provided by said sections until after the substitute trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, had been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13; 1963, c. 241; 1967, c. 945; 1969, c. 477; 1971, c. 57; 1973, c. 20; 1979, c. 580.)

§ 45-19. Mortgage to guardian; powers pass to succeeding guardian.

When a guardian to whom a mortgage has been executed dies or is removed or resigns before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the succeeding guardian. (1905, c. 433; Rev., s. 1034; C.S., s. 2584.)

§ 45-20. Sales by mortgagees and trustees confirmed.

All sales of real property made prior to February 10, 1905, by mortgagees and trustees under powers of sale contained in any mortgage or deed of trust in compliance with the powers, terms, conditions and advertisement set forth and required in any such mortgage or deed of trust, are hereby in all respects ratified and confirmed. (Ex. Sess. 1920, c. 27; C.S., s. 2584(a).)

§ 45-20.1. Validation of trustees' deeds where seals omitted.

All deeds executed prior to January 1, 1991, by any trustee or substitute trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee or substitute trustee has omitted to affix his seal after his signature are validated. (1943, c. 71; 1981, c. 183, s. 1; 1983, c. 398, s. 1; 1985, c. 70, s. 1; 1987, c. 277, s. 1; 1989, c. 390, s. 1; 1991, c. 489, s. 1.)

§ 45-20.2. Repealed by Session Laws 1981, c. 183, s. 2.

§ 45-20.3. Validation of deeds where seal omitted on power of attorney.

All deeds and other conveyances executed prior to January 1, 1991, by any attorney-in-fact in the exercise of a power of attorney are valid even though the signature of the principal was not affixed under seal on the instrument creating the power of attorney. (1991, c. 489, s. 1.1.)

§ 45-21. Validation of appointment of and conveyances to corporations as trustees.

In all deeds of trust made prior to March 15, 1941, wherein property has been conveyed to corporations as trustees to secure indebtedness, the appointment of said corporations as trustees, the conveyances to said corporate trustees, and the action taken under the powers of such deeds of trust by said corporate trustees are hereby confirmed and validated to the same extent as if such corporate trustees had been individual trustees. (1941, c. 245, s. 1.)

§ 45-21.01. Foreclosure of deeds of trust and mortgages on property affected by boundary certification.

(a) Foreclosure actions initiated on real property encumbered by a security instrument recorded in South Carolina wherein the real property is situated, in whole or in part, within the certified North Carolina boundaries shall be governed by the terms of the security instrument sought to be enforced for that portion of real property recognized as being in a different state. If the security instrument contains a power of sale clause, the party seeking to enforce the terms of the security instrument may initiate a foreclosure action in the county where the real property is situated pursuant to this Chapter. A party seeking to enforce the terms of the security instrument may also resort to judicial foreclosure, pursuant to Article 29A of Chapter 1 of the General Statutes, in accordance with the terms within the security instrument. Judgments or orders of foreclosure entered by courts of this State are binding and effective only with respect to the portion of real property situated within this State. Prior to initiating an action to enforce a security instrument, the security instrument or a certified copy shall be recorded in the office of the register of deeds for the county where the subject property is situated. The provisions of G.S. 45-10(a) shall apply with regard to the appointment or substitution of a trustee for any mortgage or deed of trust foreclosed pursuant to this section.

(b) Notwithstanding any other provision of law to the contrary, for mortgages foreclosed pursuant to subsection (a) of this section, a mortgagee or its successors or assigns shall be entitled to bid at a foreclosure sale conducted pursuant to a judgment or order of foreclosure entered by the courts of this State. (2016-23, ss. 4(a), (b).)

Article 2A.

Sales Under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definitions; construction.

- (a) The following definitions apply in this Article:
 - (1) "Resale" means a resale of real property or a resale of any leasehold interest created by a lease of real property held pursuant to G.S. 45-21.30.
 - (2) "Sale" means a sale of real property or a sale of any leasehold interest created by a lease of real property pursuant to (i) an express power of sale contained in a mortgage, deed of trust, leasehold mortgage, or leasehold deed of trust or (ii) a "power of sale", under this Article, authorized by other statutory provisions.
- (b) The following constructions apply in this Article:
 - (1) The terms "mortgage" or "deed of trust" include leasehold mortgages or leasehold deeds of trust.

- (2) The terms "mortgagee" or "trustee" include any person or entity exercising a power of sale pursuant to this Article.
- (3) The terms "real property" or "property" include any leasehold interest created by a lease of real property. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1991, c. 255; 1993, c. 305, s. 1.)

§ 45-21.2. Article not applicable to foreclosure by court action.

This Article does not affect any right to foreclosure by action in court, and is not applicable to any such action. (1949, c. 720, s. 1.)

§ 45-21.3. Repealed by Session Laws 1993, c. 305, s. 2.

§ 45-21.4. Place of sale of real property.

(a) Every sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held in any one of the counties in which any part of the tract is situated. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) When a mortgage or deed of trust with power of sale of real property designates the place of sale within the county, the sale shall be held at the place so designated.

(d) When a mortgage or deed of trust with power of sale of real property confers upon the mortgagee or trustee the right to designate the place of sale, the sale shall be held at the place designated by the notice of sale, which place shall be either on the premises to be sold or as follows:

- (1) Property situated wholly within a single county shall be sold at the courthouse door of the county in which the land is situated or at another public location within the county where the land is situated as designated by the mortgagee or trustee.
- (2) A single tract of property situated in two or more counties may be sold at the courthouse door of any one of the counties in which some part of the real property is situated or at another public location within any one of the counties in which some part of the real property is situated as designated by the mortgagee or trustee.

(e) When a mortgage or deed of trust with power of sale of real property does not designate, or confer upon the mortgagee or trustee the right to designate, the place of sale, or when it designates as the place of sale some county in which no part of the property is situated, such real property shall be sold as follows:

- (1) Property situated wholly within a single county shall be sold at the courthouse door of the county in which the land is situated or at another public location within the county where the land is situated as designated by the clerk of the superior court of the county where the land is situated.
- (2) A single tract of property situated in two or more counties may be sold at the courthouse door of any one of the counties in which some part of the real property is situated or another public location within one of the counties in which some part of the real property is situated as designated by the clerk of the superior court of one of the counties in which some part of the real property is situated. (1949, c. 720, s. 1; 1975, c. 57, s. 1.; 2024-29).

§§ 45-21.5 through 45-21.6. Repealed by Session Laws 1967, c. 562, s. 2.

§ 45-21.7. Sale of separate tracts in different counties.

(a) When the property to be sold consists of separate tracts of real property situated in different counties, there shall be a separate advertisement, sale and report of sale of the property in each county. The report of sale for the property in any one county shall be filed with the clerk of the superior court of the county in which such property is situated. The sale of each such tract shall be subject to separate upset bids. The clerk of the superior court of the county where the property is situated has jurisdiction with respect to upset bids of property situated within his county. To the extent the clerk deems necessary, the sale of each separate tract within his county, with respect to which an upset bid is received, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(b) The exercise of the power of sale with respect to a separate tract of property in one county does not extinguish or otherwise affect the right to exercise the power of sale with respect to tracts of property in another county to satisfy the obligation secured by the mortgage or deed of trust. (1949, c. 720, s. 1; 1993, c. 305, s. 3.)

§ 45-21.8. Sale as a whole or in parts.

(a) When the instrument pursuant to which a sale is to be held contains provisions with respect to whether the property therein described is to be sold as a whole or in parts, the terms of the instrument shall be complied with.

(b) When the instrument contains no provisions with respect to whether the property therein described is to be sold as a whole or in parts, the person exercising the power of sale may, in his discretion, subject to the provisions of G.S. 45-21.9, sell the property as a whole or in such parts or parcels thereof as are separately described in the instrument, or he may offer the property for sale by each method and sell the property by the method which produces the highest price.

(b1) When real property is sold in parts, the sale of any such part is subject to a separate upset bid; and, to the extent the clerk of superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(c) This section does not affect the equitable principle of marshaling assets. (1949, c. 720, s. 1; 1993, c. 305, s. 4.)

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.

(a) When a person exercising a power of sale sells property in parts pursuant to G.S. 45-21.8 he shall sell as many of such separately described units and parcels as in his judgment seems necessary to satisfy the obligation secured by the instrument pursuant to which the sale is being made, and the costs and expenses of the sale.

(b) If the proceeds of a sale of only a part of the property are insufficient to satisfy the obligation secured by the instrument pursuant to which the sale is made and the costs and expenses of the sale, the person authorized to exercise the power of sale may readvertise the unsold property and may sell as many additional units or parcels thereof as in his judgment seems necessary to satisfy the remainder of the secured obligation and the costs and expenses of the sale. As to any such sale, it shall not be necessary to comply with the provisions of G.S. 45-21.16 but the requirements of G.S. 45-21.17 relating to notices of sale shall be complied with.

(c) When the entire obligation has been satisfied by a sale of only a part of the property with respect to which a power of sale exists, the lien on the part of the property not so sold is discharged.

(d) The fact that more property is sold than is necessary to satisfy the obligation secured by the instrument pursuant to which the power of sale is exercised does not affect the validity of the title of any purchaser of property at any such sale. (1949, c. 720, s. 1; 1975, c. 492, s. 15.)

§ 45-21.9A. Simultaneous foreclosure of two or more instruments.

When two or more mortgages or deeds of trust held by the same person are secured in whole or in part by the same property, and there are no intervening liens, except for ad valorem taxes, between such mortgages or deeds of trust, the obligations secured by such mortgages or deeds of trust may be combined and the property sold once to satisfy the combined obligations if (i) powers of sale are provided in all such instruments; (ii) there is no provision in any such instrument which would not permit such a procedure; (iii) all the terms of all such instruments requiring compliance by the lender in connection with foreclosure sales are complied with; and (iv) all requirements of this Chapter governing power of sale foreclosures are met with respect to all such instruments. The proceeds of any sale shall be applied as provided in this Chapter. As between the combined obligations being foreclosed, proceeds shall be applied in the order of priority of the instruments securing them, and any deficiencies shall be determined accordingly. (1985, c. 515, s. 1; 1993, c. 305, s. 5.)

§ 45-21.10. Requirement of cash deposit at sale.

(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with.

(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee may require the highest bidder immediately to make a cash deposit not to exceed the greater of five percent (5%) of the amount of the bid or seven hundred fifty dollars (\$750.00).

(c) If the highest bidder fails to make the required deposit, the person holding the sale may at the same time and place immediately reoffer the property for sale. (1949, c. 720, s. 1; 1993, c. 305, s. 6.)

§ 45-21.11. Application of statute of limitations to serial notes.

When a series of notes maturing at different times is secured by a mortgage or deed of trust and the exercise of the power of sale for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale for the satisfaction of indebtedness represented by other notes of the series not so barred. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

§ 45-21.12. Power of sale barred when foreclosure barred.

(a) Except as provided in subsection (b), no person shall exercise any power of sale contained in any mortgage or deed of trust, or provided by statute, when an action to foreclose the mortgage or deed of trust, is barred by the statute of limitations.

(b) If a sale pursuant to a power of sale contained in a mortgage or deed of trust, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of hearing or the notice of sale is first filed, given, served, posted, or published, whichever occurs first, as provided by this Article or by the terms of the instrument pursuant to which the power of sale is being exercised. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1969, c. 984, s. 1; 1977, c. 359, s. 1.)

§ 45-21.12A. Power of sale barred during periods of military service.

(a) Power of Sale Barred. - A mortgagee, trustee, or other creditor shall not exercise a power of sale contained in a mortgage or deed of trust, or provided by statute, during, or within 90 days after, a mortgagor's, trustor's, or debtor's period of military service. The clerk of court shall not conduct a hearing pursuant to G.S. 45-21.16(d) unless the mortgagee, trustee or other creditor seeking to exercise a power of sale under a mortgage or deed of trust, or provided by statute, files with the clerk a certification that the hearing will take place at a time that is not during, or within 90 days after, a period of military service for the mortgagor, trustor or debtor. This subsection applies only to mortgages and deeds of trust that originated before the mortgagor's or trustor's period of military service.

(b) Waiver. - This section shall not apply if the mortgagor, trustor, or debtor waives his or her rights under this section pursuant to a written agreement of the parties executed during or after the mortgagor's, trustor's, or debtor's period of military service, as an instrument separate from the obligation or liability to which the waiver applies. Any waiver in writing of a right or protection provided by this section must be in at least 12 point type and shall specify the legal instrument creating the obligation or liability to which the waiver applies.

(c) Purpose. - The purpose of this section is to supplement and complement the provisions of the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501, et seq., and to afford greater peace and security for persons in federal active duty.

(d) Definitions. - The following definitions apply in this section:

(1) Military service. -

a. In the case of a member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard:

1. Active duty, as defined in 10 U.S.C. § 101(d)(1), and

2. In the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under 32 U.S.C. § 502(f), for purposes of responding to a national emergency declared by the President and supported by federal funds.

b. In the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service, and

c. Any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) Period of military service. - The period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service.

(3) Servicemember. - A member of the United States Army, Navy, Air Force, Marine Corps, Coast Guard, the commissioned corps of the National Oceanic and Atmospheric Administration, or the commissioned corps of the Public Health Service. (2010-190, s. 1; 2011-183, s. 127(b).)

§ 45-21.13. Repealed by Session Laws 1967, c. 562, s. 2.

§ 45-21.14. Clerk's authority to compel report or accounting; contempt proceeding.

Whenever any person fails to file any report or account, as provided by this Article, or files an incorrect or incomplete report or account, the clerk of the superior court having jurisdiction on his own motion or the motion of any interested party, may issue an order directing such person to file a correct and complete report or account within 20 days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 720, s. 1.)

§ 45-21.15. Trustee's fees.

- (a) When a sale has been held, the trustee is entitled to such compensation, if any, as is stipulated in the instrument.
- (b) When no sale has actually been held, compensation for a trustee's services is determined as follows:
 - (1) If no compensation for the trustee's services in holding a sale is provided for in the instrument, the trustee is not entitled to any compensation;
 - (2) If compensation is specifically provided for the trustee's services when no sale is actually held, the trustee is entitled to such compensation;
 - (3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to compensation as follows:
 - (i) one-fourth of the completed sale compensation before the trustee files the notice of hearing; (ii) one-half after the filing of the notice of hearing; and (iii) three-fourths after the hearing.
 - (4) Repealed by Session Laws 1993, c. 305, s. 7. (1949, c. 720, s. 1; 1993, c. 305, s. 7.)

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall file with the clerk of court a notice of hearing in accordance with the terms of this section. After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing, and if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of hearing. Service by posting may run concurrently with any other effort to effect service. The notice shall be posted by the sheriff. In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

If any party is not served or is not timely served prior to the date of the hearing, the clerk shall order the hearing continued to a date and time certain, not less than 10 days from the date scheduled for the original hearing. All notices already timely served remain effective. The mortgagee or trustee shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address.

- (b) Notice of hearing shall be served in a manner authorized in subsection (a) upon:
 - (1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.
 - (2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.

- (3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county. The term "record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property. Tenants in possession under unrecorded leases or rental agreements shall not be considered record owners.
- (c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:
- (1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, original holder, and book and page of the security instrument.
 - (2) The name and address of the holder of the security instrument at the time that the notice of hearing is filed.
 - (3) The nature of the default claimed.
 - (4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.
 - (5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.
 - (5a) The holder has confirmed in writing to the person giving the notice, or if the holder is giving the notice, the holder shall confirm in the notice, that, within 30 days of the date of the notice, the debtor was sent by first-class mail at the debtor's last known address a detailed written statement of the amount of principal, interest, and any other fees, expenses, and disbursements that the holder in good faith is claiming to be due as of the date of the written statement, together with a daily interest charge based on the contract rate as of the date of the written statement. Nothing herein is intended to authorize any fees, charges, or methods of charging interest which is not otherwise permitted under contract between the parties and other applicable law.
 - (5b) To the knowledge of the holder, or the servicer acting on the holder's behalf, whether in the two years preceding the date of the statement any requests for information have been made by the borrower to the servicer pursuant to G.S. 45-93 and, if so, whether such requests have been complied with. If the time limits set forth in G.S. 45-93 for complying with any such requests for information have not yet expired as of the date of the notice, the notice shall so state. If the holder is not giving the notice, the holder shall confirm in writing to the person giving the notice the information required by this subsection to be stated in the notice.
 - (6) Repealed by Session Laws 1977, c. 359, s. 7.
 - (7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain all of the following:
 - a. A statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that the debtor's failure to attend the hearing will not affect the debtor's right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should the debtor elect to do so.

- b. A statement that the trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding.
 - c. A statement that the debtor has the right to apply to a judge of the superior court pursuant to G.S. 45-21.34 to enjoin the sale, upon any legal or equitable ground that the court may deem sufficient prior to the time that the rights of the parties to the sale or resale become fixed, provided that the debtor complies with the requirements of G.S. 45-21.34.
 - d. A statement that the debtor has the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d), and that to authorize the foreclosure the clerk must find the existence of: (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to notice.
 - e. A statement that if the debtor fails to appear at the hearing, the trustee will ask the clerk for an order to sell the real property being foreclosed.
 - f. A statement that the debtor has the right to seek the advice of an attorney and that free legal services may be available to the debtor by contacting Legal Aid of North Carolina or other legal services organizations.
- (8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.
 - (8a) The name, address, and telephone number of the trustee or mortgagee.
 - (9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.
 - (10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.
 - (11) That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.
 - (12) That if the debtor is currently on military duty the foreclosure may be prohibited by G.S. 45-21.12A.
- (c1) The person giving the notice of hearing, if other than the holder, may rely on the written confirmation received from the holder under subdivisions (c)(5a) and (c)(5b) of this section and is not liable for inaccuracies in the written confirmation.
 - (c2) In any foreclosure filed on or after November 1, 2010, where the underlying mortgage debt is a home loan as defined in G.S. 45-101(1b), the notice required by subsection (b) of this section shall contain a certification by the filing party that the pre-foreclosure notice and information required by G.S. 45-102 and G.S. 45-103 were provided in all material respects and that the periods of time established by Article 11 of this Chapter have elapsed.
 - (d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. In the event that the property to be sold consists of separate tracts situated in different counties or a single tract in more than one county, only one hearing shall be necessary. However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material

respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A certified copy of any authorization or order by the clerk shall be filed in any other county where any portion of the property to be sold is located before the mortgagee or trustee may proceed to advertise and sell any property located in that county. In the event that sales are to be held in more than one county, the provisions of G.S. 45-21.7 apply.

(d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal. If the appealing party owns and occupies the property to be sold as his or her principal residence, the clerk shall require a bond in the amount of one percent (1%) of the principal balance due on the note or debt instrument, provided that the clerk, in the clerk's discretion, may require a lesser amount in cases of undue hardship or for other good cause shown; and further provided that the clerk, in the clerk's discretion, may require a higher bond if there is a likelihood of waste or damage to the property during the pendency of the appeal or for other good cause shown.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes 10 or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejectment actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no session of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or the chief district judge of a district where any part of the real estate is located, who shall be authorized to hear the appeal. A certified copy of any order entered as a result of the appeal shall be filed in all counties where the notice of hearing has been filed.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. In any case in which the original principal amount of indebtedness secured was one hundred thousand dollars (\$100,000), or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party. In all other cases, at any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above.

(g) Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding. (1975, c. 492, s. 2; 1977, c. 359, ss. 2-10; 1983, c. 335, s. 1; 1983 (Reg. Sess., 1984), c. 1108, ss. 1, 2; 1993, c. 305, s. 8; 1995, c. 509, s. 135.1(g); 1999-137, ss. 1, 2; 2007-351, s. 4; 2008-226, ss. 2, 3; 2009-573, s. 2; 2010-168, ss. 2, 3, 9; 2010-190, ss. 2, 3; 2012-79, s. 2.17(g).)

§ 45-21.16A. Contents of notice of sale.

(a) Except as provided in subsection (b) of this section, the notice of sale shall include all of the following:

- (1) Describe the instrument pursuant to which the sale is held, by identifying the original mortgagors and recording data. If the record owner is different from the original mortgagors, the notice shall also list the record owner of the property, as reflected on the records of the register of deeds not more than 10 days prior to posting the notice. The notice may also reflect the owner not reflected on the records if known.
- (2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this Article.
- (3) Describe the real property to be sold in a manner that is reasonably calculated to inform the public as to what is being sold. The description may be in general terms and may incorporate by reference the description used in the instrument containing the power of sale. Any property described in the instrument containing the power of sale which is not being offered for sale should also be described in a manner to enable prospective purchasers to determine what is and what is not being offered for sale.
- (4) Repealed by Session Laws 1967, c. 562, s. 2.
- (5) State the terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale.
- (6) Include any other provisions required by the instrument to be included.
- (7) State that the property will be sold subject to taxes and special assessments if it is to be so sold.
- (8) State whether the property is being sold subject to or together with any subordinate rights or interests provided those rights and interests are sufficiently identified.

(b) In addition to the requirements contained in subsection (a) of this section, the notice of sale of residential real property with less than 15 rental units shall also state all of the following:

- (1) That an order for possession of the property may be issued pursuant to G.S. 45-21.29 in favor of the purchaser and against the party or parties in possession by the clerk of superior court of the county in which the property is sold.
- (2) Any person who occupies the property pursuant to a rental agreement entered into or renewed on or after October 1, 2007, may, after receiving the notice of sale, terminate the rental agreement by providing written notice of termination to the landlord, to be effective on a date stated in the notice that is at least 10 days, but no more than 90 days, after the sale date contained in the notice of sale, provided that the mortgagor has not cured the default at the time the tenant provides the notice of termination. The notice shall also state that upon termination of a rental agreement, the tenant is liable for rent due under the rental agreement prorated to the effective date of the termination. (1949, c. 720, s. 1; 1951, c. 252, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 1; 1987, c. 493; 1993, c. 305, s. 9; 2007-353, s. 1; 2015-178, s. 1(c).)

§ 45-21.16B: Repealed by Session Laws 2013-412, s. 7, effective August 23, 2013.

§ 45-21.16C. Opportunity for parties to resolve foreclosure of owner-occupied residential property.

(a) At the commencement of the hearing, the clerk shall inquire as to whether the debtor occupies the real property at issue as his or her principal residence. If it appears that the debtor does currently occupy the property as a principal residence, the clerk shall further inquire as to

the efforts the mortgagee, trustee, or loan servicer has made to communicate with the debtor and to attempt to resolve the matter voluntarily before the foreclosure proceeding. The clerk's inquiry shall not be required if the mortgagee or trustee has submitted, at or before the hearing, an affidavit briefly describing any efforts that have been made to resolve the default with the debtor and the results of any such efforts.

(b) The clerk shall order the hearing continued if the clerk finds that there is good cause to believe that additional time or additional measures have a reasonable likelihood of resolving the delinquency without foreclosure. In determining whether to continue the hearing, the clerk may consider (i) whether the mortgagee, trustee, or loan servicer has offered the debtor an opportunity to resolve the foreclosure through forbearance, loan modification, or other commonly accepted resolution plan appropriate under the circumstances, (ii) whether the mortgagee, trustee, or loan servicer has engaged in actual responsive communication with the debtor, including telephone conferences or in-person meetings with the debtor or other actual two-party communications, (iii) whether the debtor has indicated that he or she has the intent and ability to resolve the delinquency by making future payments under a foreclosure resolution plan, and (iv) whether the initiation or continuance of good faith voluntary resolution efforts between the parties may resolve the matter without a foreclosure sale. Where good cause exists to continue the hearing, the clerk shall order the hearing continued to a date and time certain not more than 60 days from the date scheduled for the original hearing. Nothing in this part shall limit the authority of the clerk to continue a hearing for other good cause shown. (2009-573, s. 3.)

§ 45-21.17. Posting and publishing notice of sale of real property.

In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

- (1) Notice of sale of real property shall
 - a. Be posted, in the area designated by the clerk of superior court for posting public notices in the county in which the property is situated, at least 20 days immediately preceding the sale.
 - b. And in addition thereto,
 1. The notice shall be published once a week for at least two successive weeks in a newspaper published and qualified for legal advertising in the county in which the property is situated.
 2. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county.
 3. In addition to the required newspaper advertisement, the clerk may in his discretion, on application of any interested party, authorize such additional advertisement as in the opinion of the clerk will serve the interest of the parties, and permit the charges for such further advertisement to be taxed as a part of the costs of the foreclosure.
- (2) When the notice of sale is published in a newspaper,
 - a. The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays, and
 - b. The date of the last publication shall be not more than 10 days preceding the date of the sale.
- (3) When the real property to be sold is situated in more than one county, the provisions of subdivisions (1) and (2) shall be complied with in each county in which any part of the property is situated.

- (4) The notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 whose address is known to the trustee or mortgagee and in addition shall also be mailed by first-class mail to any party desiring a copy of the notice of sale who has complied with G.S. 45-21.17A. If the property is residential and contains less than 15 rental units, including single-family residential real property, the notice of sale shall also be mailed to any person who occupies the property pursuant to a residential rental agreement by name, if known, at the address of the property to be sold. If the name of the person who occupies the property is not known, the notice shall be sent to "occupant" at the address of the property to be sold. Notice of the hearing required by G.S. 45-21.16 shall be sufficient to satisfy the requirement of notice under this section provided such notice contains the information required by G.S. 45-21.16A.
- (5) Repealed by Session Laws 1993, c. 305, s. 10.
- (6) Any time periods relating to notice of hearing or notice of sale that are provided in the security instrument may commence with and run concurrently with the time periods provided in G.S. 45-21.16, 45-21.17, or 45-21.17A. (1949, c. 720, s. 1; 1965, c. 41; 1967, c. 979, s. 3; 1975, c. 492, s. 3; 1977, c. 359, ss. 11-14; 1985, c. 567, s. 1; 1993, c. 305, s. 10; 2007-353, s. 2; 2015-178, s. 1(a).)

§ 45-21.17A. Requests for copies of notice.

(a) Any person desiring a copy of any notice of sale may, at any time subsequent to the recordation of the security instrument and prior to the filing of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of each county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be a separate instrument entitled "Request for Notice" and shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:

"REQUEST FOR NOTICE"

In accordance with the provisions of G.S. 45-21.17A, request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on _____, _____, in Book _____, page _____, records of _____ County, North Carolina, executed by _____ as trustor (mortgagor), in which _____ is named as beneficiary (mortgagee), and _____ as trustee, be mailed to _____ at the following address: _____.

Signature: _____

[Acknowledgement]

(b) Register of Deeds' Duties. - Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a reference in the index of the book and page of the recorded security instrument to which the request refers.

(c) Mailing Notice. - The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in the Request for Notice, and directed to the address designated in such request.

(d) Effect of Request on Title. - No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of

notice has any claim or any right, title or interest in, or lien or charge upon, the property described in the deed of trust or mortgage referred to therein.

(e) Evidence of Compliance. - The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed prima facie true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then the party shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.

(f) Action to Set Foreclosure Sale Aside for Failure to Comply. - A person entitled to notice of sale by virtue of this section shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to the filing of the final report and account as provided in G.S. 45-21.33, if the property was purchased by someone other than the secured party; or if brought by the secured party, unless such action is brought within six months of the date of such filing and prior to the time the secured party sells the property to a bona fide purchaser for value, if the property was purchased by the secured party. In either event, the party bringing such an action shall also tender an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.

(g) Action for Damages from Foreclosure Sale for Failure to Comply. - A person entitled to notice of sale by virtue of this section shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of the filing of the final report and account as provided in G.S. 45-21.33. The party bringing such an action shall also deposit with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action. (1993, c. 305, s. 11; 1999-456, s. 59; 2011-246, s. 2; 2012-18, s. 1.3.)

§§ 45-21.18 through 45-21.19. Repealed by Session Laws 1967, c. 562, s. 2.

§ 45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.

A power of sale is terminated if, prior to the time fixed for a sale, or prior to the expiration of the time for submitting any upset bid after a sale or resale has been held, payment is made or tendered of -

- (1) The obligation secured by the mortgage or deed of trust, and
- (2) The expenses incurred with respect to the sale or proposed sale, which in the case of a deed of trust also include compensation for the trustee's services under the conditions set forth in G.S. 45-21.15. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

§ 45-21.21. Postponement of sale; notice of cancellation.

(a) Any person exercising a power of sale may postpone the sale to a day certain not later than 90 days after the original date for the sale if any of the following occurs:

- (1) There are no bidders.
- (2) In the sheriff's judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty.

- (3) There are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day.
- (4) The sheriff is unable to hold the sale because of illness or for other good reason.
- (5) Other good cause exists.

The sheriff may postpone the sale more than once whenever any of these conditions are met, so long as the sale is held not later than 90 days after the original date for the sale, as computed pursuant to G.S. 1A-1, Rule 6.

- (b) Upon each postponement of the sale, the sheriff shall do all of the following:
 - (1) At the time and place advertised for the sale, publicly announce the postponement of the sale.
 - (2) On the same day, attach to or enter on the notice of sale, posted at the courthouse door, as provided by G.S. 45-21.17, a notice of the postponement.
 - (3) Give written or oral notice of postponement to the judgment debtor. Written notice of postponement shall be served in any manner provided in G.S. 1A-1, Rule 5(b).
- (c) The posted notice of postponement shall be signed by the sheriff and shall state the following:
 - (1) That the sale is postponed.
 - (2) The hour and date to which the sale is postponed.
 - (3) The reason for the postponement.
- (d) If a sale is not held at the time fixed for the sale and is not postponed as provided by this section, or if on appeal, the appellate court orders a sale to be held, then prior to the sale taking place, G.S. 45-21.16 does not apply, but G.S. 45-21.16A, 45-21.17, and 45-21.17A again apply.
- (e) Repealed, Session Law 2022-69.
- (f) Repealed, Session Law 2019-243.
- (g) If the sale is postponed pursuant to this section, then the person exercising the power of sale shall, immediately upon determining that the sale will not occur and prior to the scheduled time of the sale, deliver a written notice to the clerk of superior court that is to include all of the following:
 - (1) The case number assigned by the clerk.
 - (2) The name of each mortgagor and record owner.
 - (3) The United States Postal Service address of the property or, if no address has been assigned, a brief description of the location of the property.
 - (4) The originally scheduled date and time for the sale.
 - (5) A statement that the foreclosure sale has been withdrawn, rescheduled for a specific date and time, or postponed with no date yet set, as appropriate.
- (h) If the notice required by subsection (g) of this section is not received by the clerk prior to the scheduled time of the sale, then the person exercising the power of sale shall personally, or through the person's agent or attorney, do all of the following:
 - (1) At the time and place advertised for the sale, publicly announce the cancellation.
 - (2) On the same day, attach to or enter on the notice of sale, posted as provided by G.S. 45-21.17(1)a., a notice of the cancellation;
 - (3) Give written or oral notice of cancellation to each party entitled to notice of sale under G.S. 45-21.17.
 - (4) Hand-deliver the written notice required under subdivision (2) of this subsection to the clerk's office.

(i) So that the notice required by subsection (g) of this section may be delivered in the time frame required, the clerk's office shall, upon request, provide to the person exercising the power of sale an email address or fax telephone number, or both, to use for delivery of notices.

(j) Should the clerk's office be unexpectedly closed on the day of the sale or at the time designated for the sale to take place pursuant to G.S. 45-21.23, the requirements of this section related to notice to or filings with the clerk are delayed until the next day the clerk's office is open for transactions.

(k) All notices of a scheduled foreclosure sale, withdrawal of a scheduled sale, or postponement of a scheduled sale shall, on the day of receipt by the clerk, be posted by the person exercising the power of sale in the location at the county courthouse normally used for the posting of public notices. If a scheduled sale has been withdrawn, the notice shall remain in the location for no less than 30 days. If the sale has been postponed, the notice shall remain in the location until it is replaced by a notice of a rescheduled sale or of a withdrawn sale.

(l) The delivery of notices required by this section in no way removes any responsibility of any party to file documents with the clerk as required elsewhere by law.

(m) Repealed, Session Law 2022-69. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1975, c. 492, ss. 4-6; 1983, c. 335, s. 2; 1989, c. 257; 1991 (Reg. Sess., 1992), c. 777, s. 1; 1993, c. 305, s. 12; 1995, c. 509, s. 25; 2003-337, s. 3; 2018-40, s. 11.1; 2018-145, s. 16; 2022-60, s. 2.(b).)

§ 45-21.22. Procedure upon dissolution of order restraining or enjoining sale, or upon debtor's bankruptcy before completion of sale.

(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable.

(c) When, after the entry of any authorization or order by the clerk of superior court pursuant to G.S. 45-21.16 and before the expiration of the 10-day upset bid period, the foreclosure sale is stayed pursuant to 11 U.S.C. § 105 or 362, and thereafter the stay is lifted, terminated, or dissolved, the trustee or mortgagee shall not be required to comply with the provisions of G.S. 45-21.16, but shall advertise and hold the sale in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A.

(d) In the event that completion of the foreclosure sale is stayed pursuant to 11 U.S.C. § 105 or 362, before the expiration of the 10-day upset bid period:

- (1) The clerk of superior court who received a deposit from an upset bidder shall release any deposits held on behalf of the upset bidder to the upset bidder upon receipt of a certified copy of an order or notice from the bankruptcy court indicating that the debtor has filed a bankruptcy petition; or
- (2) The trustee or mortgagee who received a cash deposit from the high bidder at the foreclosure sale, upon notification of the bankruptcy stay, shall release any deposits held on behalf of the high bidder to the high bidder. (1949, c. 720, s. 1; 1993, c. 305, s. 13; 2011-204, s. 1.)

§ 45-21.23. Time of sale.

A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than three hours after the time fixed therefor unless it is delayed by other sales held at the same place. The sale shall be held between the hours of 10:00 A.M. and 4:00 P.M. on any day when the clerk's office is normally open for transactions. (1949, c. 720, s. 1; 1993, c. 305, s. 14; 2003-337, s. 4.; 2019-243; 2024-29).

§ 45-21.24. Continuance of uncompleted sale.

A sale commenced but not completed within the time allowed by G.S. 45-21.23 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday or a legal holiday when the courthouse is closed for transactions. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 720, s. 1; 1993, c. 305, s. 15; 2003-337, s. 5.)

§ 45-21.25. Repealed by Session Laws 1967, c. 562, s. 2.

§ 45-21.25A. Bids placed remotely.

(a) The person exercising the power of sale of real property, or that person's agent, may accept remote bids from bidders not physically present at the place of sale, as designated pursuant to G.S. 45-21.4. All bids accepted at the sale must be clearly announced to all participating bidders, whether physically present or not.

(b) Prior to accepting a remote bid, the person exercising the power of sale of real property, or that person's agent, shall collect all funds required to be paid by the winning bidder in accordance with G.S. 45-21.10.

(c) Any charges incurred by the person exercising the power of sale of real property, or that person's agent, in connection with remote bidding authorized under this section shall not be chargeable to the mortgagor or otherwise recoverable as costs and expenses of the foreclosure. (2024-29.)

§ 45-21.26. Preliminary report of sale of real property.

(a) The person exercising a power of sale of real property, shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county in which the sale was had.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney, and shall show -

- (1) The authority under which the person making the sale acted;
- (2) The name of the mortgagor or grantor;
- (3) The name of the mortgagee or trustee;
- (4) The date, time and place of the sale;
- (5) A reference to the book and page in the office of the register of deeds, where the instrument is recorded or, if not recorded, a description of the property sold, sufficient to identify it, and, if sold in parts, a description of each part so sold;
- (6) The name or names of the person or persons to whom the property was sold;
- (7) The price at which the property, or each part thereof, was sold, and that such price was the highest bid therefor;
- (8) The name of the person making the report; and
- (9) The date of the report. (1949, c. 720, s. 1; 1951, c. 252, s. 2.)

§ 45-21.27. Upset bid on real property; compliance bonds.

(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars (\$750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%)

of the amount of the upset bid but in no event less than seven hundred fifty dollars (\$750.00). The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of the sale or the last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid, and if the tenth day shall fall upon a Sunday or legal holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid filed on the day following when said office is open for the regular dispatch of its business. Subject to the provisions of G.S. 45-21.30, there shall be no resales; rather, there may be successive upset bids each of which shall be followed by a period of 10 days for a further upset bid. When an upset bid is not filed following a sale, resale, or prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed.

(b) The clerk of the superior court may require an upset bidder or the highest bidder at a resale held pursuant to G.S. 45-21.30 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The compliance bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.

(c), (d) Repealed by Session Laws 1993, c. 305, s. 16.

(e) At the same time that an upset bid on real property is submitted to the court as provided for in subsection (a) above, together with a compliance bond if one is required, the upset bidder shall simultaneously file with the clerk a notice of upset bid. The notice of upset bid shall:

- (1) State the name, address, and telephone number of the upset bidder;
- (2) Specify the amount of the upset bid;
- (3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
- (4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(e1) When an upset bid is made as provided in this section, the clerk shall notify the trustee or mortgagee who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owner(s) of the property.

(f) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, shall be released from any further obligation on account of the bid and any deposit or bond provided by him shall be released.

(g) Any person offering to purchase real property by upset bid as permitted in this Article shall be subject to and bound by the terms of the original notice of sale except as modified by court order or the provisions of this Article.

(h) The clerk of superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have the authority to fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure. (1949, c. 720, s. 1; 1963, c. 377; 1967, c. 979, s. 3; 1993, c. 305, s. 16; 2003-337, s. 6.)

§ 45-21.28: Repealed by Session Laws 1993, c. 305, s. 17.

§ 45-21.29. Orders for possession.

(a) through (j) Repealed by Session Laws 1993, c. 305, s. 18.

(k) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of application therefor, may

be issued by the clerk of the superior court of the county in which the property is sold if all of the following apply:

- (1) The property has been sold in the exercise of the power of sale contained in any mortgage, deed of trust, leasehold mortgage, leasehold deed of trust, or a power of sale authorized by any other statutory provisions.
 - (2) Repealed by Session Laws 1993, c. 305, s. 18.
 - (2a) The provisions of this Article have been complied with.
 - (3) The sale has been consummated, and the purchase price has been paid.
 - (4) The purchaser has acquired title to and is entitled to possession of the real property sold.
 - (5) Ten days' notice has been given to the party or parties who remain in possession at the time application is made, or, in the case of residential property containing 15 or more rental units, 30 days' notice has been given to the party or parties who remain in possession at the time the application is made.
 - (5a) Repealed, Session Law 2019-243.
 - (6) Application is made by petition to the clerk by the mortgagee, the trustee, the purchaser of the property, or any authorized representative of the mortgagee, trustee, or purchaser of the property.
- (l) An order for possession issued pursuant to G.S. 45-21.29(k) shall be directed to the sheriff and shall authorize the sheriff to remove all occupants and their personal property from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. The purchaser shall have the same rights and remedies in connection with the execution of an order for possession and the disposition of personal property following execution as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes.
- (m) When the real property sold is situated in more than one county, the provisions of subsection (l) of this section shall be complied with in each county in which any part of the property is situated. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299; 1967, c. 979, s. 3; 1975, c. 492, ss. 7-9; 1987, c. 627, s. 3; 1993, c. 305, s. 18; 2007-353, s. 4; 2015-178, s. 2(a); 2019-53; 2019-243).

§ 45-21.29A. No necessity for confirmation of sale.

No confirmation of sales or resales of real property made pursuant to this Article shall be required. If an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed. (1967, c. 979, s. 3; 1993, c. 305, s. 19.)

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

- (a) If the terms of a sale of real property require the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.
- (b) Repealed by Session Laws 1967, c. 562, s. 2.
- (c) When the highest bidder at a sale or resale or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property. The procedure for such resale shall be the same in every respect as is provided by this Article in the case of an original sale of real property except that the provisions of G.S. 45-21.16 are not applicable to the resale.
- (d) A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that

the final sale price is less than his bid plus all the costs of the resale. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section.

(e) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 10; 1977, c. 359, s. 15; 1993, c. 305, s. 20.)

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

(a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of -

- (1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred, and reasonable counsel fees for an attorney serving as a trustee if allowed pursuant to subsection (a1) of this section;
- (2) Taxes due and unpaid on the property sold, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;
- (3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;
- (4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

(a1) The clerk of the superior court of the county where the sale was had may exercise discretion to allow reasonable counsel fees to an attorney serving as a trustee (in addition to the compensation allowed to the attorney as a trustee) where the attorney, on behalf of the trustee, renders professional services as an attorney that are different from the services normally performed by a trustee and of a type which would reasonably justify the retention of legal counsel by a trustee who is not licensed to practice law. Counsel fees are presumed reasonable if in compliance with G.S. 6-21.2(1) and (2). Nothing in this section, however, shall preclude the clerk of superior court from deeming a higher fee reasonable.

(b) Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale was had -

- (1) In all cases when the owner of the property sold is dead and there is no qualified and acting personal representative of his estate, and
- (2) In all cases when he is unable to locate the persons entitled thereto, and
- (3) In all cases when the mortgagee, trustee or vendor is, for any cause, in doubt as to who is entitled to such surplus money, and
- (4) In all cases when adverse claims thereto are asserted.

(c) Such payment to the clerk discharges the mortgagee, trustee or vendor from liability to the extent of the amount so paid.

(d) The clerk shall receive such money from the mortgagee, trustee or vendor and shall execute a receipt therefor.

~~(e) The clerk is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto, or until it is paid out under the order of a court of competent jurisdiction. (Subsection (e) repealed by Session Law 2024-33).~~ (1949, c. 720, s. 1; 1951, c. 252, s. 1; 1967, c. 562, s. 2; 1981, c. 682, s. 10; 2013-104, s. 1.)

§ 45-21.32. Special proceeding to determine ownership of surplus.

- (a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 45-21.31, to determine who is entitled thereto.
- (b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.
- (c) If any answer is filed raising issues of fact as to the ownership of the money, the proceeding shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of two hundred dollars (\$200.00) or otherwise comply with the provisions of G.S. 1-109.
- (d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 720, s. 1.)

§ 45-21.33. Final report of sale of real property.

- (a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court of the county where the sale is held a final report and account of his receipts and disbursements within 30 days after the receipt of the proceeds of such sale. Such report shall show whether the property was sold as a whole or in parts and whether all of the property was sold. The report shall also show whether all or only a part of the obligation was satisfied with respect to which the power of sale of property was exercised.
- (b) The clerk shall audit the account and record it.
- (c) The person who holds the sale shall also file with the clerk -
 - (1) A copy of the notices of sale and resale, if any, which were posted, and
 - (2) A copy of the notices of sale and resale, if any, which were published in a newspaper, together with an affidavit of publication thereof, if the notices were so published;
 - (3) Proof as required by the clerk, which may be by affidavit, that notices of hearing, sale and resale were served upon all parties entitled thereto under G.S. 45-21.16, 45-21.17, 45-21.17A, and 45-21.30. In the absence of an affidavit to the contrary filed with the clerk, an affidavit by the person holding the sale that the notice of sale was posted in the area designated by the clerk of superior court for posting public notices in the county or counties in which the property is situated 20 days prior to the sale shall be proof of compliance with the requirements of G.S. 45-21.17(1)a.
- (d) The clerk's fee for auditing and recording the final account is a part of the expenses of the sale, and the person holding the sale shall pay the clerk's fee as part of such expenses. (1949, c. 720, s. 1; 1975, c. 492, s. 11; 1983, c. 799; 1993, c. 305, s. 21; 1995, c. 509, s. 26.)

§ 45-21.33A. Effect of foreclosure on preexisting tenancy.

Repealed, Session Law 2019-53.

Article 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales on equitable grounds.

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale,

upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3; 1969, c. 44, s. 50; 1993, c. 305, s. 22.)

§ 45-21.35. Ordering resales; receivers for property; tax payments.

The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the appellate division in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3; 1969, c. 44, s. 51; 1993, c. 305, s. 23.)

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933. (1933, c. 275, s. 3; 1949, c. 720, s. 3; 1967, c. 562, s. 2.)

§ 45-21.37. Certain sections not applicable to tax suits.

Sections 45-21.34 through 45-21.36 do not apply to tax foreclosure suits or tax sales. (1933, c. 275, s. 4; 1949, c. 720, s. 3.)

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, 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: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out. (1933, c. 36; 1949, c. 720, s. 3; c. 856; 1961, c. 604; 1967, c. 562, s. 2.)

§ 45-21.38A. Deficiency judgments abolished where mortgage secured by primary residence.

(a) As used in this section, the term "nontraditional mortgage loan" means a loan in which all of the following apply:

- (1) The borrower is a natural person.
- (2) The debt is incurred by the borrower primarily for personal, family, or household purposes.
- (3) The principal amount of the loan does not exceed the conforming loan size for a single family dwelling as established from time to time by Fannie Mae.
- (4) The loan is secured by: (i) a security interest in a manufactured home, as defined in G.S. 143-145, in the State that is or will be occupied by the borrower as the borrower's principal dwelling; (ii) a mortgage or deed of trust on real property in the State upon which there is located an existing structure designed principally for occupancy of from one to four families that is or will be occupied by the borrower as the borrower's principal dwelling; or (iii) a mortgage or deed of trust on real property in the State upon which there is to be constructed using the loan proceeds a structure or structures designed principally for occupancy of from one to four families that, when completed, will be occupied by the borrower as the borrower's principal dwelling.
- (5) The terms of the loan: (i) permit the borrower as a matter of right to defer payment of principal or interest; and (ii) allow or provide for the negative amortization of the loan balance.

(b) Except as provided in subdivision (6) of subsection (c) of this section, this section applies only to the following loans:

- (1) A loan originated on or after January 1, 2005, that was at the time the loan was originated a rate spread home loan as defined in G.S. 24-1.1F.
- (2) A loan secured by the borrower's principal dwelling, which loan was modified after January 1, 2005, and became at the time of such modification and as a consequence of such modification a rate spread home loan.
- (3) A loan that was a nontraditional mortgage loan at the time the loan was originated.
- (4) A loan secured by the borrower's principal dwelling, which loan was modified and became at the time of such modification and as a consequence of such modification a nontraditional mortgage loan.

(c) This section does not apply to any of the following:

- (1) A home equity line of credit as defined in G.S. 45-81(a).
- (2) A construction loan as defined in G.S. 24-10(c).

- (3) A reverse mortgage as defined in G.S. 53-257 that complies with the provisions of Article 21 of Chapter 53 of the General Statutes.
 - (4) A bridge loan with a term of 12 months or less, such as a loan to purchase a new dwelling where the borrower plans to sell his or her current dwelling within 12 months.
 - (5) A loan made by a natural person who makes no more than one loan in a 12-month period and is not in the business of lending.
 - (6) A loan secured by a subordinate lien on the borrower's principal dwelling, unless the loan was made contemporaneously with a rate spread home loan or a nontraditional mortgage loan that is subject to the provisions of this section.
- (d) In addition to any statutory or common law prohibition against deficiency judgments, the following shall apply to the foreclosure of mortgages and deeds of trust that secure loans subject to this section:
- (1) For mortgages and deeds of trust recorded before January 1, 2010, the holder of the obligation secured by the foreclosed mortgage or deed of trust shall not be entitled to any deficiency judgment against the borrower for any balance owing on such obligation if: (i) the real property encumbered by the lien of the mortgage or deed of trust being foreclosed was sold by a mortgagee or trustee under a power of sale contained in the mortgage or deed of trust; and (ii) the real property sold was, at the time the foreclosure proceeding was commenced, occupied by the borrower as the borrower's principal dwelling.
 - (2) For mortgages and deeds of trust recorded on or after January 1, 2010, the holder of the obligation secured by the foreclosed mortgage or deed of trust shall not be entitled to any deficiency judgment against the borrower for any balance owing on such obligation if: (i) the real property encumbered by the lien of the mortgage or deed of trust being foreclosed was sold as a consequence of a judicial proceeding or by a mortgagee or trustee under a power of sale contained in the mortgage or deed of trust; and (ii) the real property sold was, at the time the judicial or foreclosure proceeding was commenced, occupied by the borrower as the borrower's principal dwelling.
- (e) The court may, in its discretion, award to the borrower the reasonable attorneys' fees actually incurred by the borrower in the defense of an action for deficiency if: (i) the borrower prevails in an action brought by the holder of the obligation secured by the foreclosed mortgage or deed of trust to recover a deficiency judgment following the foreclosure of a loan to which this section applies; and (ii) the court rules that the holder of the obligation secured by the foreclosed mortgage or deed of trust is not entitled to a deficiency judgment under the provisions of this section. The amount of attorneys' fees to be awarded shall be determined without regard to the provisions of the loan documents, the provisions of G.S. 6-21.2, or any statutory presumption as to the amount of such attorneys' fees. (2009-441, s. 1.)

§ 45-21.38B: Reserved for future codification purposes.

§ 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 Article shall not be affected thereby. (2009-441, s. 2.)

Article 11. Emergency Program to Reduce Home Foreclosures.

§ 45-100. Title.

This Article shall be known as the Emergency Program to Reduce Home Foreclosures Act. (2008-226, s. 1; 2010-168, s. 9; 2012-79, s. 2.17(g).)

§ 45-101. Definitions.

The following definitions apply throughout this Article:

- (1) Act as a mortgage servicer. - To engage, whether for compensation or gain from another or on its own behalf, in the business of receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the mortgage loan, the mortgage servicing loan documents, or servicing contract.
- (1a) Repealed by Session Laws 2010-168, s. 1, effective November 1, 2010.
- (1b) Home loan. - A loan that has all of the following characteristics:
 - a. The loan is not (i) an equity line of credit as defined in G.S. 24-9, (ii) a construction loan as defined in G.S. 24-10, (iii) a reverse mortgage transaction, or (iv) a bridge loan with a term of 12 months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within 12 months.
 - b. The borrower is a natural person.
 - c. The debt is incurred by the borrower primarily for personal, family, or household purposes.
 - d. The principal amount of the loan does not exceed the conforming loan size limit for a single-family dwelling as established from time to time by Fannie Mae.
 - e. The loan is secured by (i) a security interest in a manufactured home, as defined in G.S. 143-145, in the State which is or will be occupied by the borrower as the borrower's principal dwelling, (ii) a mortgage or deed of trust on real property in the State upon which there is located an existing structure designed principally for occupancy of from one to four families that is or will be occupied by the borrower as the borrower's principal dwelling, or (iii) a mortgage or deed of trust on real property in the State upon which there is to be constructed using the loan proceeds a structure or structures designed principally for occupancy of from one to four families which, when completed, will be occupied by the borrower as the borrower's principal dwelling.
 - f. A purpose of the loan is to (i) purchase the dwelling, (ii) construct, repair, rehabilitate, remodel, or improve the dwelling or the real property on which it is located, (iii) satisfy and replace an existing obligation secured by the same real property, or (iv) consolidate existing consumer debts into a new home loan.
- (1c) Housing Finance Agency. - The North Carolina Housing Finance Agency.
- (2) Mortgage lender. - A person engaged in the business of making mortgage loans for compensation or gain.
- (3) Mortgage servicer. - A person who directly or indirectly acts as a mortgage servicer as that term is defined in subdivision (1) of this section or who otherwise meets the definition of the term "servicer" in the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(i), with respect to mortgage loans.
- (4) (3a) Repealed by Session Laws 2010-168, s. 1, effective November 1, 2010.

- (5) Repealed by Session Laws 2010-168, s. 1, effective November 1, 2010. (2008-226, s. 1; 2009-457, s. 3; 2010-168, ss. 1, 9; 2011-288, s. 1; 2012-79, s. 2.17(g).)

§ 45-102. Pre-foreclosure notice for home loans.

At least 45 days prior to the filing of a notice of hearing in a foreclosure proceeding on a primary residence, mortgage servicers of home loans shall send written notice by mail to the last known address of the borrower to inform the borrower of the availability of resources to avoid foreclosure, including:

- (1) An itemization of all past due amounts causing the loan to be in default.
- (2) An itemization of any other charges that must be paid in order to bring the loan current.
- (3) A statement that the borrower may have options available other than foreclosure and that the borrower may discuss available options with the mortgage lender, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development.
- (4) The address, telephone number, and other contact information for the mortgage lender, the mortgage servicer, or the agent for either of them who is authorized to attempt to work with the borrower to avoid foreclosure.
- (5) The name, address, telephone number, and other contact information for one or more HUD-approved counseling agencies operating to assist borrowers in North Carolina to avoid foreclosure.
- (6) The address, telephone number, and other contact information for the State Home Foreclosure Prevention Project of the Housing Finance Agency. (2008-226, s. 1; 2010-168, ss. 1, 9; 2012-79, s. 2.17(a), (g).)

§ 45-103. Pre-foreclosure information to be filed with the Administrative Office of the Courts for home loans.

(a) Within three business days of mailing the notice required by G.S. 45-102, the mortgage servicer shall file certain information with the Administrative Office of the Courts. The filing shall be in an electronic format, as designated by the Administrative Office of the Courts, and shall contain the name and address of the borrower, the due date of the last scheduled payment made by the borrower, and the date the notice was mailed to the borrower. The Administrative Office of the Courts shall establish an internal database to track information required by this section. The Housing Finance Agency shall design and develop the State Home Foreclosure Prevention Project database, in consultation with the Administrative Office of the Courts. Only the Administrative Office of the Courts, the Housing Finance Agency, and the clerk of court as provided by G.S. 45-107 shall have access to the database.

(b) As permitted by applicable State and federal law, optional information may be requested from the mortgage servicer to facilitate further review by the State Home Foreclosure Prevention Project described in G.S. 45-104. This optional information shall be used by the State Home Foreclosure Prevention Project to prioritize efforts to reach borrowers most likely to avoid foreclosure and to prevent delay for defaults where foreclosure is unavoidable.

(c) Repealed by Session Laws 2010-168, s. 1, effective November 1, 2010. (2008-226, s. 1; 2010-168, ss. 1, 9; 2011-288, s. 2; 2012-79, s. 2.17(b), (g).)

§ 45-104. State Home Foreclosure Prevention Project and Fund.

(a) The purpose of the State Home Foreclosure Prevention Project is to seek solutions to avoid foreclosures for home loans. The Project may include input from HUD-approved housing counselors, community organizations, the Credit Union Division and other State agencies, mortgage lenders, mortgage servicers, and other partners. The Housing Finance Agency shall administer the Project.

- (b) There is established a State Home Foreclosure Prevention Trust Fund to be managed and maintained by the Housing Finance Agency. The funds shall be held separate from any other funds received by the Housing Finance Agency in trust for the operation of the State Home Foreclosure Prevention Project.
- (c) Upon the filing of the information required under G.S. 45-103, the mortgage servicer shall pay a fee of seventy-five dollars (\$75.00) to the State Home Foreclosure Prevention Trust Fund. The fee shall not be charged more than once for a home loan covered by this act. The Housing Finance Agency shall collect the fee. Upon receipt of the fee the Housing Finance Agency shall deposit the funds into the State Home Foreclosure Prevention Trust Fund. The Housing Finance Agency shall manage the State Home Foreclosure Prevention Trust Fund.
- (d) The Housing Finance Agency shall use funds from the State Home Foreclosure Prevention Trust Fund to compensate performance-based service contracts or other contracts and grants necessary to implement the purposes of this act in the following manner:
- (1) An amount, not to exceed the greater of two million two hundred thousand dollars (\$2,200,000) or thirty percent (30%) of the funds per year, to cover the administrative costs of the operation of the program by the Housing Finance Agency, including managing on behalf of the Administrative Office of the Courts the database identified in G.S. 45-103, expenses associated with informing homeowners of State resources available for foreclosure prevention, expenses associated with connecting homeowners to available resources, and assistance to homeowners and counselors in communicating with mortgage servicers.
 - (2) An amount, not to exceed the greater of three million four hundred thousand dollars (\$3,400,000) or forty percent (40%) per year, to make grants to or reimburse nonprofit housing counseling agencies for providing foreclosure prevention counseling services to homeowners involved in the State Home Foreclosure Prevention Project.
 - (3) An amount, not to exceed thirty percent (30%) of the total funds collected per year, to make grants to or reimburse nonprofit legal service providers for services rendered on behalf of homeowners in danger of defaulting on a home loan to avoid foreclosure, limited to legal representation such as negotiation of loan modifications or other loan work-out solutions, defending homeowners in foreclosure or representing homeowners in bankruptcy proceedings, and research and counsel to homeowners regarding the status of their home loans.
 - (4) Any funds remaining in the State Home Foreclosure Prevention Trust Fund as of June 30, 2011, and any funds remaining in the State Home Foreclosure Prevention Trust Fund upon the expiration of each subsequent fiscal year shall be directed to the North Carolina Housing Trust Fund.
- (e) The Housing Finance Agency shall have the discretion to enter into an agreement to administer funds under subdivisions (2) and (3) of subsection (d) of this section in a manner that complements or supplements other State and federal programs directed to prevent foreclosures for homeowners participating in the State Home Foreclosure Prevention Project.
- (f) As part of the report required under G.S. 122A-16, the Housing Finance Agency shall report on the operation of the program established by this act until the funds are completely disbursed from the State Home Foreclosure Prevention Trust Fund. Information in the report shall be presented in aggregate form and may include the number of clients helped, the effectiveness of the funds in preventing home foreclosure, recommendations for further efforts needed to reduce foreclosures, and provide any other aggregated information the Housing Finance Agency determines is pertinent or that the General Assembly requests. (2008-226, ss. 1, 5; 2010-168, ss. 1, 9; 2011-288, s. 3; 2012-79, s. 2.17(c), (f), (g).; 2023-134.)

§ 45-105. Extension of foreclosure process.

The Housing Finance Agency shall review information provided in the database created by G.S. 45-103 to determine which home loans are appropriate for efforts to avoid foreclosure. If the Housing Finance Agency reasonably believes, based on a full review of the loan information, the mortgage servicer's loss mitigation efforts, the borrower's capacity and interest in staying in the home, and other appropriate factors, that further efforts by the State Home Foreclosure Prevention Project offer a reasonable prospect to avoid foreclosure on primary residences, the Executive Director of the Housing Finance Agency shall have the authority to extend one time under this Article the allowable filing date for any foreclosure proceeding on a primary residence by up to 30 days beyond the earliest filing date established by the pre-foreclosure notice. If the Executive Director of the Housing Finance Agency makes the determination that a loan is subject to this section, the Housing Finance Agency shall notify the borrower, mortgage servicer, and the Administrative Office of the Courts. (2008-226, s. 1; 2010-168, ss. 1, 9; 2011-288, s. 4; 2012-79, s. 2.17(d), (g).)

§ 45-106. Use and privacy of records.

The data provided to the Administrative Office of the Courts pursuant to G.S. 45-103 shall be exclusively for the use and purposes of the State Home Foreclosure Prevention Project developed by the Commissioner of Banks and administered by the Housing Finance Agency in accordance with G.S. 45-104. The information provided to the database is not a public record, except that a mortgage lender and a mortgage servicer shall have access to the information submitted only with regard to its own loans. Provision of information to the Administrative Office of the Courts for use by the State Home Foreclosure Prevention Project shall not be considered a violation of G.S. 53B-8. A mortgage servicer shall be held harmless for any alleged breach of privacy rights of the borrower with respect to the information the mortgage servicer provides in accordance with this Article. (2008-226, s. 1; 2010-168, ss. 1, 9; 2011-288, s. 5; 2012-79, s. 2.17(e), (g).)

§ 45-107. Foreclosure filing.

(a) For the duration of the program authorized by this Article, foreclosure notices filed on home loans on or after November 1, 2010, shall contain a certification by the filing party that the pre-foreclosure notice required by G.S. 45-102 and the pre-foreclosure information required by G.S. 45-103 were provided in accordance with this Article and that the periods of time established by the Article have elapsed.

(b) The clerk of superior court or other judicial officer may have access to the pre-foreclosure database to confirm information provided in subsection (a) of this section. A materially inaccurate statement in the certification shall be cause for dismissal without prejudice of any foreclosure proceeding on a primary residence initiated by the mortgage servicer and for payment by the filing party of costs incurred by the borrower in defending the foreclosure proceeding. (2008-226, s. 1; 2010-168, ss. 1, 9; 2012-79, s. 2.17(g).)

G.S. Chapter 45: Power of Sale Foreclosure
NC Supreme Court and NC Court of Appeals Published Case Summaries
Meredith Smith, UNC School of Government
January 1, 2015 – November 5, 2024

Statute of Limitations Applicable to Right to Foreclose

[Real Time Resolutions, Inc. v. Cole \(COA23-464; May 7, 2024\)](#)

The clerk entered an order authorizing a power of sale foreclosure. Borrower appealed the clerk's order to the superior court arguing, in part, that the statute of limitations applicable to the proceeding under G.S. 1-47 expired and thus barred the lender's right to foreclose. The superior court entered an order denying the foreclosure and the lender appealed to the North Carolina Court of Appeals. The court affirmed the order of the superior court denying the foreclosure sale. The court noted that the statute of limitations begins to run on the date of the maturity of the loan unless the lender exercised their right to accelerate the loan. Acceleration of a loan is advancing the loan's maturity date so that payment of the entire debt is due immediately. The court held that there was "a clear and unequivocal acceleration" of the loan by the lender's notice sent to the borrower that contained the following language: "[i]f the default is not cured on or before May 12, 2008, [then] the mortgage payments will be accelerated with the full amount remaining acerated and becoming due and payable and full." The court found the acceleration date was thus May 13, 2008. The notice of hearing initiating the foreclosure action was filed on November 15, 2018, 10 years and 6 months after the acceleration of the loan, and was outside of the applicable 10-year statute of limitations under G.S. 1-47(3). Because the borrower had also been in possession of the property during the entire 10-year period, the lender's power of sale foreclosure action was time-barred under G.S. 1-47.

Validity of the Foreclosure of a Claim of Lien by a Condominium Association

[In re Foreclosure of a Lien by Executive Office Park of Durham Association, Inc. \(COA20-405; May 18, 2021\)](#)

[In re Foreclosure of a Lien by Executive Office Park of Durham Association, Inc. \(NC No. 240PA21; Nov. 4, 2022\)](#)

[In re Foreclosure of a Lien by Executive Office Park of Durham Association, Inc. \(No. COA20-405-2; Feb. 21, 2023\) \(unpublished\)](#)

A condominium association (the Association) filed a claim of lien against three condo units owned by Martin Rock for unpaid assessments and other charges. The Association then filed a nonjudicial foreclosure before the clerk to enforce the lien. The clerk entered an order authorizing sale. Rock appealed. The superior court judge entered an order authorizing sale. Rock appealed. The N.C. Court of Appeals vacated the decision of the trial court and remanded the matter for a dismissal. The court noted that the Association was formed by the execution of declarations in 1982. The North Carolina Condominium Act (the Act), which is found in G.S. Chapter 47C and authorizes nonjudicial foreclosure of condominium association liens, was enacted in 1985 and was applicable to all condominium associations created after October 1, 1986. Condominium associations existing prior to October 1, 1986 could amend their declarations to bring them within the provision of the Act. In this case, the Association never amended its declarations to bring the Association under the provisions of the Act. The Association

declarations did not include the power of nonjudicial foreclosure and therefore the Association did not have the authority to rely on G.S. Chapter 47C to effectuate a nonjudicial foreclosure of the units.

N.C. Supreme Court. On discretionary review from a unanimous decision from the N.C. Court of Appeals, the N.C. Supreme Court addressed “whether a condominium formed prior to the enactment of the North Carolina Condominium Act in 1985 has the power of sale for foreclosure pursuant to section 3-116 of that Act for nonpayment of an assessment that occurred after 1 October 1986.” The court held that the Association has the power of sale for foreclosure under G.S. 47C-3-116 based on the plain language of (i) the Act and (ii) Association’s declaration. The court looked specifically to G.S. 47C-1-102(a) which states the Chapter applies to all condominiums created “on or before October 1, 1986, unless the declaration expressly provides to the contrary.” The court found no language in the declaration expressly to the contrary of the power of sale foreclosure permitted under G.S. 47C-3-116(f). The court reversed the decision of the N.C. Court of Appeals and remanded the matter for consideration of whether Rock was in default.

N.C. Court of Appeals, on remand. On remand from the N.C. Supreme Court, the N.C. Court of Appeals vacated and remanded the matter to the trial court for a determination whether Rock owed a valid debt to the Association. The N.C. Court of Appeals held, based on prior precedent of the N.C. Supreme Court in the case *In re Foreclosure of Lucks*, 369 N.C. 222 (2016), that the 2018 non-judicial foreclosure filed by the Association currently pending before the court could not be based on the same defaults as a previously dismissed 2015 non-judicial foreclosure action filed by the Association against Rock.

Role of the Trustee; Content of the Notice of Hearing

[In re Foreclosure of Simmons \(COA21-682; Oct. 4, 2022\)](#) ** Note, this opinion was superseded and replaced by the decision below.

Attorney acted as the closing attorney for a 2014 loan refinance. In 2016, Attorney sent a letter to Borrowers as counsel for Lender noticing their failure to make payments on the loan and a second letter stating that Lender retained Attorney to initiate a foreclosure proceeding. Three months later, Attorney filed a notice of hearing as trustee. The notice of hearing did not include the statement that the trustee is a neutral party, as required by G.S. 45-21.16(c)(7)b. The clerk entered an order authorizing the foreclosure sale. Lender purchased the property out of the foreclosure sale. Attorney signed the deed out of the foreclosure as trustee. Approximately a year after the foreclosure sale, Borrowers filed a motion to set aside the sale pursuant to N.C. Rule of Civil Procedure 60(b). The motion was denied by the clerk and again by the superior court on appeal. Borrowers then appealed to the N.C. Court of Appeals. The court held the trial court erred in denying the motion. The court’s holding was based on the finding that the trustee (i) failed to include a statement in the notice of hearing that the trustee is a neutral party (as required by G.S. 45-21.16(c)(7)b.); (ii) acted as the foreclosure attorney for the noteholder; and (iii) acted as the closing attorney for the loan that later was the subject of the foreclosure. As a result, the court found that the trial court’s order was void under Rule 60(b)(4). The court

reversed the trial court and remanded the matter for entry of an order setting aside the foreclosure sale.

[In re Foreclosure of Simmons \(COA21-682-2; Oct. 17, 2023\)](#), on petition for hearing, superseding and replacing prior opinion filed on Oct. 4, 2022

Appeal by borrowers of an order denying their motion to vacate and set aside a foreclosure sale pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure (the Rules). On appeal, the North Carolina Court of Appeals held the trial court did not err in denying the motion. The court, relying on the North Carolina Supreme Court's decision [In re Foreclosure of Lucks](#), 369 N.C. 222 (2016), reiterated that the Rules do not apply to power of sale foreclosure proceedings, unless specifically engrafted into the statute. Rule 60 is not specifically engrafted into G.S. Chapter 45 and such relief cannot be sought nor granted in G.S. Chapter 45 foreclosure proceedings. Therefore, the trial court did not abuse its discretion in denying the borrowers' motion to vacate and set aside the foreclosure pursuant to Rule 60(b).

Tax Foreclosure; Due Diligence Necessary Before Relying on Publication for Proper Service; Good Faith Purchaser for Value

[County of Mecklenburg v. Ryan \(No. COA21-205; Feb. 15, 2022\)](#)

In case involving a completed county tax foreclosure, two of the issues the homeowner, Helen Ryan, raised challenging the foreclosure on appeal were (i) the sufficiency of notice of the foreclosure, and (ii) whether the owner out of foreclosure was a good faith purchaser for value. In initiating the tax foreclosure proceeding, Mecklenburg County attempted to serve the homeowner personally but was unsuccessful. When the sheriff attempted service, the sheriff reported that the property appeared vacant. Mecklenburg County unsuccessfully attempted service via certified mail and designated delivery service. Ms. Ryan had previously notified Mecklenburg County that because she was in a wheelchair and blind, it was difficult for her to access her mail and the best way to reach her was via email. Mecklenburg County did not attempt to notify her via email. To complete the tax foreclosure, Mecklenburg County relied on service by publication under Rule 4 of the N.C. Rules of Civil Procedure. The trial court entered an order authorizing the foreclosure sale and the property was sold to a third party out of the foreclosure. Ms. Ryan filed motions challenging the validity of the foreclosure and requested the court set aside the commissioners' deed to the third party. The trial court set aside the judgment confirming the sale but denied the motion to set aside the commissioners' deed. The N.C. Court of Appeals affirmed in part and reversed in part.

1. Service of process. On the issue of sufficiency of service of process, the N.C. Court of Appeals reversed the trial court and held Mecklenburg County's service under Rule 4 was insufficient because Mecklenburg County did not attempt to notify the homeowner via email before relying on publication. Relying on an earlier decision of the court *In re Foreclosure of Ackah*, 255 N.C. App. 284 (2017) (summarized below), the court noted that a party must use "all reasonably available resources to accomplish service of process." There is no mandatory checklist for what constitutes due diligence before relying on publication. Here it was undisputed that Mecklenburg County had Ms. Ryan's email address on file, the county had prior notice that she relied on email for notice due to her disabilities, and when the county's attorney asked for her email address the county was able to provide it to him. Based on these facts, the county's failure to attempt contact Ms.

Ryan via email before relying on publication did not constitute due diligence. Therefore, the reliance on publication was insufficient for purposes of completing service under Rule 4.

2. Good faith purchaser for value. On the issue of whether to set aside the deed to the third-party purchaser out of the foreclosure, the N.C. Court of Appeals affirmed the trial court's order declining to set aside the deed. Relying on an earlier decision of the N.C. Supreme Court, *In re Foreclosure George*, 377 N.C. 129 (2021) (summarized below), the court noted that a purchaser is a good faith purchaser if the defects are not such that a person attending the sale exercising reasonable care would have been aware of them. Here even though the homeowner told the purchaser that she paid the taxes in full, the court found that the purchaser reasonably relied on the county's assertion that the property was to be sold to pay outstanding taxes and therefore was a good faith purchaser for value and the deed should not be set aside.

Rules of Civil Procedure; Res judicata and collateral estoppel; Rules of Evidence

[In re Foreclosure of Lucks \(NC162A16; Dec. 21, 2016\)](#)

Substitute trustee filed a power of sale foreclosure. Clerk dismissed the proceeding due to the trustee's failure to present sufficient evidence of the trustee's appointment. Less than a year later, a new substitute trustee filed a second power of sale foreclosure. Clerk dismissed the second foreclosure on the basis of res judicata. Lender appealed. Before the superior court, the lender presented a copy of a power of attorney purporting to authorize a servicer to execute the substitution of trustee on behalf of the lender; the borrower objected to this evidence. The court sustained the borrower's objection on the basis that the POA lacked a proper foundation and constituted hearsay. The court dismissed the foreclosure with prejudice. Lender appealed. The NC Court of Appeals reversed; the court found that the trial court erred in excluding the POA given the relaxed evidentiary standard in a non-judicial foreclosure. Borrower appealed to the NC Supreme Court. The NC Supreme Court reversed the court of appeals and held:

1. The NC Rules of Civil Procedure do not apply to non-judicial power of sale foreclosure unless explicitly incorporated by G.S. Chapter 45. This applies to proceedings before both the clerk and before the superior and district court. G.S. Chapter 45 provides the exclusive statutory framework for this proceeding.
2. The rules of evidence are relaxed at the hearing before the clerk and the superior and district court. The superior court's decision to exclude the POA based on internal inconsistencies did not constitute an abuse of discretion. The lender failed to overcome these inconsistencies, which could have occurred by appointing the trustee directly (rather than through a servicer), appropriate witness testimony in person or via affidavit, submitting a certified copy of the POA, or requesting judicial notice of the recorded POA.
3. The doctrines of res judicata and collateral estoppel do not apply to non-judicial foreclosures. If the trustee elects not to proceed with the hearing, the trustee may withdraw the notice of hearing and thus terminate the proceeding. This does not constitute a dismissal and has no collateral consequence. The trustee may file the non-judicial foreclosure again at a later date. Furthermore, the clerk and the superior or district court on appeal do not have the authority to dismiss a non-judicial foreclosure *with prejudice*. If the court enters an order after the hearing that does not authorize the

sale, the creditor is prohibited from proceeding again with a non-judicial foreclosure on the same default; the creditor is not prohibited from proceeding with a judicial foreclosure on the same default. However, the creditor may file another non-judicial foreclosure on another default.

Concurring Opinion: Justices concur with the ultimate outcome of the majority opinion. However, they would not have stated, as the majority did, that the rules of evidence are relaxed before the superior and district court. Such rules are relaxed only before the clerk with regard to affidavits and certified copies, given that the clerk is mentioned in G.S. 45-21.16(d). Otherwise, they apply as in any other case. In addition, the concurring justices would not have stated that the NC Rules of Civil Procedure do not apply on appeal in superior and district court. They would have limited that portion of the opinion to the proceeding before the clerk because there is a presumption that the rules apply unless a different procedure is prescribed.

Competent evidence; res judicata; collateral estoppel; substitution of trustee; authority to conduct the foreclosure

[In re Foreclosure of Worsham \(COA18-1302, Sept. 17, 2019\)](#)

This case involves the second appeal to the NC Court of Appeals by borrowers in a foreclosure by power of sale. In the first proceeding, the court of appeals reversed the order authorizing sale entered by the superior court and remanded the matter for further proceedings. [In re Worsham](#), ___ N.C. App. ___, 815 S.E.2d 746 (2018) (unpublished). The court of appeals determined that the superior court had not found that the petitioner was the holder of the debt.

On remand, without further hearing, the superior court entered an order authorizing the foreclosure sale. The superior court concluded that petitioner is the holder of the note and deed of trust and that the note evidences a valid debt owed by borrowers. Borrowers appealed a second time, challenging multiple findings of fact, including that they were in default. Borrowers argued in the alternative, that if they were in default, the foreclosure was based on the same default that an earlier order allowing foreclosure was based on. The borrowers argued NC Supreme Court's holding in *In re Lucks*, 369 N.C. 222 (2016) precluded foreclosure, stating that a lender cannot foreclose twice based on the same default.

The NC Court of Appeals affirmed the superior court order authorizing sale. The court of appeals held:

1. There was competent evidence to support the superior court's findings that the borrowers were in default (affidavit from the lender, loan payment history, correspondence, and borrowers' admission of nonpayment at the hearing) as well as competent evidence to support the superior court's findings that the lender was the holder of a valid debt (lender presented the original note and a valid chain of indorsements at the hearing).
2. The NC Supreme Court in *Lucks*, subsequently interpreted by the NC Court of Appeals in *Gray v. Federal National Mortgage Assoc.*, 2019 WL 2528575 (2019), held that res judicata and collateral estoppel do not apply when the clerk or the superior court enters an order not authorizing the foreclosure sale. Where the court enters an order

authorizing a foreclosure sale, as the court did in this case, *Lucks* does not apply. The clerk and the superior court were therefore not precluded from entering an order authorizing sale based on the same default as an earlier order authorizing sale.

3. Where the lender substitutes in a second trustee after the filing of the notice of the hearing by the original substitute trustee, the hearing does not have to be re-noticed.
4. The authority of the loan servicer to execute and record a substitution of trustee on behalf of the lender may be demonstrated by competent evidence. The evidence in this case included language in the deed of trust providing for the servicer's authority to service the indebtedness coupled with the lender's authority to substitute the trustee. The mere absence of a power of attorney in the record evidencing the mortgage servicer's authority to execute and record a substitution of trustee on behalf of a lender did not preclude the trial court from concluding the substitute trustee was authorized to conduct the sale.

Jurisdiction; Injunctive Relief

[In re Foreclosure of Foster \(COA14-108; Feb. 17, 2015\)](#)

Trustee filed a power of sale foreclosure before clerk of superior court. The clerk dismissed the foreclosure and the lender appealed. While the lender's appeal was pending, the borrowers filed a motion in the same proceeding for permanent injunctive relief based on fraud by the lender. The NC Court of Appeals held that permanent injunctive relief is an equitable remedy and is outside the subject matter jurisdiction of the court in a power of sale foreclosure under Chapter 45, regardless of whether the request for relief is made before the clerk or on appeal of the same action before the superior court judge.

Lien Priority

[Wilmington Sav. Fund Soc'y FSB v. Mortg. Elec. Registration Sys., Inc. \(COA18-1060; May 21, 2019\)](#)

Homeowner defaulted on his mortgage as well as failed to pay HOA assessments. After a hearing on the HOA's action seeking a lien, the property was sold by quitclaim deed stating that title was "subject to any and all superior liens." Meanwhile, the note and deed of trust was assigned multiple times, although at one point one of the earlier holders of the note, MERS, filed a purported satisfaction of the deed of trust. Plaintiff, who was a subsequent holder of the deed of trust, initiated suit against multiple parties including the new owner seeking a judgment declaring the deed of trust to be a valid, enforceable first lien on the property, and that the new owner had acquired the property subject to this prior lien. The trial court determined that MERS had no interest in the deed of the trust at the time the purported satisfaction was recorded and therefore the satisfaction was void. The court granted defendant's motion for judgment on the pleadings.

The Court of Appeals reversed the trial court's order granting defendant's motion for judgment on the pleadings and remanded to the trial court to enter summary judgment for plaintiff. The Court noted that North Carolina is a "pure race" state in which the first person to record conveyance of a property takes priority, whether or not there is notice of other conveyances. There is an equitable exception, stated in *Union Cent. Life Ins. Co.*, 193 N.C. 456, 462 (1927),

where a person has relied on a cancellation of the mortgage, even if not valid, and is induced by that cancellation to purchase the property or accept a mortgage as security for a loan; that person retains priority. The trial court erroneously concluded that since plaintiff purchased the note and deed of trust while litigation concerning priority was pending, plaintiff could not rely on being protected by the equitable exception regarding the release of the mortgage. *[Summary by Aly Chen.]*

Effect of a Foreclosure on a Tax Lien

[Henkel v. Triangle Homes, Inc. \(COA15-1123; Sept. 20, 2016\)](#)

The North Carolina Court of Appeals held that a deed to real property obtained at a foreclosure sale without notice to the United States does not extinguish a federal tax lien on the property. The court noted that the general rule that federal tax liens are inferior to local tax liens applies only when the United States is provided prior notice of a foreclosure sale arising from a local tax liability. A senior lienholder foreclosing on a property subject to a federal tax lien must provide the United States notice prior to the foreclosure sale in order to extinguish the lien. If no notice is provided to the United States, then the federal tax lien remains undisturbed by the foreclosure.

Statute of Limitations

[In re Foreclosure of Brown \(COA14-937; April 21, 2015\)](#)

Mortgagor/Borrower challenged foreclosure on the basis of the expiration of the statute of limitations applicable to a foreclosure under [G.S. 1-47\(3\)](#). Provided that the mortgagor remains in absolute possession of the property during the 10 year period, court held that the 10-year statute of limitations period runs from the last to occur of the following: (i) the date that the power of sale becomes absolute, (ii) the date of the last payment made on the loan, and (iii) the date of the forfeiture of the mortgage. The court also held that the power of sale becomes absolute on the date the loan is accelerated and, if the loan is not accelerated, on the maturity date.

Service of Notice of Hearing; Good Faith Purchaser for Value; Award of Attorneys' Fees

[In re Foreclosure of George \(COA18-611; Feb. 19, 2019\)](#), with concurrence and dissent

[In re Foreclosure of George \(NC No. 77A19, April 16, 2021\)](#)

[In re Foreclosure of George \(COA22-33; September 6, 2022\)](#)

Non-judicial foreclosure filed before the clerk of superior court related to a claim of lien for unpaid homeowners' association fees in the amount of \$204.75 on an otherwise unencumbered property in Mecklenburg County. There were two record owners of the property: Mrs. Hygiena Jennifer George and Mr. Calmore George. The trustee included as evidence of proper notice two returns of service indicating (i) personal service by the sheriff on Mrs. George and (ii) substituted service by the sheriff on Mr. George by leaving notice with "Mrs. Jennifer George" at their residence. The trustee also filed an affidavit showing attempts at service by certified mail, return receipt requested and by first class mail at the property and the record owners' other address in the Virgin Islands. The clerk entered an order allowing the foreclosure to proceed. The trustee completed the foreclosure sale and KPC Holdings purchased the property out of foreclosure. KPC then conveyed the property to National Indemnity in consideration for a promise to pay \$150,000.00, evidenced by a note and deed of trust. The Georges then filed a motion to set

aside the foreclosure sale under Rule 60(c) of the NC Rules of Civil Procedure alleging invalid service in the foreclosure. The superior court ordered KPC and National Indemnity joined as necessary parties to the proceeding, but entered an order that the trustee to the deed of trust between KPC and NI was not a necessary party. The superior court entered an order setting aside the foreclosure, cancelling the trustee's foreclosure deed to KPC, and cancelling the deed from KPC to NI. Both KPC and NI appealed.

NC Court of Appeals. The COA affirmed the superior court on two grounds: (i) the trustee under the deed of trust from NI to KPC was not a necessary party to the Rule 60 proceeding and (ii) notice given to Mr. George was insufficient. However, the COA reversed the superior court's decision to set aside the foreclosure and void the deeds. The COA held:

1. The trustee of the deed of trust from NI to KPC was not a necessary party to the Rule 60 proceeding. Pursuant to G.S. 45-45.3, the trustee is not a necessary party to a civil action or proceeding involving (i) title to real property encumbered by a lien or (ii) foreclosure of a lien other than the lien of the deed of trust. Here the deed of trust from NI to KPC was not the lien that was the subject of the foreclosure and therefore the trustee of that deed of trust was not a necessary party to the proceeding.
2. Notice in the original foreclosure proceeding was insufficient to Mr. George. Service by personal delivery may be accomplished by delivery of the notice of hearing to (i) the natural person named in the NOH or (ii) by leaving a copy at the party's dwelling house or usual place of abode with someone of suitable age and discretion residing therein. There is no hard and fast rule for what constitutes a person's dwelling house or usual place of abode and a person may have more than one. Here the evidenced showed that the Mecklenburg County property was not the Georges' dwelling house or usual place of abode. The Georges owned the property in Mecklenburg County but lived in the Virgin Islands. Their three daughters lived at the property to attend college. The Georges visited the property a few times a year for holidays and maintenance issues and stayed on an inflatable bed in the study when they visited. The sheriff had actually served a daughter of Mr. George, Janine, who said she was Mrs. Jennifer George, the name of her mother. The superior court correctly held that the trustee thus failed to serve all record owners of the property as the property was not Mr. George's dwelling house or usual place of abode.
3. KPC was a good faith purchaser for value and the Georges' received constitutionally sufficient notice. Therefore, the deed from the foreclosure trustee to KPC and the deed from KPC to NI were not void and the foreclosure would not be set aside. Title to property sold to a good faith purchaser for value cannot be set aside. Here no record evidence exists that KPC or NI had actual or constructive notice of the improper service. Nothing existed in the foreclosure record that would reasonably put any prospective purchaser on notice that service was improper as the sheriff's return indicated that personal service was made on Mr. George by leaving copies at his residence with Mrs. Jennifer George. KPC was entitled to rely on that record. The low price KPC paid (\$2,650.22) comparative to the value of the property and the subsequent consideration NI paid (\$150,000.00) was not enough to set aside a foreclosure sale where there were no other material irregularities in the sale. Here

the failure to effectuate service was not a material irregularity. Finally, although notice was not sufficient for purposes of Rule 4 as required in the foreclosure proceeding, Mr. George did receive constitutionally sufficient notice required before the property was sold in the foreclosure – the homeowners’ association attempted personal service on Mr. and Mrs. George, sent certified and regular mail to both the Mecklenburg and Virgin Islands properties, and sent an email to a “Jennifer George” before the expiration of the upset bid period who responded requesting a reinstatement quote. The court also noted that the property had previously twice been subject to foreclosure proceedings and the Georges’ were familiar with the procedure.

COA Concurrence: The concurring judge notes this is a harsh result as the record owners lost significant wealth due to the low purchase price out of the foreclosure, but the court is compelled to follow the law. There is nothing in G.S. 1-108 that requires the consideration paid by a good faith purchaser be substantial. Unlike other statutes that require a good faith purchaser to pay a valuable consideration, G.S. 1-108 only requires that the purchaser at the judicial sale believe in good faith the sale was proper. Here KPC believed the foreclosure sale was proper and therefore is protected as a good faith purchaser.

COA Dissent: The dissenting judge would have affirmed the superior court’s order setting aside the foreclosure sale and voiding the deeds. The record does not establish that KPC was a good faith purchaser under G.S. 1-108 because of the gross inadequacy of the consideration paid for the property coupled with the other inequitable element of improper service on Mr. George.

NC Supreme Court. The Georges appealed to the North Carolina Supreme Court. The NC Supreme Court affirmed the COA in part, reversed in part, and remanded the matter to the trial court for determination of an additional issue. The court stated that an analysis of prior decisions demonstrates that “for a subsequent purchaser to be denied access to the benefits that are otherwise available to good faith purchasers for value, the record must show the existence of additional irregularity or defect in the proceedings leading to the challenged foreclosure sale in addition to an inadequacy of the price that was paid by the purchaser.” P. 27. Here there was evidence in the record of both. The trial court had a rational basis for concluding that the purchaser paid a grossly inadequate price and had ample reason to question the sufficiency of the notice of the foreclosure proceeding to the Georges. The COA erred in concluding the trial court abused its discretion when the trial court determined the purchasers were not good faith purchasers for value. However, the trial court did err in failing to consider the issue of restitution under G.S. 1-108. The NC Supreme Court remanded the matter for a determination by the trial court as to whether the purchasers were owed restitution for the value of any improvements to the property.

On remand the trial court denied the Georges’ request to recover restitution for their partially demolished home and other expenses related to their ejection, as well as the Georges’ request for the award of attorneys’ fees related to their successful motion to set aside the foreclosure. The trial court also denied KPC’s request for restitution for the cost of the invalidated foreclosure sale. The Georges and KPC appealed.

NC Court of Appeals (appeal following remand). The COA affirmed the trial court’s decision in part, reversed in part, and remanded back to the trial court to consider what constitutes a reasonable award of attorneys’ fees and restitution for the Georges. The court affirmed the trial court’s denial of KPC’s request for restitution, holding that the doctrine of clean hands barred recovery of any restitution by KPC due to the grossly inadequate purchase price KPC paid for the home, the fact that KPC had adequate reason to question the sufficiency of the foreclosure notice to the Georges, and upon discovering such inadequacy, denying the Georges’ offer to purchase the home back from KPC at auction price. In holding that the trial court erred in failing to award the Georges restitution, the court found the trial court’s denial was “manifestly unsupported by reason,” as G.S. 1-108 grants the trial court discretion to award restitution where a judgment is set aside pursuant to N.C. R. Civ. Pro. 60 and any part of the judgment has been collected or enforced, and here “recovery of a partially demolished home is a strikingly insufficient remedy for the extensive damages that the Georges have suffered from the defective foreclosure proceeding and Respondent’s and Intervenor’s actions in bad faith.” ¶24. The court stated that failure to award any restitution to the Georges is an abuse of discretion. In its review of the trial court’s denial of the Georges’ request for attorneys’ fees related to the Rule 60 motion, the court set forth two criteria for recovery of attorneys’ fees under G.S. 47F-3-116:

- (1) that the Georges are the prevailing party, and
- (2) that they prevailed in “an action relating to the collection of assets.”

The court found that the Georges successfully challenged the foreclosure order, with the trial court setting aside the foreclosure sale and subsequent transfers of the deed for lack of proper service. The court rejected the respondents’ argument that the Georges must have prevailed on the underlying foreclosure action. In finding that the Georges prevailed in an action relating to the collection of assets, the court reasoned that the Georges’ Rule 60 motion was necessary to obtain relief from the Association’s defective foreclosure to collect unpaid dues, thereby within the meaning of “any civil action relating to the collection of assessments.” The court remanded the case for consideration of what constitutes a reasonable award of attorneys’ fees and restitution for the Georges.

Service of Notice of Hearing; Attorneys’ Fees

[In re Foreclosure of Garrett \(COA15-1083; COA15-1118; Nov. 15, 2016\)](#)

Facts: This case involved three separate foreclosures.

1. First, the homeowner association foreclosed based on a claim of lien for unpaid assessments (Foreclosure #1). The HOA took title to the property out of the foreclosure and later conveyed the property to the first-lien mortgagee, Household Realty Corporation.
2. The HOA filed a second foreclosure as a result of Household’s failure to pay assessments and conveyed the property to Select Transportation Services LLC out of the foreclosure (Foreclosure #2). The HOA did not serve Household, the record owner, at its registered agent address in NC or principal office in IL. Instead, the HOA served Household’s “officer, director, or managing agent” at the NY address shown on the deed conveying the property from the HOA to Household recorded between Foreclosure #1 and #2.

3. Prior to the conveyance of the property by the trustee to Select from Foreclosure #2, Household filed a notice of hearing and amended notice of hearing initiating a foreclosure of the first-priority deed of trust (Foreclosure #3). Select was not served with the notice of hearing or amended notice of hearing for Foreclosure #3. Select was not the record owner or the borrower at the time of the filing of either notice of hearing. The trustee conveyed the property via trustee's deed to Household out of Foreclosure #3.

Procedural History: After the recordation of the trustee's deed from Foreclosure #3, Select filed a motion under GS 1A-1, Rule 60(b) to set aside Foreclosure #3 due to, in part, to the failure of the trustee to notice Select. Household also filed a Rule 60(b) motion to set aside Foreclosure #2 due to insufficient notice, given that the HOA did not serve Household at its registered agent or principal office address. At a consolidated Rule 60 hearing, the trial court entered an order granting the motion to set aside Foreclosure #3 and denying the motion to set aside Foreclosure #2. Select later filed a third motion for attorneys' fees, which was granted. Household appealed from both orders.

Disposition: The NC Court of Appeals affirmed the trial court's order on the Rule 60(b) motions and reversed the attorneys' fees order.

1. With regard to Foreclosure #2, the court held that the HOA properly served Household in the second foreclosure. This was based on the fact that (i) service was by certified mail, return receipt requested, (ii) service was addressed to Household by "its officer, director, or managing agent," (iii) the return receipt was signed as received, (iv) the address was the same as the used by Household on the deed from Foreclosure #1, and (v) the address was the one used to by the HOA to serve Household on prior occasions. The failure to serve Household at the registered agent or principal office address did not alone result in improper service.
2. With regard to Foreclosure #3, the court held that Household's failure to notice Select supported the trial court's order setting aside Foreclosure #3. The court did not provide analysis as to why Select was entitled to notice of Foreclosure #3.
3. Finally, with regard to the attorneys' fees order, the court held that the trial court's order did not identify the grounds on which the trial court awarded fees and therefore vacated and remanded the order to trial court for a new hearing.

Author's Note: This opinion does not address GS 45-21.16(b), which governs who is entitled to notice of the foreclosure hearing, as it does not appear that either party raised the issue on appeal or challenged the trial court's order related to Foreclosure #3 on that basis. In addition, Rule 60 no longer applies to non-judicial foreclosure proceedings given the NC Supreme Court's decision in [In re Foreclosure of Lucks](#). That opinion states that the N.C. Rules of Civil Procedure do not apply to non-judicial foreclosures.

Service of Notice of Hearing; Authority to Set Aside a Sale; Good Faith Purchaser for Value In re Foreclosure of Ackah (COA16-829; Sept. 5, 2017), with dissent

Homeowners' association (HOA) foreclosed on real property under GS Chapter 47F. After the foreclosure sale, the homeowner filed a motion to set aside the foreclosure order due to insufficient notice. The superior court entered an order setting aside the foreclosure and restoring title to the homeowner. The clerk then entered an order returning possession of the property to the homeowner. The high bidder at the foreclosure sale appealed. On appeal, the

NC Court of Appeals affirmed in part and reversed in part. The court held the superior court had the authority to set aside the sale under Rule 60 of the NC Rules of Civil Procedure. The court affirmed the trial court's finding that the HOA failed to use due diligence before relying on posting to notify the homeowner of the proceeding as required under Rule 4 of the Rules of Civil Procedure. Although the HOA attempted service by certified mail, which was unclaimed, and regular mail, the HOA had the homeowner's email address and failed to email her notice and thus failed to meet the standard of due diligence under Rule 4. However, the relief ordered by the court, that the homeowner was entitled to a return of the property, was improper. The homeowner was limited under GS 1-108 to restitution from the HOA because the property had been conveyed to a good faith purchaser for value. The inadequacies of notice, although improper under Rule 4, did not violate constitutional due process and therefore the homeowner was not entitled to the return of the property.

Dissent: The dissenting judge would have found that the trial court had the authority to set aside the sale under Rule 60 and to restore title to the homeowner as a result of the order to set aside the sale. The dissenting judge would have found that GS 1-108 affords the trial court discretion to affect title to the property if the trial court deems it necessary in the interest of justice despite a conveyance to a good faith purchaser.

Service of Notice of Hearing

[Watauga County v. Beal \(COA16-1226; Oct. 3, 2017\)](#)

Prior to filing this *tax foreclosure*, the County attempted several times unsuccessfully to deliver tax bills, payment plans, and collection notices to defendant's address of record, and during that time could find no other contact information for her. When the County filed this foreclosure action, the County served it by publication (and shortly thereafter also attempted service by certified mail, again unsuccessfully). After the court entered default judgment against defendant and the property was sold, she moved to set aside the sale based on the County's lack of due diligence in locating her before attempting service by publication. The trial court (district court) denied the motion to set it aside. The Court of Appeals affirmed, holding that under the facts of this case, the "due diligence" requirement for service by publication had been met *prior to* the filing of the complaint itself. The court stated that "where plaintiff already knew from extensive prior experience with defendant that it could not with due diligence effect service of process on defendant by personal delivery or by registered or certified mail...plaintiff's actions satisfied the 'due diligence' necessary to justify the use of service of process by publication."

[Summary by Ann Anderson.]

Right to Foreclose

[In re Foreclosure of Nicor, LLC \(COA18-1071; Aug. 6, 2019\)](#)

Borrower executed multiple promissory notes secured by multiple deeds of trust on various properties. Borrower defaulted under the notes and subsequently entered into two forbearance agreements with the lender. In the agreements, the lender agreed not to exercise its remedies under the loan documents for a certain period of time. In exchange, the borrower acknowledged the defaults under the notes and the amount of the debt owed and delivered a signed confession of judgment to the lender for the full amount due under the notes. The lender could file the

confession of judgment if borrower failed to satisfy the terms of the forbearance agreement. Later, the forbearance period expired; the borrower failed to satisfy the forbearance agreement terms. The lender filed the confession of judgment with the court for the full amount of the debt due under the notes. The lender then initiated three power of sale foreclosures related to the deeds of trust securing the notes. The clerk and the superior court entered orders authorizing sale.

The borrower appealed to the NC Court of Appeals, challenging the trial court's finding that the lender had a right to foreclose under G.S. 45-21.16(d)(iii). The borrower argued that the anti-deficiency statute set forth in [G.S. 45-21.36](#) precluded lender's right to foreclose as a matter of law. The anti-deficiency statute provides that a court may eliminate a deficiency if the borrower can show (i) the property sold at foreclosure was worth the amount of the debt at the time and place of sale or (ii) the lender's bid was substantially less than the true value of the property. The borrower argued that G.S. 45-21.36 precluded the lender from filing a confession of judgment for the full amount of the debt and then later foreclosing on the property because it would allow the lender to avoid the application of the anti-deficiency protections. The court of appeals determined that the borrower's argument was an equitable argument and therefore not a defense that may be raised in a power of sale foreclosure before the clerk or the superior court on appeal from the clerk. The defense could be raised in a separate action to enjoin the foreclosure filed under G.S. 45-21.34.

Right to Foreclose (Reverse Mortgage)

In re: Foreclosure of Clayton (COA16-960; Aug. 1, 2017)

Respondent's husband entered into a reverse mortgage with Wells Fargo (WF). Respondent and her husband signed a deed of trust (DOT) as borrowers. Only the husband signed the note as borrower. The DOT provided that the lender could accelerate the debt upon the borrower's death and foreclose the lien, provided that the property did not remain the principal residence of a "surviving borrower." After respondent's husband died, WF accelerated the debt and initiated foreclosure proceedings. The clerk of superior court dismissed the action finding that lender did not have the right to foreclose because the respondent was a surviving borrower under the DOT and the house was respondent's principal residence. WF appealed to superior court. The superior court held that the husband was the only borrower and entered an order authorizing foreclosure. The respondent appealed asserting that (i) the order was not supported by competent evidence because WF failed to formally offer any evidence at the hearing, and (ii) the lender had no right to foreclose for the same reasons found by the clerk of superior court. The NC Court of Appeals affirmed the order of the superior court authorizing the foreclosure and held:

1. Evidentiary rules are relaxed in foreclosure proceedings. The documents handed to the court in a binder and not formally offered and admitted into evidence by WF, along with stipulations by the parties, constituted sufficient competent evidence of the requisite statutory criteria for a power-of-sale foreclosure.
2. WF had a right to foreclose based on a reading of the terms of the loan documents and relevant statutory provisions. The court noted that the deed of trust, note, and loan agreement were executed simultaneously and therefore must be considered as

one instrument. Reading the documents together, the husband was the only contemplated borrower and the only person obligated to repay the loan. In addition, the respondent was not old enough to qualify for a reverse mortgage as a “borrower” under G.S. 53-257(2). Therefore, the husband was the only borrower, the respondent was not a “surviving borrower,” and WF had a right to foreclose under the DOT.

Role of the Substitute Trustee

[In re Foreclosure by Goddard & Peterson, PLLC \(COA15-591; July 5, 2016\)](#)

Trustee filed power of sale foreclosure, the clerk entered an order authorizing sale, and the debtor appealed. After the hearing before the clerk, but before the appeal hearing in superior court, the trustee was removed and replaced with a new trustee. The former trustee appeared at the superior court hearing as counsel for the lender. Debtor objected to former trustee appearing as lender’s counsel, the superior court overruled the objection, and entered the order authorizing sale. The debtor argued on appeal that the superior court erred in allowing the former trustee to appear on behalf of the lender because the change in representation constituted a breach of the trustee’s fiduciary duty. The NC Court of Appeals affirmed the superior court. The court noted the trustee has a fiduciary duty to both the debtor and the lender and must maintain the strictest impartiality while serving in the role as trustee. However, the court held that the former trustee was not precluded from withdrawing as trustee and later appearing as lender’s counsel, particularly where the former trustee gave notice to the debtor of the change in representation and there was no evidence that (i) the trustee acted in bad faith or (ii) the debtor was injured by the trustee’s actions. In addition, the court found no evidence of an ethical violation by the attorney/trustee based on a review of NC State Bar ethics opinions and a determination that the change in representation did not create an unfair advantage in favor of the lender.

Error in Deed of Trust

[In re Foreclosure of Thompson \(COA16-1014; Apr. 18, 2017\)](#)

Mortgage debtors appealed from the trial court’s order allowing foreclosure of their home to proceed. The only issue raised on appeal was whether an error in the property description in the deed of trust rendered the bank’s legal title invalid such that it had no right to pursue foreclosure. The Court of Appeals affirmed the trial court’s order after discussing the requirements of G.S. 22-2, the statute of frauds, with regard to the level of specificity needed to convey proper legal title. The Court cited to case law discussing the difference between a patent and a latent ambiguity, and noted that in general, appellate courts of this state have affirmed the validity of deeds and similar documents “when it is possible to ascertain the identity of the subject property,” and have upheld a trial court’s decision to allow extrinsic evidence in order to identify a property with greater certainty. In the instant case, the error in the deed of trust amounted to no more than a scrivener’s error which did not affect the right of the bank to foreclose on the property.

[Summary by Aly Chen.]

Evidence

- Business Records Exception

[In re Foreclosure by Goddard & Peterson, PLLC \(COA15-591; July 5, 2016\)](#)

Clerk entered an order authorizing foreclosure sale and the debtor appealed to superior court. On appeal, the debtor objected to the admission of records of the debtor's loan account into evidence. The superior court overruled the debtor and the debtor appealed. The NC Court of Appeals affirmed the superior court and held the records were properly admitted under the business records exception to the hearsay rule. The court found that the "authorized signor" of the lender's affidavit of indebtedness constituted a qualified witness with personal knowledge able to authenticate the records through the affidavit. The court found that the records were properly authenticated based on statements in the affidavit that (i) the records were made and kept in the regular course of business by persons having knowledge of the information set forth at or near the time of the acts recorded, (ii) the signor had reviewed the records, and (iii) the signor had personal knowledge as to how the records were kept and maintained. The court noted that there is no requirement that the records be authenticated by the person who made them.

- Hearsay

[In re Foreclosure by Goddard & Peterson \(COA15-591; July 5, 2016\)](#)

Clerk entered an order authorizing foreclosure sale and the debtor appealed to superior court. On appeal, the debtor objected to the admission of certain statements in the lender's affidavit of indebtedness into evidence as hearsay. The superior court overruled the objection and the debtor appealed on this basis as well. The NC Court of Appeals affirmed the superior court and held that the court properly considered the affidavit as competent evidence given (i) the specific provision in G.S. 45-21.16(d) allowing the court to consider affidavits and certified copies of documents and (ii) the necessity for expeditious procedure in a power of sale foreclosure. The court found that the debtor provided no reason to require the lender's out-of-state employee to appear at the foreclosure hearing and present live witness testimony. The court also noted that any legal conclusions contained in the affidavit, such as statements that the lender is the holder of the loan, are to be disregarded by the court, but do not otherwise invalidate the affidavit as evidence.

Rule 41 Two-Dismissal Rule

[In re Foreclosure by Rogers Townsend & Thomas \(In re Foreclosure of Beasley\) \(COA14-387; June 2, 2015\)](#)

Trustee on behalf of lender filed power of sale foreclosure. Trustee then filed a notice of voluntary dismissal of the foreclosure proceeding. Fifteen months after the dismissal, the trustee filed a second power of sale foreclosure. Prior to the foreclosure hearing before the clerk, the borrower filed a motion to dismiss the action with prejudice and the trustee filed a second voluntary dismissal of the foreclosure. At the hearing, the clerk entered an order finding that the second voluntary dismissal filed by the trustee operated as an adjudication on the merits pursuant to Rule 41(a) and granted the borrower's motion to dismiss with prejudice. Lender

appealed. In its opinion, the NC Court of Appeals addressed two issues raised by the application of Rule 41 to a power of sale foreclosure.

- First, the court noted that Rule 41 allows a plaintiff to dismiss the action any time prior to resting the plaintiff's case and file a new action on the same claim within one year after the dismissal. The court held that this one year time period is a "savings provision" that constitutes an extension beyond the general statute of limitations. It does not limit the statute of limitations if it has not yet expired. In the case of a foreclosure, there is a 10 year statute of limitations. Therefore, Rule 41 did not preclude the second power of sale foreclosure in the instant case even though it was filed more than one year after the first dismissal because the 10 year statute of limitations had not yet expired.
- After determining that Rule 41 did not preclude the second foreclosure filing by the trustee, the court then analyzed the effect of the second voluntary dismissal under Rule 41(a). The court held that the trustee's two prior voluntary dismissals of the Chapter 45 foreclosure proceeding on the same note did not operate as an adjudication on the merits that would prevent a third Chapter 45 foreclosure proceeding under Rule 41(a). Notwithstanding that the lender accelerated the debt prior to the first action, if the second action is based on different defaults or new period of defaults from the first action, then a third action is not barred because the first two actions did not arise out of the same claim of default. The court noted that the lender's election to accelerate the amount due under a note does not necessarily place future payments at issue such that the lender is barred from filing subsequent foreclosure actions based on subsequent defaults.

Author's Note: This opinion was vacated by the NC Supreme Court in [In re Foreclosure of Beasley \(NC276PA15; Dec. 21, 2016\)](#). Citing [In re Foreclosure of Lucks](#), the NC Supreme Court held that the trustee did not take a dismissal of the second foreclosure proceeding. Instead, the trustee "effectively withdrew its notice of the non-judicial foreclosure hearing" and thus terminated the proceeding.

[In re Foreclosure of Herndon \(COA15-488; Jan. 19, 2016\)](#)

Applying a holding from [In re Foreclosure of Beasley](#) to a similar set of facts, the NC Court of Appeals held that a third Chapter 45 foreclosure proceeding filed after the trustee voluntarily dismissed two previous actions under Chapter 45 on the same note was not barred by the Rule 41(a) "two-dismissal rule." The court found that each action was based on a different period of defaults and therefore the second voluntary dismissal did not operate as an adjudication on the merits and did not preclude the trustee from filing a third Chapter 45 foreclosure. The court reiterated from [Beasley](#) that the prior acceleration of the loan by the lender did not preclude the filing of future foreclosure actions based on subsequent defaults.

Author's Note: Rule 41 is no longer applicable to non-judicial foreclosure proceedings given the NC Supreme Court's decision in [In re Foreclosure of Lucks](#). That opinion states that the N.C. Rules of Civil Procedure do not apply to non-judicial foreclosures.

Application of Rule 52(a): Findings of Fact and Conclusions of Law; De Novo review
[In re Foreclosure of Garvey \(COA14-570; June 2, 2015\)](#)

The court restated language from earlier decisions that the N.C. Rules of Civil Procedure apply to power of sale foreclosures. Specifically, the court held that Rule 52(a), which requires the trial judge to make written findings of fact and conclusions of law, applies when a superior court judge conducts a hearing *de novo* on appeal from an order of the clerk. The order of the judge must include more than a summary conclusion that the party seeking to foreclose satisfied the statutory requirements. The judge must make findings as to each of the six factors required to foreclose under Chapter 45 and do so by conducting a *de novo* hearing on appeal, which is more than a *de novo* review of the clerk's order. After the *de novo* hearing, the judge must make the judge's own findings of fact and conclusions of law before entering an order as to whether the trustee may proceed with the foreclosure.

Author's Note: Rule 52(a) is no longer applicable to non-judicial foreclosure proceedings given the NC Supreme Court's decision in [In re Foreclosure of Lucks](#). That opinion states that the N.C. Rules of Civil Procedure do not apply to non-judicial foreclosures.

Authority to Cancel a Note

[In re Dispute over the sum of \\$375,757.47 \(COA14-1239; April 21, 2015\)](#)

The NC Court of Appeals applied G.S. 25-3-604 to determine whether the original lender had the authority to cancel a note where the original lender recorded a Certificate of Satisfaction with the Register of Deeds. The NC Court of Appeals determined, based on a review of the allonge to the note and the original note submitted into evidence by the current holder of the note, that the original lender did not have the authority to cancel the note because at the time of the recording of the satisfaction, the lender had previously assigned the note, no longer owned the loan, and was not a "person entitled to enforce the instrument" under G.S. 25-3-604.

Holder of the Note

[In re Foreclosure of Deed of Collins \(COA16-655; Feb. 7, 2017\)](#)

In a *de novo* Chapter 45 foreclosure hearing, the trial court did not err in accepting into evidence the affidavit of lender's administrative services employee averring the lender's possession of the original note. The fact that the affidavit was executed more than two years prior to the hearing did not invalidate it, and the affidavit sufficiently revealed that the averments as to the existence and status of the note and the merger of the holder were made on the affiant's personal knowledge. In addition, the evidence before the trial court amply demonstrated that the lender was holder of the note, so the trial court's failure to make an explicit finding of fact regarding physical possession did not require a remand.

[Summary by Ann Anderson.]

[In re Dispute over the sum of \\$375,757.47 \(COA14-1239; April 21, 2015\)](#)

The NC Court of Appeals summarized the law under G.S. Chapter 25 applicable to indorsements and the assignment of notes. The court then applied the holding of [In re Bass](#), 366 N.C. 464 (2013) to the indorsements challenged by the borrower. Under [Bass](#), there is a presumption that an indorsement to a note is valid. The court held that where a purported holder appears in court with the original note and the note is the subject of a clear chain of indorsements ending with a blank indorsement, the court could find sufficient competent evidence that purported holder was in fact the holder of the note. The burden then shifts to the borrower to provide evidence

that the purported holder is not in fact the holder. The court determined that both arguments made by the borrower failed to overcome the legal presumption and physical fact that the purported holder was the actual holder of the note. The first argument made by the borrower was that the version of the note presented in court did not match an earlier version faxed to the borrower's counsel. The court did not find this argument persuasive because the only substantive difference the court found between the copy and the original presented in court was the addition of the most recent indorsement, which was dated after the date the copy of the note was faxed to the borrower's counsel. Second, the court held that the borrower's arguments that MERS improperly assigned the note were without merit. The court held that MERS was merely the nominee under the deed of trust and had no authority to assign the note as MERS was never the holder of the note. The court held that the deed of trust followed the note and therefore any assignment of the note resulted in an assignment of the deed of trust.

[In re Foreclosure of Rawls \(COA15-248; Oct. 6, 2015\)](#)

The clerk of superior court entered an order authorizing sale in a power of sale foreclosure proceeding. The owner of the real property appealed. At the *de novo* hearing before the superior court judge, the party seeking the order of foreclosure produced the original promissory note indorsed in blank. The owner of the real property disputed whether the party seeking the order of foreclosure produced sufficient competent evidence that it was the holder of the note. The NC Court of Appeals held that production of the original note indorsed in blank by the party seeking the order of foreclosure is alone enough to establish that the party is the holder.

[Greene v. Trustee Services Of Carolina, LLC \(In re Foreclosure of Kenley\) \(COA15-97; Jan. 5, 2016\)](#)

Production of the original note indorsed in blank at the Chapter 45 foreclosure hearing by the party seeking to foreclose constitutes sufficient evidence for the court to determine that the party is the holder of the note.

Holder of a lost note

[In re Foreclosure of Frucella \(COA18-212; Oct. 2, 2018\)](#)

Respondents executed a note and deed of trust on their real property to secure the note. After closing on the loan, the original holder of the note transferred it to CitiMortgage and sometime thereafter the note was lost. Respondents defaulted and CitiMortgage then initiated a Chapter 45 foreclosure proceeding against respondents. The clerk and the superior court on appeal issued an order allowing the foreclosure sale. Respondents appealed to the NC Court of Appeals, asserting that CitiMortgage was not entitled to seek a non-judicial foreclosure because CitiMortgage was not the holder of the note due to the loss of the note. The court disagreed, concluding that the two lost note affidavits of filed by a CitiMortgage employee satisfied the requirements of G.S. 25-3-309, the NC Uniform Commercial Code provision governing entitlement to enforce a lost instrument. Because the evidence was sufficient to support the superior court's findings of fact, the superior court did not err in determining that CitiMortgage was the holder of the Note and allowing a sale. The court noted the purpose of non-judicial foreclosures, which is to avoid lengthy and costly judicial foreclosures and to allow the parties to

expeditiously resolve mortgage defaults. Here there was no evidence showing that any other entity was the holder of the debt or an actual controversy existed regarding CitiMortgage's status as holder.

Rights of High Bidder upon Expiration of the Upset Bid Period
[In re Foreclosure of Menendez \(COA17-1341; May 15, 2018\).](#)

Trustee filed power of sale foreclosure before the clerk. Trustee held the sale and a third-party was the high bidder at the sale. Between the sale and the expiration of the upset bid period, the lender reinstated the loan upon receipt of a payment from the borrower. After the expiration of the upset bid period, the trustee filed, and the clerk granted, a motion to set aside the foreclosure sale and the report of sale. The trustee returned the respondent's deposit and filed a termination of the foreclosure. The bidder appealed the clerk's order setting aside the sale. The superior court denied the appeal and the bidder appealed to the NC Court of Appeals. The bidder argued on appeal that the rights of the parties were "fixed" upon expiration of the 10-day upset bid period; the clerk was required to confirm the sale; and the trustee was required to convey title to the property to the bidder. The court rejected this argument and dismissed the appeal. The court held the bidder had no interest in the underlying property or the deed of trust. The bidder was not a real party in interest and did not have standing to force a forfeiture in satisfaction of the deed of trust. The rights "fixed" upon expiration of the upset bid period were that the bidder was obligated to tender the purchase price and the trustee could hold the bidder liable for that price. Furthermore, where the bidder had actual and constructive notice of a provision in the notice of sale that the only remedy was return of the deposit if the trustee was unable to convey the property, the trustee owed no further duty to the bidder once the lender reinstated the loan except to return the deposit.

Court's authority to safeguard interests of parties and to fix procedural details of upset bids under G.S. 45-21.27

[In re Foreclosure of Radcliff \(COA18-419; Dec. 18, 2018\)](#)

Wells Fargo (WF), a junior lienholder on real property, enters an upset bid in a power of sale foreclosure. Mr. Johnson enters a second, subsequent upset bid. Upon entry of each upset bid, the clerk emailed the trustee notice of the upset bid and the trustee mailed notice via first class mail to the prior bidder in accordance with G.S. 45-21.27(e1). However, in the case of Mr. Johnson's upset bid, the trustee did not mail the notice to WF, the last prior bidder, until 5 days after the upset bid was placed. The upset bid period expired and three days later WF filed a motion requesting the court reopen and extend the upset bid period for an additional 10 days. The clerk of superior court denied the motion and WF appealed to superior court. The superior court judge granted the motion and reopened the upset bid period for an additional 10 days. Mr. Johnson then appealed to the NC Court of Appeals.

The COA affirmed the superior court and held that the court has the authority under G.S. 45-21.27(h) to make orders necessary to safeguard the interests of the parties and determine procedural details with respect to upset bids. Here the last prior bidder, WF, had an interest in the collateral real property and stood to be eliminated by the foreclosure proceeding. The

statute does not specify when the trustee must send notice to the last prior bidder of an upset bid. Although the trustee technically complied with the notice requirements in the statute, the COA found that the superior court did not abuse its discretion in finding WF did not receive notice of Mr. Johnson's bid in sufficient time to protect its interests. Therefore, the trial court properly reopened and extended the upset bid period for an additional 10 days based on the authority granted under G.S. 45-21.27(h). The court distinguished this case from prior cases where the court refused to reopen the foreclosure on the grounds that the parties rights were fixed by the expiration of the 10 day upset bid period. In the prior cases, the *borrower*, rather than an upset bidder, sought to reopen the upset bid period to delay or halt a foreclosure sale. In this case, WF, a junior lienholder and bidder, sought to enhance the rights of the parties to the foreclosure by curing a procedural defect and entering a higher bid.

Liability of a Default Bidder

[Glass v. Zaftrin, LLC \(COA14-907; Feb. 3, 2015\)](#)

Bidder entered a high bid of \$315,000.00 during the upset bid period of a foreclosure proceeding. In connection with the bid, the bidder paid a deposit of \$15,750.00. After expiration of the upset bid period, the bidder notified the substitute trustee that it would be unable to complete purchase of the property and thus defaulted on its bid. The substitute trustee moved the court for an order to resell the property and at the second sale the high bid was \$350,000.00. The original defaulting bidder sought the return of the full amount of its deposit from the first sale. Question before the Court of Appeals was whether [G.S. 45-21.30\(d\)](#) allows the costs of the resale to be deducted from the deposit refund where the resale price was more than the defaulting bid plus the costs of resale. The court held that a defaulting bidder is only liable on its deposit to the extent that the final sale price is less than the bid plus the costs of resale. In this case, the final sale price from the resale (\$350,000.00) exceed the total of the defaulting bid (\$315,000.00) plus the costs of resale (\$1,469.80), therefore the defaulting bidder was entitled to the return of its entire deposit (\$15,750.00).

[In re Foreclosure of Ballard \(COA15-475; March 15, 2016\)](#)

Holder of a note, U.S. Bank, as trustee for J.P. Morgan Mortgage Trust 2006-A2, submitted an opening bid at the foreclosure sale. A third party, Abtos LLC, filed a winning upset bid and bid deposit with the clerk of superior court. Abtos then defaulted on the bid and the clerk ordered a resale of the property pursuant to G.S. 45-21.30(c). At the resale, U.S. Bank was the only bidder and bid an amount lower than the bank's opening bid at the original sale. Upon a motion of Abtos to release the original bid deposit, the clerk ordered the bid deposit disbursed to U.S. Bank pursuant to G.S. 45-21.30(d), which provides a defaulting bidder at any sale or resale is liable on the bid to the extent the final sale price is less than the bid plus the costs of the resale. Abtos appealed the clerk's order and argued that the procedure for resale was not the same in every respect as the original sale as is required under G.S. 45-21.30(c) due to the fact that the trustee accepted an opening bid at resale that was less than the opening bid at the original sale. The superior court and the NC Court of Appeals affirmed the order of the clerk. The NC Court of Appeals held that a party's choice to lower its opening bid in a resale does not violate G.S. 45-21.30(c). The court noted that given the "vagaries of the real estate market" it would "seem

strange to bind a party to the amount of its opening bid in a previous sale.” Abtos made no other argument that the actual procedure for resale was different than the original sale.

**Judicial Foreclosure, Equitable Action to Enjoin, and Civil Deficiency Actions
NC Supreme Court and NC Court of Appeals Published Case Summaries**

Meredith Smith, UNC School of Government
January 1, 2015 – November 5, 2024

Collateral Estoppel

[Gray v. Federal National Mortgage Association \(COA18-871; March 26, 2019\)](#)

The clerk entered an order authorizing a foreclosure sale of property owned by the Grays. After the completion of the sale, the Grays filed an action against the substitute trustee and the owner out of foreclosure, Fannie Mae, seeking a declaration that the foreclosure was void and five other claims based, in part, on the argument that the description included on the deed of trust erroneously included two residences instead of just one. The trustee filed a motion for summary judgment, arguing the foreclosure order of the clerk constituted a final judgment and collateral estoppel barred the Grays' claims. The trial court denied the motion for summary judgment and the trustee appealed. On appeal, the NC Court of Appeals reversed the trial court and held that (i) collateral estoppel applies to an order authorizing a non-judicial foreclosure, and (ii) the Grays' claims were barred by collateral estoppel. [Collateral estoppel precludes the re-litigation of an issue in a later action provided the party had a full and fair opportunity to litigate that issue in the earlier proceeding.]

1. In determining whether collateral estoppel applied generally to non-judicial foreclosures, the court examined a 2016 decision of the NC Supreme Court, [In re Foreclosure of Lucks](#). In that case, the Supreme Court stated the doctrines of collateral estoppel and res judicata do not apply to a non-judicial foreclosure. The court interpreted the NC Supreme Court's decision in [Lucks](#) to be limited to those situations where a non-judicial foreclosure was not authorized. Collateral estoppel does apply where the clerk enters an order authorizing a non-judicial foreclosure. The court stated to hold otherwise would require the lender to re-litigate basic issues regarding the validity of the foreclosure and prevent establishment of the finality of the rights of the parties.
2. The court then applied the doctrine of collateral estoppel to the Grays' claims. The court found the Grays had a full and fair opportunity to litigate the issue of whether the trustee was authorized to foreclose on both residences during the foreclosure proceeding. The Grays' claims were (i) premised on the arguments that they did not have proper notice of the property subject to foreclosure or that the deed of trust contained an erroneous legal description or (ii) otherwise related to the foreclosure. These issues were conclusively determined by the clerk in the foreclosure proceeding and the Grays could have appealed from the clerk's order. The Grays were therefore collaterally estopped from raising those issues in a subsequent lawsuit.

Reformation of deed of trust; statute of limitations in G.S. 1-47.2; unclean hands
[Nationstar Mortgage LLC v. Dean \(COA18-132; Sept. 18, 2018\)](#)

In 2004, the Deans used their beach cottage as collateral for a \$1.8 million loan from First South Bank. When recording the deed of trust, the Deans' attorney failed to include the exhibit that contained the full legal description of the property (although the note itself did include the

property's address, and there was no confusion about the property's identity). The attorney soon filed an amended deed of trust to include the description. By then the Deans had also conveyed an interest in the property to another bank, although there seems to be no dispute that it was intended to be a second-position lien. Years later, after the Deans fell behind on the payments on the first note, Aurora Bank (a successor in interest to First South Bank) eventually began foreclosure proceedings. Plaintiff Nationstar soon thereafter took over servicing of the loan and filed this action seeking a declaration that the First South Deed of Trust was a valid encumbrance on the property and, in the alternative, seeking reformation of the Deed of Trust to include the full legal description. The Deans countered that these claims were barred by the doctrine of unclean hands and by the statute of limitations. The trial court found in Nationstar's favor.

The Court of Appeals affirmed as follows: (1) The equitable remedy of deed reformation was appropriate in this case because there was no dispute that both the Deans and First South Bank intended that the property description be included in the recording and that it was only omitted by the inadvertence of the Dean's attorney; (2) Nationstar had standing to bring the reformation claim as the real party in interest because it was the holder of the original note, regardless of whether it was also the note's owner; (3) the ten-year statute of limitations in G.S. 1-47.2 (upon a sealed instrument or conveyance of real property) applied to the reformation claim, so the claim was timely; and (4) the Dean's assertions of unclean hands by Aurora Bank—which they claim persuaded them in 2011 to miss payments in order to trigger a modification process—related to conduct collateral to the 2004 recordation of the First South deed of trust. It therefore did not operate to bar that claim.

[Summary by Ann Anderson.]

[MTGLQ Investors, L.P. v. Curnin \(COA18-349; Dec. 18, 2018\)](#)

Grantee of deed of trust filed an action to quiet title and reform a deed of trust based on an inadequate legal description. The NC Court of Appeals held that reformation of the deed of trust was not necessary as the four corners of the deed of trust sufficiently described the property to create a lien. Although the legal description failed to reference the book and page number of the recorded map with the register of deeds, it referenced the property lot number and phase of development and the deed of trust identified the real estate securing the loan by the street address and tax parcel number. The street address and tax parcel number enabled the land to be identified with certainty.

[Bank of America v. Schmitt \(COA18-222; Dec. 18, 2018\)](#)

Bank of America (BOA) filed an action for declaratory judgment and alternatively reformation of a deed of trust (DOT); the property owner, the Schmitts, filed a counterclaim for reformation. BOA alleged the DOT encumbered both Tracts B and C owned by the Schmitts. The Schmitts contended that the DOT was only intended to encumber Tract B. The NC Court of Appeals held that the description in the DOT was sufficient to encumber both tracts. The effect of the DOT is to be determined by the intent of the parties as it appears from all provisions of the DOT. The DOT described the property only by the legal description for Tract C but included the tax identification numbers for both B and C and the address for B. Further, the DOT included a statement that the borrowers must occupy the property as their principal residence and the only residence was located on Tract B. These facts were sufficient to determine as a matter of law

that the DOT encumbered both tracts. There was insufficient evidence that the inclusion of Tract C in the DOT was a mutual mistake of both parties. Therefore, the Schmitts' counterclaim for reformation failed.

[Wells Fargo Bank, N.A. v. Stocks \(2021-NCSC-90; Aug. 13, 2021\)](#)

[Wells Fargo Bank, N.A. v. Stocks \(COA18-1171; July 2, 2019\) \(with dissent\)](#)

In 2005, Ms. Stocks executed a Note in favor of the bank (now Wells Fargo) to secure a loan on her home, but only her father was listed as a borrower on the Note. The corresponding Deed of Trust, however, listed Ms. Stocks as the borrower, and Ms. Stocks made payments until sometime around 2016. In 2017 Wells Fargo instituted a foreclosure action. It was then discovered that the Deed of Trust did not actually secure a valid debt because Ms. Stocks was not borrower on the Note. Wells Fargo therefore brought a claim for reformation of the Deed of Trust and judicial foreclosure. Ms. Stocks raised a statute of limitations defense (originally premised on G.S. 1-52(9)), which the trial court rejected, and summary judgment was entered in Wells Fargo's favor.

The Court of Appeals (majority) reversed. The court first determined that, under *Nationstar Mtg. LLC v. Dean* (COA 2018), a claim for reformation of a deed is subject to a 10-year statute of limitations under G.S. 1-47(2), and that the accrual of this limitations period is not delayed by a discovery period. Thus, the limitations period began in 2005, and because the claim for reformation was filed in 2017, it was outside the statute of limitations. Summary judgment in favor of Wells Fargo on its judicial foreclosure action was therefore error.

The dissenting COA judge determined that Ms. Stocks had not properly raised the statute of limitations argument under G.S. 47-1 on appeal, and thus it is waived. The judge also found problematic the application of G.S. 1-47(2) (without benefit of a discovery period) merely because the action in question involves a sealed instrument.

On appeal, the NC Supreme Court reversed the NC Court of Appeals and determined the trial court properly granted summary judgment for Wells Fargo on claims for reformation and judicial foreclosure. The supreme court noted that G.S. 1-52(9) applies to an action to reform an instrument for mistake. It establishes a three-year statute of limitations and begins running when the mistake is discovered. Here the mistake was not discovered at the drafting of the documents; it was not discovered until review of the documents when the default occurred in January 2015. The action was filed in May 2017 and thus was timely. Further, no genuine issue of material fact existed as to whether the second deed of trust was intended to secure the second note. Ms. Stocks admitted she understood the property was to serve as collateral under the second deed of trust. Therefore, the deed of trust should be reformed to match the parties' intent.

[Contractual claims under GS 45-21.34 to enjoin foreclosure; 12\(b\)\(6\) dismissal McDonald v. The Bank of New York Mellon Trust Co. \(COA17-1310; May 15, 2018\)](#)

Plaintiff filed a claim under G.S. 45-21.34 to enjoin the foreclosure sale of her home. In the complaint she alleged that the bank had breached the loan agreement (a loan modification), breached the duty of good faith and fair dealing, and violated the Unfair and Deceptive Trade Practices Act. The trial court dismissed her claims under Rule 12(b)(6). The Court of Appeals affirmed. Each of Plaintiff's claims was premised on the existence of a loan modification agreement. The complaint itself (through incorporated attachments) revealed that Plaintiff had failed to meet the first condition for existence of that agreement—making a time-is-of-the-

essence first payment of the modified loan amount. Thus there was no agreement to which the Bank was bound.

Action to Enjoin the Sale under G.S. 45-21.34

[Howse v. Bank of America, N.A. \(COA16-979; Aug. 15, 2017\) \(with partial dissent\)](#)

Borrower filed a civil action seeking (i) a declaratory judgment under the Uniform Declaratory Judgment Act that the lender had no legal or equitable rights in the note and deed of trust, including the right to foreclose, and (ii) an injunction pursuant to G.S. 45-21.34. As part of the litigation, borrower filed discovery and a motion to compel discovery. Lender's counsel filed a motion for summary judgment. Trial court granted the lender's counsel motion on the ground that both claims constituted an impermissible collateral attack on the order entered in a separate power of sale foreclosure and denied the borrower's motion to compel. On appeal, the NC Court of Appeals affirmed in part and reversed in part. The court held that the portion of the action seeking declaratory relief under the UDJA constituted an impermissible collateral attack, but the borrower's action under GS 45-21.34 was not as the power of sale foreclosure statute creates a method by which a borrower can raise equitable and certain legal defenses to a foreclosure in a separate action. Because the trial court based the decision to grant summary judgment and deny the motion to compel entirely on the ground that both claims constituted impermissible collateral attacks, the court reversed the trial court's decision with regard to GS 45-21.34, provided that the parties rights has not become fixed in the foreclosure, and with regard to the motion to compel.

Dissent: The dissenting judge would have affirmed the trial court finding that the borrower failed to produce evidence supporting essential elements of the borrower's claims and thus there was no genuine issue of material fact and summary judgment was proper. The majority responded by noting that the parties had not argued the merits on appeal and the borrower had not been given the opportunity through discovery and at the summary judgment hearing to establish a prima facie case before the trial court.

Deficiency Action filed in connection with a Foreclosure

[Branch Banking and Trust Co. v. Smith \(COA14-554; Feb. 17, 2015\)](#)

Lender loaned \$1,675,000 to borrower, secured by real estate. In connection with the loan, the lender entered into guaranty agreements with eight different individuals. Borrower defaulted, lender foreclosed on the property, and lender entered a credit bid at the sale in the amount of \$800,000. Lender was the high bidder, leaving a deficiency in the amount of approximately \$700,000 based on the balance remaining on the loan. Lender filed a civil deficiency action in superior court against each of the eight individual guarantors, which included one guarantor who had executed a limited guaranty agreement capping his liability at \$418,750. As a defense, the limited guarantor raised [G.S. 45-21.36](#), arguing that the amount bid was substantially less than the true value of the property, and therefore he was entitled to defeat or offset any deficiency judgment against him. Lender objected and argued that defense/offset provisions under G.S. 45-21.36 do not extend to guarantors. The Court of Appeals held the defense/offset set forth in G.S. 45-21.36 is available to guarantors, even if the mortgagor is dismissed from the case. The court remanded the case to allow the guarantor the opportunity to present evidence regarding the true value of the property.

[United Community Bank v. Wolfe \(COA14-1309; July 7, 2015\)](#) {REVERSED: See below.}

Lender foreclosed and was the high bidder at the foreclosure sale. Lender's bid was less than the total value of the debt. Lender filed a deficiency action against the borrowers for the remaining amount due on the loan. Superior court granted summary judgment in favor of the lender and borrowers appealed. NC Court of Appeals reversed and remanded. The court's analysis included a discussion of the defenses available to a borrower under GS 45-21.36 in a deficiency action: (1) the property was worth more than the outstanding debt, or (2) the amount of the lender's bid was substantially less than the true value of the property. The court held that an affidavit from the owner of the property setting forth the specific value of the property is sufficient to raise a genuine issue of material fact whether the value of the property was fairly worth the amount of the debt and thus defeat a summary judgment motion. The court noted prior case law from the NC Supreme Court that the owner's opinion of value is competent to prove the property's value.

[United Community Bank v. Wolfe \(NC289PA15; May 5, 2017\)](#). Reversing the unanimous opinion of the Court of Appeals at __ N.C. App. __, 775 S.E.2d 677 (2015). The anti-deficiency statute, GS 45-21.36, allows a homeowner whose foreclosed property was purchased by the creditor for less than the debt amount to challenge a deficiency action by showing that the property was in fact "fairly worth the amount of the debt[.]" In the deficiency action at issue in this case, the homeowners submitted an affidavit stating that their foreclosed property was "fairly worth the amount of the debt." The trial court found this affidavit insufficient to create a genuine issue of material fact about the property value and granted summary judgment for the creditor bank. The Court of Appeals reversed, holding that the homeowner's opinion of value was competent and sufficient to survive summary judgment. Reversing, the Supreme Court concluded that an affidavit simply making a conclusory restatement of the statutory language and "asserting an unsubstantiated opinion" was not sufficient to "show" the property's value pursuant to the statute. The court stated: "Here the issue is not a landowner's competency to testify but whether the landowner's affidavit presented substantial competent evidence under Rule 56(c) regarding the 'true value' of the foreclosed property." Remanded to the Court of Appeals to reinstate the trial court's grant of summary judgment in favor of the lender bank.

[Summary by Ann Anderson.]

[High Point Bank and Trust Co. v. Highmark Props, LLC \(NC No. 8PA14; Sept. 25, 2015\)](#)

In this case, the Supreme Court further resolved the question of whether a non-mortgagor guarantor to a loan may raise the anti-deficiency defense in order to reduce its outstanding debt to the lender. Here, Plaintiff bank issued two loans to Highmark—\$4.7 million and \$1.75 million. Guarantors, members of Highmark, guaranteed the loans. Highmark later defaulted, leaving balances of about \$3.5 million and \$1.3 million. The bank sued Highmark and the guarantors and also foreclosed on the properties, putting in the only bids: about \$2.6 million and \$720,000. In the action to collect on the deficiency, the bank dismissed Highmark and sought to collect only against the guarantors. The guarantors raised the defense under G.S.

45-21.36, the anti-deficiency statute, which allows an offset where the amounts paid for the property at foreclosure are substantially less than their true value. The trial court allowed the guarantors' motion to add Highmark (back) as a party and submitted the anti-deficiency issue to

the jury. The jury found that the fair market values of the properties were about \$3.7 million and about \$1 million, leaving guarantors with respective debts of \$0 and \$300,000.

The bank appealed, arguing that non-mortgagor guarantors are not permitted to take advantage of the anti-deficiency statute. The Court of Appeals affirmed, holding that the guarantors could indeed raise the defense; the majority and concurrence differed, however, as to whether the defense could be raised in an action in which the debtor itself was not a party. The Supreme Court looked closely at the language of G.S. 45-21.36 and concluded that a non-mortgagor guarantor may “stand in the shoes of the principal borrower” and raise the anti-deficiency defense whether or not the borrower is a party to the action. In addition, the court stated that conditioning a guarantee agreement on guarantor’s waiver of anti-deficiency protection violates public policy.

[Summary by Ann Anderson.]

[TD Bank, N.A. v. Williams \(COA15-598; June 7, 2016\)](#)

Summary judgment was properly granted against debtor/guarantor in creditor’s action to collect the debt. Debtor/guarantor failed to create a genuine issue of material fact as to his defense under the anti-deficiency statute. His contention regarding the value of the property was contained in an unverified answer and thus could not be used as evidence, and the materials included in his verified motion for partial summary judgment did not actually include appraisals or opinions of the value of the property. *(Summary by Ann Anderson)*

***Enforcement of a Lost, Stolen, or Destroyed Promissory Note in a Civil Suit on the Note* [Emerald Portfolio LLC v. Outer Banks/Kinnakeet Associates, LLC \(COA16-31; Sept. 6, 2016\)](#)**

Lender made a loan to a limited liability company borrower and individual members of the LLC signed guaranty agreements guaranteeing the debt. Lender subsequently sold the loan to Lender #2. Borrower defaulted. Lender #2 filed complaint alleging the borrower and the guarantors were in default under the terms of the note and sought a judgment against both to recover the unpaid balance of the note. Trial court granted summary judgment in favor of Lender #2. Borrowers appealed. NC Court of Appeals held that Lender #2 did not have a right to enforce the lost note against the borrower LLC as Lender #2 was not in possession of the note when the loss of possession occurred, which is a requirement of GS 25-3-309. The court noted that North Carolina did not adopt the 2002 amendments to the UCC which provide that a person who acquires ownership from a person entitled to enforce the note when the loss of possession occurred may also enforce the lost, stolen or destroyed note. As a result, such relief was not available to the note purchaser under NC’s version of the UCC. The court further held that the guaranty remained enforceable notwithstanding the unenforceability of the note against the borrower and therefore did not serve as a viable defense for the individual guarantors.

***Preclusive effect of foreclosure on separate contract and tort claims action against lender.* [Funderburk v. JPMorgan Chase Bank, N.A. \(COA14-1258; June 16, 2015\)](#)**

Plaintiffs filed this action against their former mortgage lender for breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, tortious interference with contracts and business expectancy, quantum meruit, and punitive damages—all in connection with an earlier series of foreclosures. The trial court properly dismissed these claims pursuant to Rule 12(b)(6). Each of the properties had already been foreclosed upon pursuant to Chapter 45 based on plaintiffs' payment default, and the foreclosure orders of the clerk had become final. Each of the claims in the present action was essentially premised upon an argument that there had been no default; because the issue of default had been conclusively determined in the earlier foreclosure proceedings, it could not be re-litigated in this separate civil action.

[Summary by Ann Anderson.]

Rescission of certificate of satisfaction under G.S. 45-36.6

[Wells Fargo Bank, NA v. American National Bank and Trust Co. \(COA15-689; Nov. 1, 2016\) \(with dissent\)](#). After homeowners refinanced their mortgage in 2006 through Wells Fargo, Wells Fargo filed a certificate of satisfaction certifying that an earlier 2004 deed of trust had been satisfied and was accordingly cancelled. Wells Fargo neglected, however, to enter into a subordination agreement with Defendant American National regarding an earlier home equity line of credit on the property. The effect was to elevate American National's line of credit to first priority. Wells Fargo discovered the problem six years later and filed a document of rescission of the certificate of satisfaction in an attempt to restore Wells Fargo's loan to first priority. In this declaratory judgment action, Wells Fargo argued that G.S. 45-36.6's provision allowing rescission "if a security instrument is erroneously satisfied of record" allows rescission for *any* erroneous satisfaction. Defendant, on the other hand, argued that the statute only permits rescission when a satisfaction is erroneously filed for an obligation *that was not actually satisfied*. The trial court granted summary judgment in favor of Wells Fargo. Analyzing the plain language of the statute, its legislative history, and its construction, the Court of Appeals agreed that Wells Fargo's interpretation was the right one. The court reversed the grant of summary judgment for Wells Fargo, however, holding that a genuine issue of material fact existed as to whether Wells Fargo actually filed the certificate of satisfaction erroneously or on purpose.

Dissent: The dissenting judge argued that Wells Fargo's "error" was not in filing the certificate of satisfaction, but in failing to enter into a subordination agreement with defendant by which it would have secured its first priority status. Thus it did not commit the kind of error that is correctable under G.S. 45-36.6.

[Summary by Ann Anderson.]

Declaratory judgment action related to loan obligation; 12(b)(6) dismissal; claim under G.S. 45-36.9 (Judicial Foreclosure)

[Perry v. Bank of America, N.A. \(COA16-234; Feb. 7, 2017\)](#). The trial court improperly dismissed a declaratory judgment action brought by a borrower against a lender where the complaint articulated a controversy over whether plaintiffs were obligated to repay the loan balance when that balance had been procured through fraud of a third person. The trial court properly

dismissed their claim brought pursuant to G.S. 45-36.9, however, because the complaint revealed that the plaintiffs never requested the bank cancel a security interest for which there was a zero balance. *(Summary by Ann Anderson)*

Minimum Pleading Requirements in Judicial Foreclosure

[U.S. Bank v. Pinkney \(229PA16; June 9, 2017\)](#)

Reversing the unanimous opinion of the Court of Appeals at __ N.C. App. __, 787 S.E.2d 464 (2016). The defendants (collectively, Borrowers) executed a promissory note (Note), with debt secured by a deed of trust (DOT). Several years later, plaintiff (Bank) filed a complaint seeking judicial foreclosure and judgment on the Note, alleging default by Borrowers. Borrowers filed a 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted, which the trial court allowed. In affirming the trial court's order dismissing the action, the Court of Appeals erroneously applied the requirements of G.S. 45-21.16(d), which applies to non-judicial foreclosures by power of sale. The Court of Appeals determined that the Bank failed to establish its status as holder of the Note, since it was not the original holder of the Note, and there was inadequate evidence of indorsements from one lender to the next each time the Note was transferred. The Supreme Court noted that in the instant case, the Bank was proceeding with a judicial foreclosure, which is an ordinary civil action commenced by filing a complaint and governed by the Rules of Civil Procedure. The statute cited by the Court of Appeals therefore did not apply. A complaint in a judicial foreclosure action must, at minimum, allege: (1) a debt; (2) default on the debt; (3) a deed of trust securing the debt; and (4) the plaintiff's right to enforce the deed of trust. As with other civil actions, a creditor is not required to prove the entire case at the pleading stage, but must provide sufficient facts and circumstances necessary to give a borrower adequate notice of the judicial foreclosure action. The Bank adequately pled its claim, and its inclusion of attached exhibits did not deprive Borrowers of notice. Any inadequacy of evidence or legal theory could be tested at trial by Borrowers.

Summary by Aly Chen.

Authority of Lender to Seek Specific Performance under a Note and Deed of Trust with Power of Sale

[Banks v. Hunter \(COA16-666; Jan. 17, 2017\)](#)

Defendant signed a promissory note (Note) and a deed of trust (DOT) as security for the Note. Both documents contained a power of sale clause. After defendant defaulted, plaintiff filed an action in district court seeking specific performance on the Note and for the court to convey defendant's property to him. Defendant failed to appear after being personally served and a default judgment was entered. Defendant failed to comply with the judgment requiring her to execute a deed and the trial court entered an order of divestiture and vesting pursuant to Rule 70 of the Rules of Civil Procedure. After the time for appeal expired, defendant filed a Rule 60(b) motion for relief. After that was denied, defendant appealed and asserted: (1) the trial court lacked subject matter jurisdiction; and (2) the court abused its discretion in denying relief. The Court of Appeals determined it need not reach the second question after concluding the trial court did not have subject matter jurisdiction. Although the DOT gave plaintiff the power to seek a foreclosure by power of sale, plaintiff failed to utilize this procedure. Since plaintiff did not seek relief allowed for under the foreclosure statutes, which are the exclusive means of remedy

available in this situation, he did not properly invoke the trial court's jurisdiction. The court discussed remedies for default of debt, the difference between a mortgage and an absolute deed, and the right of a debtor to redeem the property through repayment of the loan, called the equity of redemption. Public policy does not favor efforts to deprive debtors of this right, although a debtor may waive the right by executing an absolute deed. North Carolina no longer has a common law "strict foreclosure" procedure, by which a property may be conveyed to a creditor without a sale; the right to foreclose is exclusively governed by statute.

[Summary by Aly Chen.]

Tab: The Clerk's Role

Foreclosure by Power of Sale

Meredith S. Smith



www.sog.unc.edu

1

Course Objectives



2



UNC
SCHOOL OF GOVERNMENT

1

Leave here with the three C's...

1. Competent
2. Confident
3. Control



Judicial Act

“The act of the clerk in so finding or refusing to so find is a **judicial act**...”

G.S. 45-21.16(d1)

VS.

“...foreclosure by power of sale under a deed of trust is a non-judicial proceeding.”

In re Foreclosure of Lucks, 369 N.C. 222 (2016)



Power of Sale Overview

Four Key Points



#1

You don't have to solve everyone's problems.



#2

Chapter 45 controls in procedure and substance.

See In re Foreclosure of Lucks, 369 N.C. 222 (2016)



7

#3

A power of sale foreclosure is an efficient and expeditious alternative elected by the lender.



8

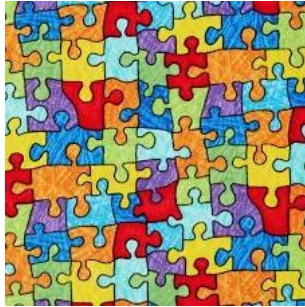


Put the pieces together.

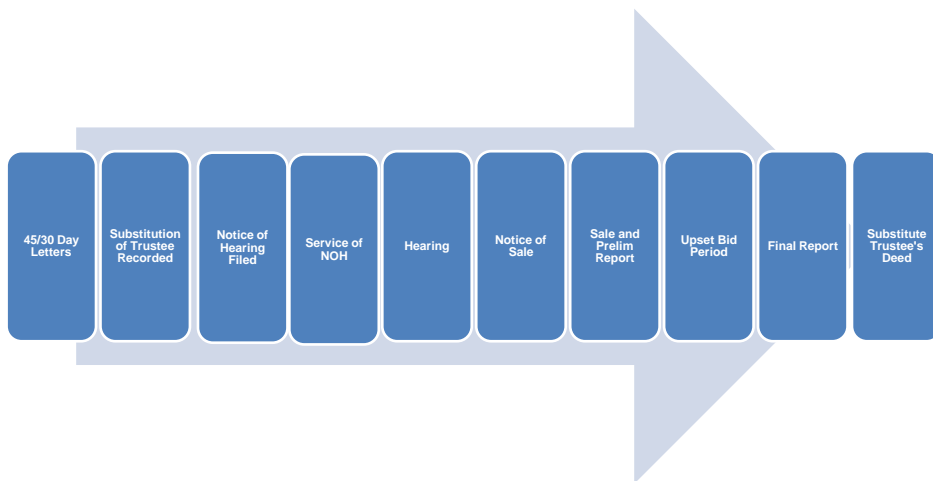
Using the notecards on each table, work as a group to put the pieces in order from what happens first in a foreclosure proceeding to last.

Judicial Foreclosure	Power of Sale Foreclosure
Superior/District Court Judge	Clerk of Superior Court
Civil Action	Filed in the same manner as a special proceeding, G.S. 45-21.16(g)
G.S. Chapter 1	G.S. Chapter 45
\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$	\$\$
2 years or more	4-5 months
Any legal or equitable issue	Limited to 6 legal findings
Holder files a complaint and summons	Holder appoints trustee and directs the trustee to file a notice of hearing

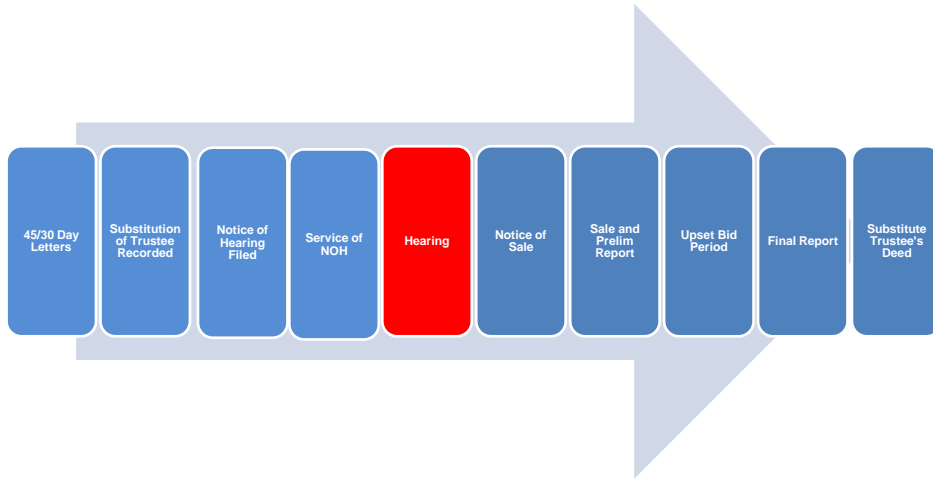
Put the pieces together.



Power of Sale Foreclosure



Power of Sale Foreclosure



13

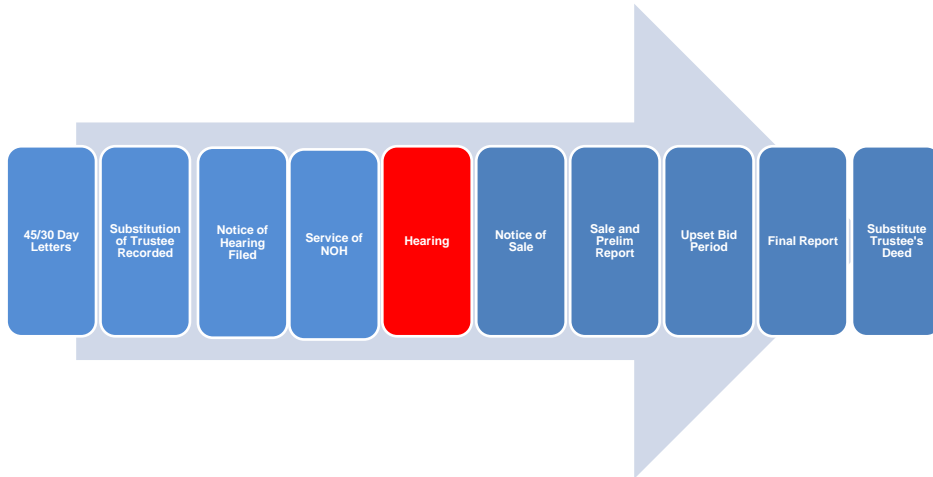
#4

The clerk's authority is limited but it is not a rubber stamp.



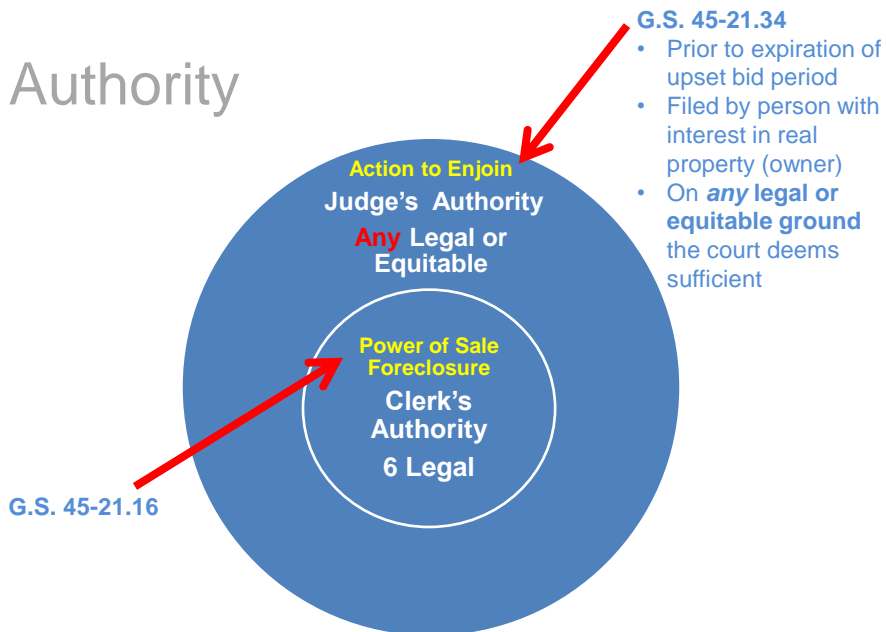
14

Power of Sale Foreclosure



15

Authority



16

The Big Six

1. **Holder of a valid debt**
2. **Right to foreclose**
3. **Default**
4. **Notice**
5. **Home Loan**
6. **Military Service**

How Searching of an Inquiry?

Competent evidence of the **existence of the six factors to authorize sale.....**

Evidence that a reasonable mind might accept as adequate to support the finding of fact as to each of the six elements.

- In re Adams, 204 NC App 318, 321 (2010)

G.S. 45-21.16(d)



Evidence Rules Relaxed



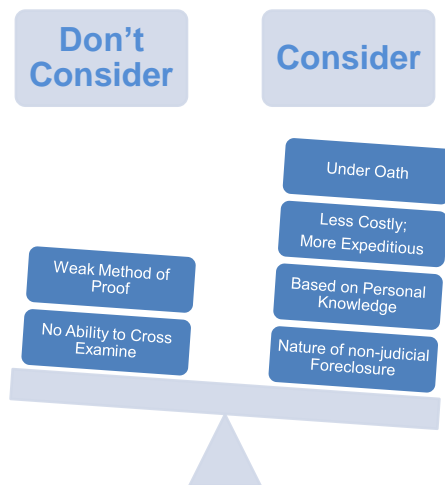
“The statute provides for a relaxation in the form rules of evidence at the hearing.”

- In re Foreclosure of Lucks, ___ N.C. ___ (Dec. 21, 2016)

In addition to other forms of evidence permitted by law, the clerk “may consider affidavits and certified copies of documents.”

- G.S. 45-21.16(d).

Testimony by Affidavit



Trial by Affidavit

#1: Affidavit should include facts, not conclusions of law.

“XYZ Bank is the holder of the note.”

Court should not consider legal conclusions postured as allegations of fact.

- In re David A. Simpson, 211 NC App 483 (2011)

Trial by Affidavit

#2: Affiant must have personal knowledge of the facts they are attesting to in the affidavit.

- In re Yopp, 217 N.C. App. 489, 492 (2011)



Trial by Affidavit

- What capacity employed
 - The nature of job responsibilities
 - How s/he familiar with loan, record keeping policies of the company, etc.
- How do they know what they are attesting to in the affidavit?

Trial by Affidavit

Generally, a “witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.”

N.C. Gen. Stat. § 8C-1, Rule 602



Repeat them!

#1: Affidavit should include facts, not conclusions of law.

#2: Affiant must have personal knowledge of the facts they are attesting to in the affidavit.

Affirmative Showing

1. *Regardless* of whether it is contested or uncontested – not a default judgment.
2. Must have a hearing with presentation of evidence or the hearing must be affirmatively waived.

- G.S. 45-21.16(f)

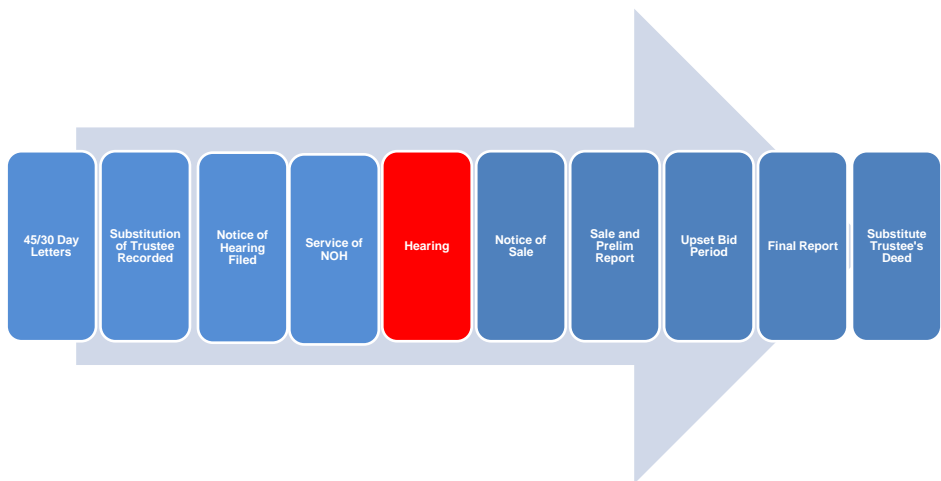


Reviewing the Documents....

What does your process look like?

- Presentation of evidence at the hearing?
Before the hearing?
- Decision under advisement?
- Trustee obligations?
- Checklist?

Power of Sale Foreclosure



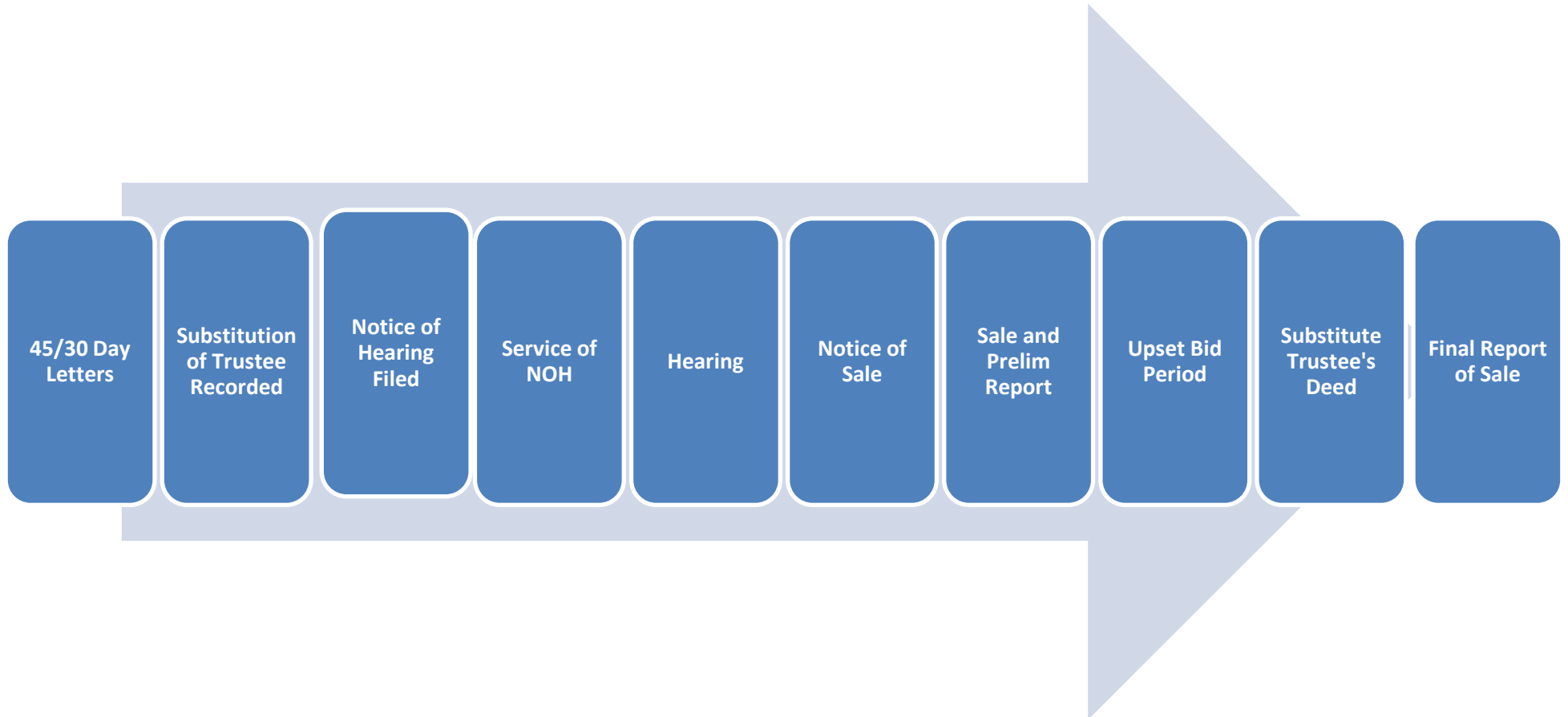
So, remember....

1. You don't have to solve everyone's problems.
2. Chapter 45 controls in procedure* and substance.
3. A power of sale foreclosure is an efficient and expeditious alternative elected by the lender.
4. The clerk's authority is limited but it is not a rubber stamp.

SOG Statutory Reference Guide

Foreclosure by Power of Sale

G.S. Chapter 45



This chart provides the statutory citation for many of the key steps in a power of sale foreclosure proceeding.

<p>1. 45 Day Letter</p>	<p>G.S. 45-102 (contents of notice) G.S. 45-103 (filing notice with AOC) G.S. 45-104(c) (servicer filing fee paid to State Home Foreclosure Prevention Trust Fund)</p>
<p>2. 30 Day Letter</p>	<p>G.S. 45-21.16(c)(5a)</p>
<p>3. Substitution of Trustee</p>	<p>G.S. 45-10 (generally + who may serve as trustee) G.S. 45-15 (recording the ST gives constructive notice to all persons) G.S. 45-17 (noteholder may substitute a trustee as often as justifiable)</p>
<p>4. Notice of Hearing</p>	<p>G.S. 45-21.16(c) (contents of NOH) G.S. 45-21.16(c2) (NOH must include certification that 45-day letter provided)</p>
<p>5. Service of Notice of Hearing</p>	<p>G.S. 45-21.16(a) (service deadlines and timeline) G.S. 45-21.16(b) (who must be served)</p>
<p>6. Non-Foreclosure Resolution</p>	<p>G.S. 45-21.16C (clerk duty to inquire regarding efforts to avoid foreclosure of primary residences)</p>
<p>7. Servicer Guidelines</p>	<p>G.S. 45-91 (assessment of fees) G.S. 45-93 (borrower requests for information)</p>
<p>8. Hearing</p>	<p>G.S. 45-21.12A (sale barred during military service) G.S. 127B-25 <i>et. seq.</i> (North Carolina Servicemembers Civil Relief Act) 50 U.S.C. 3901 <i>et. seq.</i> (Servicemembers Civil Relief Act)</p>

	<p>G.S. 45-21.16(d) (home loan, default, valid debt/holder, right to foreclose, notice) G.S. 45-21.16(d1) and (e) (judicial act of clerk; appeal and bond) G.S. 45-21.16(f) (waiver of notice and hearing)</p>
9. Notice of Sale	<p>G.S. 45-21.16A (contents of NOS) G.S. 45-21.17 (posting and publishing of NOS) G.S. 45-21.17A (requests for copies of NOS by junior lienholders and third parties)</p>
10. Sale	<p>G.S. 45.21.4 (place of sale) G.S. 45-21.7 (sale of separate tracts) G.S. 45-21.8-9 (sale in whole or in parts) G.S. 45-21.10 (deposit at sale) G.S. 45-21.21 (postponement of sale) G.S. 45-21.22 (restarting sale after bankruptcy stay lifted or order enjoining dissolved) G.S. 45-21.23 (time of sale) G.S. 45-21.24 (continuance of sale)</p>
11. Preliminary Report of Sale	<p>G.S. 45-21.26 (timing and contents) G.S. 45-21.14 (clerk's authority to compel report using contempt)</p>
12. Upset Bids	<p>G.S. 45-21.27 (timeline, amount, bond) G.S. 45-21.29A (upon expiration of upset bid period parties rights become fixed automatically) G.S. 45-21.30 (failure to comply with bid)</p>
13. Surplus Funds	<p>G.S. 45-21.31 (disposition of proceeds of sale; surplus funds) G.S. 45-21.32 (special proceeding to determine ownership of surplus funds before the clerk)</p>

<p>14. Final Report</p>	<p>G.S. 45-21.33 (timing and contents) G.S. 45-21.14 (clerk's authority to compel report using contempt) G.S. 45-21.15 (trustee's fees)</p>
<p>15. Order for Possession</p>	<p>G.S. 45-21.29</p>
<p>16. Enjoining Foreclosure Sale on Equitable Grounds (Superior Court)</p>	<p>G.S. 45-21.34 G.S. 45-21.35</p>

Timelines and Deadlines

Foreclosure by Power of Sale

G.S. Chapter 45

** All days are calculated based on calendar days. If the final day of any calculation falls on a holiday or weekend, the final day is the next business day. For example, if the 10th day of the upset bid period falls on a Saturday, then the upset bid period expires the following Monday at the time the courthouse closes.

1. 45 Day Letter (Pre-Foreclosure Notice)	G.S. 45-102	Must be sent by mail at least 45 days prior to the filing of the notice of hearing.
2. Pre-Foreclosure Home Loan Registration	G.S. 45-103(a)	Must be filed electronically with the NC Administrative Office of the Courts within 3 business days of the mailing of the 45-day letter (pre-foreclosure notice).
3. 30 Day Letter	G.S. 45-21.16(c)(5a)	Must be sent by first class mail within 30 days of the date of the notice of hearing.
4. Recording of Substitution of Trustee	G.S. 45-10	The trustee filing the notice of hearing should be the same as the most recently recorded substitution of trustee. The trustee may be substituted any number of times without limitation. The clerk should check to ensure the date of the recording of the substitution of trustee is prior to the filing of the notice of hearing.
5. Notice of Hearing	G.S. 45-21.16(a)	
i. Personal Service	G.S. 45-21.16(a)	Service must be completed pursuant to Rule 4(j) of the Rules of Civil

Timelines and Deadlines

		Procedure at least 10 days prior to the date of the hearing, includes service by sheriff, registered mail, certified mail return receipt requested, FedEx, UPS, or any other authorized carrier.
ii. Posting on Property	G.S. 45-21.16(a)	If publication is authorized and used, posting must be made at least 20 days prior to the date of the hearing. Posting must be in a conspicuous place on the property subject to foreclosure, may run concurrently with any other service effort, and may be relied on only if personal service cannot be effectuated after a reasonable and diligent effort.
6. Hearing	G.S. 45-21.16C G.S. 45-21.16	Clerk shall inquire as to whether debtor occupies property as a principal residence and whether efforts have been made to communicate with the debtor and to resolve the matter voluntarily without foreclosure. Clerk shall consider the evidence of the parties and may consider affidavits and certified copies of documents in addition to other forms of evidence required or permitted by law.
7. Order for Sale	G.S. 45-21.16(d)	The clerk shall enter the order for sale upon finding the existence of the six factors.
8. Notice of Sale	G.S. 45-21.17(4)	Notice of sale must be by first-class mail at least 20 days prior to the date of sale to the following: <ul style="list-style-type: none"> • Each party entitled to notice of hearing whose address is known to the trustee or mortgagee • Each party who filed a request for notice under GS 45-21.17A • If the property is residential and has less than 15 units, any person who occupies the property pursuant to a rental agreement at the property address. The notice is sent to the person by name if known and to “occupant” if unknown.

Timelines and Deadlines

i. Posting at the courthouse	G.S. 45-21.17(1)(a)	Notice of sale must be posted in the area of the courthouse designed by the clerk for posting at least 20 days immediately preceding the sale date.
ii. Publication in the newspaper	G.S. 45-21.17(1)(b) and (2)	Notice of sale must be published once a week for at least two consecutive weeks in a qualified newspaper. The period of publication from the date of the first publication to the last date of publication must be at least 7 days including Sundays. The date of the last publication must not be more than 10 days preceding the sale date.
9. Postponement of Sale	G.S. 45-21.21	<p>The trustee/lender may postpone the sale any number of times to a date certain up to 90 days (as computed in the manner provided by G.S. 1A-1, Rule 6) from the date of the original sale if good cause exists.</p> <ul style="list-style-type: none"> • The trustee/lender does not have to re-publish the notice of sale but instead must publicly announce the postponement at the sale, post the postponement at the courthouse, and give oral or written notice of the postponement to any person entitled to notice of the sale described in item 8 above. • In addition, the trustee or other person exercising the power of sale, immediately upon determining the sale will not occur, must deliver written notice to the clerk. Delivery to the clerk may be by email or fax or both. If the notice is not received by the clerk before the sale time, the person exercising the power of sale must publicly announce the cancellation at the time and place advertised for the sale, post a notice of cancellation on the courthouse door on the same day, give oral or written notice to any person entitled to the notice of sale described in item 8 above, and hand deliver written notice to the clerk’s office. <p>After 90 days, the trustee/lender must start over with the sale process as if the order of sale was just entered.</p>

Timelines and Deadlines

10. Sale	G.S. 45-21.23	Sale must begin at the time designated in the notice of sale or as soon thereafter practicable, but not later than three hours after the schedule time unless it is delayed by other sales held at the same place. The sale must be held between the hours of 10:00 am and 4:00 pm on any day when the clerk's office is normally open for transactions.
11. Preliminary Report of Sale	G.S. 45-21.26	Trustee or lender must file a preliminary report of sale with the clerk within five days after the sale date.
12. Upset Bid Period	G.S. 45-21.27	Any person may file an upset bid until the time the courthouse closes for normal business on the 10th day after the preliminary report of sale is filed. If the 10 th day of the upset bid period falls on a Saturday, then the upset bid period expires the following Monday at the time the courthouse closes. Any upset bid filed starts the tolling of a new 10 day upset bid period.
13. Recording of Substitute Trustee's Deed		May occur at any time after the expiration of the upset bid period.
14. Final Report of Sale	G.S. 45-21.33	Final report of sale must be filed within 30 days of the trustee's or lender's receipt of proceeds of the sale.

Foreclosure by Power of Sale

Essential Terminology

Foreclosure

Method of enforcing payment of a debt secured by a mortgage or deed of trust on real property by selling the real property and applying the proceeds of the sale to the satisfaction of the debt.

Power of Sale Foreclosure

Contractual right under the terms of a deed of trust which gives the trustee in the deed of trust the power to sell the real property on behalf of the lender if the borrower defaults. A power of sale foreclosure is executed under Chapter 45 of the North Carolina General Statutes before the Clerk of Superior Court. The clerk has no equitable jurisdiction in a power of sale foreclosure.

Judicial Foreclosure

A civil action filed to foreclose on the property filed in either district or superior court depending on the value of the property subject to foreclosure. The action is filed pursuant to GS 1-339.1 through 1-339.40. In a judicial foreclosure, the judge has general legal and equitable jurisdiction.

Promissory Note (Note)

Legal document where one party promises to pay a sum of money to another party at a fixed time or on regular intervals. It is also referred to as a negotiable instrument. The note is typically signed by only the party that promises to pay known as the borrower/maker/debtor.

Maker – Borrower – Debtor

Party that signs the note and obtains a loan from a lender.

Holder

Person, entity, estate, trust, partnership, etc. that is in (i) possession of a note that is (ii) payable to bearer, indorsed in blank, or payable to an identifiable person that is the person in possession. See G.S. 25-1-201(b)(21).

Lender – Creditor

Person or entity that lends money to the borrower. The original lender is typically considered the originator of the loan.

Indorsement

A signature, which is printed, stamped, or written, made on a document for purposes of transferring the rights to the document to a third party. See G.S. 25-3-204.

Indorser

Person or entity that makes the indorsement. See G.S. 25-3-204.

Allonge

A paper attached to a note for the purpose of evidencing indorsements to the note. If an indorsement is written on the allonge, it is the same as if it were written on the note itself.

Deed of Trust

A legal document whereby the owner of real property conveys legal title to the real property to a trustee for the benefit of a third party to secure a debt.

- A deed of trust is a similar instrument to a mortgage. A mortgage has two parties, the mortgagor and the mortgagee, while a deed of trust has three parties, the grantor, the trustee and the beneficiary.
- The deed of trust is often used in North Carolina because the beneficiary is allowed to purchase the real property at the foreclosure sale

Grantor – Mortgagor

The person or entity who grants a security interest in the real property subject to the deed of trust.

Trustee - Substitute Trustee

A neutral third party that holds beneficial title to the property under the deed of trust and typically has the right to foreclose under the instrument by power of sale. The substitute trustee does not have authority until the recording of the document substituting the trustee.

Beneficiary – Mortgagee

Typically, the lender under the deed of trust. The party that receives the benefit of the security interest.

Record Owner

The owner of the property.

Guarantor

A person who agrees to pay the debt of someone else in the event they do not pay or default under the loan.

Guaranty Agreement

An agreement whereby one person agrees to pay the debt of another in the event of a default by the original obligor/debtor.

MERS

Mortgage Electronic Registration System. A privately owned company created by the mortgage industry to simplify the loan sale process. Each time a transfer of a loan occurs the sale is registered with the MERS database to track the mortgage.

Deed

A legal document that transfers title to real property from a grantor to a grantee. The deed is typically only signed by the grantor.

Merger

The absorption of one entity into another entity. The surviving entity, by operation of law, gains all of the rights, privileges, immunities, franchises, and other property of the non-surviving entity without the necessity of any assignment.

Mortgage Securitization

The practice of bundling various types of loans together and selling an interest in the consolidated loans to investors, similar to the way that a person buys stock in a company an investor may buy an interest in a pool of mortgage loans.

Investor

Purchaser of shares or certificates in mortgage loan pools. They are the owner of the loans and are entitled to receive a proportionate share of the loan payments.

Servicer

An entity that acts on its own behalf of the owner or owners of the loan and in exchange for a fee pursuant to the terms of a Pooling and Servicing Agreement may have the right to collect payments from the borrower, respond to borrower inquiries, maintain loan details, pay property taxes and insurance, call a default for non-payment, foreclose on the mortgage or deed of trust, and modify the mortgage.

Mortgage Trust and Trustee

After the loans are pooled together, they are placed in a mortgage trust that is the owner of record of the mortgage loans. The trustee holds the pool of mortgages in the trust for the benefit of the investors and protects the investors' interests. The trustee of the trust typically does not have authority to authorize foreclosures or modifications and they do not oversee the servicers. Typically, the trustee's duties are administrative in nature, such as maintaining investor records and distributing payments to the investors that the servicer receives from the borrower.

Pooling and Servicing Agreement

Contract that governs the relationship between the various parties to the mortgage securitization process and often describes how the servicer is paid and how the servicer must go about collecting payments, pursuing loan defaults, modifying loans, and instituting foreclosure actions. Generally, pooling and servicing agreements are filed with the US Securities and Exchange Commission and copies of the agreements can be found at www.sec.gov.

Ginnie Mae Fannie Mae, and Freddie Mac

Government owned or sponsored corporations whose purpose is to expand affordable housing the in the United States by purchasing loans from banks in order to allow them to make more loans.

Foreclosure Forms

Available online at <http://www.nccourts.org/Forms/FormSearch.asp>

AOC-SP-550	Special Proceedings Cover Sheet
AOC-SP-400	Report of Foreclosure Sale/Resale (Preliminary Report)
AOC-SP-402	Final Report and Account of Foreclosure Sale
AOC-SP-403	Notice of Upset Bid Notice to Trustee or Mortgagee
AOC-SP-404	Notice (to File)
AOC-SP-915	Order to File Account
AOC-SP-384	Special Proceedings Bill of Costs

Required Contents

Notice of Hearing

G.S. 45-21.16(a), (c), and (c2)

1. Time and place for the hearing before the clerk	<input type="checkbox"/>
2. Description of property subject to foreclosure	<input type="checkbox"/>
3. Date of the deed of trust	<input type="checkbox"/>
4. Original amount of the note	<input type="checkbox"/>
5. Original holder of the note	<input type="checkbox"/>
6. Book and page number of the recorded deed of trust	<input type="checkbox"/>
7. Name of the holder at the time the notice of hearing filed	<input type="checkbox"/>
8. Address of the holder at the time the notice of hearing filed	<input type="checkbox"/>
9. Nature of the default	<input type="checkbox"/>
10. Statement the debt was accelerated (only required if debt accelerated)	<input type="checkbox"/>
11. Right of debtor to pay debt or cure default (if permitted)	<input type="checkbox"/>
12. 30 day notice letter sent	<input type="checkbox"/>
13. Statement regarding compliance with Borrower requests for information	<input type="checkbox"/>
14. Right of the borrower to appear at the hearing	<input type="checkbox"/>
15. Statement that if borrower does not contest, does not have to appear and failure to appear does not impact obligation to pay the debt or sale of the property	<input type="checkbox"/>
16. The Substitute Trustee is a neutral party and may not advocate	<input type="checkbox"/>
17. The Borrower may enjoin the sale on any legal or equitable ground, provided they comply with GS 45-21.34 (bond)	<input type="checkbox"/>
18. Right of the Borrower to contest the foreclosure at the hearing and to authorize the foreclosure the clerk must find existence certain factors	<input type="checkbox"/>
19. If Borrower fails to appear, substitute trustee will ask for an order to sell the property	<input type="checkbox"/>
20. Borrower has right to seek the advice and counsel of an attorney and free services may be available through Legal Aid	<input type="checkbox"/>
21. If sale held, then purchaser at sale is entitled to possession of the property and Borrower may be evicted if still on property	<input type="checkbox"/>
22. Name of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>
23. Telephone number of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>
24. Address of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>
25. Request that the Borrower keep trustee up to date on his or her address so that the trustee can mail notices to the borrower	<input type="checkbox"/>
26. Hearing may be on a date later in the notice and if notice will be sent of the new date	<input type="checkbox"/>
27. If the Borrower is on military duty, the foreclosure may be prohibited	<input type="checkbox"/>
28. Certification that the 45-day letter provided in all material respects, requisite information was registered with AOC, and all applicable time periods have elapsed (G.S. 45-107; G.S. 45-21.16(d)(v))	<input type="checkbox"/>

Required Contents

Notice of Sale

G.S. 45-21.16A

1. Original mortgagor	<input type="checkbox"/>
2. Record owner of the property, if different from the mortgagor	<input type="checkbox"/>
3. Recording date, book and page of the deed of trust	<input type="checkbox"/>
4. Date, hour and place of the sale	<input type="checkbox"/>
5. Description of the real property to be sold (must reasonably inform public of property to be sold)	<input type="checkbox"/>
6. Terms of sale, including amount of any required deposit	<input type="checkbox"/>
7. State whether the property sold subject to taxes and special assessments	<input type="checkbox"/>
8. State whether sold subject to or with any other rights or interests	<input type="checkbox"/>
If property is residential and has less than 15 rental units:	
9. State that an order for possession may be issued pursuant to G.S. 45-21.29	<input type="checkbox"/>
10. If rental agreement dated or renewed on or after 10-1-07, state that (i) tenant may terminate the lease to be effective on date in the notice that is at least 10 days but no more than 90 days after the sale date in the notice of sale, provided that the default is not cured at the time the tenant provides the notice of termination, and (ii) if tenant terminates the lease on 10 days' notice, tenant is responsible for prorated rent to the effective date of termination	<input type="checkbox"/>

*Highlighted language reflects changes implemented in 2015 pursuant to S.L. 2015-178.

Required Contents

Preliminary Report

G.S. 45-21.26

1. Authority of person conducting the sale	<input type="checkbox"/>
2. Name of grantor	<input type="checkbox"/>
3. Name of grantee or trustee	<input type="checkbox"/>
4. Date, time, and place of sale	<input type="checkbox"/>
5. Book and Page of the recorded deed of trust, if recorded, or description of property sold, if DOT not recorded	<input type="checkbox"/>
6. Name of highest bidder	<input type="checkbox"/>
7. Amount of the high bid at the sale and that the bid was the high bid	<input type="checkbox"/>
8. Name of person making the report	<input type="checkbox"/>
9. Date of the report	<input type="checkbox"/>
10. Filed with the clerk within 5 days of the date of sale	<input type="checkbox"/>

Required Contents

Final Report

G.S. 45-21.33

1. Accounting of receipts and disbursements	<input type="checkbox"/>
2. Shows whether property sold in whole or parts	<input type="checkbox"/>
3. Shows whether all property sold	<input type="checkbox"/>
4. Shows whether all or part of the debt satisfied	<input type="checkbox"/>
5. Copy of notices of sale and resale posted	<input type="checkbox"/>
6. Copy of notices of sale and resale published	<input type="checkbox"/>
7. Affidavit of publication	<input type="checkbox"/>
8. Affidavit of service of notice of sale on proper parties	<input type="checkbox"/>
9. Affidavit of posting	<input type="checkbox"/>
10. Fee for auditing and recording the final account	<input type="checkbox"/>



NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Office of General Counsel

Jonathan Redford Harris
General Counsel

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MEMORANDUM

TO: Clerks of Superior Court
Assistant Clerks of Court
Deputy Clerks of Court

FROM: Jonathan Harris, Allison Smith, Amy Funderburk

DATE: April 4, 2017

RE: Clerk's Authority to Review Whether a Newspaper is Legally Qualified to Publish Notices of Sale in Power of Sale Foreclosures

Question:

In power of sale foreclosure proceedings, does a Clerk of Superior Court have the authority or duty to review whether a newspaper is legally qualified to publish a notice of sale of real property, as required by G.S. § 45-21.17(1)(b.)?

Short Answer: No

Explanation:

It is critical to note at the outset that this guidance applies only to power of sale foreclosure proceedings. It is further limited to the publishing of notices of sale in these proceedings, and not to the initial notice of hearing which begins the foreclosure process.

Also, this guidance does not apply to a foreclosure by judicial action, to any proceedings in which the clerk has authority to confirm a judicial sale, or to any other proceedings where the clerk is given the discretion or authority to judge the adequacy of notice.

Our Supreme Court has emphasized that a clerk only has the authority given by statute and cannot perform functions involving the exercise of judicial discretion in the absence of statutory authority. See In re Foreclosure of the Deed of Trust of Vogler Realty, Inc., 365 N.C. 389, 394 (2012). In some proceedings, statutes do provide the clerk with the authority to

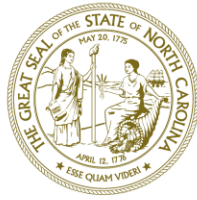
exercise judicial discretion, such as when a clerk is required to confirm a judicial sale in a partition proceeding or a special proceeding for the sale of a ward or decedent's real property. In contrast, in a power of sale foreclosure, the statutes do not confer authority on a clerk to determine whether a newspaper is legally qualified to publish notices of sale. Although a clerk "audits" the Final Report of Sale in a power of sale foreclosure under G.S. § 45-21.33(b), our courts have described this type of audit as a ministerial (not discretionary) act limited to determining whether the entries in the Final Report reflect the actual receipts and disbursements made by the trustee.

While G.S. § 45-21.33(c)(2), requires the person who holds the sale to file with the clerk a copy of the notice of sale published in a newspaper, the statute does not grant additional authority to review the adequacy of that notice.

We do not read G.S. § 45-21.33(c)(3) as a grant of authority to review published notices of sale either. This statute states that the person who holds the sale shall file with the clerk proof, as required by the clerk, which may be by affidavit, that notices of hearing, sale and resale were served upon all parties entitled thereto under G.S. § 45-21.16, 45-21.17, 45-21.17A, and 45-21.30. The "proof" required in this statute refers to proof that parties entitled to notice were, in fact, served with a notice. A notice of sale published in a newspaper is directed to the public at large. The public is not a party entitled to notice, nor can the public be "served" with notice. Therefore, G.S. § 45-21.33(c)(3) is inapplicable to notices of sale published in a newspaper.

As mentioned above, this guidance only applies to publication of the notice of sale, not to the initial notice of hearing which begins the foreclosure process and results in an order either authorizing or not authorizing the sale. The clerk does review whether a proper notice of hearing has been provided prior to authorizing the sale.

Finally, this memo also takes no position on whether a particular publication is qualified for legal advertising. If a situation arises where a clerk does have the discretion to determine if a publication is qualified, and the clerk is unsure of the answer, they should contact the Office of General Counsel for assistance.



NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Legal and Legislative
Services Division

Peter E. Powell
Legal and Legislative Administrator

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TO: Clerks of Superior Court and Assistant Clerks
FROM: Amy L. Funderburk
Assistant Counsel
DATE: June 25, 2013
SUBJECT: **New Legislation Regarding Approval of Attorneys' Fees in Foreclosure Proceedings**

The 2013 General Assembly considered and passed a number of bills affecting a wide variety of topics within the court system. H-407 (SL 2013-104) gives the Clerk additional authority in reviewing final reports of sale in foreclosures.

History

Prior to the enactment of SL 2013-104, the review of a final report of sale in a foreclosure by the Clerk was considered a ministerial act. The Clerk audited the account, but did not approve it and did not make or approve an award of attorneys' fees. In the audit, the Clerk was authorized to determine if entries on the report were supported by actual receipts and disbursements made by the Trustee.¹ In conducting the audit, the Clerk did not determine whether or not the costs and expenses of the sale were reasonable or unreasonable.

What's New: G.S. 45-21.31(a)(1) and G.S. 45-21.31(a1)

An attorney who is serving as trustee or substitute trustee in a foreclosure may receive reasonable counsel fees.

How does this impact Clerks?

You may be asked to review and make a ruling on a petition for attorneys' fees in a foreclosure action. If an attorney submits a request for fees in a foreclosure proceeding, the request should be in writing.

To order the payment of attorneys' fees, the Clerk must find all of the following:

1. the attorney, on behalf of the trustee, rendered professional services as an attorney; and
2. these professional services were different from the services normally performed by a trustee and of a type which would reasonably justify the retention of legal counsel by a trustee; and
3. the fees were reasonable.

Attorneys' fees are presumed reasonable if they comply with G.S. 6-21.2(1) and (2); subdivisions (1) and (2) of G.S. 6-21.2 allow a note, contract, or other evidence of indebtedness to say what amount of attorneys' fees will be paid. In some instances, the amount of attorneys' fees can be as high as 15% of the outstanding balance owed on a note.

¹ North Carolina Clerk of Superior Court Procedures Manual, page 130.46

If no amount is specified in the note, contract, or other evidence of indebtedness, then an award of attorneys' fees up to 15% of the outstanding indebtedness may be presumed reasonable. If an amount over 15% of the outstanding balance is specified in the note, contract, or other evidence of indebtedness, then the amount specified, up to 15% of the outstanding balance is presumed reasonable.

For example, if the amount of the outstanding balance of a mortgage is \$100,000 at the time the Notice of Hearing is filed, then a fee of up to \$15,000 in fees for providing legal services is presumed reasonable. The fee is paid based on the outstanding balance of the loan, not the original loan balance of the mortgage.

If the note, contract, or other evidence of indebtedness didn't specify how much attorneys' fees were allowed, then up to 15% (in this case, \$15,000) could be presumed to be reasonable for attorney fees.

If the note, contract, or other evidence of indebtedness specified that an attorney could receive 20% of the outstanding balance for their fee, then up to 15% (in this case, \$15,000) could be presumed to be reasonable. Even though the contract, note or other evidence of indebtedness may have allowed a higher percentage for fees, the statute only presumes 15% to be reasonable. The clerk may, however, award the higher amount (in this example the additional 5%) if the clerk determines that a higher fee is reasonable.

Lastly, if the note, contract, or other evidence of indebtedness stated that attorney fees were allowed up to 8% of the outstanding balance, then up to 8% (in this case, \$8,000) could be presumed to be reasonable for attorney fees.

The presumption is a starting point for what the statute considers reasonable; it is not a strict requirement for you to follow when awarding fees. You may exercise discretion to lower or raise the amount of attorneys' fees; you are not required to award the full amount presumed reasonable by law and you are allowed to award more than the amount presumed reasonable by law.

Please note that although you are now allowed to set attorneys' fees in a foreclosure using a percentage calculation, in the same way that you would set a commission, the attorneys' fees are not part of the substitute trustee's commission.

Effective Date

House Bill 407 was signed into law on June 12, 2013, and the changes discussed in this memo are effective immediately for all new filings; the date of the filing of the foreclosure action is not relevant to these changes.

Clerk's Manual References

Foreclosures are addressed in Chapter 130 of the Clerk's Manual. You may wish to note in your manual that changes have been made pursuant to S.L 2013-104 that impact fees in foreclosures.



ADMINISTRATIVE OFFICE OF THE COURTS

OFFICE OF GENERAL COUNSEL

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MEMORANDUM

To: Clerks of Superior Court
Assistant Clerks of Superior Court
Deputy Clerks of Superior Court

From: Nicole Brinkley, Assistant Counsel

Date: June 29, 2018

Subject: New Requirement for Persons Exercising a Power of Sale Foreclosure to Immediately Notify Clerks of Superior Court of Cancellations and Postponements of Sale ([Session Law 2018-40](#), Section 11.1, effective July 1, 2018))

Section 11.1 of Session Law 2018-40 added new sections to G.S. 45-21.21—Postponement of Sale.

Previously under G.S. 45-21.21(b) when a person exercising the power of sale postponed a sale, there was no requirement to provide written notice to the Clerk of Superior Court. For foreclosure sales noticed on or after July 1, 2018, new subsection (g) of G.S. 45-21.21 requires that a person exercising the power of sale provide written notice to the Clerk as soon as that person knows that a scheduled sale will not occur. All other provisions of G.S. 45-21.21 remain in effect.

New subsection (g) states that the person exercising the power of sale shall deliver, prior to the scheduled sale time, written notice to the Clerk of Superior Court immediately upon determining that the sale will not occur. The written notice must include the following:

- (1) The case number assigned by the Clerk.
- (2) The mortgagor(s) and record owner(s) name(s).
- (3) The United States Postal Service address of the property or, if no address has been assigned, a brief description of the location of the property.
- (4) The originally scheduled date and time for the sale.
- (5) A statement that the foreclosure sale has been withdrawn, rescheduled for a specific date and time, or postponed with no date yet set, as appropriate.

In order for a person exercising the power of sale to comply with the requirement to immediately notify the Clerk, the Clerk must provide an email address and/or fax telephone number, **upon request**, for delivery of said notices. If advance notice is not received by the Clerk prior to the sale (for example, if a trustee determines hours or minutes before the sale that the sale will not occur), then the person exercising the power of sale or his or her agent or attorney is still required to hand-deliver written notice

to the Clerk's office, in addition to complying with the other requirements in subsection (h) of G.S. 45-21.21.¹

Clerks are **not required** to post these notices, even if received in advance of the sale. Per new subsection (k), all notices involving a scheduled sale must be posted by the person exercising the power of sale in the location at the county courthouse normally used for posting public notices on the same day they are delivered to the Clerk. The posting shall remain in place for at least 30 days or until replaced by a notice of rescheduled or withdrawn sale.

In addition, newly added subsection (f) clarifies that sales must be conducted between the hours of 10:00 A.M. and 4:00 P.M. on any day the Clerk's office is *normally open for transactions*.

A Clerk of Superior Court **may** report habitual noncompliance with the requirements in G.S. 45-21.21 to the Administrative Office of the Courts by email communication to Gabrielle McKeithen at Gabrielle.C.McKeithen@nccourts.org.

These additions to G.S. 45-21.21 are effective July 1, 2018 and apply to foreclosure sales noticed on or after that date.

¹ The requirements of new subsections (h)(1) through (3) are identical to the requirements contained in already existing subsections (b)(1) through (3). However, subsection (h)(4) adds a requirement to hand deliver written notice to the Clerk. The Office of General Counsel has been informed by legislative staff that references to "subsection (b)" contained in subsections (h) and (i) are drafting errors. Subsections (h) and (i) logically refer to new subsection (g), not to subsection (b). These drafting errors will be addressed in the next legislative session.



ADMINISTRATIVE OFFICE OF THE COURTS

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MEMORANDUM

TO: Clerks of Superior Court
Assistant Clerks of Superior Court
Deputy Clerks of Superior Court
Magistrates
Chief District Court Judges
District Court Judges

FROM: Nicole Brinkley, Assistant Counsel

DATE: November 7, 2019

SUBJECT: Power of Sale Foreclosure Orders for Possession
Repeal of G.S. 45-21.29(k)(5a)
[Section 26\(c\) of Session Law 2019-243](#) (HB 470)¹

On June 26, 2019, the General Assembly enacted changes to G.S. Chapter 45, impacting the issuance of power of sale foreclosure orders for possession to reflect the restoration of the federal Protecting Tenants at Foreclosure Act (PTFA). [Session Law 2019-53](#) repealed G.S. 45-21.33A and amended G.S. 45-21.29(k)(5a), effective October 1, 2019 for petitions filed on or after that date. The overall intent of the bill sponsors was to repeal all provisions of State law that were enacted to provide protections when the PTFA had sunset.²

To provide clarification, the General Assembly further amended G.S. 45-21.29(k) in Section 26(c) of Session Law 2019-243 by repealing subsection (5a), effective immediately. This memo supersedes the NCAOC Memorandum dated October 1, 2019 entitled "Legislative Update—Power of Sale Foreclosure Orders for Possession."

Even though the reference to the PTFA was removed from G.S. 45-21.29(k), clerks are still required to comply with both state and federal law in the entry of foreclosure orders for possession. Prior to a clerk of superior court issuing an order for possession, the clerk must confirm that occupants are not bona fide tenants under the PTFA. Protections under the PTFA apply to "any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property."

¹ This memo will be available on the NCAOC's Juno website for Judicial Branch users, under the category "Foreclosure memos", at <https://juno.nccourts.org/legal-memos>.

² For background, legislative history, and the impact of the PTFA on the issuance of a Chapter 45 power of sale foreclosure order for possession, see the NCAOC memo dated August 17, 2018 and entitled "Federal Protecting Tenants at Foreclosure Act restored" available on the NCAOC's Juno site for Judicial Branch personnel, under the category "Foreclosure memos" at <https://juno.nccourts.org/legal-memos> and Meredith Smith's blog post entitled "[New\(ish\) Protections for Tenants Occupying Foreclosed Properties](#)".

An order for possession pursuant to G.S. 45-21.29 is not an available remedy if a bona fide tenant occupies a property.³ A tenancy under the PTFA is considered bona fide if:

- (1) the tenant is not the mortgagor or the child, parent, or spouse of the mortgagor;
- (2) the lease or tenancy was the result of an arms-length transaction; and
- (3) the lease or tenancy requires the payment of rent that is not substantially less than fair market value (as subsidized if applicable, for example Section 8 housing assistance).

Feel free to contact me with any questions at nicole.n.brinkley@nccourts.org.

³ Clerks may want to use as a reference pages 130.49 through 130.50 in the North Carolina Clerk of Superior Court Procedures Manual.



ADMINISTRATIVE OFFICE OF THE COURTS

OFFICE OF GENERAL COUNSEL

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MEMORANDUM

TO: Clerks of Superior Court
Assistant Clerks of Superior Court
Deputy Clerks of Superior Court

FROM: Nicole Brinkley, Assistant Legal Counsel

DATE: September 19, 2022

SUBJECT: Legislation Aligning Statutes Authorizing Postponement of Judicial Sales, Execution Sales, and Sales Authorized Under Power of Sale; [S.L. 2022-60](#)¹

On July 8, 2022, the Governor signed into law SB 769², [S.L. 2022-60](#) (hereinafter the “Act”). The Act’s amendments (i) aligned the statutes that govern the postponement of (1) public judicial sales, (2) execution sales, and (3) sales authorized under power of sale foreclosure and (ii) made various technical, conforming, and clarifying changes, as recommended by the General Statutes Commission. The Act becomes effective October 1, 2022, and applies to sales noticed on or after that date. This memo summarizes the substantive changes in the Act.

1. Public Judicial Sales

The provisions in G.S. 1-339.20(a), which authorize the postponement of public judicial sales, were substantively amended as follows:

- A person authorized to hold a public sale by auction may postpone the sale to a date certain not later than 90 days after the original sale date under certain conditions listed in the statute (*e.g.*, there are no bidders). Previously, the statute authorized a postponement of not more than six days, exclusive of Sunday.
- A person authorized to hold a public sale of timber by sealed bid may postpone the time for submitting and opening bids to a date, time, and place certain not later than 90 days after the original date under certain conditions listed in this statute (*e.g.*, there are no bidders). Previously, the statute authorized a postponement of not more than six days, exclusive of Sunday.
- The person authorized to hold a public sale may postpone the sale more than once when any of the conditions listed in the statute are met, so long as the sale is held not more than 90 days after the original sale date.

¹ For future reference, a copy of this memo will be available on the Administrative Office of the Courts (NCAOC)’s Juno site for Judicial Branch users at <http://juno.nccourts.org/legal-memos>, under the memo list for Civil Memos and Special Proceedings Memos.

² Full text of the enacted bill is available at: <https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S769v4.pdf>.



Further, G.S. 1-339.20(b) was amended to add a new subsection (2a) requiring the person postponing the sale to give written or oral notice of each postponement to parties previously served pursuant to G.S. 1A-1, Rule 4(j). Written notice must be served in any manner provided in G.S. 1A-1, Rule 5(b).

2. Execution Sales

The provisions in G.S. 1-339.58(a), which authorize the postponement of execution sales by the sheriff, were substantively amended as follows:

- The sheriff may postpone a sale to a day certain not later than 90 days after the original sale date under certain conditions listed in the statute (*e.g.*, there are no bidders). Previously, the statute authorized a postponement of not more than six days, exclusive of Sunday.
- The sheriff may postpone the sale more than once when any of the conditions listed in the statute are met, so long as the sale is held not more than 90 days after the original sale date.

G.S. 1-339.58(b) was amended to add a new subsection (3) requiring the sheriff postponing the sale to give written or oral notice of each postponement to the judgment debtor. Written notice must be served in any manner provided in G.S. 1A-1, Rule 5(b).

Finally, G.S. 1-310 was amended to allow an extension of the 90-day period to return an execution based on the number of days a sale is postponed. For example, if a sheriff postpones a sale by 5 days, the sheriff now has 95 days to return the execution instead of 90.

3. Sales Under Power of Sale Foreclosure

The provisions in G.S. 45-21.21, which authorize the postponement of sales by persons exercising a power of sale, were substantively amended as follows:

- A person exercising a power of sale may postpone a sale to a day certain not later than 90 days after the original sale date under certain conditions listed in the statute (*e.g.*, there are no bidders). Previously, the statute authorized a postponement of not later than 90 days, exclusive of Sundays.
- Both G.S. 45-21.21(a) and (e) previously authorized the postponement of a sale more than once. However, the Act (i) amended subsection (a) to clarify that a sale may be postponed more than once, so long as the sale is held not later than 90 days after the original date, and (ii) deleted subsection (e), eliminating duplicative language.
- Subsection (m) of G.S. 45-21.21(m) was deleted, which previously authorized reports to the Administrative Office of the Courts of habitual noncompliance of sale postponements.

Sale Postponement and G.S. 1A-1, Rule 6

The above provisions, which authorize the postponement of (1) public judicial sales, (2) execution sales, and (3) sales authorized under power of sale foreclosure, provide that the sale must occur not later than 90 days after the original sale date, as computed in the manner provided by G.S. 1A-1, Rule 6. The time computation under Rule 6(a) provides that “the day of the act, event, default or publication after which the designated time period begins is *not* to be included. The last day of the period so computed *is* to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions. (emphasis added).” For example, if the original sale is scheduled for Monday, September 19, 2022, and then postponed by the person authorized to conduct the sale (*e.g.*, sheriff in an execution sale), September 20 would be day one of the ninety-day window because the date of the original sale would be excluded from the count.

The last day to hold the public sale in this example would be Monday, December 19, because day 90 falls on a Sunday.

Court officials with any questions may contact or Nicole Brinkley at Nicole.N.Brinkley@nccourts.org or Matt Kraus at Matthew.R.Kraus@nccourts.org. Thank you.



ADMINISTRATIVE OFFICE OF THE COURTS

OFFICE OF GENERAL COUNSEL

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MEMORANDUM

TO: Clerks of Superior Court
Assistant Clerks of Superior Court
Deputy Clerks of Superior Court

FROM: Nicole Brinkley, Deputy Legal Counsel

DATE: September 20, 2024

SUBJECT: 2024 Legislation – Changes to Foreclosure Sales Conducted under G.S. Chapter 45 Power of Sale (SB 319)¹

On July 2, 2024, the Governor signed into law Senate Bill 319, which is chaptered as Session Law 2024-29 (hereinafter “the Act”).² This memorandum summarizes Section 4 of the Act that (i) made changes to provisions that provide for the location and time of a foreclosure sale conducted pursuant to G.S. Chapter 45 and (ii) created authority for a person exercising the power of sale to receive bids remotely. The changes summarized herein are effective October 1, 2024, and apply to notices of foreclosure sale filed with the clerk of superior court on or after that date.

I. Physical Location of Sale

G.S. 45-21.4 provides for the physical location of a sale conducted pursuant to foreclosure power of sale in three scenarios.

1) Mortgage or Deed of Trust Designates Place of Sale

When a mortgage or deed of trust with power of sale designates a sale location within the county, the trustee must hold the sale at the location designated in the deed of trust or mortgage. G.S. 45-21.4(c).

2) Mortgage or Deed of Trust Confers Right to Designate Place of Sale

When a mortgage or deed of trust with power of sale confers upon the mortgagee or trustee the right to designate the physical location of a sale, G.S. 45-21.4(d) requires the sale be held at one of three locations.

- (i) On the premises to be sold.
- or
- (ii) At the courthouse door.

¹ This memo will be available on the NCAOC’s Juno website for Judicial Branch users at <https://juno.nccourts.org/legal-memos>, under the Foreclosure and Special Proceedings Memos categories.

² Full text of the enacted bill is available at <https://www.ncleg.gov/BillLookup/2023/s319>.



- a. For property situated wholly within a single county, the sale must be held at the courthouse door of the county in which the property is situated.
- b. For a single tract of property situated in two or more counties, the sale must be held at the courthouse door of any one of the counties where some part of the property is situated.

or

- (iii) **New** - For notices of foreclosure sale filed with the clerk on or after October 1, 2024, at another public location within the county designated by the mortgagee or trustee.
 - a. For property situated wholly within a single county, the “public location” designated by the mortgagee or trustee must be “within the county where the land is situated.”
 - b. For a single tract of property situated in two or more counties, the “public location” designated by the mortgagee or trustee must be “within any one of the counties in which some part of the real property is situated.” S.L. 2024-29, sec. 4.(a).

The term “public location” is not defined in the Act.

3) Mortgage or Deed of Trust Fails to Designate or Confer Right to Designate Place of Sale or Designates a County Where No Part of the Property is Situated

When a mortgage or deed of trust with power of sale does not designate a place of sale, does not confer upon the mortgagee or trustee the right to designate the place of sale, or when it designates a place in a county where no part of the land is situated, G.S. 45-21.4(e) requires that sale be held at one of two locations.

- (i) At the courthouse door.
 - a. For property situated wholly within a single county, the sale must be held at the courthouse door of the county in which the property is situated.
 - b. For a single tract of property situated in two or more counties, the sale must be held at the courthouse door of any one of the counties where some part of the property is situated.

or

- (ii) **New** - For notices of foreclosure sale filed with the clerk on or after October 1, 2024, at another public location within the county designated by the clerk of superior court.
 - a. For property situated wholly within a single county, the public location is “designated by the clerk of superior court of the county where the land is situated.”
 - b. For a single tract of property situated in two or more counties, the public location is designated by the clerk of superior court of one of the counties in which some part of the real property is situated.”

The term “public location” is not defined in the Act, and the Act does not provide a procedure for how the clerk designates another public location. The clerk is not required to designate another public location. However, in determining whether to designate another public location, the clerk should carefully consider any suggested public location. Considerations might be clear accessibility by the public to the location (e.g., not behind a code-restricted or locked gate) and whether there is a need for a security presence that is similar to what is provided at a courthouse.

II. Time of Sale

The Act amended G.S. 45-21.23 to require that a sale begin no later than three hours (previously one hour) after the time fixed for sale designated in the notice of sale, unless delayed by other sales held at the same place. Below is the full text of G.S. 45-21.23, as amended:

A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than ~~one hour~~ three hours after the time fixed therefor unless it is delayed by other sales held at the same place. The sale shall be held between the hours of 10:00 A.M. and 4:00 P.M. on any day when the clerk's office is normally open for transactions.

S.L. 2024-29, sec. 4.(b).

III. Bids Placed Remotely at Trustee's Sale

The Act created a **new** G.S. 45-21.25A that authorizes a person exercising the power of sale of real property, or that person's agent, to accept remote bids from bidders not physically present at the sale. In doing so, the person exercising the power of sale, or that person's agent, must comply with the following:

- All bids accepted at the sale must be clearly announced to all participating bidders (both physically present and remote).
- The person exercising the power of sale, or that person's agent, must collect all funds required to be paid by the winning bidder pursuant to G.S. 45-21.10 prior to accepting the remote bid.
- Charges incurred by the person exercising the power of sale, or that person's agent, in connection with remote bidding shall not be chargeable to the mortgagor or otherwise recoverable as costs and expenses of the foreclosure.

S.L. 2024-29, sec. 4(c).

This provision does **not** change the process for filing reports of sale under G.S. 45-21.26 or upset bids under G.S. 45-21.27.

Court officials with any questions or matters requiring discussion are welcome to contact Nicole Brinkley at Nicole.N.Brinkley@nccourts.org or Matt Kraus at Matthew.R.Kraus@nccourts.org. Thank you.

Where are We Now: The Protecting Tenants at Foreclosure Act

As I noted in a [prior blog post](#), the US Congress restored the federal Protecting Tenants at Foreclosure Act (PTFA) without expiration on June 23, 2018. The PTFA has been in effect, expired, and restored at various points over the past decade. During one period after the PTFA expired, the NC General Assembly passed a law ([S.L. 2015-178](#)) to provide somewhat similar (but not exact, more on that below) protections for tenants of foreclosed property under state law. Most recently, the NC General Assembly took action to repeal that law in light of the permanent restoration of the PTFA. See [S.L. 2019-53](#) and [S.L. 2019-243](#). This blog post tracks where we've been and where the law currently stands related to the PTFA and power of sale foreclosures under G.S. Chapter 45 in NC.

The Origins of the PTFA

The PTFA was first enacted by Congress in 2009 during the financial crisis. See Public Law 111-22 (May 20, 2009) (codified at [12 U.S.C. sec. 5220 note](#)) [PTFA]. It was intended to provide protection for tenants living in foreclosed properties. In many cases, tenants had little or no notice of the foreclosure and the need to vacate the premises. See [Protecting Tenants at Foreclosure](#), Department of Housing and Urban Development Notice, 74 Fed. Reg. 30106 (June 24, 2009). The purpose of the PTFA is to ensure tenants receive appropriate notice of the foreclosure and are not abruptly displaced. *Id.* The federal PTFA overrides state foreclosure law that held that upon a foreclosure the tenant has no right to continued possession of the premises. North Carolina Clerk of Superior Court Procedures Manual, pg. 130.49 (2012) [CSC Manual]. See *Dixieland Realty Co v. Wysor*, 272 N.C. 172, 175 (1967); *In re Foreclosure of Lien by Ridgeloach Homeowners Ass'n, Inc.*, 182 N.C. App. 464, 469 (2007). See also *Nativi v. Deutsche Bank Nat'l Trust Co.*, 167 Ca. Rptr.3d 173, 192-93 (Cal. Ct. App. 2014); *Curtis v. U.S. Bank Nat Ass'n*, 50 A.3d 558, 564 (Md. 2012).

The protections under Section 702 of the PFTA apply in the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property. PTFA, Sec. 702(a). The protections apply for bona fide tenants. A lease or tenancy is considered bona fide only if

1. The tenant is not the mortgagor, or the child, spouse, or parent of the mortgagor;
2. The lease or tenancy was the product of an arms-length transaction; and
3. The rent required by the lease or tenancy is not substantially less than the fair rental value of the property, or if it is, the rent is reduced by a government subsidy. PTFA, Sec. 702(b).

The protections provided to these tenants under the PTFA include

1. The tenant's right to receive a notice to vacate at least 90 days before the effective date of

- the notice (the “90-day notice”);
2. The tenant’s right to occupy the premises until the end of the lease term, provided the lease is bona fide and was entered into before the notice of the foreclosure, unless the purchaser will occupy the property as a primary residence;
 3. If the purchaser will occupy the property as a primary residence, the tenant’s right to receive the 90-day notice;
 4. In cases without a lease or a lease terminable at will, the tenant’s right to receive the 90-day notice; and
 5. Any other requirements for termination of a Federal or State subsidized tenancy or any State or local law that provides longer time periods or additional protections for tenants.

PTFA, Sec. 702(a). When the PTFA was enacted in 2009, it contained a sunset provision, meaning it automatically expired unless Congress renewed it. It was originally set to expire on December 31, 2012. Congress then extended it to December 31, 2014.

The Application of the PTFA in NC From 2009 to December 31, 2014

When the PTFA was enacted, it added a requirement to the list of things the clerk must consider before issuing an order for possession under N.C.G.S. 45-21.29. This state statute prescribes the process a purchaser of foreclosed property must follow to remove an occupant from the foreclosed property. An application is made by petition to the clerk by the trustee, the lender, or the purchaser of the property or one of their authorized representatives. G.S. 45-21.29(k)(6). If the clerk finds that the petitioner complied with the requirements for issuance of the order, the clerk will enter an order for possession and the sheriff is directed to remove all occupants and their personal property from the premises. G.S. 41-21.29(l).

The guidance set out in the 2012 version of the North Carolina Clerk of Superior Court Procedures Manual addressing the impact of the PTFA on a North Carolina nonjudicial foreclosure stated that the petitioner seeking an order for possession had to show the clerk that the occupant in possession of the foreclosed property was **not a bona fide tenant** in addition to the other requirements listed in G.S. 45-21.29. [North Carolina Clerk of Superior Court Procedures Manual](#), pg. 130.49 (2012). See also [The Protecting Tenants at Foreclosure Act of 2009](#), Dona Lewandowski, UNC School of Government (explaining prior to December 31, 2014 that if the occupant was a bona fide tenant, then the purchaser would have to pursue summary ejectment remedies before the magistrate).

NC General Assembly Responds

When the PTFA expired on December 31, 2014, the NC General Assembly acted to fill in the gap left by the expiration of the PTFA and provide protections for certain tenants of foreclosed property. That state law, S.L. 2015-178, is the discussion of my earlier [blog post](#). It went into effect on October 1, 2015 and created a new G.S. 45-21.33A listing those protections.

From October 1, 2015 until the PTFA was permanently restored on June 23, 2018, before the clerk could issue an order for possession the clerk had to find that the applicant “satisfied” the provisions of G.S. 45-21.33A. G.S. 45-21.29(k)(5a)(2015). For example, if the lease was oral, terminable at will, or the purchaser was going to occupy the premises as a primary residence, then the applicant had to provide

- a 90-day notice to vacate to the tenant “before making an application for possession” before the clerk and
- evidence of the 90-notice to the clerk as part of the application. S. 45-21.33A(d).

One impact of the 2015 state law was to allow a purchaser from a foreclosure to go to the clerk to obtain an order for possession rather than seek summary ejectment to remove the protected tenant from the premises. Orders for possession and summary ejectment are very distinct remedies. An order for possession is typically issued by the clerk without a hearing and without notice of the petition for the order to the tenant or other occupant(s). The tenant generally has no opportunity to raise defenses before the clerk issues the order. This is unlike a summary ejectment proceeding which requires notice to the tenant and opportunity to be heard at a hearing before the magistrate.

Congress Permanently Restores the PTFA

The game of ping-pong continued in 2018 when Congress permanently restored the PTFA, effective June 23, 2018. [Public Law 115-174, title III, sec. 304 \(May 24, 2018\)](#). As a result, both state and federal protections applied to tenants of foreclosed property. State law did not exactly mirror federal law and as a result there was a significant amount of confusion that occurred when one applied both laws to a tenant of foreclosed property.

NC General Assembly Responds (Again...and Again)

The conflict did not last for long because in 2019 a bill was introduced that reflects “the restoration of the federal Protecting Tenants at Foreclosure Act and deletes provisions of State law that were enacted to provide protections when the federal act had sunset.” See [Bill Analysis, House Bill 531: Protect. Tenants at Foreclosure Act Restored, May 31, 2019](#). The bill repealed G.S. 45-21.33A. It also amended G.S. 45-21.29(k)(5a) to delete the reference to G.S. 45-21.33A and revise it to reference the PTFA. The bill was signed by Governor Cooper and went into effect as S.L. 2019-53 on October 1, 2019. The General Assembly then amended G.S. 45-21.29(k) a second time in 2019. Effective November 6, 2019, S.L. 2019-243 repeals G.S. 45-21.29(k)(5a) in its entirety.

Just Get to the Point, Meredith: Where are We Now?

In the words of Cher, we have officially turned back time. The federal and North Carolina statutory law related to protecting tenants at foreclosure is as it existed prior to the passage of North Carolina Session Law 2015-178 (discussed above) and the expiration of the PTFA. The conflict

between state and federal statutes has been eliminated. The protections for tenants in G.S. 45-21.33A added in 2015 to NC law are repealed.

However, Cher was only partially correct. Although we have turned back time on the federal and state statutory framework, the courts have not remained silent on the subject of the PTFA. In 2015 and 2016, two federal court opinions interpreting the PTFA were published by the United States District Court for the Eastern District of North Carolina that inform the analysis of when a clerk may issue an order for possession under G.S. 45-21.29(k): (i) *House v. Fed. Home Loan Mortg. Corp.*, 2015 WL 135979, at *5 (E.D.N.C. Jan. 9, 2015), *aff'd*, 699 F. App'x 259 (4th Cir. 2017) (House 1), and (ii) *House v. Fed. Home Loan Mortg. Corp.*, 261 F. Supp. 3d 623, 633 (E.D.N.C. 2016), *aff'd*, 699 F. App'x 259 (4th Cir. 2017) (House 2). Both opinions were affirmed by the federal Fourth Circuit Court of Appeals. These opinions establish the term “requisite time period” under the PTFA and are the subject of [my next post](#). In the meantime, for purposes of ensuring compliance with both the PTFA and G.S. 45-21.29(k), keep in mind:

- If there is **a bona fide tenant** under the PTFA occupying the foreclosed property, the clerk may not issue the order for possession under G.S. 45-21.29(k) unless the “requisite time period” under the PTFA has run. During the PTFA’s requisite time period, the purchaser of the foreclosed property must pursue summary ejectment before the magistrate to remove a tenant from the property.
- If there is **not a bona fide tenant** under the PTFA and the other requirements set forth in G.S. 45-21.29 are met, then the clerk may issue the order for possession. CSC Manual, pg. 130.49 (2012). An applicant for the order for possession may show there is not a bona fide tenant, for example, through a sworn statement about the applicant’s knowledge of the person or persons occupying the property submitted with the application.

For those of you in the judicial branch, the NC Administrative Office of the Courts Office of General Counsel published a helpful checklist applicable to orders for possession in power of sale foreclosures that is available on the AOC intranet (JUNO). Hopefully, we have heard the last of the PTFA-related legislation but given this history outlined in this post, you can never be too sure.

** This post was updated on August 31, 2020 to include references to the requisite time period under the PTFA and the case decisions in House 1 and House 2.*

More on the Protecting Tenants at Foreclosure Act

** Note, this post focuses solely on the application of the federal Protecting Tenants at Foreclosure Act to Chapter 45 power of sale foreclosure proceedings. Many foreclosures and evictions of occupants from properties acquired through foreclosure, including pursuant to an order for possession under G.S. 45-21.29(k) (the subject of this post), remain subject to a federal moratorium due to the pandemic. This moratorium was recently **extended through December 31, 2020**. To read more about current federal and state limits imposed on foreclosure proceedings due to the pandemic, [click here](#).*

A borrower stops making his home mortgage payments. A lender files a power of sale foreclosure pursuant to G.S. Chapter 45 to foreclose the lien of the deed of trust. After title to the property is transferred to a new owner out of the foreclosure, an occupant remains on the property. The new owner of the property, also known as the successor in interest, files a petition with the clerk of superior court under [G.S. 45-21.29\(k\)](#) for an order for possession. The petition and other evidence provided by the petitioner meet requirements of subsection (k) but the petition also states the occupant is a bona fide tenant.*

May the clerk issue the order for possession?

The short answer is yes, provided that all requisite time periods under the Protecting Tenants at Foreclosure Act (PTFA) have run. *House v. Fed. Home Loan Mortg. Corp.*, 261 F. Supp. 3d 623, 633 (E.D.N.C. 2016), *aff'd*, 699 F. App'x 259 (4th Cir. 2017) (House 2). I discussed the PTFA and the recent federal and state legislation related to this federal law in a [prior post](#). This post addresses the impact of that legislation and two important case decisions from the United States District Court for the Eastern District of North Carolina on the process of obtaining an order for possession from the clerk after a foreclosure.

Ordinarily under North Carolina law, a tenant's subordinate leasehold interest is extinguished by a foreclosure of a senior deed of trust. *Id.* at 631. Absent PTFA protections, a successor in interest could remove an occupant from foreclosed property without a trial to determine their status as a tenant because the foreclosure extinguished the rights of the tenant by operation of law. *Id.* at 632. However, when the PTFA applies, the tenancy survives the foreclosure and the successor in interest assumes the landlord's role, including the landlord's rights and responsibilities under state law. *House v. Fed. Home Loan Mortg. Corp.*, 2015 WL 135979, at *5 (E.D.N.C. Jan. 9, 2015), *aff'd*, 699 F. App'x 259 (4th Cir. 2017) (House 1). The PTFA creates a landlord-tenant relationship between the successor in interest and the bona fide tenant for the PTFA's "requisite time period." *Id.* at *6.

Once the requisite PTFA period ends, the parties return to the positions under state law they occupied "before the PTFA intervened to give the [bona fide tenant] additional legal protection." *House 2*, 261 F. Supp. 3d at 633. As a result, at the end of the requisite PTFA time

period, the bona fide tenant qualifies as a party in possession and the successor in interest may remove the party in possession by obtaining an order for possession from the clerk under G.S. 45-21.29 rather than by seeking summary ejectment before a magistrate under G.S. Chapter 42. *Id.*

What is the requisite time period under the PTFA?

Section 702 of the PTFA applies to property subject to a foreclosure on a federally related mortgage loan or any dwelling or residential real property. [Pub.L. No. 111-22](#), sec. 702(a) (codified at [12 U.S.C. sec. 5220 note](#)) [PTFA]. The requisite time period under Section 702 of the PTFA is “at least 90 days following foreclosure and possibly until the end of the lease term.” *House 1*, 2015 WL 135979, at *6.

Protection for at least 90 days. In all cases under Section 702, the successor in interest must give the bona fide tenant a notice to vacate at least 90 days prior to the effective date of the notice. PTFA, sec. 702(a)(1). *See House 1*, 2015 WL 135979, at *5-6 (stating that under the PTFA a tenancy survives foreclosure for a minimum of 90 days).

Protection through the end of a lease term. In addition to the obligation to send the 90-day notice to vacate, the successor in interest takes the property subject to the right of a bona fide tenant under a bona fide lease to occupy the premises until the end of the remaining term of the lease. PTFA, sec. 702(a)(2)(A). As a result, the requisite time period under the PTFA may run for longer than 90 days if there is a bona fide lease with a remaining term that is greater than 90 days. PTFA, sec. 702(a)(2).

For example, a mortgagor enters into a one-year fixed term lease with a tenant on January 1, 2020. The deed conveying title out of the foreclosure to the successor in interest is executed and recorded on January 30, 2020. The tenant has the right to remain on the property under the PTFA until December 31, 2020, the end of the lease term. During that time period, a landlord-tenant relationship exists under the PTFA. *House 1*, 2015 WL 135979, at *5. After December 31, 2020, the successor in interest may apply for an order for possession from the clerk on the basis that the requisite time period under the PTFA expired. *House 2*, 261 F. Supp. 3d at 634. The successor in interest is required to give the bona fide tenant the 90-day notice to vacate. PTFA, Sec. 702(a)(1).

There are few additional limitations on a bona fide tenant’s right to remain on the premises pursuant to a lease:

- The lease may not be terminable at will under state law. PTFA, sec. 702(a)(2).
- The lease must be entered into before the notice of foreclosure. PTFA, sec. 702(a)(2)(A). The date of a notice of foreclosure is “the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.” [Pub. L. No. 111-203, sec. 1484](#).

- The lease term may be cut short if the successor in interest sells the property to a purchaser who will occupy the property as a primary residence. PTFA, sec. 702(a)(2). However, even in that case, the bona fide tenant is entitled to the 90-day notice to vacate.
- The protections under Section 702 of the PTFA apply to the remaining term of the lease in effect pre-foreclosure; they do not apply to renewals of the lease. *House 2*, 261 F. Supp. 3d at 634.

How does the clerk confirm the requisite time period under the PTFA expired?

If a petition seeking an order for possession under G.S. 45-21.29 asserts there is (i) a bona fide tenant on the property and (ii) the requisite time periods expired, the court will likely look for evidence of the following before entering the order for possession:

1. The successor in interest provided any bona fide tenant with a notice to vacate at least 90 days before the effective date of the notice. PTFA, sec. 702(a)(1).
2. There is:
 - no lease,
 - a lease terminable at will,
 - a sale of the property to a purchaser who will occupy the property as a primary residence, or
 - a lease not terminable at will entered into before the notice of foreclosure and the term of the bona fide lease expired. PTFA, sec. 702(a)(2).
3. The tenancy is not a Federal or State subsidized tenancy and there are no state or local laws that provide longer time periods or additional protections for the tenant. PTFA, sec. 702(a) and sec. 703. Note, the availability of an order for possession in the case of a subsidized tenancy is beyond the scope of this post.**

The petition may include statements to support each of these findings. A clerk may determine that those statements are sufficient, if made under oath, for the clerk to find the requisite time period under the PTFA expired. But the clerk is not bound by those statements and may require additional evidence to support them before issuing the order for possession.

It is relatively straightforward for a petitioner to provide evidence of the 90-day notice to vacate (item 1 above) by providing a copy of the notice sent by the successor in interest to the party in possession. It may be more challenging for a petitioner to provide proof to support the other statements in the petition (items 2 and 3 above). The successor in interest likely will have no prior relationship with the party in possession and may not have a copy of the lease, if one exists. The successor in interest may have made attempts to communicate with the party in possession and received no response. The successor in interest may not know, for example, whether there is a lease, whether it is terminable at will, or whether a recipient of Section 8 housing assistance resides at the property. The party in possession of the real property is not entitled to notice of a petition for the order for possession under G.S. 45-21.29(k) and the order for possession is

typically entered by the clerk without a hearing. In the absence of competent evidence or where there is conflicting evidence as to whether the PTFA's requisite time period has run and thus whether an order for possession is an appropriate remedy, some clerks will require notice to the party in possession and hold a hearing before issuing the order for possession.

Despite these challenges, the decisions of the federal district court in *House 1 and House 2*, indicate that a clerk may issue an order for possession even if the property is occupied by a bona fide tenant provided the PTFA requisite time period, and thus the landlord tenant relationship established by the PTFA, expired. It is up to the clerk to determine what evidence is sufficient to enable the clerk to conclude the time period has in fact expired where a petition alleges a property is or may be occupied by a bona fide tenant.

* A bona fide lease or tenancy is one where (i) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (ii) the lease or tenancy was a result of an arms-length transaction; and (iii) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy. [Pub. L. No. 111-22, sec. 702\(b\)](#).

** Under Section 702, the successor in interest must comply with any requirements for termination of a federal or state subsidized tenancy. PTFA, sec. 702(a). Section 703 of the PTFA applies to one type of federally subsidized tenancy. It applies to any foreclosure of a federally related mortgage loan or on any dwelling or residential real property in which a recipient of assistance under Section 8 of the United States Housing Act of 1937 resides. PTFA, sec. 703(2). Under Section 703, the immediate successor in interest assumes ownership "subject to the lease between the prior owner and the tenant **and** to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit." PTFA, sec. 703(2) (emphasis added). The immediate successor in interest may terminate the tenancy effective on the date of the transfer of the unit to the owner if the owner (i) will occupy the unit as a primary residence, and (ii) has provided the tenant the 90 day notice to vacate. Sec. 703(1).

Foreclosure Moratorium in Effect in North Carolina for Certain Counties and Certain Mortgage Loans

Many counties in Western North Carolina continue to struggle with the devastating effects of Hurricane Helene. As of today, seven county courthouses are reporting closures of some type. An updated list of counties along with the types of closures in each county is available through the North Carolina Administrative Office of the Courts [website](#). Officials in federal, state, and local government are taking action to provide relief in many forms. This includes actions at both the federal and state level that impact foreclosures.

Federal Foreclosure Moratorium

On September 28, 2024, President Biden [issued](#) a major disaster declaration ([amended](#) October 2, 2024), effective September 25, 2024. As a result of this declaration, the U.S. Department of Housing and Urban Development (HUD) announced the implementation of federal disaster assistance for North Carolina and ordered federal aid to supplement state, tribal, and local recovery efforts in the areas affected by Helene.

The aid includes a 90-day moratorium on foreclosures of certain mortgage loans. It is not a moratorium on all foreclosures and does not apply to, for example, privately insured mortgage loans or other federally backed loans such as loans guaranteed or insured by the U.S. Department of Agriculture or the U.S. Department of Veterans Affairs (VA)* or loans purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association. It may be the case that the federal government takes action to implement a moratorium on these types of loans in the future, but for now the moratorium is limited and applies only to:

- mortgages insured by the Federal Housing Administration (FHA), and
- mortgages to Native American borrowers guaranteed under the Section 184 Indian Home Loan Guarantee program.

There is also a 90-day extension granted automatically for Home Equity Conversion Mortgages, which are federally insured reverse mortgages. This moratorium is in effect as of the date of the President's disaster declaration date, which is September 25, 2024, and thus runs through December 24, 2024.

The moratorium applies to foreclosures of covered mortgage loans in the following 25 counties: Alexander, Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Catawba, Clay, Cleveland, Gaston, Haywood, Henderson, Jackson, Lincoln, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Transylvania, Watauga, Wilkes, and Yancey. It also applies to the Eastern Band of Cherokee Indians.

You can read more about the moratorium and other relief available to homeowners in impacted areas on HUD's [website](#).

Order from the Chief Justice of the North Carolina Supreme Court

The Chief Justice of the North Carolina Supreme Court entered an [emergency order](#) applicable to certain counties impacted by Helene on September 29, 2024, as amended September 30 (the "Original Order"). You can read more about that order in a [blog post](#) available from my colleague, Sara DePasquale. The Original Order extends "the time and periods of limitation for filing and for acts due to be done" in 28 North Carolina counties in civil actions, criminal actions, estates, and special proceedings between the dates of September 26, 2024 and October 14, 2024. Under the Original Order, such documents and acts are "deemed to be timely" if they are filed or done before the close of business on October 14, 2024. The Original Order applies to the same 25 counties as the federal foreclosure moratorium and adds to that list an additional three counties, Swain, Cherokee, and Graham. Unlike the federal moratorium, the Chief Justice's Order does not apply to the Eastern Band of Cherokee Indians.

On October 11, 2024, the Chief Justice [entered an order](#) extending the Original Order for 13 of the 28 counties (the "Extension Order," and together with the "Original Order," the "Order"). The 13 counties covered by the Extension Order are: Avery, Buncombe, Haywood, Henderson, Jackson, Madison, McDowell, Mitchell, Polk, Rutherford, Transylvania, Watauga, and Yancey. The Extension Order extends the time and periods of limitation for filing and for acts due to be done in those counties to the close of business on October 28, 2024. The chart at the end of this post reflects a summary of the covered counties both with respect to the federal moratorium and the Chief Justice's Order.

For foreclosures in covered counties, this means that, if an order authorizing or not authorizing a foreclosure sale is entered, the deadline to appeal the order, which is 10 days from the entry of the order ([G.S. 45-21.16\(d1\)](#)), will be extended to the close of business on the date specified in the Order. If, for example, a foreclosure hearing took place on September 24, and it resulted in the entering of an order allowing a foreclosure sale to proceed, the homeowner would normally have until October 4 to file an appeal. However, the Order now extends the time to file an appeal to either (1) October 14, 2024, for 15 of the 28 counties covered in the Original Order or (2) October 28, 2024, for the 13 counties covered by the Extension Order.

It also means that, after a foreclosure sale, a report of sale may be filed and any person may file an upset bid, but the upset bid period does not expire until the close of business on the date specified in the Order. For example, a foreclosure sale was held on September 24. The trustee filed the report of sale the same day. The filing of the report of sale starts the running of the 10-day upset bid period. Absent the Chief Justice's Order, the upset bid period would have run on October 4. However, the Order now extends the time to file an upset bid on the property to the close of business on (i) October 14, 2024 for 15 of the 28 North Carolina counties covered in the Original

Order and (ii) October 28, 2024 for the 13 counties covered by the Extension Order. If no one files an upset bid, the upset bid period would run to the close of business on either October 14 or October 28, depending on whether the Extension Order applies to that county. This is because the Chief Justice's Order does not prevent someone from filing an upset bid. The Order authorizes someone to file an upset bid by the close of business on October 14 or October 28, as applicable, and the bid would be deemed timely despite being outside of the statutory 10-day upset bid period.

If a person, Jane, appeared on September 27 in **Graham County** (a county covered by the Original Order, but not the Extension Order) to file an upset bid related to the sale held on September 24, Jane could file the upset bid provided it otherwise meets the requirements of an upset bid (bid amount equal to the greater of \$750 or 5% more than the previous bid and other requirements in [G.S. 45-21.27](#)). If Tom appeared on September 30, he could upset Jane's bid if his bid also meets the statutory requirements. However, if Jane then files another upset bid on October 9, the 10-day upset bid period would fall on October 21, a date outside the period protected by the Original Order. As a result, the final time to file an upset bid on the property would be at the close of business on October 21.

If another person, let's say Jake, appeared on October 4 in **Polk County** (a county covered by the Extension Order) to file an upset bid related to a foreclosure sale held on September 24, Jake could file the upset bid provided it otherwise meets the requirements of an upset bid (bid amount equal to the greater of \$750 or 5% more than the previous bid and other requirements in [G.S. 45-21.27](#)). If Tonya appeared on October 14, she could upset Jake's bid if her bid also meets the statutory requirements. However, if Jake then files another upset bid on October 22, the 10-day upset bid period would fall on November 1, a date currently outside the period protected by the Extension Order. As a result, the final time to file an upset bid on the property would be at the close of business on November 1.

Summary: Foreclosure Relief as of October 11, 2024

Some key takeaways of this combined federal and state relief are:

- Foreclosure hearings are not prohibited by the Chief Justice's Order, however, mortgage lenders and servicers are prohibited from pursuing foreclosure of covered loans in covered counties. Before proceeding to enter an order in any of the covered counties, judicial officials should inquire as to whether the mortgage loan is a loan that is the subject of the moratorium. The court should not enter an order authorizing the foreclosure sale if the loan is a covered loan.
- Foreclosure sales are not expressly restricted by the Chief Justice's Order, but certain sales may be prohibited by the federal moratorium depending on the type of mortgage loan.
- Reports of sale and upset bids may be filed but an upset bid period ending on or after September 26, 2024 may not expire until (i) the close of business on October 14 for 15 counties covered by the Original Order and (ii) the close of business on October 28 for 13

On the Civil Side

A UNC School of Government Blog

<https://civil.sog.unc.edu>

counties covered by the Extension Order, in accordance with the Chief Justice's Order. Likewise, if a deadline for a party to appeal a foreclosure order occurred on or after September 26, 2024, the deadline is extended for the same period of time.

Additional relief may be forthcoming, we'll update this blog post as appropriate to provide any additional information available related to impacted foreclosures. As always feel free to reach out with any questions, I'm available at meredith.smith@sog.unc.edu.

Counties Covered by the Foreclosure Moratorium and the Chief Justice's Order

County	Federal Foreclosure Moratorium Expiration Date	Chief Justice's Order Expiration Date
Alexander	12/24/24	10/14/24
Alleghany	12/24/24	10/14/24
Ashe	12/24/24	10/14/24
Avery	12/24/24	10/28/24
Buncombe	12/24/24	10/28/24
Burke	12/24/24	10/14/24
Caldwell	12/24/24	10/14/24
Catawba	12/24/24	10/14/24
Cherokee	Does not apply.	10/14/24
Clay	12/24/24	10/14/24
Cleveland	12/24/24	10/14/24
Gaston	12/24/24	10/14/24
Graham	Does not apply.	10/14/24
Haywood	12/24/24	10/28/24
Henderson	12/24/24	10/28/24
Jackson	12/24/24	10/28/24
Lincoln	12/24/24	10/14/24
Macon	12/24/24	10/14/24
Madison	12/24/24	10/28/24
McDowell	12/24/24	10/28/24
Mitchell	12/24/24	10/28/24
Polk	12/24/24	10/28/24
Rutherford	12/24/24	10/28/24
Swain	Does not apply.	10/14/24
Transylvania	12/24/24	10/28/24
Watauga	12/24/24	10/28/24
Wilkes	12/24/24	10/14/24
Yancey	12/24/24	10/28/24

Eastern Band of
Cherokee
Indians

Does not apply.

*On May 29, 2024, in an action unrelated to hurricane Helene relief, the VA [announced](#) loan repayment relief for borrowers under VA-guaranteed loans by issuing a notice *encouraging* loan servicers to implement a targeted foreclosure moratorium through December 31, 2024.

Tab:
Holder of a
Valid Debt

Holder of a Valid Debt

Meredith Stone Smith
UNC School of Government
Foreclosure Hearings for Clerks
November 2024

1

The Big Six

1. **Holder of a valid debt**
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one: loss mitigation pursuant to G.S. 45-21.16C.

2

Clerk's Duty to Inquire

At the **start** of the hearing, the clerk **shall** inquire as to

#1: Whether the debtor occupies the property as their principal residence.

#2: If it **appears** that the debtor does currently occupy the property as a principal residence, the clerk shall further inquire as to the efforts the mortgagee, trustee, or loan servicer has made

- to communicate with the debtor and
- to attempt to resolve the matter voluntarily before the foreclosure proceeding.

G.S. 45-21.16C(a)

3

G.S. 45-21.16C
Opportunity for
parties to resolve
foreclosure of
owner-occupied
residential
property.

- Added to Art. 2A of Chapter 45 by The Consumer Economic Protection Act of 2009
- Purpose—reduce foreclosures by requiring mortgagees and servicers to attempt to resolve delinquencies outside of foreclosure process.

4

Clerk's Duty to Inquire

Clerk may consider whether the mortgagee, trustee, or loan servicer has offered the debtor an **opportunity to resolve the foreclosure** through forbearance, loan modification, or other commonly accepted resolution plan appropriate under the circumstances.

- Did the borrower request forbearance or modification?
- Has the borrower had an alternative resolution before?

G.S. 45-21.16C(b)

5

Clerk's Duty to Inquire

Clerk may consider whether the mortgagee, trustee, or loan servicer has engaged in **actual responsive communication** with the debtor, including telephone conferences or in-person meetings with the debtor or other actual two-party communications.

- Did borrower receive notices from the lender? Did the borrower respond in a timely way? Did the lender?
- Did the borrower attempt to contact servicer for modification? What did they say?
- Did you submit an initial package of documents?
 - Did you hear back?

G.S. 45-21.16C(b)

6

Clerk's Duty to Inquire

Clerk may consider whether the debtor has indicated that **debtor has the intent and ability to resolve** the delinquency by making future payments under a foreclosure resolution plan.

- What is borrower's monthly income?
- What is borrower's current mortgage payment?
- How far behind is the borrower?
- What can the borrower afford to pay each month?

G.S. 45-21.16C(b)

7

Clerk's Duty to Inquire

Clerk may consider whether the initiation or continuance of **good faith voluntary resolution** efforts between the parties may resolve the matter without a foreclosure sale.

G.S. 45-21.16C(b)

8

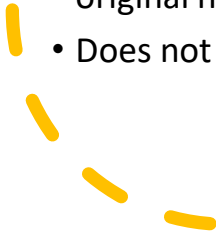


Remedy

The clerk **shall order** the hearing continued if the clerk finds that there is good cause to believe that additional time or additional measures have a reasonable likelihood of resolving the delinquency without foreclosure.

- Continue to date and time certain no more than 60 days from the original hearing date
- Does not otherwise limit clerk's authority to continue for good cause

G.S. 45-21.16C(b).



9



Exception to the Clerk's Duty

The inquiry is not be required if the mortgagee or trustee has submitted, at or before the hearing, an affidavit briefly describing

1. any efforts that have been made to resolve the default with the debtor and
2. the results of any such efforts.

G.S. 45-21.16C(a).



10

Prohibition on Foreclosure During Forbearance

Federal loan servicing regulations **prohibit** foreclosure during forbearance

“A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program” Reg. X, 12 C.F.R. 1024.41(c)(ii).

11

Federal Foreclosure Moratorium: Helene

Federal foreclosure moratorium in effect as of the date of the President’s disaster declaration date (September 25, 2024) and runs through December 24, 2024 for:

- mortgages insured by the Federal Housing Administration (FHA), and
- mortgages to Native American borrowers guaranteed under the Section 184 Indian Home Loan Guarantee program.

There is also a 90-day extension granted automatically for Home Equity Conversion Mortgages, which are federally insured reverse mortgages.

12

Federal Foreclosure Moratorium: Helene

Applies to the following 25 counties: Alexander, Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Catawba, Clay, Cleveland, Gaston, Haywood, Henderson, Jackson, Lincoln, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Transylvania, Watauga, Wilkes, and Yancey. It also applies to the Eastern Band of Cherokee Indians.

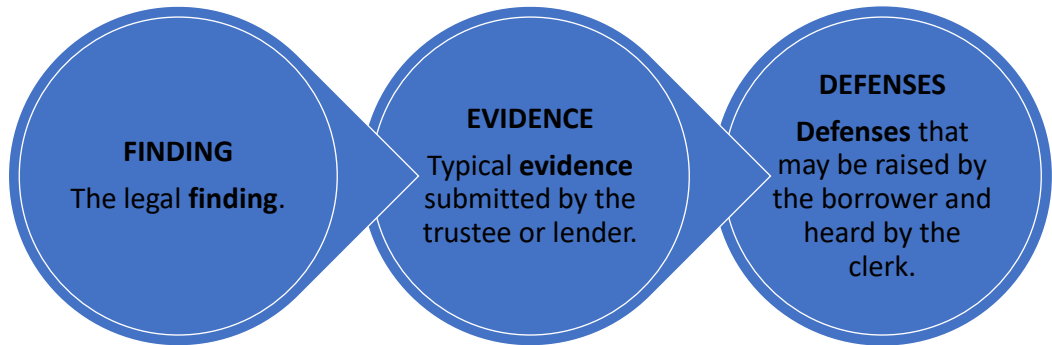
13

The Big Six

1. **Holder of a valid debt**
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one: loss mitigation pursuant to G.S. 45-21.16C.

14



15

Holder of a Valid Debt

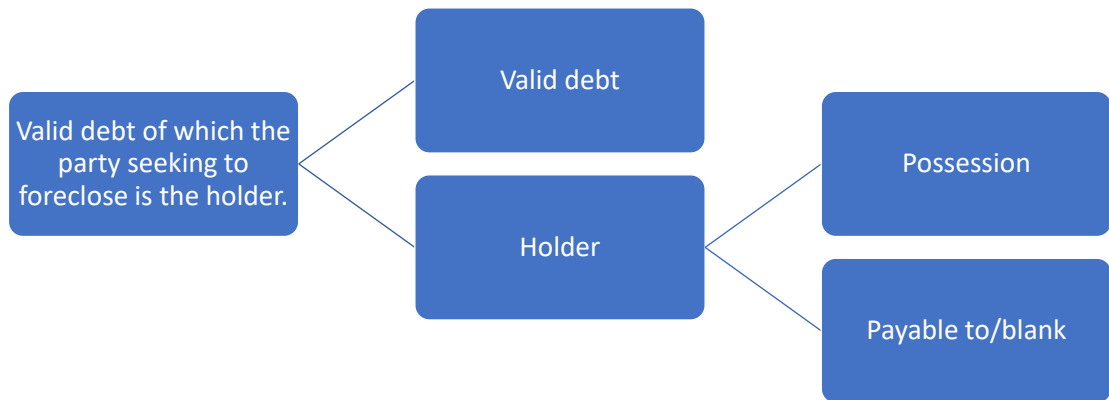
If the clerk finds the existence of

- (i) Valid debt of which the party seeking to foreclose is the holder

G.S. 45-21.16(d)

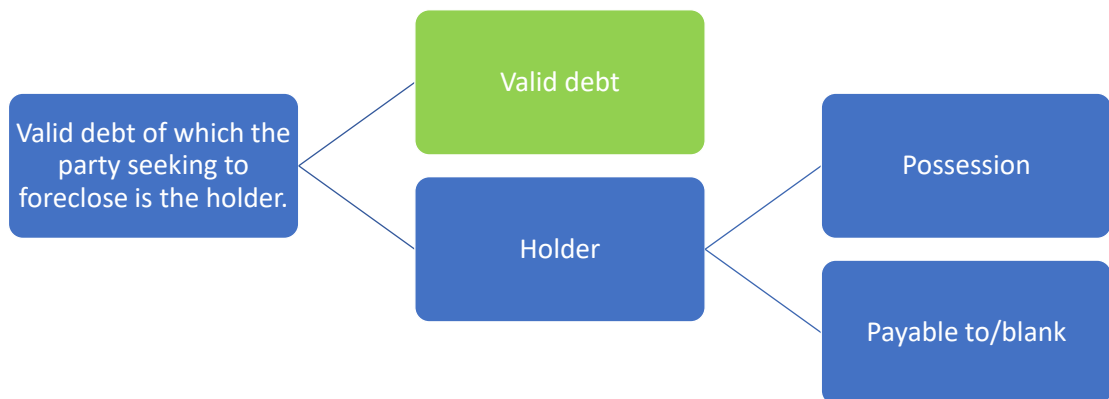
16

The Clerk's Findings



17

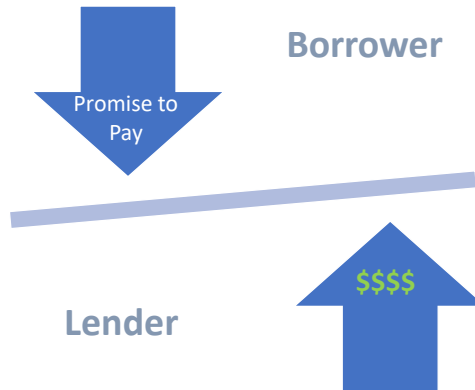
The Clerk's Findings



18

Valid Debt

Most foreclosures –promissory note executed by borrower in favor of lender.



19

Evidence: Valid Debt

Affidavit testimony (typically from servicer or lender)

- Loan made to borrower
- Amount
- Date
- Evidenced by note signed by the borrower

 STATE OF NORTH CAROLINA COUNTY OF PRICE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21-SP-1234
IN THE MATTER OF THE FORECLOSURE of a Deed of Trust from December 5, 2006 dated and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Register of Deeds by Sunshine Trustee Services, LLC (Substitute Trustee)	SERVICER AFFIDAVIT
The undersigned, being first duly sworn, deposes and says that:	
<ol style="list-style-type: none"> 1. I am the Assistant Secretary of Nationstar Loan Servicing LLC. I am familiar with the books and records of Nationstar Loan Servicing LLC and I am authorized and competent to make this affidavit. 2. Happy Lending LLC ("Holder") is the current owner and holder of the Promissory Note executed by Bob and Belinda Barker in the original principal amount of \$417,000.00 dated December 5, 2006 (as amended, modified, <u>renewed</u> or restated, the "Note"). 3. Payment of the Note is secured by a Deed of Trust from Bob and Belinda Barker to PRLAP, Inc. for the benefit of Capital One, FSB, dated December 5, 2006 and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Public Registry, securing indebtedness in the original principal amount of \$417,000.00 (the "Deed of Trust"). 4. The copies of the Note and the Deed of Trust attached hereto as Exhibits A and B, respectively, are true, accurate and complete copies of the original Note and Deed of Trust, which are the subject of this foreclosure proceeding. 	

20

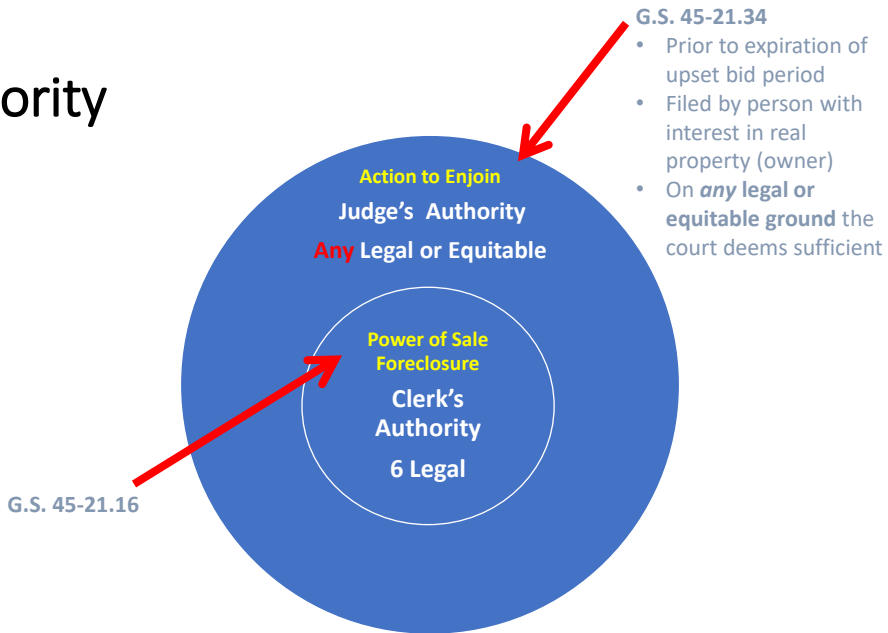


Can the clerk hear it? Is it a legal defense to one of six factors or is it another type of legal or equitable defense?



23

Authority



24

Clerk or No Clerk

Borrower A argues that Borrower B forged her name on a note and thus there is not a valid debt against Borrower A.

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

25

Forgery

Forgery of a legal document is a proper legal defense to a lender's assertion that a valid debt exists.

Espinosa v. Martin, 135 N.C. App. 305, 308 (1999);

In re Hudson, 182 N.C. App. 499, 503 (2007)

If forgery alleged, then the question becomes whether the party otherwise consented through conduct? i.e. ratification

In re Foreclosure of Rivera (2015) (unpublished)

26

Clerk or No Clerk

Borrower argues that the debt is not valid because she was not competent at the time she signed the note.

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

27

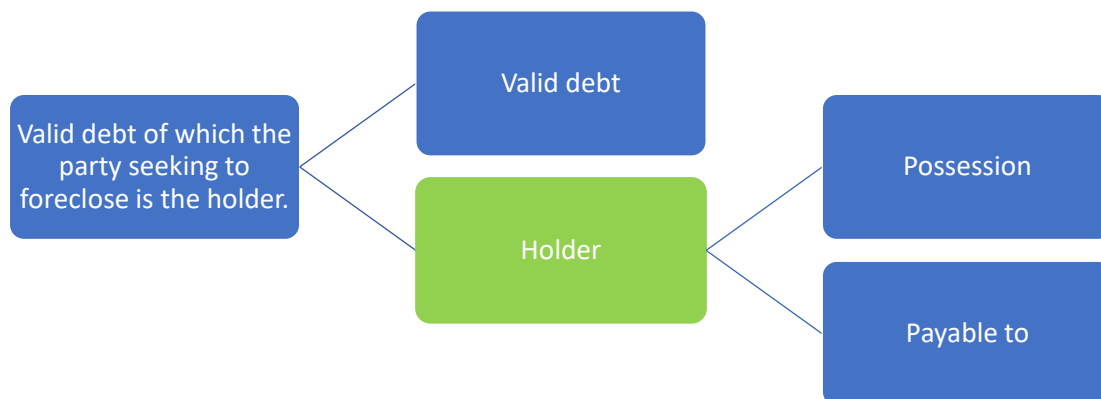
Incompetence/Incapacity Defense

Deed of Trust executed by an incompetent grantor may be set aside by a suit in equity to rescind or cancel the deed of trust.

In re Foreclosure of Godwin, 121 NC App. 703 (1996)

28

The Clerk's Findings



29

Definition of Holder

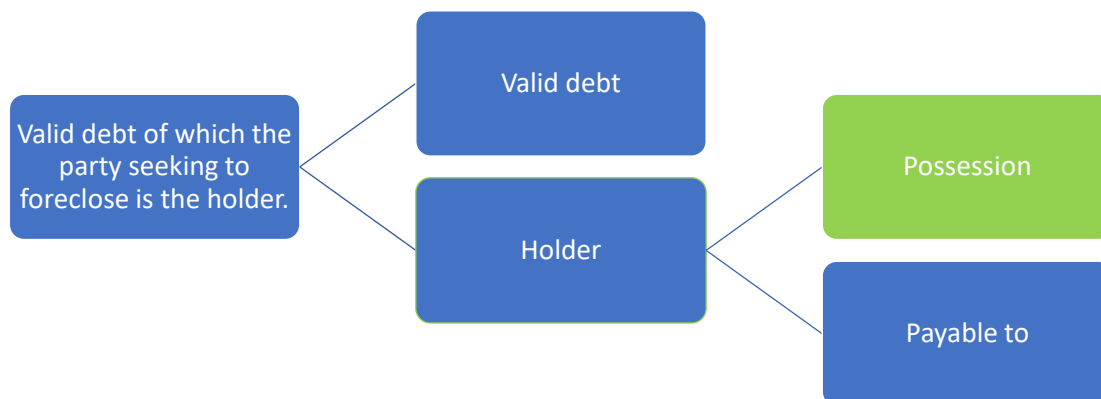
If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the **holder**. G.S. 45-21.16(d).

In re Bass, 366 NC 464 (2013).

- Definition of holder from the Uniform Commercial Code (G.S. 25-1-201(b)(21)) applies.
- "Holder" is defined as a person in **possession** of a negotiable instrument that is **payable to bearer or an identified person that is the person in possession**.

30

The Clerk's Findings



31

The Clerk's Findings: Possession

No one can be a holder without possession of the instrument, either directly or through an agent.

UCC 25-3-201 cmt. 1

G.S. Chapter 45 foreclosures: The absence of possession defeats holder status.

Connolly v. Potts, 63 NC App 547 (1983).

32

NOTE

DECEMBER 5, 2006
[Date]

SHOWDOWN
[City]

NORTH CAROLINA
[State]

716 Woodland Road, Showdown, NC

1212 Wheel Way, Showdown, NC 27692

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$417,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is Capital One, FSB. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 5.00%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on March 1, 2012. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on January 5, 2046 I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 89 Lending Lane, Chapel Hill, NC 27514 or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$1,200.00.

33

Evidence: Possession

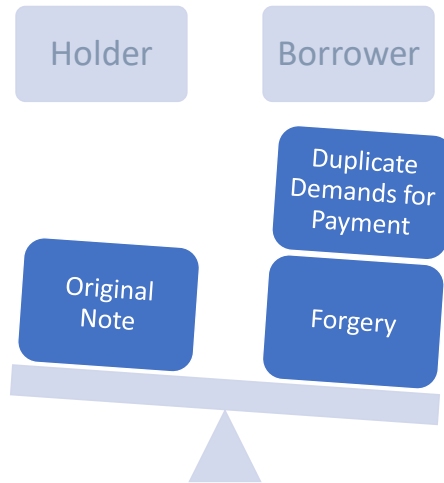
Original Note: Is the original alone enough?

Yes, under G.S. 8C-902(9), GS 25-3-308 and *In re Bass*: signatures to note and indorsements **presumed authentic and authorized**

- *In re Bass*: Borrower must provide affirmative evidence that inauthentic/unauthorized – not just state the same
- See also *In re Foreclosure of Rawls* (NC App. 2014) and *In re Foreclosure of Kenley* (NC App. 2015) (original note indorsed in blank)

34

The holder produces the original note and the burden of proof shifts.



35

Evidence: Possession

Two Common Questions

1. Does the holder have to produce the original note or is a copy enough?
2. What if the note is lost?

36

Evidence: Copy of the Note

In re Helms, 55 N.C. App. 68 (1981)

- Best evidence rule does not require original note where the opposing party admits copies are correct

In re Adams, 204 N.C. App. 318 (2010)

- Copy properly admitted to establish possession where no dispute as to authenticity of the copy

37

Evidence: Copy of the Note

The exception swallows the rule....

Dobson v. Sub. Trustee Services, 212 N.C. App. 45 (2011)

- Borrower does not admit the copy is a correct copy of the note
- Borrower specifically states in brief that the note is not a true and correct copy and that the borrower is unable to confirm authenticity of the copy

38

Evidence: Copy of the Note

Dobson v. Sub. Trustee Services, 212 N.C. App. 45 (2011)

So long as “there is no evidence that photocopies of a note or deed of trust are not exact reproductions of the original instruments, a party need not present the original note or deed of trust and may establish that it is the holder of the instruments by presenting photocopies of the note or deed of trust.”

39

Evidence: Copy of the Note

Dobson v. Sub. Trustee Services, 212 N.C. App. 45 (2011)

Borrower must:

- Make **more** than bare assertions that copies are not exact reproductions to dispute holder status
- Offer affirmative proof that copy is not accurate

What does that look like from the borrower?

- Difficult standard when the borrower may not have access to the original

40



Defenses: Possession

41

Clerk or No Clerk

The lender is obligated to produce the “wet ink” signatures on the note.

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

42



43

The “Wet Ink” Defense

Must be more than just a “wet ink” signature is required

Borrower must provide affirmative evidence that the copy is not accurate or the signatures are not authentic or authorized.

Up to you as judge to decide what is sufficient/persuasive

44

Recap: Proving Possession

Original or copy of the note suffices to prove possession.

Borrower must provide affirmative evidence that copy is not exact or the signatures on the note are inauthentic or unauthorized; more than bare assertions.

45

Evidence: What if the note is lost?

The holder may provide a lost note affidavit.

STATE OF MISSOURI
COUNTY OF ST. CHARLES

OCT 05 2018
CLERK OF SUPERIOR COURT

AFFIDAVIT OF LOST NOTE

1. the undersigned, being duly sworn, state as follows:

1. I am employed as a Vice President - Document Control of CitiMortgage, Inc. CitiMortgage, Inc. is the servicer of the loan and SunTrust Bank (the "Custodian") is the custodian of the collateral documents described below. I have access to the business records of CitiMortgage, Inc. and Citibank, N.A., an affiliate of CitiMortgage, Inc., concerning that loan. I make this affidavit based upon my review of those records and communications with SunTrust Bank.
2. A Note dated June 28, 1985, in the original principal amount of \$191,000.00, with an original interest rate of 8.625% per annum, providing for initial monthly payments in the amount of \$1,485.62, was executed by David L. Pirotila and Marilyn L. Pirotila, and secured by a deed of Trust dated June 28, 1985 and recorded in the office of the Register of Deeds of Mecklenburg, North Carolina in Book 5094 at Page 0764.
3. CitiMortgage, Inc.'s agent, Citibank, N.A., has obtained the hard copy collateral file for this loan from the Custodian. After a good faith thorough and diligent manual search, the hard copy collateral file pertaining to this loan (which includes the original Note) was not located.
4. The Custodian has confirmed to CitiMortgage, Inc. in writing that it is not in possession of the original Note.
5. The business records described above reflect that the Note was in CitiMortgage, Inc.'s possession at the time it was lost or destroyed.
6. To the best of CitiMortgage, Inc.'s knowledge, information and belief, the loss of possession is not the result of the original Note being assigned, endorsed, or delivered to another party, cancelled, pledged, hypothecated or otherwise transferred; and

-00008-

7. A copy of the original Note is attached hereto.

Name: Ashley L. Whitchell
Title: Vice President - Document Control
Date: 10/2/2018

Subscribed and sworn to before me
this 2 day of June, 2018, by
Ashley L. Whitchell

[Signature], Notary Public
State of Missouri
My commission expires: 6-2-17

Personally known: X OR
Produced identification: NA

Type of identification produced:
NA

EPHRAIM CAMPBELL
Notary Public - Notary Seal
State of Missouri
St. Charles County
Commission # 19488991
My Commission Expires June 02, 2017

46

Evidence: Lost Note Affidavit

One: Prove a Right to Enforce

1. The person was in possession of the instrument and entitled to enforce it when the loss of possession occurred, and
2. The loss of possession was not due to transfer by the person or a lawful seizure, and
3. The person is not reasonably able to obtain possession of the instrument because the instrument was lost, stolen, or destroyed.

Two: Prove terms of the Instrument

Three: Show adequate protection against loss of another claiming authority to enforce; any reasonable means.

G.S. 25-3-309

47

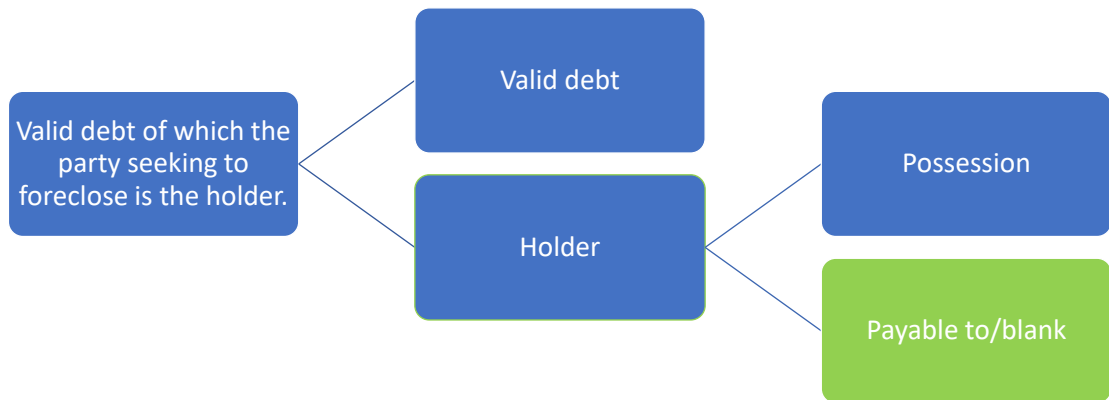
Evidence: Lost Note Affidavit

In re Foreclosure of Frucella, 821 S.E.2d 249 (Oct. 2018)

- Upheld an order authorizing sale where the person seeking to enforce the note lost the original note.
- Evidence satisfied the requirements of G.S. 25-3-309 of the NC UCC for lost notes.

48

The Clerk's Findings



49

Definition of Holder

Person in **possession** of a negotiable instrument that is **payable to bearer or an identified person that is the person in possession**.

In re Bass, 366 NC 464 (2013).

50

Promissory Note

1. To the order of

- Identified person
- "Borrower promises to pay to the order of **XYZ Bank.**"

2. To bearer

- Anyone who holds it

51

NOTE

January 5, 2016

Chapel Hill, NC

1234 Landing Lane, Chapel Hill, NC 27514

1. BORROWER'S PROMISE TO PAY

~~In return for a loan~~ that I have received, I promise to pay U.S. \$450,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is Happy Lending, LLC. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 8.00%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on March 1, 2016. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on January 5, 2046 I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 89 Lending Lane, Chapel Hill, NC 27514 or at a different place if required by the Note Holder.

52

Transfer

1. If payable to bearer, then only requires transfer of possession
2. If payable to an identified person, requires transfer of possession **and** indorsement

G.S. 25-3-301

53

Indorsement

A signature that itself or along with other words is made on a promissory note for the **purpose of transferring the note**.

G.S. 25-3-204(a)

- Signature is an indorsement if indicates an intent to transfer the debt.
- A signature may be a symbol that is printed, stamped, or written.
 - *In re Bass*, 366 NC 464 (2013)

54

Evidence: Payable to

Affidavit testimony (typically from servicer or lender)

- Note originally payable to XYZ
- Indorsed to PDQ
- ABC is the current owner and holder of the note

STATE OF NORTH CAROLINA
COUNTY OF PRICE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-SP-1234

IN THE MATTER OF THE FORECLOSURE of a Deed of Trust from December 5, 2006 dated and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Register of Deeds by Sunshine Trustee Services, LLC (Substitute Trustee)

SERVICER AFFIDAVIT

The undersigned, being first duly sworn, deposes and says that:

1. I am the Assistant Secretary of Nationstar Loan Servicing LLC. I am familiar with the books and records of Nationstar Loan Servicing LLC and I am authorized and competent to make this affidavit.
2. Happy Lending LLC ("Holder") is the current owner and holder of the Promissory Note executed by Bob and Belinda Barker in the original principal amount of \$417,000.00 dated December 5, 2006 (as amended, modified, renewed or restated, the "Note").
3. Payment of the Note is secured by a Deed of Trust from Bob and Belinda Barker to PRLAP, Inc. for the benefit of Capital One, FSB, dated December 5, 2006 and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Public Registry, securing indebtedness in the original principal amount of \$417,000.00 (the "Deed of Trust").
4. The copies of the Note and the Deed of Trust attached hereto as Exhibits A and B, respectively, are true, accurate and complete copies of the original Note and Deed of Trust, which are the subject of this foreclosure proceeding.

55

Evidence: Payable to

Copy/original note

NOTE
DECEMBER 5, 2006 SHOWDOWN NORTH CAROLINA
[Date] [City] [State]

716 Woodland Road, Showdown, NC
1212 Wheel Way, Showdown, NC 27692

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$417,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is Capital One, FSB. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 5.00%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on March 1, 2012. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on January 5, 2046 I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 89 Lending Lane, Chapel Hill, NC 27514 or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$1,200.00.


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Evidence: Indorsement

1. Identified person
2. In blank
3. To bearer

Pay to the order of:
Emax Financial Group, LLC
without recourse

By: Mortgage Lenders Network USA,
Inc.

Pay to the Order of
Without Recourse
HomeBanc Mortgage Corporation

Page Peggy Wells
Limited Vice President

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The Clerk's Findings

“Negotiable instruments like mortgage notes that are endorsed in blank may be freely transferred. And once transferred, the old adage about possession being nine-tenths of the law is, if anything, an understatement. **Whoever possesses an instrument endorsed in blank has full power to enforce it.**”

In re Foreclosure of Rawls, ___ N.C. App. ___ (Oct. 6, 2015), citing *Horvath v. Bank of New York, N.A.*, 641 F.3d 617, 621(4th Cir. 2011)

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Evidence: Indorsement

1. On the note itself
2. On an **Allonge**: paper affixed to the note – GS 25-3-204(a)



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In re Bass, 366 NC 464 (2013)

Pay to the order of:
Emax Financial Group, LLC
without recourse

By: Mortgage Lenders Network
USA, Inc.

1. Intent to transfer clear on the face of the stamp
2. Stamp also appeared on the page where the other uncontested indorsements were placed
3. Original note was actually transferred in accordance with the stamp's intent

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Defenses: Payable To/Blank

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Clerk or No Clerk

The entity foreclosing is not the holder of the note because Susan Shareholder did not have the authority to sign on behalf of Mortgage Lenders.

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

Pay to the order of:
 Emax Financial Group, LLC
 without recourse

By: Mortgage Lenders Network
 USA, Inc.
 Susan Shareholder, Vice President

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Yes, but....

- Bass tells us that there is a presumption that an indorsement is valid and authorized
- Defense that an indorsement to the note is not valid or unauthorized, the borrower must make more than mere statements to that effect; must provide affirmative evidence
 - For example, the borrower received demands for payment from multiple people asserting they were the holder

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Clerk or No Clerk

The affidavit of the servicer was executed over two and half years prior to the hearing and the possibility exists that the Note was negotiated during that time.

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

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Yes, but...

In re Foreclosure of Collins (COA16-655; Feb. 7, 2017) – there must be more than speculation, borrower must provide a “colorable reason” that indicates the note was negotiated or transferred to another party before the hearing

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Identify the Holder

Holder of a Valid Debt

Case Problems

**UNC School of Government
Judicial College Course
Foreclosure for Clerks**

Identify the Holder

Identify the chain of assignments.

Note #1

Original Lender: _____

Holder #1: _____

Holder #2: _____

Holder #3: _____

Holder #4: _____

Note #2

Original Lender: _____

Holder #1: _____

Holder #2: _____

Holder #3: _____

Holder #4: _____

Note #1:

PROMISSORY NOTE

Pay to the order of:
Solo Financial Group, LLC
without recourse
By: American Bank, N.A.

FOR VALUE RECEIVED, the undersigned jointly and severally promise to pay to the order of American Bank, N.A. the sum of \$500,000, together with interest thereon at the rate of 5% per annum on any unpaid balance.

Said sum, inclusive of interest, shall be paid in monthly installments of \$1,000 each, with a first payment due January 31, 2000 and a like amount on the same day of each

Monthly thereafter until the full amount of this note and accrued interest shall be fully paid. All payments shall be first applied to accrued interest and the balance to principal. The undersigned reserves the right to pre-pay this note in whole or in part without penalty.

This note shall be fully payable upon demand of any holder in the event the undersigned shall default in making any payments due under this note within 5 days of its due date.

In the event of any default, the undersigned agreed to pay all reasonable attorney fees and costs of collection to the extent permitted by law. This note shall take effect as a sealed instrument and be enforced in accordance with the laws of the payee's state.

Dated: January 21, 2000

Sally Homeowner

Sally Homeowner

Pay to the order of:
without recourse
By: Home Loans R Us LLC

Pay to the order of:
Home Loans R Us LLC
without recourse
By: Solo Financial Group Inc.

NOTE #2:

NOTE

2334 Hanson Dr, Raleigh NC 27608

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$550,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder." The Lender is Happy Lenders, Inc.

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 5%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 5th day of each month beginning on January 31, 2014. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on January 1, 2044, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at Lender's address or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$2,300.00.

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED this 21st day of January, 2014.

_____ *Sally Homeowner* _____ (Seal)

Sally Homeowner- Borrower

_____ *Sammy Homeowner* _____ (Seal)

Sammy Homeowner- Borrower

ALLONGE

This Allonge is attached to the Promissory Note dated January 21, 2014 (the "Note") in the principal amount of \$500,000.00 made by Sally Homeowner and payable to Happy Lenders, Inc.

Pay to the order of Mortgage Mavens, LLC

Dated: January 31, 2014

WITHOUT RECOURSE BY:

Happy Lenders, Inc.

By: *Robert Railway*
W. Robert Railway
Assistant Vice President

PAY TO THE ORDER OF:

US Bank, as trustee for as trustee for the ABFC
2005-PT, BFC Asset-Backed Certificates, Series
2005-OPT

WITHOUT RECOURSE

Mortgage Mavens, LLC

By: *Betty Banker*
Betty Banker, Vice President

Foreclosure Moratorium in Effect in North Carolina for Certain Counties and Certain Mortgage Loans

Many counties in Western North Carolina continue to struggle with the devastating effects of Hurricane Helene. As of today, seven county courthouses are reporting closures of some type. An updated list of counties along with the types of closures in each county is available through the North Carolina Administrative Office of the Courts [website](#). Officials in federal, state, and local government are taking action to provide relief in many forms. This includes actions at both the federal and state level that impact foreclosures.

Federal Foreclosure Moratorium

On September 28, 2024, President Biden [issued](#) a major disaster declaration ([amended](#) October 2, 2024), effective September 25, 2024. As a result of this declaration, the U.S. Department of Housing and Urban Development (HUD) announced the implementation of federal disaster assistance for North Carolina and ordered federal aid to supplement state, tribal, and local recovery efforts in the areas affected by Helene.

The aid includes a 90-day moratorium on foreclosures of certain mortgage loans. It is not a moratorium on all foreclosures and does not apply to, for example, privately insured mortgage loans or other federally backed loans such as loans guaranteed or insured by the U.S. Department of Agriculture or the U.S. Department of Veterans Affairs (VA)* or loans purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association. It may be the case that the federal government takes action to implement a moratorium on these types of loans in the future, but for now the moratorium is limited and applies only to:

- mortgages insured by the Federal Housing Administration (FHA), and
- mortgages to Native American borrowers guaranteed under the Section 184 Indian Home Loan Guarantee program.

There is also a 90-day extension granted automatically for Home Equity Conversion Mortgages, which are federally insured reverse mortgages. This moratorium is in effect as of the date of the President's disaster declaration date, which is September 25, 2024, and thus runs through December 24, 2024.

The moratorium applies to foreclosures of covered mortgage loans in the following 25 counties: Alexander, Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Catawba, Clay, Cleveland, Gaston, Haywood, Henderson, Jackson, Lincoln, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Transylvania, Watauga, Wilkes, and Yancey. It also applies to the Eastern Band of Cherokee Indians.

You can read more about the moratorium and other relief available to homeowners in impacted areas on HUD's [website](#).

Order from the Chief Justice of the North Carolina Supreme Court

The Chief Justice of the North Carolina Supreme Court entered an [emergency order](#) applicable to certain counties impacted by Helene on September 29, 2024, as amended September 30 (the "Original Order"). You can read more about that order in a [blog post](#) available from my colleague, Sara DePasquale. The Original Order extends "the time and periods of limitation for filing and for acts due to be done" in 28 North Carolina counties in civil actions, criminal actions, estates, and special proceedings between the dates of September 26, 2024 and October 14, 2024. Under the Original Order, such documents and acts are "deemed to be timely" if they are filed or done before the close of business on October 14, 2024. The Original Order applies to the same 25 counties as the federal foreclosure moratorium and adds to that list an additional three counties, Swain, Cherokee, and Graham. Unlike the federal moratorium, the Chief Justice's Order does not apply to the Eastern Band of Cherokee Indians.

On October 11, 2024, the Chief Justice [entered an order](#) extending the Original Order for 13 of the 28 counties (the "Extension Order," and together with the "Original Order," the "Order"). The 13 counties covered by the Extension Order are: Avery, Buncombe, Haywood, Henderson, Jackson, Madison, McDowell, Mitchell, Polk, Rutherford, Transylvania, Watauga, and Yancey. The Extension Order extends the time and periods of limitation for filing and for acts due to be done in those counties to the close of business on October 28, 2024. The chart at the end of this post reflects a summary of the covered counties both with respect to the federal moratorium and the Chief Justice's Order.

For foreclosures in covered counties, this means that, if an order authorizing or not authorizing a foreclosure sale is entered, the deadline to appeal the order, which is 10 days from the entry of the order ([G.S. 45-21.16\(d1\)](#)), will be extended to the close of business on the date specified in the Order. If, for example, a foreclosure hearing took place on September 24, and it resulted in the entering of an order allowing a foreclosure sale to proceed, the homeowner would normally have until October 4 to file an appeal. However, the Order now extends the time to file an appeal to either (1) October 14, 2024, for 15 of the 28 counties covered in the Original Order or (2) October 28, 2024, for the 13 counties covered by the Extension Order.

It also means that, after a foreclosure sale, a report of sale may be filed and any person may file an upset bid, but the upset bid period does not expire until the close of business on the date specified in the Order. For example, a foreclosure sale was held on September 24. The trustee filed the report of sale the same day. The filing of the report of sale starts the running of the 10-day upset bid period. Absent the Chief Justice's Order, the upset bid period would have run on October 4. However, the Order now extends the time to file an upset bid on the property to the close of business on (i) October 14, 2024 for 15 of the 28 North Carolina counties covered in the Original

Order and (ii) October 28, 2024 for the 13 counties covered by the Extension Order. If no one files an upset bid, the upset bid period would run to the close of business on either October 14 or October 28, depending on whether the Extension Order applies to that county. This is because the Chief Justice's Order does not prevent someone from filing an upset bid. The Order authorizes someone to file an upset bid by the close of business on October 14 or October 28, as applicable, and the bid would be deemed timely despite being outside of the statutory 10-day upset bid period.

If a person, Jane, appeared on September 27 in **Graham County** (a county covered by the Original Order, but not the Extension Order) to file an upset bid related to the sale held on September 24, Jane could file the upset bid provided it otherwise meets the requirements of an upset bid (bid amount equal to the greater of \$750 or 5% more than the previous bid and other requirements in [G.S. 45-21.27](#)). If Tom appeared on September 30, he could upset Jane's bid if his bid also meets the statutory requirements. However, if Jane then files another upset bid on October 9, the 10-day upset bid period would fall on October 21, a date outside the period protected by the Original Order. As a result, the final time to file an upset bid on the property would be at the close of business on October 21.

If another person, let's say Jake, appeared on October 4 in **Polk County** (a county covered by the Extension Order) to file an upset bid related to a foreclosure sale held on September 24, Jake could file the upset bid provided it otherwise meets the requirements of an upset bid (bid amount equal to the greater of \$750 or 5% more than the previous bid and other requirements in [G.S. 45-21.27](#)). If Tonya appeared on October 14, she could upset Jake's bid if her bid also meets the statutory requirements. However, if Jake then files another upset bid on October 22, the 10-day upset bid period would fall on November 1, a date currently outside the period protected by the Extension Order. As a result, the final time to file an upset bid on the property would be at the close of business on November 1.

Summary: Foreclosure Relief as of October 11, 2024

Some key takeaways of this combined federal and state relief are:

- Foreclosure hearings are not prohibited by the Chief Justice's Order, however, mortgage lenders and servicers are prohibited from pursuing foreclosure of covered loans in covered counties. Before proceeding to enter an order in any of the covered counties, judicial officials should inquire as to whether the mortgage loan is a loan that is the subject of the moratorium. The court should not enter an order authorizing the foreclosure sale if the loan is a covered loan.
- Foreclosure sales are not expressly restricted by the Chief Justice's Order, but certain sales may be prohibited by the federal moratorium depending on the type of mortgage loan.
- Reports of sale and upset bids may be filed but an upset bid period ending on or after September 26, 2024 may not expire until (i) the close of business on October 14 for 15 counties covered by the Original Order and (ii) the close of business on October 28 for 13

counties covered by the Extension Order, in accordance with the Chief Justice’s Order. Likewise, if a deadline for a party to appeal a foreclosure order occurred on or after September 26, 2024, the deadline is extended for the same period of time.

Additional relief may be forthcoming, we’ll update this blog post as appropriate to provide any additional information available related to impacted foreclosures. As always feel free to reach out with any questions, I’m available at meredith.smith@sog.unc.edu.

Counties Covered by the Foreclosure Moratorium and the Chief Justice’s Order

County	Federal Foreclosure Moratorium Expiration Date	Chief Justice’s Order Expiration Date
Alexander	12/24/24	10/14/24
Alleghany	12/24/24	10/14/24
Ashe	12/24/24	10/14/24
Avery	12/24/24	10/28/24
Buncombe	12/24/24	10/28/24
Burke	12/24/24	10/14/24
Caldwell	12/24/24	10/14/24
Catawba	12/24/24	10/14/24
Cherokee	Does not apply.	10/14/24
Clay	12/24/24	10/14/24
Cleveland	12/24/24	10/14/24
Gaston	12/24/24	10/14/24
Graham	Does not apply.	10/14/24
Haywood	12/24/24	10/28/24
Henderson	12/24/24	10/28/24
Jackson	12/24/24	10/28/24
Lincoln	12/24/24	10/14/24
Macon	12/24/24	10/14/24
Madison	12/24/24	10/28/24
McDowell	12/24/24	10/28/24
Mitchell	12/24/24	10/28/24
Polk	12/24/24	10/28/24
Rutherford	12/24/24	10/28/24
Swain	Does not apply.	10/14/24
Transylvania	12/24/24	10/28/24
Watauga	12/24/24	10/28/24
Wilkes	12/24/24	10/14/24
Yancey	12/24/24	10/28/24

Eastern Band of 12/24/24
Cherokee
Indians

Does not apply.

*On May 29, 2024, in an action unrelated to hurricane Helene relief, the VA [announced](#) loan repayment relief for borrowers under VA-guaranteed loans by issuing a notice *encouraging* loan servicers to implement a targeted foreclosure moratorium through December 31, 2024.

Foreclosure by Power of Sale

Equitable vs. Legal Defenses

G.S. Chapter 45-21.16

At a power of sale foreclosure hearing held before the clerk of superior court, the clerk's authority is limited.¹ At the hearing, the party seeking an order authorizing the foreclosure sale, whether the original lender or an assignee of the original lender, must prove six factors:

- (i) The existence of a valid debt of which the party seeking to foreclose is the holder,
- (ii) Default,
- (iii) Right to foreclose under the deed of trust,
- (iv) Proper notice,
- (v) Home loan compliance as set forth in G.S. 45-21.16(d), and
- (vi) That the sale is not barred due to a party's military service.²

The clerk may only consider legal defenses to these factors raised by a party in making a decision whether or not to enter the order for sale. The clerk has no equitable jurisdiction, meaning that the clerk is not able to consider defenses based on general fairness.³ The clerk must decline to address any party's request for equitable relief even if the parties stipulate that an equitable issue is properly before the clerk.⁴

The outline below constitutes a list of commonly raised defenses to a foreclosure action. Those listed as legal defenses may be considered by the clerk, those listed as equitable defenses may not. A foreclosure by power of sale before the clerk does not resolve all matters in controversy between the parties.⁵ The proper mechanism to raise equitable defenses to the foreclosure is by filing an action before the superior court to enjoin the foreclosure sale under G.S. 45-21.34.

In addition to considering the legal defenses raised in connection with the six factors described above, the clerk must also determine whether there is a reasonable likelihood that the parties will resolve the matter without foreclosure.⁶ At the start of the hearing, the clerk has an affirmative obligation to inquire whether the borrower currently occupies the property

¹ See *In re Helms*, 55 N.C. App. 68, 71-72 (1981). The superior court, on appeal *de novo* from a decision of the clerk, is similarly limited to legal defenses resolved by the clerk. *Id.*

² See G.S. 45-21.16(d).

³ See *In re Helms*, 55 N.C. App. at 71-72.

⁴ See *Mosler ex rel. Simon v. Druid Hills Land Co., Inc.*, 199 N.C. App. 293, 298 (2009).

⁵ See *In re Helms*, 55 N.C. App. at 72.

⁶ See G.S. 45-21.16C.

subject to foreclosure as his or her primary residence.⁷ If so, then the clerk must ask questions to find out the status of efforts between the parties to reach a non-foreclosure solution, including a loan modification, short sale, forbearance agreement, or loan reinstatement. If, for example, the clerk determines that the borrower has submitted a loan modification application in good faith or is in the process of modification discussions with the lender, then the clerk must continue the hearing to a date certain that is not more than 60 days from the original hearing date.⁸ If alternative resolution efforts are still ongoing at the time of the continued hearing date, the clerk may continue the hearing again for good cause to any date the clerk determines is appropriate.⁹ These types of defenses are not set forth below because they would not result in an order dismissing the action but rather a continuance of the hearing. In contrast, the legal defenses to the six factors set forth above, if proven, may result in an order from the clerk dismissing the case.¹⁰

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Typically, if there are viable defenses raised with regarding to any of the factors except for proper notice, then the clerk will dismiss the action. However, if the substitute trustee gave improper notice of the foreclosure proceeding, then many times the clerk will allow the substitute trustee to file an amended notice of hearing and re-notice the hearing rather than dismissing the case and requiring the substitute trustee to re-file the action.

Equitable Defenses – May Not Be Considered by the Clerk¹¹

1. The borrower disputes amount owed to the lender under the note, the amount the borrower is in default, or the amount of other charges, such as late fees.¹²
2. The borrower disputes the amount of the interest rate charged by the lender.¹³
3. The borrower argues that the lender waived a default or multiple defaults by the lender's conduct and/or course of dealing, such as consistently accepting late payments and applying them to the debt¹⁴ or stating that the borrower would have additional time to make payments due.¹⁵
4. The loan officer or other agent of the lender led the borrower to believe that the lender was going to modify the loan and as a result the borrower stopped making payments or changed his or her conduct in reliance on the lender's representations that the lender was going to modify the loan.
5. The lender failed to offer a modification in accordance with federal loan modification regulations such as the Home Affordable Modification Program (HAMP).¹⁶
6. The borrower asserts that he or she rescinded the loan after the lender made the loan.¹⁷
7. The borrower asserts that the lender failed to comply with the federal Truth in Lending Act or other state and federal regulations.¹⁸

¹¹ This list is not an exhaustive list but rather an example of the types of equitable arguments that may not be considered by the clerk in a power of sale foreclosure proceeding.

¹² See *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603 (1980). If the borrower is a day late or a dollar short, that is typically enough to constitute a default under the loan documents unless the documents specifically provide otherwise, such as a right to notice and opportunity to cure before a late payment becomes a default. The amount the borrower is in default does not generally impact the lender's right to foreclose.

¹³ See *In re Helms*, 55 N.C. App. 68, 70 (1981).

¹⁴ See *In re of Foreclosure of Deed of Trust by Goforth Properties, Inc.*, 334 N.C. 369, 374 (1993); *In re Fortescue*, 75 N.C. App. 127, 131 (1985).

¹⁵ See *In re Helms*, 55 N.C. App. at 71.

¹⁶ See *In Foreclosure of Raynor*, ___ N.C. App. ___, 748 S.E.2d 579, 583-84 (2013). The North Carolina Court of Appeals decided the case on other grounds but stated that superior court's decision was premised on the determination that the lender's failure to comply with HAMP regulations constituted an equitable defense.

¹⁷ See *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 488 (2011).

¹⁸ *Id.*

8. The borrower asserts that he or she did not have sufficient bargaining power to negotiate different terms; the lender had the upper hand in the negotiation and execution of the loan documents.
9. The lender was malicious, aggressive, or unfair in the way they demanded payment from the borrower.
10. Any defense based on fraud¹⁹, duress, unfair and deceptive trade practices, bad faith, malice, tortious interference, or general unfairness.
11. The borrower argues that the borrower's attorney failed to take some action or make a particular argument or defense.
12. The servicer or holder of the loan failed to comply with requests for information required under G.S. 45-93.²⁰
13. The borrower argues there is a good reason or excuse as to why the borrower did not make payments when the borrower was supposed to under the note.
14. The borrower was not competent or lacked capacity at the time he or she signed the note and deed of trust.²¹
15. The lender failed to comply with the terms of a loan modification agreement and the lender is equitably estopped from pursuing foreclosure.²²

¹⁹ *But see* In re Hudson, 182 N.C. App. 499, 503 (2007) (holding that it is within the authority of the clerk of superior court to determine whether the property is secured by the lien of the deed of trust, even if the basis for the defense is as a result of the fraudulent acts of the lender); Espinosa v. Martin, 135 N.C. App. 305, 308 (1999) (holding that forgery of a legal document is a proper legal defense to a lender's assertion that a valid debt exists).

²⁰ See G.S. 45-94.

²¹ See In re Foreclosure of Godwin, 121 N.C. App. 703, 705 (1996).

²² See In re Young, ___ N.C. App. ___, 744 S.E.2d 476, 479 (2013).

*Legal Defenses – May Be Considered by the Clerk*²³

Default

1. The borrower is not in default because the borrower made all payments due and satisfied all obligations under the loan documents.²⁴
2. The loan documents require the lender to give the borrower notice of the default and an opportunity to cure the default and the lender did not give the borrower the required notice and opportunity to cure.²⁵
3. The officer or agent of the lender who executed the affidavit of default filed by the lender does not have sufficient personal knowledge of the loan or the related transactions to attest to the statements contained in the affidavit regarding the default.²⁶

Notice to Proper Parties

4. A party entitled to notice under G.S. 45-21.16(c) did not receive written notice via personal service at least 10 days prior to the hearing or via posting at least 20 days prior to the hearing.²⁷
5. The notice received by a party entitled to notice does not contain all of the required information set forth in G.S. 45-21.16(c).
6. The trustee did not comply with the notice provisions in the note and/or the deed of trust.

²³ This list is not an exhaustive list but rather an example of the types of legal arguments that may be raised in defense of a foreclosure. A clerk should look for a defense raised to be supported by competent evidence and more than a mere empty recitation of the defense itself.

²⁴ See *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603 (1980).

²⁵ See *In re Michael Weinman Assoc.*, 333 N.C. 221, 231-32 (1993). If this argument is raised by a borrower, the clerk should request that the borrower identify the provision in the loan documents that requires the lender to give the borrower notice prior to holding them in default. Not all loan documents require a pre-default notice and opportunity to cure.

²⁶ It is important to note that any such assertions by the borrower must be supported by competent evidence that the person signing the affidavit does not have personal knowledge. See *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 496 (2011).

²⁷ *But see In re Norton*, 41 N.C. App. 529, 531 (1979) (a party given less than 10 days' notice waives the right to 10 days' notice by appearing at the hearing and not objecting).

7. The trustee and/or the lender did not use due diligence in attempting to locate and serve the borrower before relying on posting.²⁸

Right to Foreclose

8. The property has been released from the deed of trust and does not secure the note.²⁹
9. The lender does not have a right to foreclose on the property because the borrower is entitled to a release of the property from the lien of the deed of trust and the lender refuses to deliver or record the release.³⁰
10. The property described in the Notice of Hearing is not encumbered by the lien of the deed of trust because the legal description in the deed of trust is incorrect or missing.³¹
11. The substitute trustee does not have the right to foreclose because the substitution of trustee was recorded after the filing of the notice of hearing with the clerk of superior court.³²
12. The deed of trust does not contain a valid power of sale provision.³³
13. The lien of deed of trust is invalid because the grantor under the deed of trust did not own the property at the time the deed of trust was granted.
14. The deed of trust does not encumber the property because it was not properly executed by the appropriate parties.³⁴
15. The deed of trust does not secure the debt (promissory note) described in the notice of hearing.

²⁸ See *Dowd v. Johnson*, ___ N.C. App. ___, 760 S.E.2d 79, 83-84 (2014). *But see* *In re Powell*, N.C. App. COA14-498 (Dec. 2, 2014) (holding that the substitute trustee does not have to exhaust all methods of service before relying on posting and the diligence used in attempting to locate and serve a party is analyzed on a case by case basis).

²⁹ See *In re Michael Weinman Assoc.*, 333 N.C. at 228.

³⁰ *Id.*

³¹ See *In re Foreclosure of Deed of Trust by Goforth Properties, Inc.*, 334 N.C. 369, 375 (1993); *In re Michael Weinman Assoc.*, 333 N.C. at 230.

³² See ANN M. ANDERSON AND JOAN BRANNON, *North Carolina Clerk of Superior Court Procedures Manual*, August 2012, Page 130.4.

³³ See *In re Michael Weinman Assoc.*, 333 N.C. at 230.

³⁴ See *Espinosa v. Martin*, 135 N.C. App. 305, 308 (1999).

16. The lender does not have a right to foreclose because the owner of the property subject to foreclosure owns the property free and clear of the deed of trust being foreclosed.³⁵
17. The property is not secured by the deed of trust because the lender fraudulently attached a legal description to the deed of trust after the borrower signed it and before the lender recorded it.³⁶

Holder of a Valid Debt

18. The holder must present the original note because the copies presented are not authentic and do not constitute accurate representations of the original note.³⁷
19. A condition precedent to the foreclosure contained in the loan documents has not been met.³⁸
20. The party seeking to foreclose does not have actual possession of the note and is therefore not the holder of the debt.³⁹
21. The holder did not present competent evidence of transfer of title of the note to the holder, by indorsement, merger, or otherwise, and relied solely on a legal conclusion in an affidavit that the party is a holder of the note to prove holder status.⁴⁰
22. The purported indorsement or allonge or related circumstances unambiguously indicate that the indorsement signature was made for a purpose other than indorsement.⁴¹

³⁵ See *In re Michael Weinman Assoc.*, 333 N.C. at 230.

³⁶ See *In re Hudson*, 182 N.C. App. 499, 503 (2007).

³⁷ See *In re Helms*, 55 N.C. App. 68, 70 (1981). Originals of the note and deed of trust are required only when there is a dispute as to the authenticity of the copies presented by the lender as evidence. See *In re Adams*, 204 N.C. App. 318, 323-24 (2010). If the borrower raises this as a defense, the borrower is required to offer some proof that the copies are not authentic. *Id.* Mere assertions that the copies of the note and/or the deed of trust are not accurate are not enough. See *Dobson v. Substitute Trustee Services, Inc.*, 212 N.C. App. 45, 49 (2011).

³⁸ See *In re of Foreclosure of Deed of Trust by Goforth Properties, Inc.*, 334 N.C. 369, 376-77 (1993) (the deed of trust subject to foreclosure required lender to first foreclose another deed of trust and apply proceeds to debt and only if there was a deficiency from that foreclosure could lender foreclose the second deed of trust in question).

³⁹ See *Connolly v. Potts*, 63 N.C. App. 547, 551 (1983).

⁴⁰ See *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 491 (2011). A statement in the bank's affidavit that it was the owner and holder of the note is not sufficient competent evidence of a valid holder. *Id.*

⁴¹ See *In re Bass*, 366 N.C. 464, 468 (2013) (stating that the signature or other evidence must unambiguously indicate that the signature is intended for something besides indorsement and may be treated as an indorsement even though the signer intended something else where that standard is not met).

23. Although the foreclosing party has actual possession of the original note, the note is not indorsed to the foreclosing party or in blank.⁴²
24. The signatures on the loan documents were forged.⁴³
25. The borrower and/or the owner of the property did not receive consideration in exchange for signing the note and/or the deed of trust.⁴⁴
26. The person who signed the indorsement on behalf of the company or entity transferring the note did not have the authority to sign on the company's behalf.⁴⁵
27. The note is lost, destroyed, or stolen and the holder is unable to prove the terms of the note and the holder's right to enforce it.⁴⁶

Military Status

28. The borrower under the note or the grantor under the deed of trust is currently serving in the military or returned from service within the last 90 days, the loan originated prior to the person's military service, and the lender did not obtain a valid waiver from the servicemember.⁴⁷
29. The foreclosing party did not file an affidavit that the hearing is scheduled to take place at least 90 days after a period of military service of the borrower under the note or the grantor under the deed of trust and the loan originated prior to the person's military service.⁴⁸

⁴² See *In re David A. Simpson, P.C.*, 211 N.C. App. at 491.

⁴³ See *Espinosa v. Martin*, 135 N.C. App. 305, 308 (1999); *In re Hudson*, 182 N.C. App. 499, 503 (2007).

⁴⁴ See *Foreclosure of Deed of Trust of Blue Ridge Holdings Ltd.*, 129 N.C. App. 534, 537-38 (1998). A note signed under seal creates a rebuttable presumption of consideration. *Id.*

⁴⁵ It is important to note that any such assertions by the borrower must be supported by competent evidence that the person signing the affidavit does not have such authority. The North Carolina Supreme Court has stated that an indorsement is presumed to be authentic and authorized until some evidence is introduced which would support a finding that the signature is forged or unauthorized. See *In re Bass*, 366 N.C. at 470-71. Until the party disputing the validity of the indorsement presents evidence that it is invalid due to forgery, error or otherwise, the purported holder is not required to prove that the signature is valid. *Id.* In *Bass*, the North Carolina Supreme Court held that a stamp with only the names of the transferring holder and the current holder was enough to show holder status. *Id.*

⁴⁶ See G.S. 25-3-309(b). In the event the note is lost, destroyed or stolen, the holder may file an affidavit and if the issue is not contested by the borrower that may be sufficient to prove a valid debt and holder status.

⁴⁷ See *Servicemembers' Civil Relief Act*, 50 U.S.C. app. sec. 521; G.S. 45-21.12A(a).

⁴⁸ See *id.*

Home Loan

30. The underlying mortgage debt is a home loan and the foreclosing party failed to send the 45 day pre-foreclosure notice.⁴⁹
31. The underlying mortgage debt is a home loan and the 45 day pre-foreclosure notice sent by the foreclosing party failed to include all of the information required under G.S. 45-102.⁵⁰
32. The foreclosing party failed to file the 45 day pre-foreclosure notice in the N.C. Administrative Office of the Courts home loan database within three days of mailing the notice.⁵¹

⁴⁹ See G.S. 45-21.16(d).

⁵⁰ See *id.*

⁵¹ See G.S. 45-103.

All About Bass and Indorsements in a Power of Sale Foreclosure

The majority of foreclosures in North Carolina are filed before the clerk of superior court as non-judicial power of sale foreclosures under Chapter 45. The clerk of court at a power of sale foreclosure hearing is limited to hearing arguments related to six legal factors. [G.S. 45-21.16](#). Recently, I wrote a [bulletin](#), which is now posted on the clerk of superior court [Hot Topic page](#), about some of the legal defenses to a power of sale foreclosure that may be considered by the clerk at the foreclosure hearing. One such defense, that a mere stamp is insufficient to transfer a promissory note, was addressed by the North Carolina Supreme Court. [In re Bass, 366 N.C. 464, 465 \(2013\)](#). The court held that, yes, a mere stamp is enough to transfer a note.

In [Bass](#), the following stamp, without a handwritten signature or initials or the name or title of the individual with the authority to act on behalf of the company, was enough to transfer the note:

Pay to the order of:

Emax Financial Group, LLC

without recourse

By: Mortgage Lenders Network USA, Inc.

Why Are We Talking About Stamps? As most of us have all learned over the course of the years since the recession, mortgage lending today has changed. Lenders, particularly residential mortgage lenders, typically make loans with an eye for selling them shortly after a closing. The loan may go through a number of similar sales with several loan buyers before landing in a securitized trust, pooled together with hundreds of other loans. Each time a loan is sold, the transfer is most often evidenced by an **indorsement** to the note.

An indorsement is a signature that itself or along with other words is made on a promissory note for the purpose of transferring the note. [G.S. 25-3-204\(a\)](#). There are two types of indorsements: (1) a **special indorsement**, which is an indorsement made payable to an identified party, and (2) a **blank indorsement**, which is an indorsement where the payable to line is left blank (similar to a blank check). [G.S. 25-3-205\(a\)](#).

Due to the frequency and volume of loans sold, many times the owner of the note uses a **stamp** to indorse the note. A stamp for a special indorsement typically includes (i) the name of the loan seller, (ii) the name and title of the person at the loan seller who will sign the indorsement, and (iii)

language indicating that the stamp is being made to transfer the note, such as “pay to the order of” and “without recourse.” After imprinting the stamp on the note, the officer of the loan seller referenced on the stamp then types or writes the name of the loan buyer and signs the indorsement.

In Bass, the stamp contained only the names of the loan purchaser and buyer and the “pay to the order of” and “without recourse” language. The borrower challenged the stamp at the power of sale foreclosure hearing arguing that the stamp was ineffective to transfer the note because it did not contain a valid signature of the loan seller, and it did not identify the individual at the loan seller who had the authority to authorize the transfer of the note. The borrower asserted that as a result (1) there was a break in the chain of the indorsements to the current holder, (2) the note was not payable to the party in possession of the note, and (3) the party was not a valid holder of the note entitled to foreclose.

When is a Stamp a Signature and a Signature an Indorsement? Under the UCC, signature is defined as “any symbol executed with the present intention to adopt or accept a writing.” [G.S. 25-1-201\(b\)\(37\)](#). Looking at the official comments to the UCC, the court in Bass noted that signature is defined broadly and is not limited to a long-form writing of an individual person’s name. A signature may be a symbol that is printed, stamped, or written.

The court noted that the determinative factor for the stamp at issue in Bass and for indorsement signatures generally is whether the stamp indicates an intention to transfer the debt. If the stamp indicates intent to transfer the debt, then the stamp constitutes a signature. The court determined that the stamp in question indicated the requisite intent. The court highlighted the fact that (a) the intent to transfer the note from Mortgage Lenders Network USA, Inc. to Emax Financial Group, LLC was clear on the face of the stamp, (b) the stamp also appeared on the page where the other uncontested indorsements were placed, and (c) the original note was actually transferred in accordance with the stamp’s intent. Therefore, the court concluded that the stamp was enough to be a valid signature.

The court then held that the signature constituted a valid indorsement. The holding was based on the strong presumption under the UCC that a signature and its accompanying words on a note are an indorsement and an indorsement is valid unless the circumstances unambiguously indicate that the signature was made for some other purpose than indorsement. [G.S. 25-3-204\(a\)](#). This holds true regardless of the actual intent of the signer. *Id.* As noted in Bass, the purpose of this presumption is to protect the transfer of promissory notes by giving force to the information presented on the face of the instrument.

What Does Bass Tell Us Going Forward? A stamp alone is enough to indorse a note where the stamp indicates intent to transfer the note. In addition and most importantly, Bass tells us that there is a presumption that an indorsement is valid and authorized.

At the foreclosure hearing, the party seeking to foreclose must show that they are a holder of the debt to obtain the order authorizing sale. This is done by showing:

- the party is in possession of the note, and
- the note is either indorsed to them specifically or in blank by virtue of a chain of valid indorsements.

The party seeking to foreclose does not have an affirmative obligation to show that the indorsements are valid and authorized because they are presumed to be so. If the borrower raises a defense that an indorsement to the note is not valid or unauthorized, the borrower must make more than mere statements to that effect. The presumption favoring the validity of the indorsement requires the borrower to provide evidence of the grounds for the assertion before a purported holder is required to introduce evidence as to whether the indorsement is authentic and authorized.

Unfortunately, Bass does not tell us what type of evidence the clerk should expect from a borrower raising this type of defense. It may include evidence showing the borrower received demands for payments from another party purporting to be the holder or that the note was not actually transferred in accordance with the chain of purported indorsements. However, the clerk as the trier of fact in a power of sale foreclosure is obligated to presume that the indorsement is valid and authorized unless and until evidence is introduced by the borrower that supports a finding that this is not the case. [Bass at 470 \(citing G.S. 25-3-308 cmt. 1\)](#).

In re Foreclosure of Kenley: Proving Possession of the Note in a Power of Sale Foreclosure Proceeding

In an opinion published on January 5, 2016, a three-judge panel of the NC Court of Appeals addressed a frequently contested issue in power of sale foreclosure proceedings: whether the party seeking to foreclose by power of sale provided sufficient evidence to establish it was the holder of the note under [G.S. 45-21.16\(d\)\(i\)](#). See [In re Foreclosure of Kenley](#), ____ N.C. App. ____ (Jan. 5, 2016).

NC courts have determined that the definition of holder from the UCC applies to G.S. 45-21.16(d)(i). See [In re Foreclosure of Bass](#), 366 N.C. 464, 468 (2013); [In re Foreclosure of Adams](#), 204 N.C. App. 318, 322 (2010). In practice, this results in a two part analysis: (i) the party must establish that it has possession of the note, and (ii) the party must show that the note is payable to it specifically or indorsed in blank or to bearer. *Id.*

The note produced in [Kenley](#) was indorsed in blank, meaning that whoever had possession of it was entitled to enforce it as the holder. After [Bass](#), a case that I previously blogged about [here](#), it is clear that indorsements to a note are presumed to be valid and authorized. The same is true to a certain extent for signatures on a negotiable note. [G.S. 25-3-308\(a\)](#). No additional evidence is required from the party seeking to enforce the note (hereinafter, referred to as the “lender”) as to the validity or the authority of such signatures. The burden then shifts to the borrower to provide evidence to overcome the presumption in favor of the signatures. See [Bass](#) at 469. The property owner in [Kenley](#) did not dispute the validity of the note or the indorsement on the note from the original lender in blank.

Instead, the property owner disputed whether the lender sufficiently established that it had possession of the note. In the order authorizing sale entered by the superior court judge, the judge made a finding that counsel for the lender produced the original note at the hearing on appeal from the clerk. In addition, the lender filed an affidavit in the proceeding signed by an officer of the servicer of the loan attesting to the lender’s status as the noteholder. The court may consider affidavits at a hearing held under G.S. 45-21.16 in addition to any other evidence permitted by law. G.S. 45-21.16(d).

Citing language from an earlier decision of the court in [In re David A. Simpson, P.C.](#), the property owner argued that mere production of the original note does not alone constitute sufficient evidence that the lender is the holder of the note. 211 N.C. App. 483, 491 (2011). In an appellate brief to the court, the property owner asserted that the lender must present evidence to illustrate how it came into possession of the note, such as the date of possession and that possession was transferred to the lender for the purposes of enforcement. The property owner further argued that the affidavit from the servicer of the loan did not provide any evidence of the transfer of the note or information as to how the lender came into possession of the note.

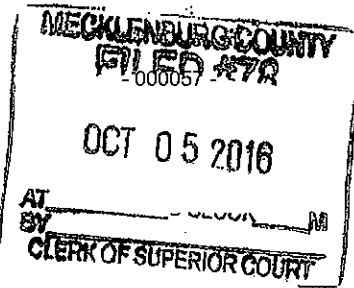
Deciding in favor of the lender, the NC Court of Appeals did not address the adequacy of the affidavit from the servicer regarding the lender's possession of the note. This is because the court's holding was that **production of the original note indorsed in blank at a power of sale foreclosure hearing is sufficient to establish that the lender is the holder of the note.** The court stated that whenever the court previously held that mere possession of the original note was insufficient to satisfy the definition of a holder, (1) the original notes were either not drawn, issued, or indorsed to the party, to bearer, or in blank, or (2) the trial court neglected to make a finding in its order as to which party had possession of the note at the hearing.

Because of another recent NC Court of Appeals opinion, it appears that even if the trial court fails to make a finding regarding possession in the order authorizing sale, it may not constitute a viable basis for an appeal by a party disputing the foreclosure. See [In re Foreclosure of Rawls](#), ___ NC App. ___ (Oct. 6, 2015). In [Rawls](#), the lender produced the original note indorsed in blank at the foreclosure hearing and the trial court entered an order authorizing the sale. The property owner cited the failure of the trial court to make specific findings on possession as a basis for the appeal to the Court of Appeals. Affirming the trial court's order, the court noted that the failure of the trial court to make a finding on the element of possession did not require the court to remand the case because the fact that the lender was in physical possession of the note at the hearing was not disputed and the court was not required to remand the matter for additional findings on facts that were not in dispute.

It is clear based on the holdings in [Rawls](#) and [Kenley](#) that production of an original note indorsed in blank is sufficient to establish the lender is in possession of the note. Once that occurs, the burden then shifts to the party disputing the foreclosure to provide some evidence to the contrary. It is not clear after these cases what evidence a property owner could introduce to disprove possession by the lender who appears at the hearing with the original note indorsed in blank.

**This post was updated on January 26, 2016 to include the last two paragraphs and provide additional information regarding the decision of the NC Court of Appeals in [In re Foreclosure of Rawls](#).*

STATE OF MISSOURI §
§
COUNTY OF ST. CHARLES§

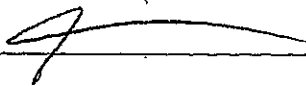


AFFIDAVIT OF LOST NOTE


I, the undersigned, being duly sworn, state as follows:

1. I am employed as a Vice President - Document Control of CitiMortgage, Inc. CitiMortgage, Inc. is the servicer of the loan and SunTrust Bank (the "Custodian") is the custodian of the collateral documents described below. I have access to the business records of CitiMortgage, Inc. and Citibank, N.A., an affiliate of CitiMortgage, Inc., concerning that loan. I make this affidavit based upon my review of those records and communications with SunTrust Bank;
2. A Note dated June 28, 1985, in the original principal amount of \$191,000.00, with an original interest rate of 8.625% per annum, providing for initial monthly payments in the amount of \$1,485.62, was executed by David L. Frucella and Marilyn L. Frucella, and secured by a Deed of Trust dated June 28, 1985 and recorded in the office of the Register of Deeds of Mecklenburg, North Carolina in Book 5044 at Page 0764;
3. CitiMortgage, Inc.'s agent, Citibank, N.A., has obtained the hard copy collateral file for this loan from the Custodian. After a good faith thorough and diligent manual search, the hard copy collateral file pertaining to this loan (which includes the original Note) was not located;
4. The Custodian has confirmed to CitiMortgage, Inc. in writing that it is not in possession of the original Note.
5. The business records described above reflect that the Note was in CitiMortgage, Inc.'s possession at the time it was lost or destroyed.
6. To the best of CitiMortgage, Inc.'s knowledge, information and belief, the loss of possession is not the result of the original Note being assigned, endorsed, or delivered to another party, cancelled, pledged, hypothecated or otherwise transferred; and

7. A copy of the original Note is attached hereto.


 Name: Ashley L. Whitehall
 Title: Vice President - Document Control
 Date: 6/2/2014

Subscribed and sworn to before me
 this 2 day of June, 2014, by
Ashley L. Whitehall

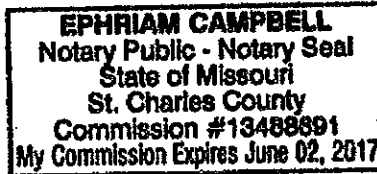
, Notary Public

State of Missouri

My commission expires: 6-2-17

Personally known X OR
 Produced identification NA

Type of identification produced:
NA



Tab: Role of the Trustee

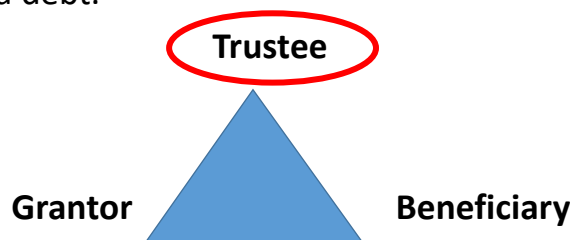
The Role of the Trustee

Meredith Smith
Foreclosure for Clerks
November 2024

1

Deed of Trust – Three Parties

- Owner conveys legal title to trustee for benefit of third party.
- To secure a debt.



2

Trustee

Charged with carrying out the foreclosure

Initiates the foreclosure at the instruction of the creditor by filing a **notice of hearing** with the clerk

3

Substitution of Trustee

New trustee is substituted by execution of a written document properly recorded pursuant to G.S Chapter 47.

G.S. 45-10(a)

When may this occur?

4

When?

The power to substitute a trustee **may be exercised as often and as many times** as the right to make such substitution may arise.

G.S. 45-17

5

Clerk's Role

Check the time and date of the recording of the substitution instrument to make sure that the trustee initiating foreclosure has the authority to exercise the power of sale at the time of filing.

If filed before the recording of the substitution instrument, then the trustee must dismiss and refile a new NOH.

[CSC Manual Series, Foreclosure, pg. 2.5](#)

6

Substitution of Trustee

New trustee is substituted by execution of a written document properly recorded pursuant to G.S Chapter 47.

G.S. 45-10(a)

Who signs the substitution?

7

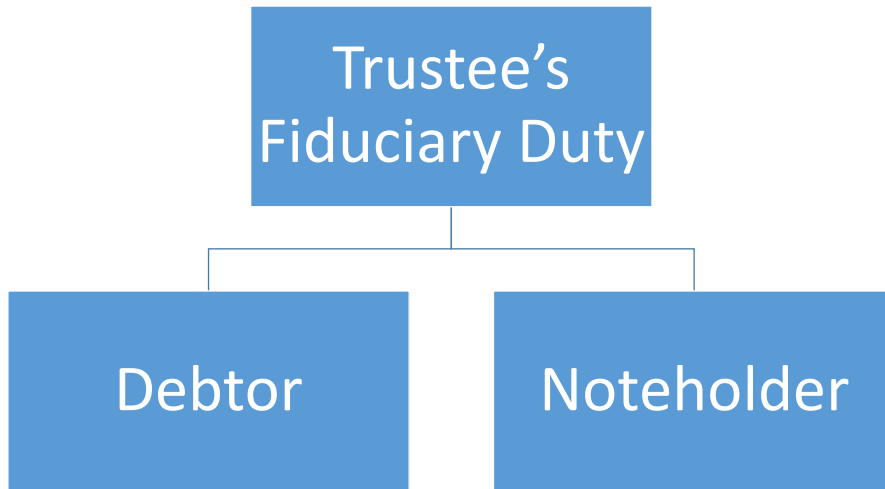
“Noteholder” under G.S. 45-10

The holders or owners of a majority in the amount of the indebtedness, notes, bonds, or other instruments evidencing a promise to pay money and secured by instruments creating a lien on property, such as a deed of trust.

A noteholder is commonly referred to as the creditor or lender.

SL 2017-206 (H770)

8



In re Foreclosure of Vogler Realty, Inc.,
365 N.C. 389, 397 (2012)

9

What does that mean?

- Disinterested third party
- Must be impartial in the performance of his or her duties
- May not give an unfair advantage to one party to the detriment of the other

In re Foreclosure by Goddard & Peterson, PLLC,
789 S.E.2d 835, 841 (2016)

In re Foreclosure of Real Property for \$143,600.00,
156 N.C. App. 477, 483 (2003)

10

Notice of Hearing

Must include the statement that the trustee is a neutral party and, while holding that position, may not advocate for the creditor or the debtor in the foreclosure proceeding.

[G.S. 45-21.16\(c\)\(7\)b.](#)

11

PART ONE: Trustee is an Attorney

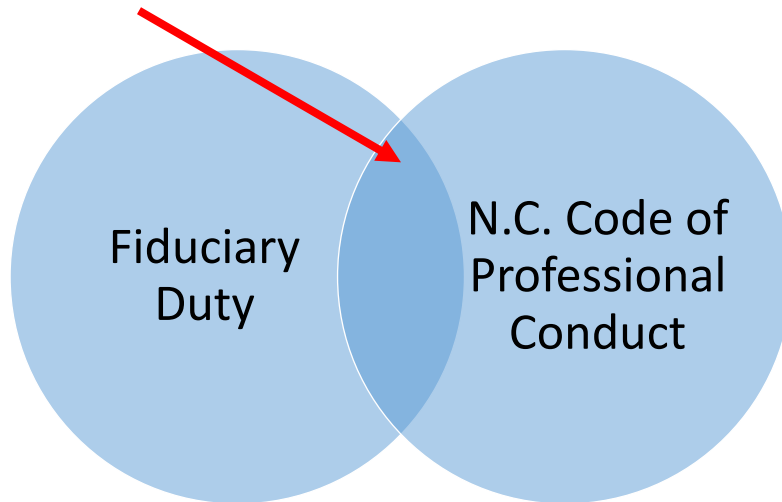
N.C. Rules of Professional Conduct apply to the attorney's conduct.

- Means must maintain client confidences
- Means must avoid conflicts of interest

2013 FEO 5: Attorney/trustee has a duty to act impartially as between the parties and to ensure that the foreclosure is prosecuted in accordance with the law and the terms of the DOT.

12

Attorney/Trustee



13

SL 2017-206 (H770)

- Revisions to G.S. 45-10
- Codifies ethics opinions from the NC State Bar

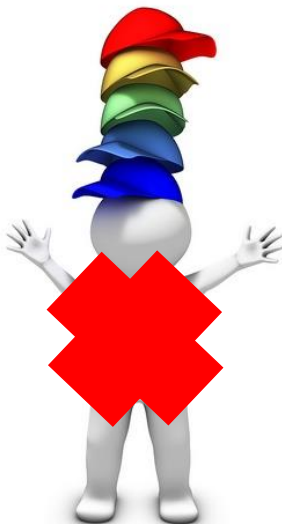
14

Rule #1

An attorney who serves as trustee or substitute trustee shall not represent either the noteholder or the interests of the borrower while **initiating** a foreclosure proceeding.

G.S. 45-10(a).

15



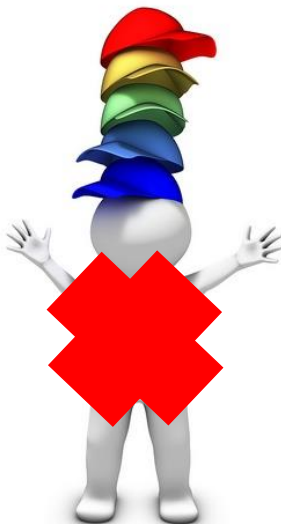
16

CPR 166

A fiduciary represents the interests of both the lender and the borrower and would violate his or her fiduciary duty to also be the attorney-advocate for either party **at any stage of the foreclosure** proceeding while serving as trustee.

17

Hat of Trustee
+ Hat Lender's
Counsel



18

Contested vs. Uncontested

Does not ethically prohibit the trustee from presenting evidence at the hearing on behalf of the lender necessary to support the clerk's findings essential to a foreclosure order **if the matter is uncontested.**

CPR 166

19

Contested vs. Uncontested

If the matter becomes contested, then the trustee must assume a neutral posture consistent with the trustee's fiduciary duty.

CPR 166

20

When is it contested?

- Request for continuance?
 - Request to postpone the sale?
 - Challenge?
 - Service
 - Debt
 - Default
 - Notice
 - Power of Sale
 - Home Loan
 - Military Status
 - Jurisdiction
-

2008 FEO 11

21

Question

- Attorney sends a demand letter to borrower expressly stating he represents the lender
- Borrower fails to pay
- Attorney is then appointed as trustee and files the notice of hearing
- **Does this violate trustee/attorney's duty?**

22

RPC 3

Prior representation of the lender does not ethically prohibit the attorney from serving as trustee, provided that the attorney does not also represent the lender in the foreclosure or proceedings related to the foreclosure.

23

Question

Attorney Adams previously represented lender in closing the loan that is the subject of the foreclosure. Attorney Adams is later appointed as trustee in the foreclosure. Borrower and lender begin discussing a loan modification. An attorney from the Attorney Adams' firm represents the lender in the negotiation of the modification.

- Violate fiduciary duty, ethical responsibilities?

24

RPC 90 + CPR 220

Yes –

#1: It would violate the ethical rules for the attorney to serve as trustee and represent the lender in the negotiation of the modification EVEN IF it is amicable and no foreclosure proceeding is initiated.

#2: If an attorney is serving as trustee and is ethically unable to rep either party, then no member of the attorney's firm may rep the lender in the foreclosure.

25

Rule #2 (H770):

An attorney may serve as the trustee in a foreclosure proceeding while simultaneously representing the noteholders on **unrelated** matters and others within the attorney's firm may also continue to represent the noteholders on **unrelated** matters.

G.S. 45-10(a).

26

Question

Attorney Adams is employed by a law firm. The firm's biggest client is Bankers R Us. All of the lawyer's in the firm perform some work for Bankers R Us.

May the attorney ethically serve as trustee in the foreclosure while the attorney and others in the firm continue to represent the bank on unrelated matters?

27

2008 FEO 11

Possible for the attorney to ethically serve as trustee under those circumstances provided that the attorney determines he can protect the interests of the bank in unrelated matters and maintain impartiality in the foreclosure proceeding.

Attorney has a duty to inform debtor that lawyer and members of law firm will continue to represent creditor on unrelated matters.

28

CPR 305

While serving as trustee, the attorney and the other attorneys in the firm **could not represent** the bank on matters related to the loan with the borrower, including filing a motion for relief from stay in a related bankruptcy proceeding.

29

Rule #3:

An attorney who initiates a foreclosure as trustee may resign as trustee after the foreclosure becomes contested and act as counsel to the noteholders.

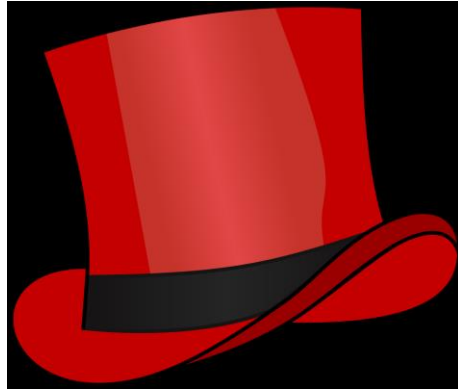
G.S. 45-10(a).

30

Trustee



Lender's Counsel



31

CPR 201, RPC 82, RPC 90

Former service as trustee does not preclude an attorney from resigning and assuming a partisan role in all further proceedings related to the foreclosure.

32

PART TWO: Trustee is a corporation

A corporation cannot represent itself in court, and may only appear through an attorney.

G.S. 84-5; Lexis Nexis v. Travishan Corp., 155 NC App 205 (2002)

Trustee must be represented at all stages of the litigation – from signing the NOH to appearing at the foreclosure hearing before the clerk.

AOC Legal Memo, Feb. 10, 2005

33

Attorney represents the trustee

- Trustee is a lawyer.
- Trustee is represented by a lawyer.

Duty is the same:

The **lawyer** is subject to the same duties relative to the debtor and creditor.

34

Rule #1:

An attorney may not ethically represent the lender in an adversarial proceeding related to the deed of trust where the trustee is a corporation that is controlled by or the alter ego of the attorney for the lender.

See [RPC 82](#).

35

Rule #2:

An attorney may not represent the lender and a corporate trustee in the same foreclosure proceeding, regardless of whether the attorney or the attorney's firm has ties to the corporation.

See [2008 FEO 11](#); [2014 FEO 2](#).

36

Rule #3:

An attorney is precluded from representing the lender in a foreclosure where the attorney's spouse, relative, or employee is serving as trustee or owns an interest in the closely-held corporate trustee.

See [RPC 82](#); [2011 FEO 5](#).

37

Question

Separate entity created by law firm to serve as trustee on DOTs. Law firm, its lawyers, or their family members have a controlling interest.

- May lawyer from the firm represent the entity as trustee in the F/C?

38

Answer

Yes

BUT, if the foreclosure is contested, a firm lawyer may not represent the creditor or debtor in the foreclosure or related matters

39

What can you do?

- Warn the attorney, advise of neutral role
- Call the State Bar Ethics Counsel: 919-828-4620

Note, Borrower could bring breach of fiduciary duty claim in civil court or file complaint with the State Bar

40

Trustee's Duty

Attorney/trustee has a duty to explain role in the foreclosure proceeding to any unrepresented party who is an unsophisticated consumer of legal services.

2013 FEO 5

41

Ex Parte Communications

- May lawyer/trustee communicate *ex parte* with the Clerk of Court after the foreclosure is filed?
 - Rule 3.5(a)(3) prohibits *ex parte* communications by litigator with a “judge or other official” except in court, in writing copied to opposing party (OP), or orally on adequate notice to OP.
- Answer: Maybe. Is lawyer/trustee more like a litigator or a litigant?
 - “Generally, in adversary proceeding, lawyer should not communicate with judge relative to a matter pending before...a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.” cmt. [8].

42

New Legislation Applicable to Attorneys Serving as Trustees in Chapter 45 Foreclosures

A trustee in a power of sale foreclosure has a fiduciary duty to both the debtor and the creditor. [In re Foreclosure of Vogler Realty, Inc.](#), 365 N.C. 389, 397 (2012). The trustee must be impartial in the performance of his or her duties as a disinterested third party and may not give an unfair advantage to one party to the detriment of the other. *Id.* See also [In re Foreclosure by Goddard & Peterson, PLLC](#), 789 S.E.2d 835, 841 (2016); [In re Foreclosure of Real Property for \\$143,600.00](#), 156 N.C. App. 477, 483 (2003). This duty is recognized in G.S. Chapter 45, which requires that the notice of hearing include a statement that the trustee is a neutral party and, while holding that position, may not advocate for the creditor or the debtor in the foreclosure proceeding. [G.S. 45-21.16\(c\)\(7\)\(b\)](#).

A trustee may be held liable for breach of fiduciary duty through a civil action brought in district or superior court. See [Goddard](#), 789 S.E.2d at 841. If the trustee is an attorney or represented by an attorney, then the attorney also may be subject to sanctions by the N.C. State Bar for violating the N.C. Rules of Professional Conduct. This includes [Rule 1.7\(a\)](#) which prohibits the common representation of multiple clients if the representation involves a concurrent conflict of interest. A number of ethics opinions drafted by the Ethics Committee of the State Bar provide guidance to an attorney serving as or representing a trustee in a power of sale foreclosure. See [CPR 94](#); [CPR 166](#); [CPR 201](#); [CPR 220](#); [CPR 297](#); [CPR 305](#); [RPC 3](#); [RPC 64](#); [RPC 82](#); [RPC 90](#); [2004 FEO 3](#); [2008 FEO 11](#); [2011 FEO 5](#); [2013 FEO 5](#); and [2014 FEO 2](#).

A new law, [Session Law 2017-206](#), went into effect on August 30, 2017 codifies a number of these opinions. The law contains a modification and addition to G.S. Chapter 45-10 and directly applies to those situations in foreclosure proceedings where an attorney is serving as the trustee. This post will give some preliminary thoughts on the new law as well as briefly discuss some of the related ethics opinions. For a more detailed review and application to a particular case in your practice, I would recommend reviewing the full ethics opinions cited herein.

A. Key Provisions of Revised G.S. 45-10 Related to the Attorney Serving as Trustee

The key modifications of G.S. 45-10 in S.L. 2017-206 related to foreclosures are as follows:

- 1. An attorney who serves as trustee or substitute trustee shall not represent either the noteholder* or the interests of the borrower while initiating a foreclosure proceeding. G.S. 45-10(a).**

This means that an attorney may not do two things at once – both serve as trustee and represent either the noteholder, commonly referred to as the lender, or the borrower at the same time when

initiating a foreclosure proceeding. This language appears to be adopted from a series of ethics opinions from the State Bar that draw the same conclusion. See CPR 166; RPC 82; RPC 90; 2004 FEO 3 (“[A] lawyer who serves as a trustee must be neutral as between the interests of the lender and the interests of the borrower and may not, therefore, represent either party individually while initiating a foreclosure proceeding”).

In [CPR 166](#), the N.C. State Bar Ethics Committee notes that the trustee as a fiduciary represents the interests of both the lender and the borrower and would violate his or her fiduciary duty to also be the attorney-advocate for either party at any stage of the foreclosure proceeding while serving as trustee. In another opinion, [RPC 90](#), the Ethics Committee notes that this restriction precludes representation of the lender by the attorney serving as trustee in the negotiation of a loan modification related to the deed of trust, even if the negotiation is amicable and no foreclosure proceeding has been initiated. However, the attorney/trustee may draft and preside over the execution of documents evidencing the agreement negotiated between the lender and the borrower. RPC 90. Finally, if an attorney is serving as trustee and is unable to ethically represent either party in an advocacy role, then no member of the attorney’s law firm may represent the lender in the foreclosure proceeding or matters related to the foreclosure. [CPR 220](#).

The Ethics Committee has noted that this restriction does not ethically prohibit the attorney/trustee from presenting evidence at the hearing on behalf of the lender necessary to support the clerk’s findings essential to a foreclosure order *if* the matter is uncontested. CPR 166. However, if the matter becomes contested, then the trustee must assume a neutral posture consistent with the trustee’s fiduciary duty. *Id.* A matter becomes contested according to the Ethics Committee when anyone with standing, including the borrower, contests jurisdiction or any one of the six statutory elements under [G.S. 45-21.16\(d\)](#) the clerk is charged with finding to authorize the sale. [2008 FEO 11](#). The same opinion notes that a matter does not become contested if the borrower or the trustee simply requests a continuance or makes a request to postpone the sale. *Id.*

A frequent question raised is whether an attorney may serve as trustee where, prior to serving as trustee, the attorney sent a demand letter on behalf of the lender or otherwise represented lender in connection with the loan that is the subject of the foreclosure. The Ethics Committee has given guidance on this question and provides that prior representation of the lender does not ethically prohibit the attorney from serving as trustee, provided that the attorney does not also represent the lender in the foreclosure or related proceedings. [RPC 3](#). This includes if the attorney previously represented the lender in negotiating and closing the original loan that is the subject of the foreclosure provided the attorney terminates representation of the lender on all matters related to the foreclosure proceeding. *Id.*

- 2. An attorney may serve as the trustee in a foreclosure proceeding while simultaneously representing the noteholders on unrelated matters and others within the attorney’s firm may also continue to represent the noteholders on unrelated matters. G.S. 45-10(a).**

While an attorney may not serve as trustee and at the same time represent the noteholder in the foreclosure or matters related to the foreclosure, the attorney/trustee and other attorneys in the same firm may represent the noteholder on other matters unrelated to the foreclosure. This new provision inserted in G.S. 45-10(a) appears to be a codification of [2008 FEO 11](#). See *also* RPC 3. In that opinion, the Ethics Committee addressed the following (paraphrased) question:

Attorney A is employed by a law firm. The firm's biggest client is Bank Z. All of the lawyer's in the firm perform some work for Bank Z. May the attorney ethically serve as trustee in the foreclosure of a deed of trust securing a loan made by Bank Z while the attorney and others in the firm continue to represent Bank Z on unrelated matters?

The Ethics Committee opined that it is possible for the attorney to ethically serve as trustee under those circumstances provided that the attorney determines he can protect the interests of the bank in unrelated matters and maintain impartiality in the foreclosure proceeding. 2008 FEO 11. However, while serving as trustee, the attorney and the other attorneys in the firm could not represent the bank on matters related to the loan with the borrower, including filing a motion for relief from stay in a related bankruptcy proceeding. [CPR 305](#).

3. An attorney who initiates a foreclosure as trustee may resign as trustee after the foreclosure becomes contested and act as counsel to the noteholders. G.S. 45-10(a).

It is clear based on the revised G.S. 45-10 and ethics opinions that an attorney may not serve as trustee in a foreclosure proceeding and at the same time represent the noteholder or borrower in a contested foreclosure proceeding. However, G.S. 45-10(a) makes clear that if the foreclosure is initiated by an attorney serving as trustee and the proceeding later becomes contested, the attorney may resign as trustee and subsequently appear as attorney for the noteholder in the proceeding. This appears to codify ethics opinions [CPR 201](#), [RPC 82](#), and [RPC 90](#), which generally state that former service as trustee does not preclude an attorney from resigning and assuming a partisan role in all further proceedings related to the foreclosure. Note, the new trustee must be substituted by execution of a written document properly recorded pursuant to G.S. Chapter 47. G.S. 45-10(a).

B. Attorney Does Not Serve as Trustee but Represents the Trustee

The revisions to G.S. 45-10 apply to those situations where the attorney is serving as trustee in a power of sale foreclosure. This new law does not directly address where an attorney represents an entity or individual who serves as trustee. However, the same ethical rules apply to an attorney where the attorney represents the trustee. The Ethics Committee has addressed a number of scenarios involving representation of the trustee by an attorney and has stated:

1. An attorney may not ethically represent the lender in an adversarial proceeding related to the deed of trust where the trustee is a corporation that is controlled by or the alter ego of

- the attorney for the lender. See [RPC 82](#).
2. An attorney may not represent the lender and a corporate trustee in the same foreclosure proceeding, regardless of whether the attorney or the attorney's firm has ties to the corporation. See [2008 FEO 11](#); [2014 FEO 2](#).
 3. An attorney is precluded from representing the lender in a foreclosure where the attorney's spouse, relative, or employee is serving as trustee or owns an interest in the closely-held corporate trustee. See [RPC 82](#); [2011 FEO 5](#).

C. Remedy for a Violation of G.S. 45-10(a) – What May the Clerk Do?

Many of these provisions frequently cause confusion with borrowers appearing in foreclosure proceedings before the clerk. Prior to the initiation of the foreclosure proceeding, the borrower may have received communications from the attorney asserting that the attorney represents the lender.

The attorney is subsequently substituted in as trustee and appears at the hearing as a neutral party with a fiduciary duty to both the borrower and the lender. However, G.S. 45-10(a) and the ethics opinions from the State Bar make clear that these actions on their face are not prohibited. This is true as long as the attorney is not serving as trustee and advocating for the lender on matters related to the foreclosure at the same time and the attorney can maintain his or her impartiality when later serving as trustee.

If an attorney/trustee appears at a contested hearing before the clerk and advocates for the lender, the revised G.S. 45-10 does not give authority to the clerk to take action in response to a violation of the statute. The borrower may have a separate cause of action in civil court for breach of fiduciary duty against the trustee or could file a complaint against the attorney with the State Bar. *Vogler Realty*, 365 N.C. at 397 (2012).

If an attorney appearing before the clerk is acting in contradiction to the statute or an ethical rule, it is appropriate for the clerk to caution the attorney and remind the attorney of the trustee's fiduciary duty. If the attorney persists with the conduct in light of the clerk's warning or concerns, the clerk may [contact the State Bar](#) with the parties to the proceeding for guidance as to the appropriateness of the attorney's continued service as trustee or representation of a party to the proceeding. This is always an option for a clerk presiding over a hearing where the clerk has concerns or questions about the ethical propriety of an attorney's conduct.

What are your thoughts about this new law and the role of the trustee in these proceedings? What are you seeing in practice? Feel free to leave comments below.

* Noteholder is defined in a new subsection (d) to G.S. 45-10 as "the holders or owners of a majority in the amount of the indebtedness, notes, bonds, or other instruments evidencing a

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promise to pay money and secured by” instruments creating a lien on property, such as a deed of trust. A noteholder is commonly referred to as the creditor or lender.

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017**

**SESSION LAW 2017-206
HOUSE BILL 770**

AN ACT TO MAKE CLARIFYING CHANGES TO ENSURE ESSA COMPLIANCE; CLARIFY PROPERTY TAX COMMISSION SALARIES; CLARIFY ADMINISTRATIVE COSTS FOR THE HEALTHY FOOD SMALL RETAILER PROGRAM; CLARIFY SINGLE-STREAM FUNDING FOR LME/MCOS; CHANGE THE MEMBERSHIP OF THE NORTH CAROLINA MEDICAL BOARD; PROHIBIT ATTORNEYS SERVING AS TRUSTEES FROM REPRESENTING NOTEHOLDERS OR BORROWERS WHILE INITIATING A FORECLOSURE PROCEEDING; MAKE CHANGES TO REPORTING REQUIREMENTS TO THE GENERAL ASSEMBLY; AND MAKE CHANGES TO THE NORTH CAROLINA STATE LOTTERY COMMISSION.

The General Assembly of North Carolina enacts:

PART I. CLARIFYING CHANGES TO ENSURE ESSA COMPLIANCE

SECTION 1.(a) G.S. 115C-83.15 reads as rewritten:

"§ 115C-83.15. School achievement, growth, performance scores, and grades.

...

(b) Calculation of the School Achievement Score. – In calculating the overall school achievement score earned by schools, the State Board of Education shall total the sum of points earned by a school as follows:

- (1) For schools serving any students in kindergarten through eighth grade, the State Board shall assign points on the following measures available for that school:
 - a. One point for each percent of students who score at or above proficient on annual assessments for mathematics in grades three through eight. For the purposes of this Part, an annual assessment for mathematics shall include any mathematics course with an end-of-course test.
 - b. One point for each percent of students who score at or above proficient on annual assessments for reading in grades three through eight.
 - c. One point for each percent of students who score at or above proficient on annual assessments for science in grades five and eight.
 - d. One point for each percent of students who progress in achieving English language proficiency on annual assessments in grades three through eight.
- (2) For schools serving any students in ninth through twelfth grade, the State Board shall assign points on the following measures available for that school:
 - a. One point for each percent of students who score at or above proficient on either the Algebra I or Integrated Math I end-of-course test or, for students who completed Algebra I or

Integrated Math I before ninth grade, another mathematics course with an end-of-course test.

- b. One point for each percent of students who score at or above proficient on the English II end-of-course test.
- c. One point for each percent of students who score at or above proficient on the Biology end-of-course test.
- d. One point for each percent of students who complete Algebra II or Integrated Math III with a passing grade.
- e. One point for each percent of students who achieve the minimum score required for admission into a constituent institution of The University of North Carolina on a nationally normed test of college readiness.
- f. One point for each percent of students enrolled in Career and Technical Education courses who meet the standard when scoring at Silver, Gold, or Platinum levels on a nationally normed test of workplace readiness.
- g. One point for each percent of students who graduate within four years of entering high school.
- h. One point for each percent of students who progress in achieving English language proficiency.

In calculating the overall school achievement score earned by schools, the State Board of Education shall (i) use a composite approach to weigh the achievement elements based on the number of students measured by any given achievement element and (ii) proportionally adjust the scale to account for the absence of a school achievement element for award of scores to a school that does not have a measure of one of the school achievement elements annually assessed for the grades taught at that school. The overall school achievement score shall be translated to a 100-point scale and used for school reporting purposes as provided in G.S. 115C-12(9)c1., 115C-218.65, 115C-238.66, and 116-239.8.

(c) ~~Calculation of the School Growth Score as a Measure of School Quality and Student Success Score.~~ – Using EVAAS, the State Board shall calculate the overall growth score earned by schools as a measure of school quality and student success. schools. In calculating the total growth score earned by schools, the State Board of Education shall weight student growth on the achievement indicators-measures as provided in subsection (b) of this section that have available growth values-values; provided that for schools serving students in grades nine through 12, the growth score shall only include growth values for measures calculated under sub-subdivisions a. and b. of subdivision (2) of subsection (b) of this section. The numerical values used to determine whether a school has met, exceeded, or has not met expected growth shall be translated to a 100-point scale and used for school reporting purposes as provided in G.S. 115C-12(9)c1., 115C-218.65, 115C-238.66, and 116-239.8.

...."

SECTION 1.(b) G.S. 115C-83.16 reads as rewritten:

"§ 115C-83.16. School performance indicators for the purpose of compliance with federal law.

(a) The State Board of Education shall use the school performance scores and grades as calculated under G.S. 115C-83.15 to satisfy the federal requirement under the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESSA), P.L. 114-95, to meaningfully differentiate the performance of schools on an annual basis. ~~The State Board shall weigh the measures in accordance with the requirements of G.S. 115C-83.15.~~ For the purpose of compliance with federal law, the indicators shall be defined as follows:

- (1) For schools serving any students in kindergarten through eighth grade, the State Board shall define the indicators as follows:
 - a. Academic indicators. –
 1. The academic achievement indicator shall include the following measures:
 - I. Proficiency on annual assessments for mathematics in grades three through eight.
 - II. Proficiency on annual assessments for reading in grades three through eight.
 2. The other academic indicator shall include the following measures:
 - I. Proficiency on annual assessments for science in grade five.
 - II. Proficiency on annual assessments for science in grade eight.
 3. The English language proficiency indicator shall be the percentage of students who progress in achieving English language proficiency on annual assessments in grades three through eight.
 - b. School quality and student success indicator. – The measure of school quality and student success shall be the growth score earned by schools.
- (2) For schools serving any students in ninth through twelfth grade, the State Board shall define the indicators as follows:
 - a. Academic indicators. –
 1. The academic achievement indicator shall include the following measures:
 - I. Proficiency on either the Algebra I or Integrated Math I end-of-course test or, for students who completed Algebra I or Integrated Math I before ninth grade, another mathematics course with an end-of-course test.
 - II. Proficiency on the English II end-of-course test.
 - III. The growth score earned by schools.
 2. ~~The other academic indicator shall include the following measures:~~
 - I. ~~Proficiency on the Biology end-of-course test.~~
 - II. ~~The percentage of students who complete Algebra II or Integrated Math III with a passing grade.~~
 - III. ~~The percentage of students who achieve the minimum score required for admission into a constituent institution of The University of North Carolina on a nationally normed test of college readiness.~~
 - IV. ~~The percentage of students enrolled in Career and Technical Education courses who meet the standard when scoring at Silver, Gold, or Platinum levels on a nationally normed test of workplace readiness.~~
 3. The graduation rate indicator shall be the percentage of students who graduate within four years of entering high school.

4. The English language proficiency indicator shall be the percentage of students who progress in achieving English language proficiency.
- b. School quality and student success indicator. – ~~The measure of school quality and student success shall be the growth score earned by schools.~~ The school quality and student success indicator shall be made up of the following measures:
 1. Proficiency on the Biology end-of-course test.
 2. The percentage of students who complete Algebra II or Integrated Math III with a passing grade.
 3. The percentage of students who achieve the minimum score required for admission into a constituent institution of The University of North Carolina on a nationally normed test of college readiness.
 4. The percentage of students enrolled in Career and Technical Education courses who meet the standard when scoring at Silver, Gold, or Platinum levels on a nationally normed test of workplace readiness.

(b). Notwithstanding subsection (a) of this section and only for the purpose of conforming with ESSA, the State Board may label measures as indicators different from those described in subsection (a) of this section; provided that each measure shall be calculated in accordance with the requirements of G.S. 115C-83.15."

SECTION 1.(c) This section is effective when it becomes law and applies beginning with the 2017-2018 school year.

PART II. CLARIFY PROPERTY TAX COMMISSION SALARIES

SECTION 2.(a) G.S. 105-288(d) reads as rewritten:

"§ 105-288. Property Tax Commission.

...

(d) Expenses. – The members of the Property Tax Commission shall receive travel and subsistence expenses in accordance with G.S. 138-5 and a salary as provided for by the Commission when hearing cases, meeting to decide cases, and attending training or continuing education classes on property taxes or judicial procedure. The members of the Property Tax Commission whose salaries or any portion of whose salaries are paid from State funds shall not receive travel and subsistence expenses, in accordance with G.S. 138-5(f), but shall receive a salary as provided for by the Commission under this subsection. The Secretary of Revenue shall supply all the clerical and other services required by the Commission. All expenses of the Commission and the Department of Revenue in performing the duties enumerated in this Article shall be paid as provided in G.S. 105-501."

SECTION 2.(b) This section is effective when it becomes law and applies retroactively to expenses of the Property Tax Commission incurred on or after April 1, 2017.

PART III. CLARIFY ADMINISTRATIVE COSTS FOR THE HEALTHY FOOD SMALL RETAILER PROGRAM

SECTION 3.(a) Section 12.5(a) of S.L. 2017-57 reads as rewritten:

"SECTION 12.5.(a) The funds appropriated by this act for the Healthy Food/Small Retailer program shall be used to continue a program to reimburse small food retailers for expenditures related to enhancing access to healthy foods in areas that qualify as food desert zones according to the Economic Research Service of the United States Department of Agriculture. For the purposes of this section, a small food retailer is defined as a business that is a small retail outlet, including corner stores, convenience stores, cooperatives, and bodegas, of no more than 3,000 heated square feet that sells a limited selection of foods and

other products. Funds may be used to reimburse small food retailers for the purchase and installation of refrigeration equipment, display shelving, and other equipment necessary for stocking nutrient-dense foods, including fresh vegetables and fruits, whole grains, nuts, seeds, beans and legumes, low-fat dairy products, lean meats, and seafood. The Department may retain up to ten percent (10%) of the funds allocated pursuant to this section for administrative costs associated with the healthy food small retailer program."

SECTION 3.(b) This section becomes effective July 1, 2017.

PART IV. CLARIFY SINGLE-STREAM FUNDING FOR LME/MCOS

SECTION 4.(a) Section 11F.2(b) of S.L. 2017-57 reads as rewritten:

"**SECTION 11F.2.(b)** The DMH/DD/SAS is directed to reduce its allocation for single-stream funding by thirty-one million four hundred eighty-seven thousand three hundred sixty-six dollars (\$31,487,366) in recurring funds and by fifty-five million four hundred fifty-four thousand nine hundred twenty-three dollars (\$55,454,923) in nonrecurring funds for the 2017-2018 fiscal year and by thirty-six million two thousand eight hundred fifty-four dollars (\$36,002,854) in recurring funds and by fifty-four million six hundred five thousand eight hundred twenty-three dollars (\$54,605,823) in nonrecurring funds for the 2018-2019 fiscal year.

The DMH/DD/SAS shall allocate these recurring and nonrecurring reductions for single-stream funding among the LME/MCOs as follows:

	FY 2017-2018	FY 2018-2019
Alliance Behavioral Healthcare		
Recurring	(\$6,836,920)(<u>\$7,468,941</u>)	
(\$9,448,259)(<u>\$10,226,331</u>)		
Nonrecurring	(\$8,231,710)(<u>\$8,478,129</u>)	
(\$9,149,477)(<u>\$9,357,813</u>)		
Cardinal Innovations Healthcare		
Recurring	(\$6,786,444)(<u>\$7,413,799</u>)	(\$9,326,550)
(\$10,120,076)		
Nonrecurring	(\$14,078,868)(<u>\$14,500,322</u>)	(\$15,685,591)
(\$16,075,545)		
Eastpointe		
Recurring	(\$1,256,185)(<u>\$1,372,311</u>)	(\$1,978,540)
(\$2,116,105)		
Nonrecurring	(\$5,463,292)(<u>\$5,626,836</u>)	(\$5,576,099)
(\$5,721,407)		
Partners Behavioral Health Management		
Recurring	(\$5,172,345)(<u>\$2,739,719</u>)	(\$5,314,232)
(\$2,912,599)		
Nonrecurring	(\$8,104,130)(<u>\$6,686,675</u>)	(\$7,477,787)
(\$6,356,282)		
Sandhills Center		
Recurring	(\$6,795,867)(<u>\$7,424,094</u>)	(\$7,996,922)
(\$8,607,466)		
Nonrecurring	(\$8,534,756)(<u>\$8,790,246</u>)	(\$8,250,223)(<u>\$8,431,511</u>)
Trillium Health Resources		

Recurring (\$33,869)	(\$3,056,342) (\$3,338,878)	(\$79,709)
Nonrecurring (\$3,126,486)	(\$5,488,067) (\$5,652,353)	(\$3,067,562)
Vaya Health		
Recurring (\$1,986,408)	(\$1,583,263) (\$1,729,624)	(\$1,858,642)
Nonrecurring (\$5,536,779)	(\$5,554,100) (\$5,720,363)	(\$5,399,084)
TOTALS		
Recurring (\$36,002,854)		(\$31,487,366)
Nonrecurring (\$54,605,823)		(\$55,454,923)

By March 1, 2018, the Secretary of Health and Human Services shall submit to the Joint Legislative Oversight Committee on Health and Human Services and the Fiscal Research Division a proposal for any adjustments to the specified recurring reductions among the LME/MCOs for future fiscal years. The proposal must include a detailed explanation supporting any proposed changes.

During each year of the 2017-2019 fiscal biennium, each LME/MCO shall offer at least the same level of service utilization as during the 2014-2015 fiscal year across the LME/MCO's catchment area. This requirement shall not be construed to require LME/MCOs to authorize or maintain the same level of services for any specific individual whose services were paid for with single-stream funding. Further, this requirement shall not be construed to create a private right of action for any person or entity against the State of North Carolina or the Department of Health and Human Services or any of its divisions, agents, or contractors and shall not be used as authority in any contested case brought pursuant to Chapter 108C or 108D of the General Statutes."

SECTION 4.(b) This section becomes effective July 1, 2017.

PART V. CHANGE MEMBERSHIP OF MEDICAL BOARD

SECTION 5.(a) G.S. 90-2 reads as rewritten:

"§ 90-2. Medical Board.

(a) There is established the North Carolina Medical Board to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina. The Board shall consist of 13 members.

(1) Seven of the members shall be duly licensed physicians recommended by the Review Panel and appointed by the Governor as set forth in G.S. 90-3.

(2) ~~The remaining six~~ Four members shall all be appointed by the Governor as follows:

a. One shall be a duly licensed physician who is a doctor of osteopathy or a full-time faculty member of one of the medical schools in North Carolina who utilizes integrative medicine in that person's clinical practice or a member of The Old North State Medical Society. This Board position shall not be subject to recommendations of the Review Panel pursuant to G.S. 90-3.

b. ~~Three shall be public members, and these Board positions~~ One shall be a public member, and this Board position shall not be subject to ~~recommendations~~ recommendation of the Review Panel pursuant

to G.S. 90-3. ~~A public member shall not be a health care provider nor the spouse of a health care provider. For the purpose of Board membership, "health care provider" means any licensed health care professional, agent or employee of a health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program as preparation to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.~~

- c. One shall be a physician assistant as defined in G.S. 90-18.1 as recommended by the Review Panel pursuant to G.S. 90-3.
- d. One shall be a nurse practitioner as defined in G.S. 90-18.2 as recommended by the Review Panel pursuant to G.S. 90-3.

(3) Two public members appointed by the General Assembly in accordance with G.S. 120-121, one upon recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President Pro Tempore of the Senate.

(a1) Each appointing and nominating authority shall endeavor to see, insofar as possible, that its appointees and nominees to the Board reflect the composition of the State with regard to gender, ethnic, racial, and age composition.

(b) No member shall serve more than two complete three-year terms in a lifetime, except that each member shall serve until a successor is chosen and qualifies.

(b1) A public member appointed pursuant to sub-subdivision (a)(2)b. and subdivision (a)(3) of this section shall not be a health care provider nor the spouse of a health care provider. For the purpose of Board membership, "health care provider" means any licensed health care professional, agent, or employee of a health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program as preparation to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(c) Repealed by Session Laws 2003-366, s. 1, effective October 1, 2003.

(d) Any member of the Board may be removed from office by the Governor for good cause shown. Any vacancy in the physician, physician assistant, or nurse practitioner membership of the Board shall be filled for the period of the unexpired term by the Governor from a list submitted by the Review Panel pursuant to G.S. 90-3 except as provided in G.S. 90-2(a)(2)a. Any vacancy in the public membership of the Board shall be filled by the ~~Governor~~ appropriate appointing authority for the unexpired term.

(e) The North Carolina Medical Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as any private person or corporation, subject only to approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing, and sale of real property. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board."

SECTION 5.(b) For the term of the public member appointed by the Governor expiring in 2017, that member shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, in accordance with G.S. 120-121. For the term of the public member appointed by the Governor expiring in 2018, that member shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, in accordance with G.S. 120-121. As terms expire

thereafter or as vacancies occur prior to the expiration of a term, the members on the Medical Board shall be appointed in accordance with G.S. 90-2, as amended by this act.

SECTION 5.(c) This section is effective when it becomes law and applies to vacancies occurring after June 30, 2017.

PART VI. PROHIBIT ATTORNEYS SERVING AS TRUSTEES FROM REPRESENTING NOTEHOLDERS OR BORROWERS WHILE INITIATING A FORECLOSURE PROCEEDING

SECTION 6. G.S. 45-10 reads as rewritten:

"§ 45-10. Substitution of trustees in mortgages and deeds of trust.

(a) In addition to the rights and remedies now provided by law, the ~~holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon,~~ noteholders may, in their discretion, substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee or a holder or owner of any or all of the obligations secured thereby, by the execution of a written document properly recorded pursuant to Chapter 47 of the North Carolina General Statutes. An attorney who serves as the trustee or substitute trustee shall not represent either the noteholders or the interests of the borrower while initiating a foreclosure proceeding. Notwithstanding this restriction, an attorney may serve as the trustee in a foreclosure proceeding while simultaneously representing the noteholders on unrelated matters and others within the attorney's firm may also continue to represent the noteholders on unrelated matters. Additionally, an attorney who has as trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as counsel to the noteholders.

...
(d) In this section, the term "noteholders" means the holders or owners of a majority in the amount of the indebtedness, notes, bonds, or other instruments evidencing a promise to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon."

PART VII. CHANGES TO REPORTING REQUIREMENTS TO THE GENERAL ASSEMBLY

SECTION 7.(a) Section 7.18(b) of S.L. 2008-107 is repealed.

SECTION 7.(b) Section 31.7(b) of S.L. 2015-241 reads as rewritten:

"SECTION 31.7.(b) Reporting. – The following reports are required:

- (1) By ~~October 1, 2015,~~ October 15, 2017, and every six months thereafter, each State agency shall report on the status of agency capital projects to the Joint Legislative Commission on Governmental Operations.
- (2) By ~~October 1, 2015,~~ October 15, 2017, and quarterly thereafter, each State agency shall report on the status of agency capital projects to the Fiscal Research Division of the General Assembly and to the Office of State Budget and Management."

PART VIII. NORTH CAROLINA STATE LOTTERY COMMISSION CHANGES

SECTION 8. G.S. 18C-112(a) reads as rewritten:

"(a) Of the members of the Commission appointed by the Governor, at least one member shall have a minimum of five years' experience in law enforcement. Notwithstanding subsection (e) of this section, a member serving in this slot may be an elected law enforcement official."

PART IX. EFFECTIVE DATE

SECTION 9. Except as otherwise provided, this act is effective when it becomes law.
In the General Assembly read three times and ratified this the 3rd day of August, 2017.

s/ Bill Rabon
Presiding Officer of the Senate

s/ Tim Moore
Speaker of the House of Representatives

VETO Roy Cooper
Governor

Became law notwithstanding the objections of the Governor at 7:28 p.m. this 30th day of August, 2017.

s/ Sarah Lang
Senate Principal Clerk



ADMINISTRATIVE OFFICE OF THE COURTS
DIVISION OF LEGAL & LEGISLATIVE SERVICES

JOHN M. KENNEDY
ACTING DIRECTOR

JUSTICE BUILDING
P. O. BOX 2448
RALEIGH, NC 27602

PETER POWELL
DEPUTY DIRECTOR

DAVID HOKE
ASSISTANT DIRECTOR

PAMELA WEAVER BEST
ASSOCIATE COUNSEL

MEMORANDUM

TO: Clerks of Superior Court **
FROM: Pamela Weaver Best, Associate Counsel
DATE: February 19, 2002

RE: **Pending Foreclosures and Substitution of Trustee**
(* ** please share this with your special proceedings clerks)

I have recently been notified by an assistant clerk of the following situation and wanted to share this information and procedures with you for your information.

FACTS: Trustee is named on a number of deeds of trust, some of which are already in foreclosure. The lender(s) desire to have the trustee replaced by a corporate trustee. The trustee has suggested rather than follow the substitution of trustee procedures, that he execute a power of attorney to give the corporate trustee the authority to act on his behalf.

ISSUE 1: *May a trustee assign his rights, powers and duties by a power of attorney to another person or corporation so that the person or corporation may "act" as the trustee (substitute trustee)?*

CONCLUSION: No.

LAW and ANALYSIS: Only the lender may give authority and power to the trustee and substitute trustee. The "...holders of ...the indebtedness...may, in their discretion, substitute a trustee whether the trustee ... is the original or a substituted trustee." G.S. §45-10.

In order for a substitute trustee to be given the power to serve the procedures in Chapter 45 of the North Carolina General Statutes must be followed. Those procedures require the appointment of a substitute trustee be in writing and recorded in the Register of Deeds of the county in which the property is found. G.S. §45-10.

ISSUE 2: *May the trustee be substituted while a foreclosure is pending?*

CONCLUSION: Yes.

LAW and ANALYSIS: The power to substitute a trustee”... may be exercised as often and as many times as the right to make such substitution may arise....” G.S. §45-17. Provided the substitution is done in accordance with law, G.S. 45-10 and 11 there does not appear to be any limitation on the number of substitutions or the timing of the substitution. A substitution may be made while a foreclosure brought by the original (or another substitute trustee) is still pending. *Pendergrast v. Home Mortgage Co.*, 211 N.C. 126 (1937).

C: John Kennedy, Director
 Tom Andrews, Counsel
 Pete Powell, Deputy Director
 Professor Joan Brannon
 CSAs



ADMINISTRATIVE OFFICE OF THE COURTS
DIVISION OF LEGAL & LEGISLATIVE SERVICES

JUDGE RALPH A. WALKER
DIRECTOR

DAVID HOKE
ASSISTANT DIRECTOR

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P. O. BOX 2448
RALEIGH, NC 27602
(919)733.7107

PETER POWELL
DEPUTY DIRECTOR

PAMELA WEAVER BEST
ASSOCIATE COUNSEL

MEMORANDUM

TO: Clerks of Superior Court
FROM: Pamela Weaver Best, Associate Counsel
DATE: February 10, 2005

RE: Foreclosures and the Unauthorized Practice of Law

The North Carolina State Bar (Bar) has issued a number of Cease and Desist orders to trustees and substitute trustees in foreclosure actions. As you all are aware, most recently the Bar addressed the issue of corporate trustees (i.e., Priority Trustee Services) filing actions and appearing at foreclosure hearings before you without the benefit of counsel. Additionally, the Bar in a separate action has ruled on the common practice of paralegals meeting with clerks to “hand over the paperwork” on behalf of trustees or substitute trustees.

Based on the Bar’s recent rulings, and my discussions with Bar Counsel, what follows is a summary of the rulings and our suggestions for handling foreclosure actions in the future.

Summary of Bar Rulings—Representation by an Attorney

1. A corporation cannot represent itself in court, and may only appear through an attorney. G.S. §84-5; *Lexis Nexis v. Travishan Corp.*, 155 N.C. App. 205 (2002).
2. If a trustee or substitute trustee (Trustee) is a corporate or other entity (e.g., Corp., Inc., L.L.P., L.L.C., P.A.) the Trustee must be represented by an attorney at all stages of the “litigation” which includes everything from signing the pleadings to appearing at the foreclosure hearing before the Clerk.
3. A paralegal may not appear at the hearing on behalf of a party, even to simply present documents to you, since the Bar considers appearing at the hearing litigation. Hence, if the Trustee is a corporate or other entity, either an attorney must appear at the hearing or the lender can take its chances and proceed without anyone appearing at the hearing.
4. If the Trustee is an individual, the Trustee can appear personally and represent him or herself or an attorney can appear for the Trustee.

Filing the Notice of Hearing

Clerks have asked whether they should review the notice of hearing before it is filed to determine whether it should be rejected because the trustee is a corporation. As you know, Clerks do not have authority to deny filings with the court except in very limited circumstances, such as fraudulent liens. In addition, we recognize that clerks do not have the staff to allow a comprehensive review of every pleading before it is filed. Therefore, we recommend you not reject a filing, and instead make your determination of appropriateness of representation at the hearing.

However, if you can determine immediately upon filing that the person filing the notice is engaging in the unauthorized practice of law you may choose to inform the person that you will likely dismiss the action because it was not signed by an attorney.

Conducting Hearings in the Future

The following questions and answers assume a notice of hearing has been filed and you are at the stage of conducting the hearing.

1. Corporate Trustee files a notice for hearing with your office.
 - a. If an officer for the corporate trustee signs the documents, can you proceed?

No, because the corporation would be practicing law without a license. It is within your discretion to either continue the action to give an attorney time to appear or dismiss the action.
 - b. If a paralegal delivers the documents to you at the hearing, can you proceed?

No, because the paralegal would be practicing law without a license. It is within your discretion to either continue the action to give an attorney time to appear or dismiss the action.
 - c. If the Trustee or a paralegal simply mails the necessary documents to you (or otherwise has them delivered to your office), but does not appear at the hearing, can you proceed?

If counsel represents the Trustee, as evidenced on the documents (e.g., the notice of hearing is signed by a lawyer) you can proceed. Of course, you will need to determine if the documents in the file are sufficient for you to make the necessary four findings.
2. What if a corporate trustee signed the pleadings, but now an attorney appears at the hearing, can you proceed?

It is within your discretion to strike the pleadings, dismiss the case or let the case proceed now that an attorney is present. Should you decide to proceed you should insist that an attorney provide representation to the trustee as the case moves forward. At a minimum, the attorney should file a notice of appearance in the case. Some attorneys may also choose to amend the notice or sign the existing notice.
3. What if the Corporate Trustee (e.g., H. Terry Hutchens, P.A.) is really a law firm, can you proceed?

If an attorney signs the necessary documents in his or her role as attorney representing the corporation, the action can proceed. If the attorney signs as officer, agent, or employee of the corporation, this is still a corporate trustee attempting to litigate *pro se* and is not permissible.

4. Can a non-lawyer sign the affidavit concerning service of the notice?

The Bar's order did not address this issue. However since proper service goes directly to your finding whether notice has been given to those entitled to such notice, as required in GS 45-21.16(d) and your finding is considered a judicial act [GS 45-21.16(d1)] the affidavit would be in furtherance of litigation and should be signed by an attorney.

5. Can someone other than an attorney conduct the sale of the property?

The Bar's orders do not address this, but it would seem permissible since the sale is not litigation.

6. Can a non-attorney who held the sale sign the report of sale?

The Bar's orders did not address this issue, however G.S. 45-21.26(b) states that the "...report shall be signed by the person authorized to hold the sale, or by his agent or attorney..." Based on that language someone other than the attorney can sign the report of sale as "agent" of the trustee.

7. Can a non-lawyer sign the final report?

The Bar's orders do not address this issue and the statutes do not have language similar to the language quoted above for the report of sale. It appears that the final report could be considered in furtherance of litigation and therefore, should be signed by the attorney or individual trustee not an agent or corporate entity.

Out of State Attorneys

If the attorney who represents the trustee is not licensed to practice law in North Carolina, he or she may not proceed with the foreclosure until the procedures in G.S. 84-4.1 have been followed. Those procedures require that in each case a motion for admission signed by the out of state attorney accompanied by an admission fee of \$100.00. The motion should include or be accompanied by a statement setting forth all the information set out in G.S. 84-4.1. If the motion satisfies the requirements and is accompanied by the \$100 fee you can enter an order allowing the attorney to appear in the matter before you.

For your information, G.S. 84-4.1 is quoted below in its entirety. If you have any questions or need further information please contact Pete Powell or Pamela Best.

C: Jennifer Porter, NC State Bar; Prof. Joan Brannon; Mark Baker, Esq.; Jim Bonner, Esq.; Terry Hutchens, Esq.

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of that state and in good standing therein, having been retained as attorney for a party to

any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina, the North Carolina Utilities Commission, the North Carolina Industrial Commission, the Office of Administrative Hearings of North Carolina, or any administrative agency, may, on motion, be admitted to practice in that forum for the sole purpose of appearing for a client in the litigation. The motion required under this section shall be signed by the attorney and shall contain or be accompanied by:

- (1) The attorney's full name, post-office address, bar membership number, and status as a practicing attorney in another state.
- (2) A statement, signed by the client, setting forth the client's address and declaring that the client has retained the attorney to represent the client in the proceeding.
- (3) A statement that unless permitted to withdraw sooner by order of the court, the attorney will continue to represent the client in the proceeding until the final determination thereof, and that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if the attorney were a regularly admitted and licensed member of the Bar of North Carolina in good standing.
- (4) A statement that the state in which the attorney is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.
- (5) A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with the legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State.
- (6) A statement accurately disclosing a record of all that attorney's disciplinary history. Discipline shall include (i) public discipline by any court or lawyer regulatory organization, and (ii) revocation of any pro hac vice admission.
- (7) A fee in the amount of one hundred dollars (\$100.00) for support of the General Court of Justice to be remitted to the State Treasurer.

Compliance with the foregoing requirements does not deprive the court of the discretionary power to allow or reject the application.

**G.S. Chapter 45 Power of Sale Foreclosure
Role of Trustee –NC Appellate Cases and State Bar Ethics Opinions**

KEY NC APPELLATE DECISIONS

Lynn v. Federal National Mortgage Association, 235 NC App 77 (2014)

- Trustees have fiduciary duty to both debtor and creditor in a typical foreclosure proceeding
- Trustee vested in a position of power; bound to act in the interests of the parties and exercise its powers accordingly

In re Foreclosure of Real Property for \$143,600.00, 156 NC App 477 (2003)

- Trustee is disinterested third party acting as the agent of both the debtor and creditor
- Trustee charged with duty to effect service of notice of hearing
- Holding – trustee called by lender to testify and did testify as to efforts to serve borrower; not improper for substitute trustee to testify as to efforts to serve where borrower contested service and direct examination by lender limited to means employed to obtain service (judge's inquiry broadened to other factors which borrower's counsel further expanded in cross); duty of trustee to serve inures to benefit of borrower and lender

In re Foreclosure of McDuffie, 114 NC App 86 (1994)

- Establishes principal that trustee is disinterested third party acting as agent of both debtor and creditor

In re Foreclosure of Vogler Realty, Inc., 365 NC 389 (2012)

- Trustee stands in a fiduciary relationship with both debtor and creditor
- Trustee must be impartial in performance of duties; can't give unfair advantage to one party to the detriment of the other
- Re: fiduciary relationship: special confidence reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence
- Duty is bound by his office to bring the estate to a sale under every possible advantage to the debtor as well as to the creditor and he is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and the creditor alike, apprising both of the intention of selling, that each may take the means to procure an advantageous sale
- Duty of fidelity and impartiality, good faith and every requisite degree of diligence; making due advertisement and giving due notice
- Upon default – trustee's duties are rendered responsible, critical, and active and he is required to act discreetly as well as judiciously in making the best use of the security for the protection of the beneficiaries

In re Foreclosure by Goddard & Peterson, PLLC, 789 S.E.2d 835 (2016)

- Goddard & Peterson (G&P) substituted as trustee for RTT (G&P successor) then RTT began representing lender in foreclosure

- Respondent objects to appearance of RTT as petitioner’s counsel and advocate against respondent in the foreclosure hearing; argues RTT had a fiduciary duty to borrower and representation of lender constituted breach
- RTT removed as trustee before the hearing in superior court; borrower fails to show how representation violated a specific principal of law or was undertaken in **bad faith** or how borrower sustained some **specific injury** that was proximately caused by RTT’s conduct; when parties appeared before superior court RTT had no duty to act as a disinterested party, and therefore the court discerns **no prejudice to R’s rights** or interests as a result of RTT’s representation of lender or how it allowed **lender to gain unfair advantage** in the FC proceeding – no evidence that borrower was unrepresented, unsophisticated legal consumer or that she disclosed material confidential information to RTT when RTT was acting as ST – instead borrower was represented throughout the foreclosure proceedings; record replete with evidence that RTT notified borrower of the hearing in superior court
- No legal or ethical violation in connection with RTT representation of petitioner

NC STATE BAR ETHICS OPINIONS

When an attorney is required to withdraw from representation or from a fiduciary role, it may be due to either

1. Concerns of **confidences** of the client under Rule 4 and its predecessors or
2. **Conflicts of interest** under Rule 5.1 or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding.

Key ethics opinions from the NC State Bar related to the role of the trustee are available at <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/> and include:

1. CPR 94 – October 21, 1976
2. CPR 166 – July 14, 1978
3. CPR 201 – October 19, 1978
4. CPR 220 – April 13, 1979
5. CPR 297 – July 15, 1981
6. CPR 305 – October 14, 1981
7. RPC 46 – October 28, 1988
8. RPC 3 – April 18, 1986
9. RPC 64 – July 14, 1989
10. RPC 82 – January 12, 1990
11. RPC 90 - October 17, 1990
12. 2004 FEO 3 – April 23, 2004
13. 2008 FEO 11 – January 15, 2010
14. 2011 FEO 5 - July 15, 2011
15. 2013 FEO 5 – July 19, 2013
16. 2014 FEO 2 – April 25, 2014

Tab:

Securitization

Securitization and Servicers

Meredith S. Smith



www.sog.unc.edu

1

Session Objectives

1. Identify the key documents and parties to a traditional mortgage loan
2. Understand the bird's eye view of securitization
3. Identify the resulting players entering the foreclosure proceeding



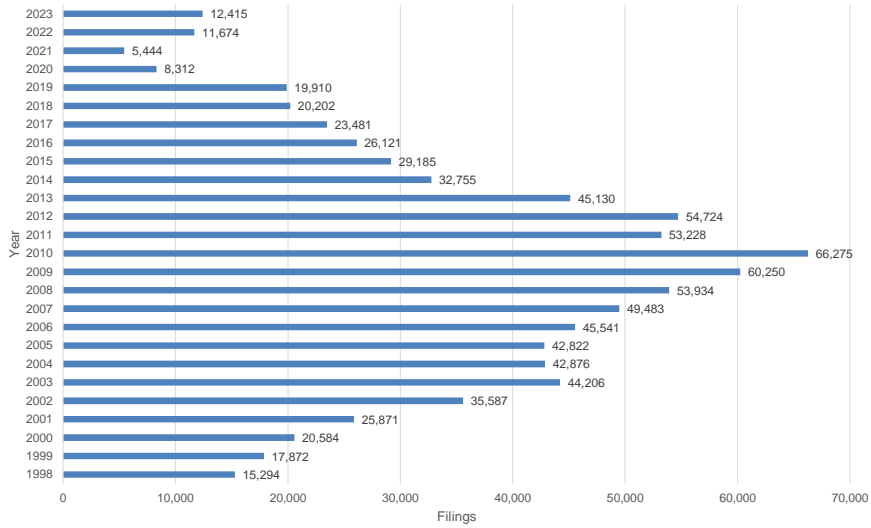
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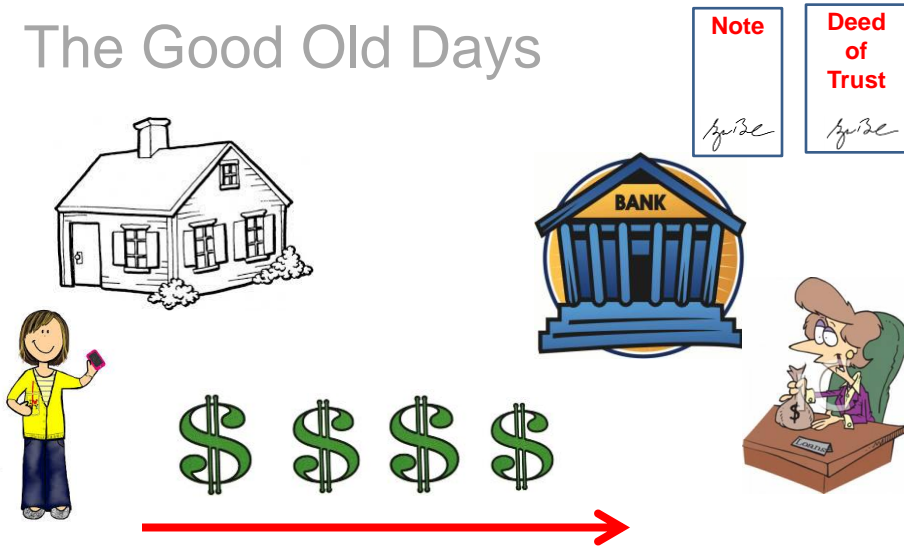
UNC
SCHOOL OF GOVERNMENT

1

North Carolina Foreclosure Filings
(1998 through 2023)



The Good Old Days



Fundamental Loan Documents

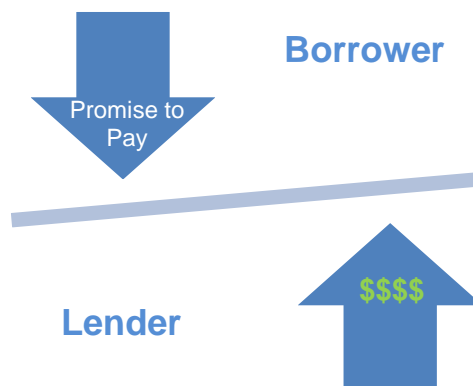
1. Note

2. Deed of Trust



5

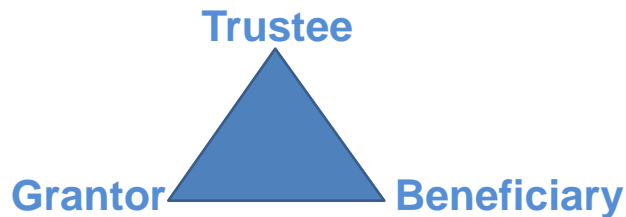
The Note: Two Parties



6

Deed of Trust – Three Parties

- Owner conveys legal title to trustee for benefit of third party.
- To secure a debt.



7

Note

1. Maker

- Borrower
- Payor
- Debtor

2. Payee

- Lender
- Creditor
- Holder*

Deed of Trust

1. Grantor

- Trustor
- Mortgagor
- Original homeowner

2. Trustee

- Substitute Trustee

3. Beneficiary

- Lender
- Grantee
- Mortgagee



8



What's the difference?

Holder vs. Lender



GS 45-21.16(d)(i) – valid debt of which party seeking to foreclose is the holder

Person, entity, estate, trust, partnership, etc.

1. **In possession** of a note
2. Note **payable to** bearer, indorsed in blank, or payable to an identifiable person that is the person in possession.

See G.S. 25-1-201(b)(21).



See, also: creditor or secured creditor as used in Chapter 45

Person or entity that lends money to the borrower.

The original lender is typically considered the originator or original holder of the loan.

Questions



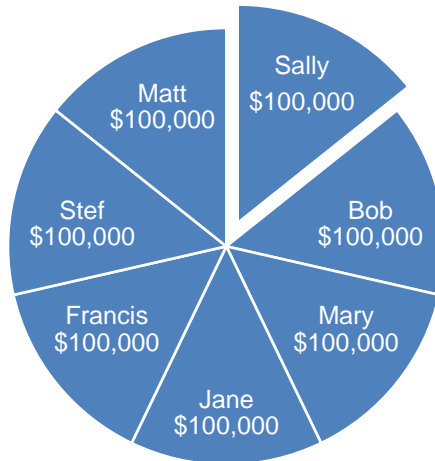
The Good Old Days

- Slow returns
- No liquidity to lend
- Retained risk of bad loans



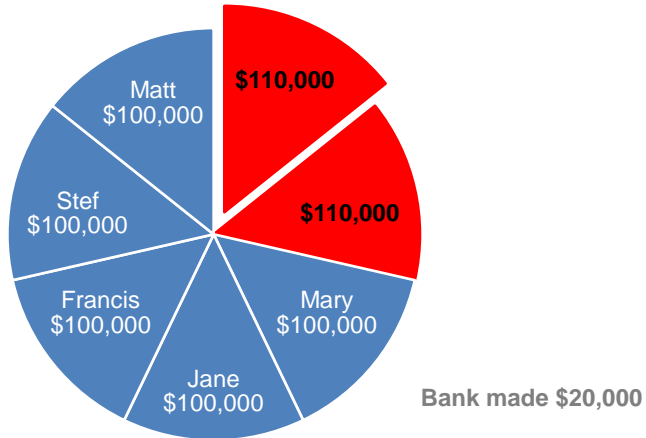
11

Bank Sells Loans



12

Bank Sell Loans



13

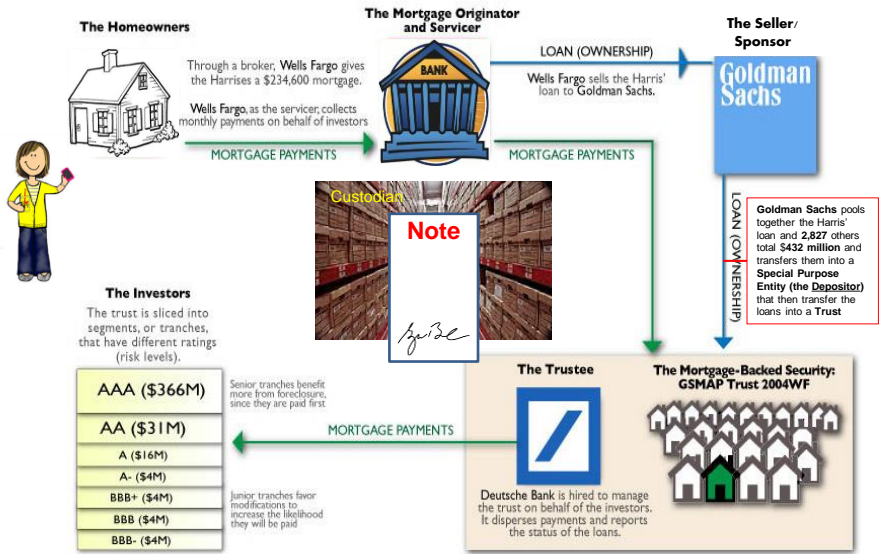
Fannie – Freddie Buy Loans to Expand Housing



Private Companies Buy Loans to Make Money, Meet Investor Demand



14



Source: ProPublica

Pooling and Servicing Agreement

- Trustee/Trust
- Issuer + Depositor
- Servicer
- Custodian



WELLS FARGO COMMERCIAL MORTGAGE SECURITIES, INC.,
as Depositor

WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Master Servicer

C-III ASSET MANAGEMENT LLC,
as Special Servicer

WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Certificate Administrator

WILMINGTON TRUST, NATIONAL ASSOCIATION,
as Trustee,

and

PENTALPHA SURVEILLANCE LLC,
as Operating Advisor and Asset Representations Reviewer,

POOLING AND SERVICING AGREEMENT

Dated as of December 1, 2015

Commercial Mortgage Pass-Through Certificates
Series 2015-P2

Trustee → Investor

Administer the trust for the benefit of investors.

- Duties are administrative in nature
 - Maintaining investor records
 - Distributing payments to the investor
 - Making reports to investors
- **XYZ Bank, as trustee** for the ABFC 2005-
OPT, ABFC Asset-Backed Certificates, Series
2005-OPT



Servicer → Borrower

Decisions must maximize the return on the investment for the investors.

- Collect payments from the borrower and responds to borrower inquiries
- Maintain loan details
- Oversee property taxes and insurance
- Call a default for non-payment
- Manage foreclosure of the mortgage and maintains the related property
- Modify mortgage terms within limitations outlined by PSA



19

Business of Residential Servicing As of March 31, 2017

Q1 2017 (in \$ billion)	Own Mortgages Serviced	+ Third-Party Mortgages	= Total Mortgage Servicing
Wells Fargo	335	1,204	1,539
JPMorgan Chase	264	583	836
Bank of America	258	296	554
U.S. Bancorp	58	234	292
Citibank	71	64	136
Top 5 Total	986	2,381	3,356

Source: Forbes



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Types of Servicers



Master Servicer

Special Servicer

Legal Definition

Receive scheduled periodic payments from a borrower pursuant to the terms of a residential/mortgage loan.

- GS 45-101(1)
- GS 53-244.030(11)(c) (SAFE Act)
- RESPA, 12 US 2605

Custodian

Takes physical possession of the notes

- Typically pursuant to the terms of the PSA

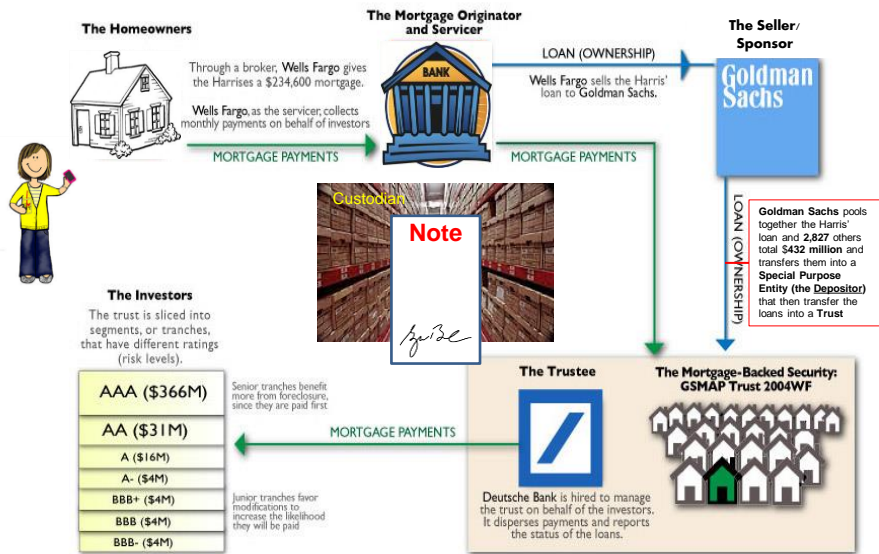
PSA Provision

In connection with such transfer and assignment, the Depositor does hereby deliver to, and deposit with, the **Custodian**, with **copies to the Master Servicer and the Special Servicer**, the following documents or instruments with respect to each Mortgage Loan

(i) (A) the **original Note**, bearing, or accompanied by, all prior or intervening endorsements, **endorsed by the most recent endorsee prior to the Trustee or, if none, by the Originator, without recourse, either in blank or to the order of the Trustee in the following form: "Pay to the order of Wilmington Trust, National Association, as Trustee, for the benefit of the Holders of COMM 2015-LC23 Mortgage Trust Commercial Mortgage Pass-Through Certificates, without recourse"**;

(ii) the **original (or a copy thereof certified from the applicable recording office) of the Mortgage** and, if applicable, the originals (or copies thereof certified from the applicable recording office) of any intervening assignments thereof showing a complete chain of assignment....





Things to Keep in Mind...

- Who is appearing/testifying before you?
Who does the attorney represent?
- Servicer: What is evidence of their authority to act on behalf of the holder?
What authority do they have?
- What are they qualified to testify to?

The Promissory Note

Questions

1. Who is the maker of the note?
2. Who is the lender?
3. Who is the borrower?
4. What is the promise?
5. Who is the payee?

NOTE

January 5, 2012

Chapel Hill, NC

1234 Landing Lane, Chapel Hill, NC 27514

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$450,000.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is Happy Lending, LLC. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 8.00%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on March 1, 2012. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on January 5, 2046 I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 89 Lending Lane, Chapel Hill, NC 27514 or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$1,200.00.

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 5 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder’s Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys’ fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. “Presentment” means the right to require the Note Holder to demand payment of amounts due. “Notice of Dishonor” means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the “Security Instrument”), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender’s prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

Sally Homeowner

(Seal)

Sally Homeowner- Borrower

The Deed of Trust

Questions

1. Who is the grantor?
2. Who is the trustee?
3. Who is the beneficiary?
4. Who is the record owner?

After Recording Return To:
ABC Law Firm
PO Box 2356
Chapel Hill, NC 27514

_____ [Space Above This Line For Recording Data] _____

DEED OF TRUST

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) “Security Instrument” means this document, which is dated January 5, 2012, together with all Riders to this document.

(B) “Trustor” is Sally and John Homeowner. Trustor is the Borrower under this Security Instrument.

(C) “Lender” is Happy Lending LLC. Lender is a limited liability company organized and existing under the laws of North Carolina. Lender’s address is 89 Lending Lane, Chapel Hill, NC 27514. Lender is the beneficiary under this Security Instrument.

(D) “Trustee” is Sunshine Trustee Services, Inc.

(E) “Note” means the promissory note signed by Sally Homeowner and dated January 5, 2012. The Note states that Sally Homeowner owes Lender \$450,000.00 plus interest. Sally Homeowner has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than January 5, 2046.

(F) “Property” means the property that is described below under the heading “Transfer of Rights in the Property.”

(G) “Loan” means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) “Riders” means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- | | | |
|--|---|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Other(s) [specify] _____ |
| <input type="checkbox"/> 1-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider | |

(I) “Applicable Law” means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) “Community Association Dues, Fees, and Assessments” means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) “Electronic Funds Transfer” means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) “Escrow Items” means those items that are described in Section 3.

(M) “Miscellaneous Proceeds” means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) “Mortgage Insurance” means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) “Periodic Payment” means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) “RESPA” means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, “RESPA” refers to all requirements and restrictions that are imposed in regard to a “federally related mortgage loan” even if the Loan does not qualify as a “federally related mortgage loan” under RESPA.

(Q) “Successor in Interest of Borrower” means any party that has taken title to the Property, whether or not that party has assumed Borrower’s obligations under the Note and/or this Security Instrument.

.....
.....
.....

BY SIGNING UNDER SEAL BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

Sally Homeowner

(Seal)
Sally Homeowner

John Homeowner

(Seal)
John Homeowner

Tab:
Right to
Foreclose &
Default

Right to Foreclose and Default

Meredith Stone Smith
UNC School of Government
Foreclosure Hearings for Clerks
November 2024

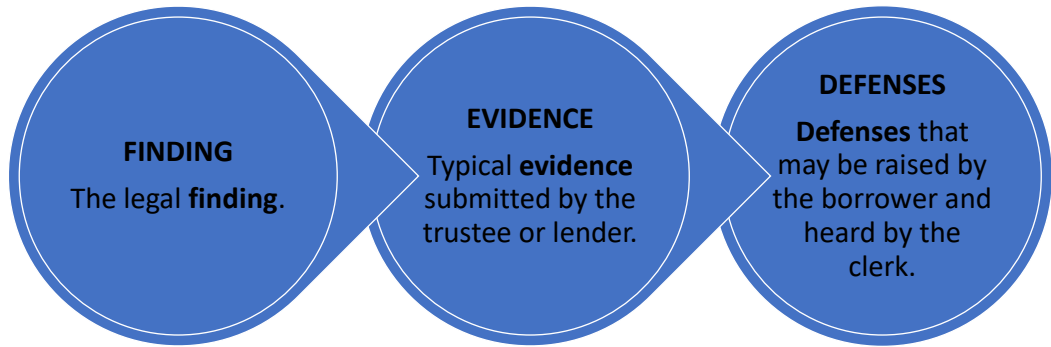
1

The Big Six

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one: loss mitigation pursuant to G.S. 45-21.16C.

2



3

The Clerk's Finding: Right to Foreclose

If the clerk finds the existence of a “right to foreclose under the instrument.”

G.S. 45-21.16(d)

4



5

Book 7242 Page 1394



2011027425
 GUILFORD CO, NC FEE \$39.00
 PENDING & RECORDING
 05-26-2011 02:44:31 PM
 JEFF L. THOMPEN
 REGISTER OF DEEDS
 BY: TERESE STELTMAN
 DEPUTY CLERK
BK: R 7242
PG: 1394-1397

NORTH CAROLINA DEED OF TRUST

48
 SATISFACTION: The debt secured by the within Deed of Trust together with the note(s) secured thereby has been satisfied in full.
 This the _____ day of _____, 20____
 Signed: _____

Parcel Identifier No. _____ Verified by _____ County on the _____ day of _____, 20____
 By: _____

Mail/Box to: TERRY MISHOE, 2920 Swan Lake Dr., High Point, NC 27262

This instrument was prepared by: PLYLER LAW FIRM, 604 E. GUILFORD STREET, THOMASVILLE, NC 27360

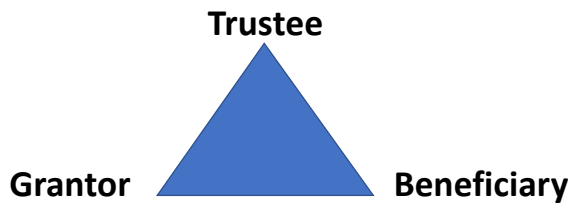
Brief description for the Index: _____

THIS DEED OF TRUST made this _____ 25th day of _____ May _____, 2011, by and between:

6

Deed of Trust – Three Parties

- Owner conveys legal title to trustee for benefit of third party.
- To secure a debt.



7

Power of Sale

Contractual remedy which grants the authority to the trustee to sell the property to satisfy the debt on behalf of the lender.

The authority to pursue the foreclosure before the clerk instead of judicial foreclosure.

8

Evidence:
Copy of the
Deed of
Trust


2011027425
GUILFORD CO., NC FEE \$30.00
RECORD & RETURN
05-26-2011 02:44:31 PM
JEFF L. TRIGDEN
REGISTER OF DEEDS
BY: TERESA STEWART
DRAUGHTON
BK: R 7242
PG: 1394-1397

NORTH CAROLINA DEED OF TRUST

ly SATISFACTION: The debt secured by the within Deed of Trust together with the note(s) secured thereby has been satisfied in full.
This the _____ day of _____, 20____
Signed: _____

Parcel Identifier No. _____ Verified by _____ County on the _____ day of _____, 20____
By: _____

Mail/Box to: TERRY MISHOR, 2920 Swan Lake Dr., High Point, NC 27262

This instrument was prepared by: PLYLER LAW FIRM, 604 E. GUILFORD STREET, THOMASVILLE, NC 27360

Brief description for the Index: _____

THIS DEED OF TRUST made this 25th day of May, 2011, by and between:

Evidence: The Deed of Trust

- Valid Power of Sale provision in the deed of trust?
- Recorded in county where foreclosure pending?
- Legal description of property included/attached?
- DOT secure the debt that is the basis of the foreclosure?

Evidence: Affidavit of Substitute Trustee

STATE OF NORTH CAROLINA
COUNTY OF PRICE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-SP-1234

IN THE MATTER OF THE FORECLOSURE of
a Deed of Trust from December 5, 2006 dated and
recorded on December 22, 2006 in Book 6569,
Page 1029 of the Price County Register of Deeds
by Sunshine Trustee Services, LLC (Substitute
Trustee)

Affidavit of Substitute Trustee

The undersigned, as attorney on behalf of Sunshine Trustee Services, LLC ("Substitute Trustee"), being first duly sworn, deposes and says:

1. That the Sunshine Trustee Services, LLC is the Substitute Trustee in the above-referenced matter having been substituted by the instrument recorded in Book 3636, Page 2512 of the Price County Register of Deeds, a copy of such Substitution of Trustee is attached hereto as Exhibit A.
2. That based on an examination of the title to the real property described in the above referenced deed of trust and the record owner of said real property, as of the date of giving of this notice of this foreclosure proceeding are Bob and Belinda Barker.

This the 13th day of November, 2021.

Sunshine Trustee Services, LLC,
Substitute Trustee

BY: Barbara Boswell, Attorney for

11

Evidence: Affidavit of the Trustee

Confirm the recording of the substitution of trustee occurred prior to the date of the filing of the NOH.

Right of the trustee to foreclose.

12

Clerk or No Clerk

The legal description in the deed of trust does not encumber the property that is the subject of the foreclosure.

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

13

Right to Foreclose

“Right to foreclose” includes that the DOT encumbers the property subject to foreclosure.

See In re Foreclosure of Deed of Trust by Goforth Properties, Inc.,
334 N.C. 369, 375(1993).

14

Metes and Bounds Description

and other good and valuable consideration to GRANTOR in hand paid by GRANTEES, the receipt whereof is hereby acknowledged, has granted, bargained and sold to the said GRANTEES and GRANTEES' heirs, successors and assigns forever, the following described land, situate, lying and being in the County of **Bay** State of **Florida** to wit:

Commence at the NE Corner of the East 1/2 of West 1/2 of NE 1/4 of SW 1/4 of Section 17, Township 1 North, Range 12 West and run S 0 degrees 03'08" E, 28 feet to the South right of way line of Silver Lake Road and the Point of Beginning; thence continue S 0 degrees 03'08" E, 409.67 feet; thence N 89 degrees 54'41" W, 314.69 feet to the East line of a 20 foot easement; thence run N 0 degrees 04'27" W along said line, 409.50 feet to the South right of way line of Silver Lake Road; thence run S 89 degrees 56'41" E along said line 314.86 feet to the Point of Beginning.

Map Book and Page Description

considerations, receipt whereof is hereby acknowledged, by these presents does grant, bargain, sell, alien, remise, release, convey and confirm unto grantee, all that certain land situate in Miami-Dade County, Florida, viz:

Lot 9, Block 58, SCOTT LAKE MANOR SECTION 8, according to the plat thereof, as recorded in Plat Book 65, at Page 117 of the Public Records of Miami-Dade County, Florida.

15

What is enough to encumber?

Legal description in DOT fails to reference book and page number of recorded map with Register of Deeds.

References property lot number and development phase.

References street address and tax parcel number.

→ This was enough to identify the land with certainty.

MTGLQ Investors, L.P. v. Curnin, 263 NC App. 193 (2018)

16

What is enough to encumber?

Legal description in DOT describes on Tract #2.

References tax identification number for Tracts #1 and #2

References street address for Tract #2.

DOT states borrower must occupy property as principal residence; residence located on Tract #1.

Lender argues encumbers both. Borrower argues encumbers only Tract #2.

17

What is enough to encumber?

This was enough to determine DOT encumbered both tracts as matter of law; no evidence of mutual mistake (i.e. parties did not intend to encumber both tracts).

Bank of America v. Schmitt (COA18-222; Dec. 18, 2018)

18

Take Away

More than just the “Exhibit A” legal description that is determinative as to what DOT encumbers.

→ Courts look to intent of the parties as it appears from all provisions of the DOT.

19

Clerk or No Clerk

The property is not secured by the deed of trust because the lender fraudulently attached a legal description to the deed of trust after the borrower signed it and before the lender recorded it.

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

20

Clerk or No Clerk

Equitable but clerk can consider this defense.

In re Hudson, 182 N.C. App. 499, 503 (2007) (holding that it is within the authority of the Clerk of Superior Court to determine whether the property is secured by the lien of the deed of trust, even if the basis for the defense is as a result of the fraudulent acts of the lender).

21

Clerk or No Clerk

The deed of trust is invalid because the grantor under the deed of trust did not own the property at the time the deed of trust was granted.

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

22

Clerk or No Clerk

Borrower argues that the deed of trust is not valid because she was not competent at the time she signed it.

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

23

Incompetence/Incapacity Defense

Deed of trust executed by an incompetent grantor may be set aside by a suit in equity to rescind or cancel the deed of trust.

In re Foreclosure of Godwin, 121 NC App. 703 (1996)

24

Clerk or No Clerk

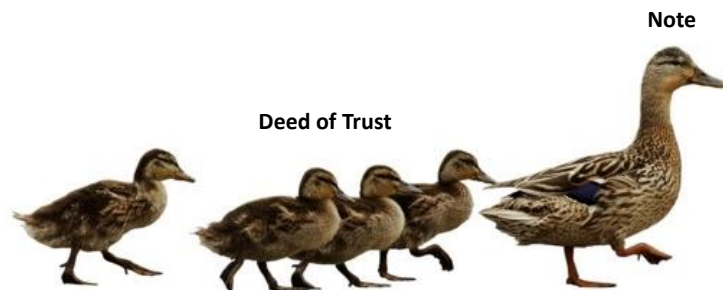
The deed of trust was granted to MERs for the benefit of the lender. The note is payable to the lender. Because the note and the deed of trust are split the holder can't foreclose.

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

25

Follow the leader – the deed of trust follows the note.



26

Deed of Trust Follows the Note

Valid transfer of the note secured by the deed of trust is an effective assignment of the deed of trust.

The **assignee of the note** then has the right to enforce the note AND all the rights of the assignor in the deed of trust, including:

- Substitute the trustee named in any deed of trust, and
- ***Exercise any power of sale*** contained in the instrument without restriction.

Also see AOC Legal Memo, Foreclosures, 1.24.07

27

Key Takeaways: Right to Foreclose

1. Typical evidence to determine right to foreclose:
 - deed of trust – power of sale provision and properly recorded (county, debt, legal description).
 - affidavit of substitute trustee – notice hearing filed after recording of the substitution of trustee (if any).
2. The clerk **can** hear defenses based on whether the deed of trust legally encumbers the property.
 - Court will look to all of information appearing on the deed of trust to determine what property is encumbered by it (tax id, lot number, street address, etc.)
 - Error in DOT not usually fatal where possible to ascertain identity of the property.
3. The clerk cannot hear defenses based on lack of capacity, undue influence, fraud against the borrower, or unfair and deceptive trade practices.
4. The deed of trust follows the note – remember the ducklings.

28

The Clerk's Finding: Default

If the clerk finds the existence of “default.”

G.S. 45-21.16(d)

29

Default

An omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform under an **agreement**.

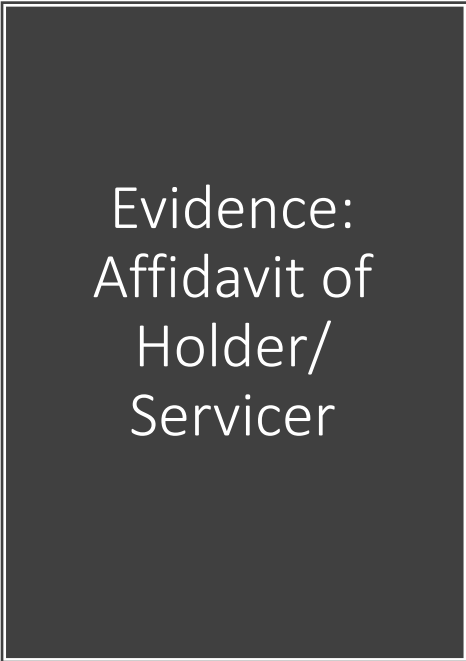
What agreements are we talking about in a foreclosure?

30

Default

- 1. What constitutes a default under the loan documents?
- 2. Whether there is evidence that a default exists?

31



STATE OF NORTH CAROLINA
COUNTY OF PRICE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-SP-1234

IN THE MATTER OF THE FORECLOSURE of a Deed of Trust from December 5, 2006 dated and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Register of Deeds by Sunshine Trustee Services, LLC (Substitute Trustee)	SERVICER AFFIDAVIT
--	---------------------------

The undersigned, being first duly sworn, deposes and says that:

1. I am the Assistant Secretary of Nationstar Loan Servicing LLC. I am familiar with the books and records of Nationstar Loan Servicing LLC and I am authorized and competent to make this affidavit.
2. Happy Lending LLC ("Holder") is the current owner and holder of the Promissory Note executed by Bob and Belinda Barker in the original principal amount of \$417,000.00 dated December 5, 2006 (as amended, modified, renewed or restated, the "Note").
3. Payment of the Note is secured by a Deed of Trust from Bob and Belinda Barker to PRLAP, Inc. for the benefit of Capital One, FSB, dated December 5, 2006 and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Public Registry, securing indebtedness in the original principal amount of \$417,000.00 (the "Deed of Trust").
4. The copies of the Note and the Deed of Trust attached hereto as Exhibits A and B, respectively, are true, accurate and complete copies of the original Note and Deed of Trust, which are the subject of this foreclosure proceeding.

32

Clerk or No Clerk

Borrower: “The late fees and interest charged are unconscionable and outrageous.”

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

33

Amount of Late Fees and Interest

The amount the borrower is in default or interest/fees charged is not a valid legal defense to power of sale foreclosure.

In re Foreclosure of Burgess, 47 NC App. 599 (1980)

34

Clerk or No Clerk

Borrower: "I don't owe \$42,503.32, I only owe \$32,303.21 and I can show you."

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

35

Clerk or No Clerk

Borrower: "I don't owe anything. I made all payments when due. I'm not in default."

May the clerk hear it?

1. Yes, the clerk may hear it.
2. No, the clerk may not hear it.

36

Key Takeaways: Default

1. A default is typically a payment default but there may be other types of defaults under the agreements. It is any breach of the agreement between borrower and holder that then allows holder to foreclose.
2. Some defaults require notice and opportunity to cure before the lender may foreclose. The requirements will depend on the agreement between the parties.
3. The amount the borrower is in default or the amount of interest and late fees is not something that the clerk may consider. A day late and a dollar short may be enough depending on the terms of the agreements.



**ADMINISTRATIVE OFFICE OF THE COURTS
JUSTICE BUILDING**

PO BOX 2448 • RALEIGH, NC 27602

PHONE: (919) 733-7107

FAX: (919) 733-1845

RALPH A. WALKER
DIRECTOR

PETER E. POWELL
LEGAL COUNSEL

DAVID F. HOKE
ASSISTANT DIRECTOR

January 24, 2007

MEMORANDUM

TO: Clerks of Superior Court (Please share with your SP staff)

FROM: Peter E. Powell, Legal Counsel

SUBJECT: Foreclosures Involving Mortgage Electronic Registration Systems, Inc. (MERS)

This memorandum addresses recent questions regarding the status of Mortgage Electronic Registration Systems, Inc. ("MERS") in foreclosure proceedings in North Carolina. MERS is a company founded by various mortgage lenders and secondary market participants to hold title to mortgage liens on behalf of lenders. MERS is often named as a "nominee" on deeds of trust securing home loans made in North Carolina. However, its nominee status does not make any difference with regards to whether it is the holder of the note and has the right to foreclose.

MERS should be treated like any other note-holder seeking to foreclose in North Carolina. As such, MERS may foreclose on a deed of trust when it satisfies the requirements of N.C.G.S. § 45-21.16(d) by presenting evidence to the Clerk that: (1) it is the holder of the promissory note; (2) the loan is in default; (3) the deed of trust provides for the foreclosure remedy; and (4) notice has been given to borrower and others entitled to notice. The questions that have arisen revolve around how the foreclosing party shows that it is the holder of the note. In determining whether MERS is the holder, the Clerks should apply the same standards as would be applied to any note holder.

Obviously, the original lender or a subsequent lender (assignee) may foreclose a deed of trust in a power of sale proceeding. There is no need or requirement that an assignment of a deed of trust be recorded. See G.S. § 47-17.2. Under North Carolina law, when the note is duly assigned or transferred, the rights under the deed of trust follow the note. As a result, whichever party is holder of the note is entitled to foreclose under the deed of trust.

Any note holder, including the original lender (payor), may assign the note by endorsement. This is typically done by an endorsement on the reverse side of the note (just the way a check is endorsed) or on the face of the note. If the note is properly assigned/endorsed, the deed of trust follows the indebtedness and the holder of the note is entitled to foreclose under power of sale. An endorsement may be either “in blank” or to a specified person or entity, as follows:

“Pay to the order of:

/s/ Joe Mortgage Mann
President, First National Bank”

(This is a blank endorsement.)

OR

“Pay to the order of:

Mortgage Electronic Registration Systems, Inc.

/s/ Joe Mortgage Mann
President, First National Bank”

(This is an endorsement to a specific assignee.)

If the endorsement is in blank, then whoever has possession of the note is the holder. In the specific endorsement example above, Mortgage Electronic Registration Systems, Inc. is the holder. A note also may be endorsed by an “allonge.” This is separate document that contains the endorsement and is attached to the note. Whether by endorsement on the note or on the allonge, MERS can be the holder, and may foreclose if it establishes the three other evidentiary issues: that the loan is in default, the deed of trust provides for the foreclosure remedy, and notice has been provided to the borrower and all other parties entitled to notice.

To summarize how Clerks should proceed in confirming whether the foreclosing entity is entitled to foreclose on a Deed of Trust:

1. Original Lender is Foreclosing. When the original lender is the foreclosing entity, foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or a copy of the note; (iii) an affidavit

that the indebtedness is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

2. MERS is Foreclosing. When MERS is the foreclosing entity, they must proceed as a subsequent lender, and foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or copy of the note endorsed in blank or specifically endorsed or assigned to MERS; (iii) an affidavit reciting that MERS is the holder and that the debt is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

If the original note, as endorsed, is produced, the affidavit need not recite that MERS is the holder, as they are obviously in possession of the note. If the original note is not produced, and the endorsement is in blank, then the affidavit should recite that the foreclosing party is the holder.

3. Other Entity is Foreclosing. When any subsequent lender or servicer other than MERS is the foreclosing entity, foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or a copy of the note endorsed in blank or specifically endorsed or assigned to the foreclosing lender or servicer; (iii) an affidavit reciting that the subsequent lender is the holder and that the indebtedness is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

If the original note, as endorsed, is produced, the affidavit need not recite that the subsequent lender is the holder, as they are obviously in possession of the note. If the original note is not produced, and the endorsement is in blank, then the affidavit should recite that the foreclosing party is the holder.

In conclusion, the above suggested procedures are applicable to all foreclosures, no matter who brings the proceeding. MERS should be treated exactly as any other holder of indebtedness would be under the North Carolina foreclosure statutes. However, without a proper assignment or endorsement as described above, MERS or any subsequent lender, cannot be established as the holder of a note in which the original lender is the proper party. Merely being named as a “nominee” in the original deed of trust is not sufficient. If you should have any further questions concerning this matter please feel free to call me at 919-715-4907 or Pamela Best at 919-715-4849.

Default and Right to Foreclose

Case Problems

**UNC School of Government
Judicial College Course
Foreclosure for Clerks**

Right to Foreclose

Richard and Lynn Roy borrowed the sum of \$191,100 from Terry L Mishoe on May 25, 2011. The debt is evidenced by a note. The note is secured by a deed of trust recorded in Guilford County on May 26, 2011. The trustee filed a notice of hearing in Alamance County on October 14, 2024 to foreclose on the property. Review the Deed of Trust and answer the following questions:

1. The power of sale provision is located:
2. Is the power of sale valid?
3. Location of legal description?
4. Valid legal description?
5. Foreclosure filed in the proper county?
6. Book and Page number of recorded DOT?
7. Does the DOT secure the note?
8. Signed and notarized by grantor?
9. Do you find a right to foreclose?

Default

Richard and Lynn Roy borrowed the sum of \$91,000 from Terry L Mishoe on May 25, 2011. The debt is evidenced by a note. The note is secured by a deed of trust recorded in Guilford County on May 26, 2011. Richard and Lynn hit hard times and kept making payments on the note but were unable to pay their county taxes related to the property or the homeowners insurance. They also decided they didn't want to live in the house anymore so they decided to move and sold it to their friend Todd as long as he agreed to make the payments on the note. Todd made the payments. He had the money because he makes most of his money from a part time service station he runs for friends and neighbors he started in the backyard. Richard and Lynn ran into more troubles after a friend, Sarah, who had helped repair the roof before they moved filed a lawsuit against them based on a claim of lien she filed in March of 2011. Richard and Lynn didn't respond to the lawsuit and Sarah got a default judgment against them in August of 2011.

In October, Mr. Mishoe had enough and decided to foreclose. He hired Attorney Wilson to serve as substitute trustee and Wilson sent the 30 day notice of principal, interest, late fees (Todd paid but not always on time), and daily interest due and then filed the notice of hearing. At the hearing before you, Richard and Lynn object saying that Todd always made his payments when due and Mrs. Roy batted her eyes and said she wasn't aware of any other defaults. Mr. Mishoe argues there were many other defaults.

Based on the language in the deed of trust and the facts above, name the other defaults below.



2011027425

GUILFORD CO, NC FEE \$39.00

PRESENTED & RECORDED:

05-26-2011 02:44:31 PM

JEFF L. THIGPEN

REGISTER OF DEEDS

BY: TERESA STEELMAN

DEPUTY-HP

BK: R 7242

PG: 1394-1397

NORTH CAROLINA DEED OF TRUST

488

SATISFACTION: The debt secured by the within Deed of Trust together with the note(s) secured thereby has been satisfied in full.

This the _____ day of _____, 20__

Signed: _____

Parcel Identifier No. _____ Verified by _____ County on the _____ day of _____, 20__
By: _____

Mail/Box to: TERRY MISHOE, 2920 Swan Lake Dr., High Point, NC 27262

This instrument was prepared by: PLYLER LAW FIRM, 604 E. GUILFORD STREET, THOMASVILLE, NC 27360

Brief description for the Index: _____

THIS DEED of TRUST made this 25th day of May, 2011, by and between:

GRANTOR	TRUSTEE	BENEFICIARY
RICHARD ROY and wife, LYNN ROY 1810 JOHNSON ST. HIGH POINT, NC 27262	CRANFORD O. PLYLER III	TERRY L. MISHOE or CAROLYN P. MISHOE 2920 Swan Lake Dr. High Point, NC 27262

Enter in appropriate block for each party: name address, and, if appropriate, character of entity, e.g. corporation or partnership

The designation Grantor, Trustee, and Beneficiary as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, That whereas the Grantor is indebted to the Beneficiary in the principal sum of Ninety One Thousand and 00/100 Dollars (\$91,000.00), as evidenced by a Promissory Note of even date herewith, the terms of which are incorporated herein by reference. The final due date for payments of said Promissory Note, if not sooner paid, is June 1, 2026

NOW, THEREFORE, as security for said indebtedness, advancements and other sums expended by Beneficiary pursuant to this Deed of Trust and costs of collection (including attorneys fees as provided in the Promissory Note) and other valuable consideration, the receipt of which is hereby acknowledged, the Grantor has bargained, sold, given and conveyed and does by these presents bargain, sell, give, grant and convey to said Trustee, his heirs, or successors, and assigns, the parcel(s) of land situated in the City of HIGH POINT, High Point Township, GUILFORD County, North Carolina, (the "Premises") and more particularly described as follows:

BEING all of Lot 5, LARKIN STREET EXT. PROPERTY OF ROBERT CONNOR.

TO HAVE AND TO HOLD said Premises with all privileges and appurtenances thereunto belonging, to said Trustee, his heirs, successors, and assigns forever, upon the trusts, terms and conditions, and for the uses hereinafter set forth.

If the Grantor shall pay the Note secured hereby in accordance with its terms, together with interest thereon, and any renewals or extensions thereof in whole or in part, all other sums secured hereby and shall comply with all of the covenants, terms and conditions of this Deed of Trust, then this conveyance shall be null and void and may be canceled of record at the request and the expense of the Grantor.

If, however, there shall be any default (a) in the payment of any sums due under the Note, this Deed of Trust or any other instrument securing the Note and such default is not cured within ten (10) days from the due date, or (b) if there shall be default in any of the other covenants, terms or conditions of the Note secured hereby, or any failure or neglect to comply with the covenants, terms or conditions contained in this Deed of Trust or any other instrument securing the Note and such default is not cured within fifteen (15) days after written notice, then and in any of such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash, after having first giving such notice of hearing as to commencement of foreclosure proceedings and obtained such findings or leave of court as may then be required by law and giving such notice and advertising the time and place of such sale in such manner as may then be provided by law, and upon such and any resales and upon compliance with the law then relating to foreclosure proceedings under power of sale to convey title to the purchaser in as full and ample manner as the Trustee is empowered. The Trustee shall be authorized to retain an attorney to represent him in such proceedings.

The proceeds of the Sale shall after the Trustee retains his commission, together with reasonable attorneys fees incurred by the Trustee in such proceedings, be applied to the costs of sale, including, but not limited to, costs of collection, taxes, assessments, costs of recording, service fees and incidental expenditures, the amount due on the Note hereby secured and advancements and other sums expended by the Beneficiary according to the provisions hereof and otherwise as required by the then existing law relating to foreclosures. The Trustee's commission shall be five percent (5%) of the gross proceeds of the sale or the minimum sum of \$ _____ whichever is greater, for a completed foreclosure. In the event foreclosure is commenced, but not completed, the Grantor shall pay all expenses incurred by Trustee, including reasonable attorneys fees, and a partial commission computed on five per cent (5%) of the outstanding indebtedness or the above stated minimum sum, whichever is greater, in accordance with the following schedule, to-wit: one-fourth (¼) thereof before the Trustee issues a notice of hearing on the right to foreclosure; one-half (½) thereof after issuance of said notice, three-fourths (¾) thereof after such hearing; and the greater of the full commission or minimum sum after the initial sale.

And the said Grantor does hereby covenant and agree with the Trustee as follows:

1. **INSURANCE.** Grantor shall keep all improvements on said land, now or hereafter erected, constantly insured for the benefit of the Beneficiary against loss by fire, windstorm and such other casualties and contingencies, in such manner and in such companies and for such amounts, not less than that amount necessary to pay the sum secured by this Deed of Trust, and as may be satisfactory to the Beneficiary. Grantor shall purchase such insurance, pay all premiums therefor, and shall deliver to Beneficiary such policies along with evidence of premium payments as long as the Note secured hereby remains unpaid. If Grantor fails to purchase such insurance, pay premiums therefor or deliver said policies along with evidence of payment of premiums thereon, then Beneficiary, at his option, may purchase such insurance. Such amounts paid by Beneficiary shall be added to the principal of the Note secured by this Deed of Trust, and shall be due and payable upon demand of Beneficiary. All proceeds from any insurance so maintained shall at the option of Beneficiary be applied to the debt secured hereby and if payable in installments, applied in the inverse order of maturity of such installments or to the repair or reconstruction of any improvements located upon the Property.

2. **TAXES, ASSESSMENTS, CHARGES.** Grantor shall pay all taxes, assessments and charges as may be lawfully levied against said Premises within thirty (30) days after the same shall become due. In the event that Grantor fails to so pay all taxes, assessments and charges as herein required, then Beneficiary, at his option, may pay the same and the amounts so paid shall be added to the principal of the Note secured by this Deed of Trust, and shall be due and payable upon demand of Beneficiary.

3. **ASSIGNMENTS OF RENTS AND PROFITS.** Grantor assigns to Beneficiary, in the event of default, all rents and profits from the land and any improvements thereon, and authorizes Beneficiary to enter upon and take possession of such land and improvements, to rent same, at any reasonable rate of rent determined by Beneficiary, and after deducting from any such rents the cost of reletting and collection, to apply the remainder to the debt secured hereby.

4. **PARTIAL RELEASE.** Grantor shall not be entitled to the partial release of any of the above described property unless a specific provision providing therefor is included in this Deed of Trust. In the event a partial release provision is included in this Deed of Trust, Grantor must strictly comply with the terms thereof. Notwithstanding anything herein contained, Grantor shall

not be entitled to any release of property unless Grantor is not in default and is in full compliance with all of the terms and provisions of the Note, this Deed of Trust, and any other instrument that may be securing said Note.

5. WASTE. The Grantor covenants that he will keep the Premises herein conveyed in as good order, repair and condition as they are now, reasonable wear and-tear excepted, and will comply with all governmental requirements respecting the Premises or their use, and that he will not commit or permit any waste.

6. CONDEMNATION. In the event that any or all of the Premises shall be condemned and taken under the power of eminent domain, Grantor shall give immediate written notice to Beneficiary and Beneficiary shall have the right to receive and collect all damages awarded by reason of such taking, and the right to such damages hereby is assigned to Beneficiary who shall have the discretion to apply the amount so received, or any part thereof, to the indebtedness due hereunder and if payable in installments, applied in the inverse order of maturity of such installments, or to any alteration, repair or restoration of the Premises by Grantor.

7. WARRANTIES. Grantor covenants with Trustee and Beneficiary that he is seized of the Premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that he will warrant and defend the title against the lawful claims of all persons whomsoever, except for the exceptions hereinafter stated. Title to the property hereinabove described is subject to the following exceptions:

8. SUBSTITUTION OF TRUSTEE. Grantor and Trustee covenant and agree to and with Beneficiary that in case the said Trustee, or any successor trustee, shall die, become incapable of acting, renounce his trust, or for any reason the holder of the Note desires to replace said Trustee, then the holder may appoint, in writing, a trustee to take the place of the Trustee; and upon the probate and registration of the same, the trustee thus appointed shall succeed to all rights, powers and duties of the Trustee.

X THE FOLLOWING PARAGRAPH, 9. SALE OF PREMISES, SHALL NOT APPLY UNLESS THE BLOCK TO THE LEFT MARGIN OF THIS SENTENCE IS MARKED AND/OR INITIALED.

9. SALE OF PREMISES. Grantor agrees that if the Premises or any part thereof or interest therein is sold, assigned, transferred, conveyed or otherwise alienated by Grantor, whether voluntarily or involuntarily or by operation of law [other than: (i) the creation of a lien or other encumbrance subordinate to this Deed of Trust which does not relate to a transfer of rights of occupancy in the Premises; (ii) the creation of a purchase money security interest for household appliances; (iii) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety; (iv) the grant of a leasehold interest of three (3) years or less not containing an option to purchase; (v) a transfer to a relative resulting from the death of a Grantor; (vi) a transfer where the spouse or children of the Grantor become the owner of the Premises; (vii) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the Grantor becomes an owner of the Premises; (viii) a transfer into an inter vivos trust in which the Grantor is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the Premises], without the prior written consent of Beneficiary, Beneficiary, at its own option, may declare the Note secured hereby and all other obligations hereunder to be forthwith due and payable. Any change in the legal or equitable title of the Premises or in the beneficial ownership of the Premises, including the sale, conveyance or disposition of a majority interest in the Grantor if a corporation or partnership, whether or not of record and whether or not for consideration, shall be deemed to be the transfer of an interest in the Premises.

10. ADVANCEMENTS. If Grantor shall fail to perform any of the covenants or obligations contained herein or in any other instrument given as additional security for the Note secured hereby, the Beneficiary may, but without obligation, make advances to perform such covenants or obligations, and all such sums so advanced shall be added to the principal sum, shall bear interest at the rate provided in the Note secured hereby for sums due after default and shall be due from Grantor on demand of the Beneficiary. No advancement or anything contained in this paragraph shall constitute a waiver by Beneficiary or prevent such failure to perform from constituting an event of default.

11. INDEMNITY. If any suit or proceeding be brought against the Trustee or Beneficiary or if any suit or proceeding be brought which may affect the value or title of the Premises, Grantor shall defend, indemnify and hold harmless and on demand reimburse Trustee or Beneficiary from any loss, cost, damage or expense and any sums expended by Trustee or Beneficiary shall bear interest as provided in the Note secured hereby for sums due after default and shall be due and payable on demand.

12. WAIVERS. Grantor waives all rights to require marshaling of assets by the Trustee or Beneficiary. No delay or omission of the Trustee or Beneficiary in the exercise of any right, power or remedy arising under the Note or this Deed of Trust shall be deemed a waiver of any default or acquiescence therein or shall impair or waive the exercise of such right, power or remedy by Trustee or Beneficiary at any other time.

13. CIVIL ACTION. In the event that the Trustee is named as a party to any civil action as Trustee in this Deed of Trust, the Trustee shall be entitled to employ an attorney at law, including himself if he is a licensed attorney, to represent him in said action and the reasonable attorney's fee of the Trustee in such action shall be paid by the Beneficiary and added to the principal of the Note secured by this Deed of Trust and bear interest at the rate provided in the Note for sums due after default.

14. PRIOR LIENS. Default under the terms of any instrument secured by a lien to which this Deed of Trust is subordinate shall constitute default hereunder.

15. OTHER TERMS.

IN WITNESS WHEREOF, the Grantor has duly executed the foregoing as of the day and year first above written.

(Entity Name)

Richard Roy (SEAL)
RICHARD ROY

By: _____
Title: _____

By: _____
Title: _____

By: _____
Title: _____

(SEAL)

(SEAL)

State of North Carolina - County of Davidson
~~GUILFORD~~

I, the undersigned Notary Public of the County and State aforesaid, certify that RICHARD ROY 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 25th day of May, 2011.

My Commission Expires: 8-30-2015

Laura M. Tysinger
Notary Public



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 _____ 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 such 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

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

Tab: Notice

Notice

Meredith Stone Smith
UNC School of Government
Foreclosure Hearings for Clerks
November 2024

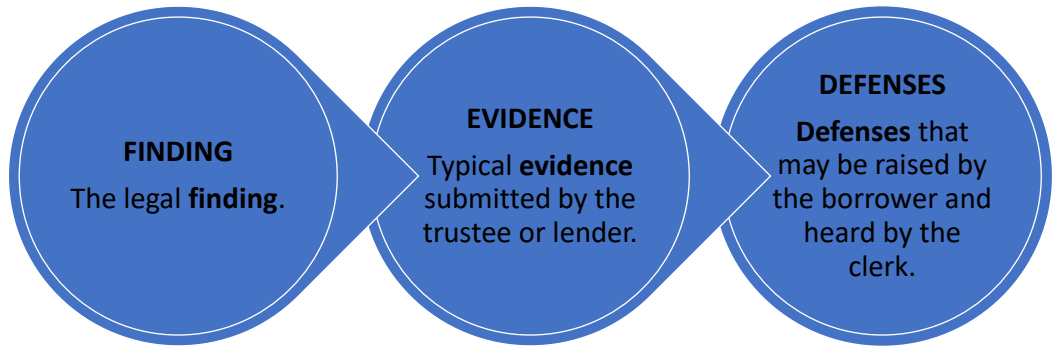
1

The Big Six

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one: loss mitigation pursuant to G.S.
45-21.16C.

2



3

The Clerk's Finding: Notice

If the clerk finds the existence of

(iv) **notice** to those entitled to such under G.S. 45-21.16(b).

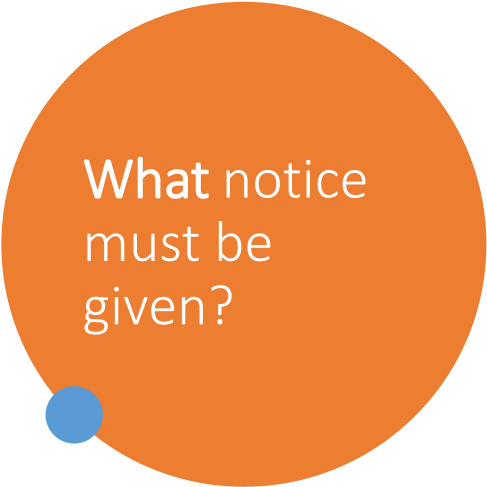
G.S. 45-21.16(d)

4

Three Key Questions: Notice

1. **What** notice must be given?
2. **Who** is entitled to notice?
3. **How** is notice served?

5



What notice
must be
given?



6

What notice must be given?

Notice of hearing must

- be in writing,
- be filed with the clerk,
- state the time and place for the hearing before the clerk,
- state “in a manner reasonably calculated to make a party entitled to notice aware of” those issues set forth in G.S. 45-21.16(c) and (c2).

G.S. 45-21.16(a), (c), (c2).

Required Contents

Notice of Hearing

G.S. 45-21.16(c) and (c2)

1. Description of property subject to foreclosure	<input type="checkbox"/>
2. Date of the deed of trust	<input type="checkbox"/>
3. Original amount of the note	<input type="checkbox"/>
4. Original holder of the note	<input type="checkbox"/>
5. Book and page number of the recorded deed of trust	<input type="checkbox"/>
6. Name of the holder at the time the notice of hearing filed	<input type="checkbox"/>
7. Address of the holder at the time the notice of hearing filed	<input type="checkbox"/>
8. Nature of the default	<input type="checkbox"/>
9. Statement the debt was accelerated (only required if debt accelerated)	<input type="checkbox"/>
10. Right of debtor to pay debt or cure default (if permitted)	<input type="checkbox"/>
11. 30 day notice letter sent	<input type="checkbox"/>
12. Statement regarding compliance with Borrower requests for information	<input type="checkbox"/>
13. Right of the borrower to appear at the hearing	<input type="checkbox"/>
14. Statement that if borrower does not contest, does not have to appear and failure to appear does not impact obligation to pay the debt or sale of the property	<input type="checkbox"/>
15. The Substitute Trustee is a neutral party and may not advocate	<input type="checkbox"/>
16. The Borrower may enjoin the sale on any legal or equitable ground, provided they comply with GS 45-21.34 (bond)	<input type="checkbox"/>
17. Right of the Borrower to contest the foreclosure at the hearing and to authorize the foreclosure the clerk must find existence certain factors	<input type="checkbox"/>
18. If Borrower fails to appear, substitute trustee will ask for an order to sell the property	<input type="checkbox"/>
19. Borrower has right to seek the advice and counsel of an attorney and free services may be available through Legal Aid	<input type="checkbox"/>
20. If sale held, then purchaser at sale is entitled to possession of the property and Borrower may be evicted if still on property	<input type="checkbox"/>
21. Name of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>
22. Telephone number of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>
23. Address of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>

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Who is entitled to notice?

1. Anyone required by the terms of the deed of trust
2. Any person obligated to repay the debt who the holder intends to hold liable for the debt in a deficiency action
3. Every record owner whose interest is “of record in the county where the real property is located at the time the notice of hearing is filed”

G.S. 45-21.16(b)

8

Record Owner

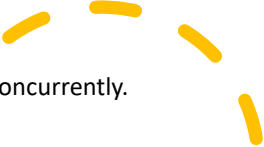
Does **not** include

1. Tenant under an unrecorded lease
2. Trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property

9



How is notice served?



Two methods for service. May run concurrently.

1. Rule 4 service at least 10 days prior to the hearing
2. Posting the notice by the sheriff in a conspicuous place on the property at least 20 days prior to the hearing

G.S. 45-21.16(a)

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Rule 4(j)(1) Service on Natural Person

1. Delivering a copy of the NOH to the person
2. Leaving a copy of the NOH at the person's dwelling house or usual place of abode with an individual of "suitable age and discretion then residing therein"
3. Delivering a copy of the NOH to an agent authorized to accept service of process
4. Mailing a copy of the NOH, addressed to the party to be served, by registered or certified mail, return receipt requested, and delivering the copy to the addressee
5. Depositing a copy of the NOH, addressed to the party to be served, with a designated delivery service (typically UPS or FedEx), delivering the copy to the addressee, and obtaining a delivery receipt
6. Mailing a copy of the NOH, addressed to the party to be served, by United States Postal Service, signature confirmation delivery, and delivering the copy to the addressee

11

Dwelling or Usual Place of Abode

- No hard and fast rule
- Fact specific, case specific inquiry if challenged
- Person may have more than one

12

Posting

If service is obtained by posting, an **affidavit shall be filed with the clerk** showing the circumstances warranting the use of service by posting.

If service is by posting, the clerk must find competent evidence that the trustee used reasonable and diligent efforts to **LOCATE** and **SERVE** the party entitled to notice by Rule 4 service before relying on posting.

Can't skip Rule 4 service and rely on posting alone.

G.S. 45-21.16(a)

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Locate + Serve

Affidavit should describe efforts to locate:

- Google, Lexis, Facebook, VCAP, ROD, tax records, loan docs, email
- Anything else?

Affidavit should describe efforts to serve via Rule 4:

- Don't have to use all methods before posting
- Case by case basis

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Diligent and Reasonable Efforts

In re Foreclosure of Ackah, 804 S.E.2d 794 (NC App. Sept. 2017)

Holding: HOA failed to use due diligence before relying on posting

- Attempted service by certified mail (unclaimed) and regular mail
- Had homeowner's email address and failed to email her to locate her

15

Diligent and Reasonable Efforts

Our appellate courts have refused to make a restrictive mandatory checklist for what constitutes due diligence.

Case by case, fact specific analysis.

In re Foreclosure of Powell, 237 NC App 441 (2014)

16

Evidence:
Affidavit of
Service

STATE OF NORTH CAROLINA COUNTY OF PRICE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21-SP-1234
IN THE MATTER OF THE FORECLOSURE of a Deed of Trust from December 5, 2006 dated and recorded on December 22, 2006 in Book 6509, Page 1029 of the Price County Register of Deeds by Sunshine Trustee Services, LLC (Substitute Trustee)	Affidavit of Service

The undersigned, on behalf of Sunshine Trustee Services, LLC ("Substitute Trustee"), being first duly sworn, deposes and says:

1. That the entity is the Substitute Trustee in the above captioned foreclosure action, having been so substituted by instrument recorded in Book 3636, Page 2512 of the Price County Public Registry.
2. That pursuant to the North Carolina Rules of Civil Procedure, a copy of the Notice of Hearing on Foreclosure of Deed of Trust was sent on October 1, 2021 by certified mail, return receipt requested to the following:

Bob and Belinda Barker
716 Woodland Road
Showdown, NC 27692

A copy of the letter enclosing the Notice of Hearing on Foreclosure of Deed of Trust is attached as Exhibit A.

3. The receipt for mailing sent by certified mail, return receipt requested was not returned.
4. Pursuant to the NC Rules of Civil Procedure, copies of the Notice of Hearing were forwarded to the Price County Sheriff for posting at the following address:
 - a. 1212 WHEEL WAY, SHOWDOWN, NORTH CAROLINA 27692, and
 - b. 716 Woodland Road, Showdown, NC
5. As evidenced by the Sheriff's Return of Service attached as Exhibit B, the Notice of Hearing was posted on the property on October 15, 2021 thereby completing service and notice at least 20 days prior to the December 10, 2021 Foreclosure Hearing for Bob and Belinda Barker pursuant to GS 45-21.16(a).
6. In accordance with GS 45-21.16(b), all parties required to receive notice of the Foreclosure Hearing received such notice.

This the 13th day of November 2021.

Defense: Insufficient Notice

If any party is not served or is not timely served prior to the date of the hearing, the clerk **shall order the hearing continued** to a date and time certain that is not less than 10 days from the original hearing date.

G.S. 45-21.16(a).

Party entitled to notice....

1. Is not at the hearing

- Clerk confirms proper notice prior to or at the start of the hearing; if improper, continue the hearing at least 10 days to allow proper notice to be completed

2. Is at the hearing and asserts there was improper notice

- If clerk agrees with objection, clerk continues unless party waives objection

3. Is at the hearing and does not object to notice

- If clerk confirms improper notice, get an affirmative waiver from the party at the start of the hearing or continue at least 10 days to allow proper notice to be completed

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Effect of Continuance

- All notices already timely served remain effective.
- Trustee or holder must serve the party not served or not timely served with notice of the original hearing.
- Any party timely served, who has not received actual notice of the continuance date, must be sent the order of continuance by first-class mail at their last known address.

G.S. 45-21.16(a)

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Questions



ADMINISTRATIVE OFFICE OF THE COURTS
North Carolina Judicial Center

PO BOX 2448 • RALEIGH, NC 27602

PHONE: (919) 890-1303

FAX: (919) 890-1914

RALPH A. WALKER
DIRECTOR

PETER E. POWELL
LEGAL COUNSEL

DAVID F. HOKE
ASSISTANT DIRECTOR

March 3, 2008

MEMORANDUM

TO: Clerks of Superior Court and Assistant Clerks

FROM: Peter E. Powell

SUBJECT: New Foreclosure Legislation - April 1, 2008

I. During the past session, the General Assembly enacted new legislation effective April 1, 2007 that requires that more specific information be included in notices of hearing in foreclosure actions. See S. L. 2007-351 (H-1374).

The legislation amends G. S. 45-21.16 to require the notice of hearing to include the following new information:

- 1) The holder confirms that a detailed statement of the amount due has been mailed to the debtor, which includes all principal, interest, fees, expenses and disbursement due;
- 2) A statement as to whether the holder or servicer (one who, on behalf of the holder, receives payments from the debtor), in the last two years, has received any requests for information from the borrower, and if so, whether the requests have been complied with (NOTE: The act includes provisions setting out in detail the duties of a servicer in responding to requests for information from a borrower, and provides civil remedies for violations);
- 3) A statement that the debtor has the right to appear at the foreclosure hearing and contest the evidence, but that the debtor is not required to attend the hearing, and his failure to attend does not affect his right to pay the indebtedness and prevent the sale;
- 4) A statement that the trustee is a neutral party and may not advocate for the creditor or debtor in the foreclosure proceeding;
- 5) A statement that the debtor may apply to a judge of the superior court for equitable relief;

- 6) A statement that, to authorize the foreclosure, the Clerk must find a valid debt of which the party seeking the foreclosure is the holder, default, the right to foreclose under the instrument, and notice to those entitled to it;
- 7) A statement that if the debtor fails to appear at the hearing, the trustee will ask the Clerk for an order to sell the property; and
- 8) A statement that the debtor has the right to seek the advice an attorney and that free legal advice may be available by contacting Legal Aid or other service providers.

The legislation does not change the other requirements for inclusion in the notice of hearing set forth in G. S. 45-21.16, which include, among other things, such items as the name, address and telephone number of the trustee, and the fact that, if the foreclosure sale is consummated, the purchaser will be entitled to possession (i.e. to evict the debtor).

Obviously, Clerks of Superior Court must make a finding as to the sufficiency of notice, as one of the four required elements in a foreclosure hearing. Thus, Clerks have a duty to examine the notice of hearing to determine whether or not the notice complies with the amendments to G. S. 45-21.16. The legislation is effective April 1, 2008. Although the bill is not specific, it appears that the new requirements apply to notices of hearing filed on or after that date, and do not affect notices filed prior thereto.

Finally, the new legislation deletes the prohibition in G. S. 45-21.16(c1) against the Clerk considering evidence of a dispute concerning the mailing or accuracy of the “detailed statement of the amount due”. While the actual receipt or the exact accuracy of the detailed statement is not and was not at issue before the clerk, the issue of whether or not there is a default (i.e. whether the loan is current) was and still is before the clerk, and evidence from either side on this point is relevant.

II. The bill also enacted provisions that deems that, in usury actions, N. C. courts have jurisdiction over out-of-state lenders and servicers of loans secured by North Carolina real property and made to North Carolina residents.



**ADMINISTRATIVE OFFICE OF THE COURTS
JUSTICE BUILDING**

PO BOX 2448 • RALEIGH, NC 27602

PHONE: (919) 733-7107

FAX: (919) 733-1845

RALPH A. WALKER
DIRECTOR

DAVID F. HOKE
ASSISTANT DIRECTOR

PETER E. POWELL
LEGAL COUNSEL

PAMELA WEAVER BEST
DEPUTY LEGAL COUNSEL

August 31 2006

MEMORANDUM

TO: Clerks of Superior Court

FROM: Peter E. Powell and Pamela Weaver Best

SUBJECT: Due Diligence Required Before Notice by Publication/Posting

Over time, questions have arisen regarding the validity of publication or posting as a means of service of process in many forms of actions, including foreclosures. The short answer is that service by publication/posting is not allowed unless the plaintiff establishes by sworn affidavit the circumstances justifying substituted service, and details the efforts made to actually locate and serve the defendant—this is referred to as “due diligence.” The long answer is set forth below.

Why is due diligence important?

A basic principle of law is that at a minimum a person has a right to know what action is pending and has a right to be heard to challenge the action. In *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306(1950), the United States Supreme Court held “ [t]he fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending...” This is often referred to as notice and opportunity to be heard. In civil and special proceeding cases notice is given when the person is served with summons either by the sheriff, certified mail, designated delivery service or acceptance of service.

When service by any of the above means is, for whatever reason, unsuccessful the plaintiff has the right to use ‘substituted service’, usually publication, to provide notice to the defendant. However, substituted service should only be attempted once other efforts

to locate the defendant have been exhausted. This is in large part due to the fact that many people do not read the notices in the paper to look for cases pending against them.

What acts of due diligence must be shown to permit service by publication?

“A party subject to service of process under N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 4(j)(9) may be served by publication whenever the party's address, whereabouts, dwelling house, or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party... Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of N.C. Gen. Stat. § 1-75.10(2) and the **circumstances warranting the use of service by publication.**” *Sink v. Easter*, 284 NC 555 (1974),

In *Barclays American/Mortgage Corp. v. Beca Enterprises*, 116 NC App. 100(1994), the court held that notice by posting in a foreclosure action was invalid where the lender's only attempt at service was mailed to the partnership's business address when the partners residential addresses were readily available from a Certificate of General Partnership on record with the register of deeds, where tax records revealed both residential and other business addresses, as did the local telephone directory. “The ‘due diligence’ test of Rule 4(j1) requires a party to use all reasonably available resources to accomplish service.” See also *Federal Land Bank v. Lackey*, 94 NC App. 553 (1989).

In those instances, such as foreclosure, in which the Clerk is called upon to decide whether a party received notice of a proceeding, it is appropriate for the Clerk to require the serving party to establish what attempts were made to locate the party to be served. A simple statement that defendant could not be located is not sufficient. This information, in the form of an affidavit, is what the Clerk uses to ensure that the party serving by publication /posting used “due diligence” to attempt to locate the other party, and that the circumstances “warrant use of service by publication...” G. S. 1A-1, Rule 4(j2)(3).

Due diligence could include, but is not limited to:

1. Checking phone books
2. Checking tax records
3. Checking DMV and Voter records
4. Checking real estate (Register of Deeds)
5. Searching the plaintiff's own records (For example, a lender should check its own records for change of address information that may be on file)
6. If appropriate, doing an Internet Search

We hope you find this information helpful.

Service

Case Problems

**UNC School of Government
Judicial College Course
Foreclosure for Clerks**

Service

Question 1.

BB&T holds a note and deed of trust on a home located in Johnston County. Tardie, the mortgagor, fails to make payments and BB&T asks Attorney Wilson, the trustee, to foreclose. Wilson files a foreclosure proceeding, and the Clerk holds a hearing on February 28. At the hearing, the clerk notes that the notice of hearing was filed on February 5. The clerk reviews the affidavit of service and sees that Wilson delivered a copy of the Notice of Hearing to the Johnston County sheriff who went to the property, determined no one was home, and posted the property on February 8th. There is also evidence that Wilson attempted to serve Tardie at her home on February 9th via certified mail, return receipt requested. However, the mail was unclaimed.

- At the hearing on the foreclosure, Tardie is not present. The trustee asks the court to enter the order authorizing sale. Do you determine this constitutes a reasonable and diligent effort to serve Tardie?

Question 2.

Frank and Susie are the borrowers under a note signed in favor of SunTrust. The note is secured by a lien on a building owned by Frank's company, Frank's Franks LLC. Frank's Franks LLC is a guarantor of the loan. Frank and Susie default on the note and SunTrust instructs Attorney Wilson to file the foreclosure proceeding. At the hearing, the clerk reviews the Affidavit of Service filed by Wilson and sees that Wilson did not serve Frank's Franks. Frank and Susie were served with personal service by the sheriff 20 days prior to the hearing. They appear at the hearing and argue that the foreclosure cannot proceed because Wilson did not serve Frank's Franks. Wilson states that the holder does not intend to pursue a deficiency against Frank's Franks since the company's only asset is the building so he didn't bother trying to serve the company.

- Do you require service on Frank's Franks?

Question 3.

At the hearing for Frank and Susie, Charles Chaplin, Martha Washington and Tom Berger appear. Charles is an attorney who represents BB&T. BB&T has a second lien on the property. He objects to the foreclosure because he states that BB&T is a record owner who is entitled to notice. However, Attorney Wilson only sent BB&T a copy of the Notice of Hearing by first class mail. Martha Washington is also an attorney. She represents Harvy's Hardwood Flooring. Harvy did work for Frank on the property and Frank never paid him. She said that she filed a lien against the property on their behalf and should have received notice of the hearing. She states that she even recorded a Request for Notice with the Register of Deeds. She found out about the hearing because she was at the courthouse with Charles and he told her he was there for the Frank's Franks hearing. She objects to the foreclosure based on lack of notice. Tom Berger objects to the foreclosure because he says that he purchased the building from Frank's Franks the week before the hearing. He has a copy of the signed deed in his hand that was recorded 8 days ago and waives it in your face hysterically.

- How do you rule with regard to Chaplin, Washington and Berger?

§ 45-21.16. Notice and hearing.

- (b) Notice of hearing shall be served in a manner authorized in subsection (a) upon:
- (1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.
 - (2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.
 - (3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county. The term "record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property. Tenants in possession under unrecorded leases or rental agreements shall not be considered record owners.

Tab:

Home Loans

Home Loans

Meredith Stone Smith
UNC School of Government
Foreclosure Hearings for Clerks
November 2024

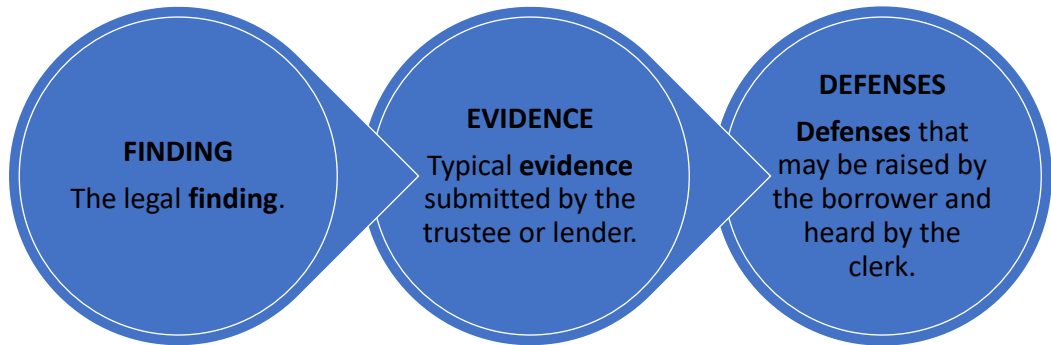
1

The Big Six

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
5. **Home Loan**
6. Military Service

Plus one: loss mitigation pursuant to G.S. 45-21.16C.

2



3

Home Loans

If the clerk finds that the underlying mortgage debt is

1. not a home loan as defined in G.S. 45-101(1b), or
2. if the loan is a home loan under G.S. 45-101(1b), that
 - a. the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and
 - b. the periods of time established by G.S. Chapter 45, Article 11 have elapsed.

G.S. 45-21.16(d)(v).

4

What is a home loan?

Depends on

1. Type of loan
2. Type of borrower
3. Type of debt
4. Amount of debt
5. Type of security
6. Purpose of the loan

5

Type of Loan

Not an equity line.

Not a construction loan with funds disbursed periodically.

Not a reverse mortgage.

Not a bridge loan with a term of 12 months or less.

Not a commercial/business loan.

G.S. 45-101(1b).

6

Type of Borrower

Borrower must be a natural person.



G.S. 45-101(1b).

7

Type of Debt

Debt must be primarily for family, personal, or household purposes.



G.S. 45-101(1b).

8

Amount of Debt

Principal amount does not exceed Fannie Mae limits for single-family dwelling

G.S. 45-101(1b).

Units	Max Loan 2024	Max Loan 2022	Max Loan 2021
1	\$766,550	\$647,200	\$548,250
2	\$981,500	\$828,700	\$702,000
3	\$1,186,350	\$1,001,650	\$848,500
4	\$1,474,400	\$1,244,850	\$1,054,500

9

Type of Security

Secured by a lien on current or future principal dwelling of the borrower, which is:

- Manufactured home,
- 1-4 family existing structure, or
- 1-4 family to be built structure

G.S. 45-101(1b).

10

Purpose of the Loan

- Purchase the house,
- Construct, improve, repair, remodel, or improve the dwelling or the real property on which it is located,
- Refinance an existing obligation secured by the same real property, or
- Consolidate existing consumer debts into a new home loan.

G.S. 45-101(1b).

11

Party Asserts: Not a Home Loan

Clerk confirms competent evidence that it is not a home loan:

1. Look for statement in the affidavits
2. From party capable of certifying loan status
3. That gives a reason why not a home loan –what element of G.S. 45-101(1b) makes it not a home loan?

Trustee or holder may also obtain a “non-home loan certificate” from the AOD/Housing Finance Agency database.

12

Evidence: Not a Home Loan

Non-Home Loan Certificate

This is to certify the following information about File No. 2011-085495 which has been generated by access to the database established and maintained by the Administrative Office of the Courts (the "Database") as required under General Statute § 45-154:

- That on August 30, 2011, the servicer of the loan subject to the File No. 2011-085495, PNC Bank, National Association, submitted information to the database regarding the terms of the loan, which are attached to this certification as Exhibit A.
- That based upon the information provided by the servicer, the loan which is the subject of File No. 2011-085495 is not a "Home Loan" as defined under North Carolina General Statute 45-151.7(a).

The information contained in this certification and Exhibit A may be verified by accessing the database at www.courts.state.nj.us/ncadef/afid.htm, under File No. 2011-085495.

I, **SUSAN A. DENNIS**, an employee or agent of **PNC BANK**, National Association, a member of the State that is the subject of 2011-085495, have the day mentioned the database established and maintained by the Administrative Office of the Courts and printed this certification.

Date: 10/13/11
Witness by my hand: Susan A. Dennis

North Carolina

County

I certify that **Susan A. Dennis** personally appeared before me this and acknowledged the due execution of the foregoing document. Witness my hand and official seal this **13** day of **OCTOBER**, 20 **11**.

JULIA JAMES
Notary Public
Official Seal

STATE OF NORTH CAROLINA
COUNTY OF PRICE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-SP-1234

IN THE MATTER OF THE FORECLOSURE OF a Deed of Trust from December 5, 2006 dated and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Register of Deeds by Sunshine Trustee Services, LLC (Substitute Trustee)	SERVICER AFFIDAVIT
--	---------------------------

The undersigned, being first duly sworn, deposes and says that:

- I am the Assistant Secretary of Nationstar Loan Servicing LLC. I am familiar with the books and records of Nationstar Loan Servicing LLC and I am authorized and competent to make this affidavit.
- Happy Lending LLC ("Holder") is the current owner and holder of the Promissory Note executed by Bob and Belinda Barker in the original principal amount of \$417,000.00 dated December 5, 2006 (as amended, modified, renewed or restated, the "Note").
- Payment of the Note is secured by a Deed of Trust from Bob and Belinda Barker to PRLAP, Inc. for the benefit of Capital One, FSB, dated December 5, 2006 and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Public Registry, securing indebtedness in the original principal amount of \$417,000.00 (the "Deed of Trust").
- The copies of the Note and the Deed of Trust attached hereto as Exhibits A and B, respectively, are true, accurate and complete copies of the original Note and Deed of Trust, which are the subject of this foreclosure proceeding.

13

Party Asserts: It is a Home Loan

- 45-Day Letter:** At least 45 days prior to filing the notice of hearing, servicer must send written notice by mail to the last known address of the borrower to inform the borrower of resources available to avoid foreclosure
- Registration:** Servicer must register the loan within 3 business days of mailing the letter in the AOC/Housing Finance Agency Database
- Certification:** Trustee must include a certification in the notice of hearing that the pre-foreclosure notice (45-day letter) and information required in the registration were provided material respects and that all requisite time periods have elapsed.

* Servicer includes any person or entity entitled to receive loan payments.

14

FILED
PRICE COUNTY
CLERK OF COURT
10/1/2021
11:43AM

STATE OF NORTH CAROLINA
COUNTY OF PRICE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-89-1234

IN THE MATTER OF THE FORECLOSURE OF
a Deed of Trust from December 5, 2006 dated and
recorded on December 22, 2006 in Book 6569,
Page 1027 of the Price County Register of Deeds
by Sunamine Trustee Services, LLC (Substitute
Trustee)

**NOTICE OF HEARING ON FORECLOSURE
OF DEED OF TRUST**

To: Bob Barker and Belinda Barker

YOU ARE HEREBY NOTIFIED that the Clerk of Superior Court of Price County, North Carolina, shall conduct a hearing pursuant to North Carolina General Statutes Sections 45-21.16 with respect to the foreclosure of certain real property, as hereinafter set forth.

THE ABOVE HEARING SHALL BE CONDUCTED IN THE OFFICE OF THE CLERK OF SUPERIOR COURT IN THE CLINTON COUNTY COURTHOUSE, 1234 Wheel Way, Showdown, NC, Room 214, on December 6, 2021 at 1:00 PM. THE HEARING MAY BE CONTINUED TO A LATER TIME OR DATE IN WHICH EVENT YOU WILL RECEIVE WRITTEN NOTICE.

(1) The particular real estate security interest being foreclosed is a Deed of Trust from Bob and Belinda Barker (collectively, "Owner") to PRLAP, Inc. (the "Original Trustee") for the benefit of Capital One FSB ("Original Lender"), a beneficiary dated December 5, 2006 and recorded on December 22,

45 Day Letter
USPS First Class Mail

August 1, 2019

Bob and Belinda Barker
1234 Price in Right Way
Showdown NC 27992

RE: 1234 PRICE IS RIGHT WAY, SHOWDOWN, NORTH CAROLINA 27992

To Bob and Belinda Barker:

You are obligated under a promissory note dated December 5, 2006, which is secured by a deed of trust on the above referenced property. Please be advised of the following:

- You are currently past due on the note in the amount of \$65,000.
- You have fees in the amount of \$2,000.
- You have early late options available other than foreclosure and that the borrower may discuss available options with the mortgage lender, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development.
- The address, telephone number, and other contact information for servicer who is authorized to attempt to work with you to avoid foreclosure is: National Loan Servicing, LLC, 6250 Money Drive, Anglen, NY 20472, 910-695-6234.
- The name, address, telephone number, and other contact information for a HUD-approved counseling agency operating to assist borrowers in North Carolina to avoid foreclosure is: White Oak Foundation, 1611 White Oak Church Road, Showdown, North Carolina, 910-562-6708.
- The address, telephone number, and other contact information for the State Home Foreclosure Prevention Program of the Housing Finance Agency is:
 - P.O. Box 20366
Raleigh, NC 27611-0366
 - 1938 Bush Street
Raleigh, NC 27609-7509

05-068732

**Conditional Certificate of Compliance with Article 11,
Chapter 45 of the General Statutes**

This is to certify the following information about File No. 2019-07201, which has been prepared by notice to the debtor as required and maintained by the Administrative Office of the Clerk of the Superior Court of Price County, North Carolina, is true and correct.

- That on 08/01/2019, the servicer of the loan subject to the certificate (File No. 2019-07201), listed Public Foreclosure, Inc., and the following pre-foreclosure address: Parcel number: 0.0, 45-102:
 - Shoreway Home-401 - 4440201, 4440202
 - Chapel Hill - 17116, 17117, 17118
 - 10000 on 02/01/2019 with title insured prior to 0.0, 45-102 was mailed to the borrower at the last known address on 02/01/2019
 - Former borrower's mailing address: 771 GALL STREET, WELLS, NORTH CAROLINA, 28084
- That the case information is complete, accurate, and sufficient to allow the period of time established by Article 11, Chapter 45 of the General Statutes, to be elapsed.

The information contained in this certificate may be verified by the Clerk of the Superior Court examining the database at: <https://www.ncsl.com/ncsl/PDF/CaseManagementToolbox.pdf>, under File No. 2019-07201.

I, Jessica Proctor, as employee or agent of Capital One, the servicer of the loan subject to the certificate, certify that the information established and maintained by the Administrative Office of the Superior Court is true and correct.

Notary Public, State of North Carolina, expires 10/1/2021

The holder of the servicer of the loan has mailed to the borrower's last known address a complete notification of the information required under G.S. 45-102.

Notary Public
JESSICA PROCTOR

Capital One
Mortgage Servicing

LAURA REED
Mortgage Servicing
Capital One
10/1/2021

DOMINIC DAVIS
Mortgage Servicing
Capital One
10/1/2021

Evidence: Home Loan

15

Discussion: Is this sufficient?

Notice of hearing states:

"If the underlying mortgage debt is a home loan as defined by NCGS 45-101(1b), the filing party certifies that the pre-foreclosure notice and information required by G.S. 45-102 and G.S. 45-103 were provided in all material respects and that the periods of time established by Article 11 of Chapter 45 have elapsed."

16

The Clerk's Review: 45 Day Letter

Review copy of 45-day letter and confirm:

1. Sent at least 45 days (or more if required) before filing of the notice of hearing
2. Confirm the notice was provided in "all material respects"

GS 45-21.16(d)(v)

17

Required Contents: 45 Day Letter

1. In writing, by mail
2. To borrower's last known address
3. At least 45 days prior to the NOH filing date
4. Itemize past due amounts
5. Itemize charges to bring the loan current
6. Statement that other options may be available
7. Contact info for servicer or other authorized agent authorized to attempt to work with the borrower to avoid foreclosure
8. Contact info for HUD counseling agency assisting borrowers in North Carolina avoid foreclosure
9. Contact info for State Home Foreclosure Prevention Project

Standard:
All Material Respects
G.S. 45-21.16(d)(v); 45-102

18

The Clerk's Review: Certificate of Compliance

Review copy of certificate of compliance and confirm

1. Registration occurred within **three business days** of mailing of the 45-day letter
2. Registration completed in all material respects

*Clerk has AOC database access via Juno.

GS 45-21.16(d)(v); GS 45-107

19

Certificate of Compliance

Servicer must register:


- Name and address of Borrower
- Last scheduled payment made
- Date 45-day notice mailed

GS 45-103(a)

Based on review of information submitted by the servicer, the Housing Finance Agency may order extension on bar to foreclosure filing – CSC can verify in database.

-114-

15-068732



**HOUSING
FINANCE
AGENCY**

**Conditional Certificate of Compliance with Article 11,
Chapter 45 of the General Statutes**

This is to certify the following information about File No. 2014-1872247, which has been generated by access to the database established and maintained by the Administrative Office of the Courts (the "database") as required under General Statute § 45-104.

1. That on 6/4/2014, the servicer of the loan subject to the NCHFA File No. 2014-1872247, Select Portfolio Servicing, Inc., filed the following pre-foreclosure information required under G.S. 45-103(a):
 - a. Borrower Name(s) - MARGE IANNUCCI
 - b. Property Address - 21 TALL PINE TRAIL, ARDEN, NC - 28704
 - c. That the pre-foreclosure notice required under G.S. 45-102 was mailed to the borrower at the last known address on 6/3/2014.
 - d. Primary Borrower's Mailing Address - 21 TALL PINE TRAIL, ARDEN, NC - 28704
 - e. That the due date of the last scheduled payment made by the borrower was 12/1/2013.
2. That, if the above information is materially accurate, as of 6/4/2014 allowed the periods of time established by Article 11, Chapter 45 of the General Statutes, have elapsed.

The information contained in this certification may be verified by the Clerk of Court by accessing the database at <https://www.nchfa.org/SitePages/OnlineApplication.aspx>, under File No. 2014-1872247.

I, Jessica Proctor, as employee or agent of Select Portfolio Servicing, Inc. servicer of this loan, have this day accessed the database established and maintained by the Administrative Office of the Courts and printed this certification therefrom.

I further certify that on 6/3/2014 the lender or servicer of this loan mailed to the borrower's last known address a complete itemization of all the information required under G. S. 45-102.

North Carolina County Wayne 3/9/15 Witness by my hand
Date

I certify that Jessica Proctor personally appeared before me this and acknowledged the due execution of the foregoing document. Witness my hand and official seal this the 9 day of March, 2015.

LAURA BEST
NOTARY PUBLIC
Wayne County
North Carolina
My Commission Expires March 26, 2018

(Official Seal)

Laura Best
My Commission Expires _____

20

Database Access Through JUNO

Juno site wide search of “foreclosure database”

or

SP clerks page under “Judicial Groups” and then “Special Proceedings Clerks”

21

Certification in Notice of Hearing

Materially inaccurate statement in the **certification in the notice of hearing** is cause for dismissal and for payment of the filing party of costs incurred by the borrower in defending the foreclosure.

G.S. 45-21.16(c2);
45-107(b)

22

Foreclosure by Power of Sale

Home Loans

G.S. Chapter 45, Article 11

G.S. 45-101(1b) - Requirements to be a valid **Home Loan**:

1. **TYPE OF LOAN:**
 - a. Not an equity line.
 - b. Not a construction loan with funds disbursed periodically.
 - c. Not a reverse mortgage.
 - d. Not a bridge loan with a term of 12 months or less.
 - e. Not a commercial/business loan.

2. **TYPE OF BORROWER:** Borrower must be a natural person.

3. **TYPE OF DEBT:** Debt primarily for family, personal, or household purposes.

4. **MAX AMOUNT OF DEBT:** Principal amount does not exceed Fannie Mae limits for a single-family dwelling.
 - a. Visit <http://www.fhfa.gov/DataTools/Downloads/Pages/Conforming-Loan-Limits.aspx> to determine loan limit.
 - b. Limit depends on: date of the loan and the county where property located.
 - c. Ex., limit on a loan made in 2012 on a single family home in Edgecombe County was \$510,400.

5. **TYPE OF SECURITY:** Secured by a lien on current or future principal dwelling of the borrower, which is:
 - a. Manufactured home,
 - b. 1-4 family existing structure, or
 - c. 1-4 family to be built structure

6. **PURPOSE OF THE LOAN:**
 - a. Purchase the house,
 - b. Construct, improve, repair, remodel, or improve the dwelling or the real property on which it is located,
 - c. Refinance an existing obligation secured by the same real property, or
 - d. Consolidate existing consumer debts into a new home loan.

** Home Loan requirements apply to anyone who acts as a mortgage servicer – meaning anyone who accepts loan payments for compensation or gain.

CLERK'S ROLE:

1. Determine whether there is competent evidence that the loan is a home loan or not. Use definition found in GS 45-101(1b).
2. If it is not a home loan, confirm the following in the foreclosure filings:
 - a. A statement that it is not a home loan,
 - b. Attested to by someone with the capacity to certify loan status,
 - c. Who states why it is not a home loan.
3. If it is a home loan based on the evidence presented:
 - a. Review the 45 day letter and confirm per GS 45-102 and GS 45-107(a):
 - i. It was sent in writing, by mail to the borrower's last known address, and
 - ii. It contained the following information:
 1. Itemized past due amounts
 2. Itemized charges due to bring loan current
 3. A statement that there may be other options available than foreclosure
 4. Name, address and phone number for the following (i) Servicer, lender or other agent authorized to work with Borrower to avoid foreclosure; (ii) HUD approved counseling agency; and (iii) State Home Foreclosure Prevention Project
 - b. Confirm that the Notice of Hearing
 - i. was filed at least 45 days after the date of the mailing of the 45-day letter (may be more if the Housing Finance Agency extended the time period prohibiting filing by the servicer), and
 - ii. contains a certification by the filing party that the pre-foreclosure notice and information required by G.S. 45-102 and G.S. 45-103 were provided in all material respects and that all requisite periods of time have elapsed.
 - c. Review Certificate of Compliance filed by the servicer to confirm registration completed in all material respects:
 - i. Certification that the servicer mailed 45-day letter.
 - ii. Borrower's name and address.
 - iii. Contains last scheduled payment made at the time of registration.
 - iv. Date the 45-day notice mailed.

- v. Confirm servicer registered the loan within 3 business days of mailing the 45-day letter.

- d. If desired, check the HFA database, to verify servicer's certification in the notice of hearing. If the certification in the notice of hearing contains a materially inaccurate statement, the clerk may dismiss the foreclosure without prejudice and charge costs incurred by the borrower in defending the foreclosure against the filing party. G.S. 45-107(b).

Home Loans

Case Problems

UNC School of Government
Judicial College Course
Foreclosure for Clerks

Home Loan Questions

Note: Relevant statutes and other information are attached for reference.

Question 1.

Phil and Jane own and operate a building in Edgecombe County that has four apartments in it. They live in one of the apartments and rent the other three. They decide they want to leave the apartment and build a house. They go to their friend Bob Banker at North Star Bank to obtain a loan to purchase the lot and build the house. Bob gives them a great deal on the loan terms. They get a \$750,000 loan disbursed to them immediately to buy the lot and build the house. The loan is secured by a deed of trust on the apartment complex. The interest is 5% fixed for 5 years. Unfortunately, Phil and Jane hit hard times and they default on the loan after 1 year. North Star appoints a substitute trustee and he notices the default and files for foreclosure. Are pre-foreclosure notice and registration required?

Question 2.

Same facts as above except this time the bank secures the loan with a deed of trust on the lot. Are pre-foreclosure notice and registration required?

Question 3.

Tim is the President of Falls Lake Home and Garden, which is a retail lawn and garden center. Falls Lake owns a lot and on the lot sits two buildings: a house where Tim lives and the lawn and garden center. Tim's house falls into ill-repair and he wants to get a loan to do some improvements. He goes to Bob Banker at North Star and gets a loan: up to \$50,000, 5 year term, interest rate of 5%. Tim signs the note and Falls Like grants a deed of trust to secure the note. Tim defaults and North Star files for foreclosure. Are pre-foreclosure notice and registration required?

Question 4

Review the Conditional Certificate of Compliance below.

- a. Date of the pre-foreclosure notice: _____
- b. Date of the last scheduled payment: _____
- c. Did the servicer comply with the statutory registration requirement?

15-068732



**Conditional Certificate of Compliance with Article 11,
Chapter 45 of the General Statutes**

This is to certify the following information about File No.2014-1872247, which has been generated by access to the database established and maintained by the Administrative Office of the Courts (the "database") as required under General Statute § 45-104.

1. That on 6/4/2014, the servicer of the loan subject to the NCHFA File No.2014-1872247, Select Portfolio Servicing, Inc., filed the following pre-foreclosure information required under G.S. 45-103(a):
 - a. Borrower Name(s) - MARGE IANNUCCI
 - b. Property Address - 21 TALL PINE TRAIL, ARDEN, NC - 28704
 - c. That the pre-foreclosure notice required under G.S. 45-102 was mailed to the borrower at the last known address on 6/3/2014.
 - d. Primary Borrower's Mailing Address - 21 TALL PINE TRAIL, ARDEN, NC - 28704
 - e. That the due date of the last scheduled payment made by the borrower was 12/1/2013.
2. That, if the above information is materially accurate, as of 6/4/2014 allowed the periods of time established by Article 11, Chapter 45 of the General Statutes, have elapsed.

The information contained in this certification may be verified by the Clerk of Court by accessing the database at <https://www.nchfa.org/SHEFPOnline/fcs/default.aspx>, under File No.2014-1872247.

I, Jessica Proctor, as employee or agent of Select Portfolio Servicing, Inc servicer of this loan, have this day accessed the database established and maintained by the Administrative Office of the Courts and printed this certification therefrom.

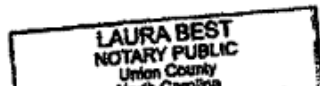
I further certify, that on 6/3/2014 the lender or servicer of this loan mailed to the borrower's last known address a complete itemization of all the information required under G. S. 45-102.

3/9/15
Date

[Signature]
Witness by my hand

North Carolina Moore County
Jessica Proctor

I certify that _____ personally appeared before me this and acknowledged the due execution of the foregoing document. Witness my hand and official seal this the 9 day of March, 2015.



(Official Seal)

[Signature]
My Commission Expires _____

§ 45-101. Definitions.

The following definitions apply throughout this Article:

- (1b) Home loan. - A loan that has all of the following characteristics:
- a. The loan is not (i) an equity line of credit as defined in G.S. 24-9, (ii) a construction loan as defined in G.S. 24-10, (iii) a reverse mortgage transaction, or (iv) a bridge loan with a term of 12 months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within 12 months.
 - b. The borrower is a natural person.
 - c. The debt is incurred by the borrower primarily for personal, family, or household purposes.
 - d. The principal amount of the loan does not exceed the conforming loan size limit for a single-family dwelling as established from time to time by Fannie Mae.
 - e. The loan is secured by (i) a security interest in a manufactured home, as defined in G.S. 143-145, in the State which is or will be occupied by the borrower as the borrower's principal dwelling, (ii) a mortgage or deed of trust on real property in the State upon which there is located an existing structure designed principally for occupancy of from one to four families that is or will be occupied by the borrower as the borrower's principal dwelling, or (iii) a mortgage or deed of trust on real property in the State upon which there is to be constructed using the loan proceeds a structure or structures designed principally for occupancy of from one to four families which, when completed, will be occupied by the borrower as the borrower's principal dwelling.
 - f. A purpose of the loan is to (i) purchase the dwelling, (ii) construct, repair, rehabilitate, remodel, or improve the dwelling or the real property on which it is located, (iii) satisfy and replace an existing obligation secured by the same real property, or (iv) consolidate existing consumer debts into a new home loan.

§ 24-9. Loans exempt from rate and fee limitations.

- (a) As used in this section, the following definitions apply:
- (2) "Equity line of credit" means a loan, other than an exempt loan, that satisfies all of the following conditions:
- a. The lender is a bank.
 - b. The loan is a revolving line of credit, open-end loan, revolving credit plan, or revolving credit card plan, and the loan is secured by a mortgage or deed of trust on real property.

c. At any time within a specified period not to exceed 30 years the borrower may request and the lender is obligated to provide credit advances up to the agreed aggregate credit limit. As used in this sub-subdivision, "lender is obligated" means that the lender is contractually bound to provide credit advances. However, the equity line of credit and the lender's obligation to make credit advances shall be subject to the provisions of section 226.5b(f) of Title 12 of the Code of Federal Regulations and the official commentaries and rulings issued pursuant thereto, as the same may be amended from time to time, without regard to whether that section of the Code of Federal Regulations would otherwise apply to the loan.

d. Any repayments of principal by the borrower within the specified time will reduce the amount of advances counted against the aggregate credit limit.

e. The initial loan amount is ten thousand dollars (\$10,000) or more. On January 1, 2008, and on January 1 every five years thereafter, the minimum initial loan amount sufficient to qualify a loan closed on or after that date as an equity line of credit under this section shall be increased by one thousand dollars (\$1,000). For example, a loan closed on or after January 1, 2008, but prior to January 1, 2013, shall not be considered an equity line of credit unless the initial loan amount is eleven thousand dollars (\$11,000) or more, and a loan closed on or after January 1, 2013, but prior to January 1, 2018, shall not be considered an equity line of credit unless the initial loan amount is twelve thousand dollars (\$12,000) or more.

An equity line of credit shall cease being an equity line of credit subject to the provisions of this section from and after the date the loan amount is reduced below the equity line of credit's initial loan amount unless (i) the loan amount was reduced for one or more of the reasons or pursuant to one or more of the methods specified in section 226.5b(f)(2) or section 226.5b(f)(3)(vi) of Title 12 of the Code of Federal Regulations and the official commentaries and rulings issued pursuant thereto, as the same may be amended from time to time, without regard to whether that section of the Code of Federal Regulations would otherwise apply to the loan, or (ii) the loan amount was reduced at the request of the borrower because the borrower was engaged in the refinancing of a loan secured by a superior lien on the same real property and the reduction in the loan amount of the equity line of credit is no greater than the difference between the loan amount secured by the refinancing mortgage and the outstanding principle balance of the loan being refinanced.

§ 24-10. Maximum fees on loans secured by real property.

(c) "Construction loan" means a loan which is obtained for the purpose of financing fully, or in part, the cost of constructing buildings or other improvements upon real property and the proceeds of which, under the terms of a written contract between a lender and a borrower, are to be disbursed periodically as the construction work progresses. A construction loan shall be payable in full not later than 18 months in case of a loan made under the provisions of G.S. 24-1.1(a)(1) or 36 months in case of any other construction loan made after the execution of the note by the borrower. A construction loan may include advances for the purchase price of the property upon which the improvements are to be constructed.

§ 143-145. Definitions.

The following definitions apply in this Article:

(7) **Manufactured home.** - A structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width, or 40 body feet or more in length, or, when erected on site, is 320 or more square feet; and which is built on a permanent chassis and designed to be used as a dwelling, with or without permanent foundation when connected to the required utilities, including the plumbing, heating, air conditioning and electrical systems contained therein. "Manufactured home" includes any structure that meets all of the requirements of this subsection except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary of HUD and complies with the standards established under the Act.

For manufactured homes built before June 15, 1976, "manufactured home" means a portable manufactured housing unit designed for transportation on its own chassis and placement on a temporary or semipermanent foundation having a measurement of over 32 feet in length and over eight feet in width. "Manufactured home" also means a double-wide manufactured home, which is two or more portable manufactured housing units designed for transportation on their own chassis that connect on site for placement on a temporary or semipermanent foundation having a measurement of over 32 feet in length and over eight feet in width.

FIPS State Code	FIPS County Code	County Name	State	CBSA Number	One-Unit Limit	Two-Unit Limit	Three-Unit Limit	Four-Unit Limit
37	059	DAVIE COUNTY	NC	49180	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	061	DUPLIN COUNTY	NC		\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	063	DURHAM COUNTY	NC	20500	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	065	EDGECOMBE COUNTY	NC	40580	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	067	FORSYTH COUNTY	NC	49180	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	069	FRANKLIN COUNTY	NC	39580	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	071	GASTON COUNTY	NC	16740	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	073	GATES COUNTY	NC	47260	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	075	GRAHAM COUNTY	NC		\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	077	GRANVILLE COUNTY	NC	20500	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	079	GREENE COUNTY	NC		\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	081	GUILFORD COUNTY	NC	24660	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	083	HALIFAX COUNTY	NC	40260	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	085	HARNETT COUNTY	NC	22180	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	087	HAYWOOD COUNTY	NC	11700	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	089	HENDERSON COUNTY	NC	11700	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	091	HERTFORD COUNTY	NC		\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400
37	093	HOKE COUNTY	NC	22180	\$ 766,550	\$ 981,500	\$ 1,186,350	\$ 1,474,400

Available at: <https://www.fhfa.gov/DataTools/Downloads/Pages/Conforming-Loan-Limit.aspx>

Tab:
NCHFA

State Home Foreclosure Prevention Project (SHFPP)

Foreclosure Hearings for Clerks of Superior Court
UNC School of Government, Chapel Hill

November 22, 2024

Mary M. Holder- Program Manager

Purpose and Goals



- Reduce foreclosures by facilitating communication between homeowners, servicers, housing counselors, and legal service providers.



- Provide North Carolina homeowners with free resources such as housing counseling and legal services as they work with loan servicers on alternatives to foreclosure.



Program Activity Oct. 2008 to Sept. 2024



708,065 first-time home loan filings from 2,100 noteholders



100,667 housing counseling sessions have been conducted



19,134 foreclosures have been prevented



14,278 statutory 30-day extensions have been granted

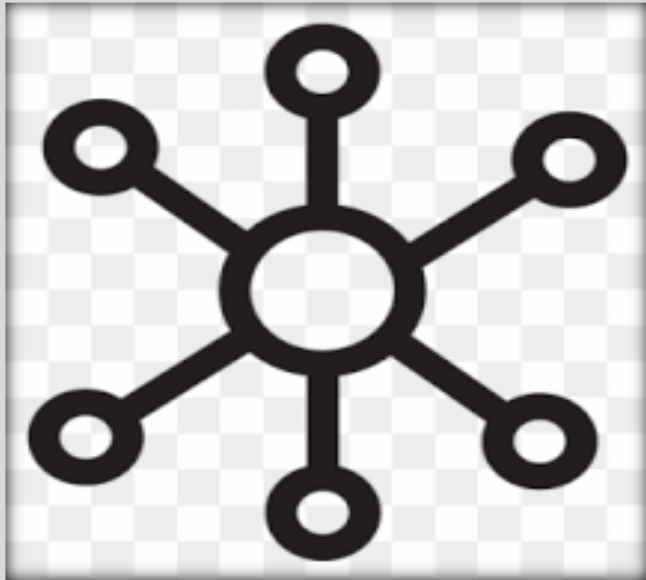


140,680 incoming homeowner calls have been processed

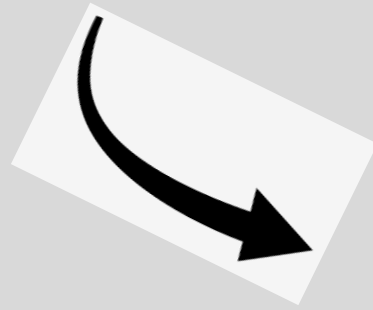
Program Players & Roles

- NC Housing Finance Agency- Administrator
- NC Administrative Office of the Clerks – Certificate of Compliance/Hearing
- Mortgage Loan Servicers/Lenders/Individual Noteholders- 45-Day Letter & Filing
- NC Housing Finance Agency Call Center- NCHFA Staff
- HUD-Approved Housing Counselors - Budgets, Action Plan, Loss Mitigation, Local Mortgage Payment Assistance Program Applications, Food and Utilities Help Referrals, etc.
- Legal Service Providers- FC Sale Defense, Modifications/HOA Dues, Bankruptcy, etc.
 - Legal Aid of NC –offices across the state
 - Financial Protection Law Center- Wilmington
 - Landloss Prevention Project- Durham
 - Charlotte Center for Legal Advocacy- Charlotte
 - Pisgah Legal Services- Asheville

Help For Homeowners



FC Prev. Calls Team



Housing Counseling



Legal Services



19,134 Foreclosures Prevented



Equity & Communities Preserved



Lender & Investor Losses Avoided

Homeowner Outreach & Housing Counseling Referral

- NC Housing Finance Agency sends homeowners a “Foreclosure Help Outreach Letter” announcing the availability of free housing counseling.
- Homeowners can call the SHFPP toll-free number (1-888-442-8188) to learn more about program services. NCHFA staff connect interested homeowners to counseling partners.
- Homeowner files are assigned to counseling partners using a system referral wizard. The system directs the call assignment to participating counseling organizations by county service area.
- NCHFA has SHFPP partnership agreements with HUD-approved housing counseling organizations to help homeowners facing foreclosure. The counselors report the number of sessions completed and foreclosures prevented for homeowners assisted.

FC Help Letter to Homeowners



August 16, 2024



7*29*****MIXED AADC 275 1

John Doe
123 USA Blvd
Raleigh, NC 27604-9999

State Home Foreclosure Prevention Project
SHFPP File No: 2018-9999999

Dear John Doe,

North Carolina has free services available for homeowners who need help exploring options to keep their homes. These services are available **at no cost to the homeowners**:

- **Help to determine your best course of action to avoid foreclosure.** Homeowners who receive this letter have access to free services from a local, HUD-approved housing counseling agency. The professional housing counselor can help to determine the best course of action to avoid foreclosure. A housing counselor may also be able to help you submit a loan modification or other loss mitigation package to the servicer. The housing counselor can assist in developing a financial budget and make suggestions to improve your monthly cash flow.
- **Extension of the foreclosure process** may be an option after meeting with a housing counselor and contacting the servicer to discuss foreclosure prevention alternatives.

The program has helped more than 19,000 North Carolinians avoid foreclosure. To be connected to a HUD-approved housing counseling agency, call **1-888-442-8188**, Monday through Friday, from 9:00 a.m. until 5:00 p.m.

Note: The North Carolina Attorney General offers information on avoiding foreclosure and loan modification scams at www.ncdoj.gov.

Please call **1-888-442-8188** without delay. The sooner you get started, the better your opportunity to achieve a successful outcome.

Sincerely,

Mary M. Holder
Manager, Foreclosure Prevention Programs



HousingBuildsNC.com



Housing Counseling Help (Retention & Relocation)

- Default Loan & Housing Stability Counseling
 - Income and Expense Budget Review
 - Credit Report Review and Analysis
 - Client Action Plans (options to avoid foreclosure: retention and relocation)
- Forbearance Exit Options, Loan Modification & Repayment Plan Packages (Retention)
 - Assist homeowners with documentation submission for servicer review.
- Federal, State, and County Housing Assistance Fund Programs (Retention)
 - Assist homeowners with applications for mortgage payment assistance (local programs).
- Short Sale & Deed in Lieu Packages (Relocation)
 - Assist homeowners with documentation and submission for servicer review.
- Rental Relocation Assistance- NC Housing Search- www.nchousingsearch.org

Pre Foreclosure Filing Submissions

❑ Home Loan Filings

- Primary residence intent at origination
- Electronic filing submission- system calculated 45-day earliest possible court filing date (EPCFD)
- \$75.00 filing fee billed (one-time per home loan)
- Home Loan Certificate of Compliance available 45 days after filing (EPCFD)
- 30-day extension allowance (certificate available 75 days after filing)

❑ Non Home Loan Filings

- Non-primary residence intent at origination, and loans that exceed the Fannie Mae conforming loan size limit (annual update in filing system for determinations)
 - Electronic filing submission (no EPCFD calculated)
 - No filing fee billed
 - Non-Home Loan Certificate available for hearing to validate electronic submission

Pre Foreclosure Filing Submission- Data Fields (First Screen)

Property Address Information:

- Street Address
- City, State, and Zip Code

Loan Information:

- Original Loan Date
- Original Loan Amount
- Loan Terms (in months)
- Lien Status (1st or 2nd)
- Borrower's Principal Dwelling at Origination* (yes or no)

Primary Borrower Information:

- First Name:
- Last Name:
- Borrower's Mailing Address (if different from the property address)

Pre Foreclosure Filing Submission- Data Fields (Second Screen)

Note: This screen will only be displayed if the filing is deemed a Home Loan

Co-Borrower Information:

- First Name:
- Last Name:
- Co-Borrower's Mailing Address (if different from the property address)

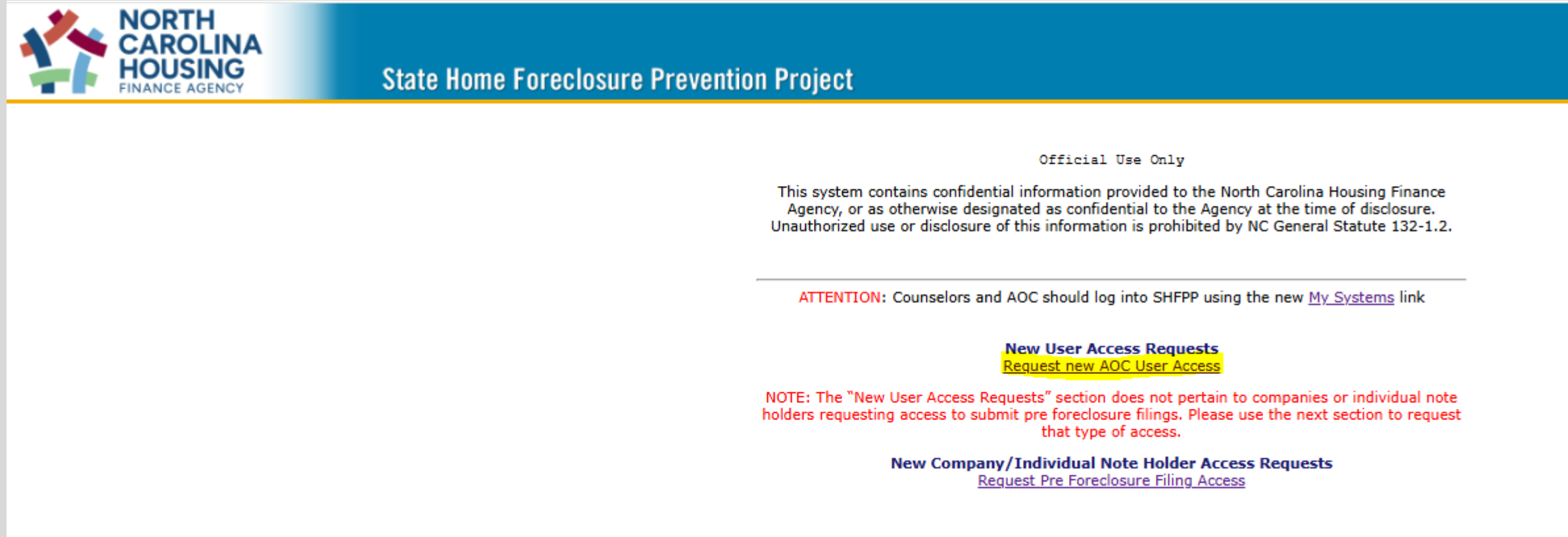
Loan Confirmations:

- Date of 45-102 Pre-foreclosure Notice:
- Due Date of Last Scheduled Payment Made:

Note: The system will provide confirmation of successful submission with the file number.

Pre Foreclosure Filing System Access- AOC Users

- ❑ Request new system access link: <https://www.nchfa.org/SHFPPOnline/login.aspx>



NORTH CAROLINA HOUSING FINANCE AGENCY
State Home Foreclosure Prevention Project

Official Use Only

This system contains confidential information provided to the North Carolina Housing Finance Agency, or as otherwise designated as confidential to the Agency at the time of disclosure. Unauthorized use or disclosure of this information is prohibited by NC General Statute 132-1.2.

ATTENTION: Counselors and AOC should log into SHFPP using the new [My Systems](#) link

New User Access Requests
[Request new AOC User Access](#)

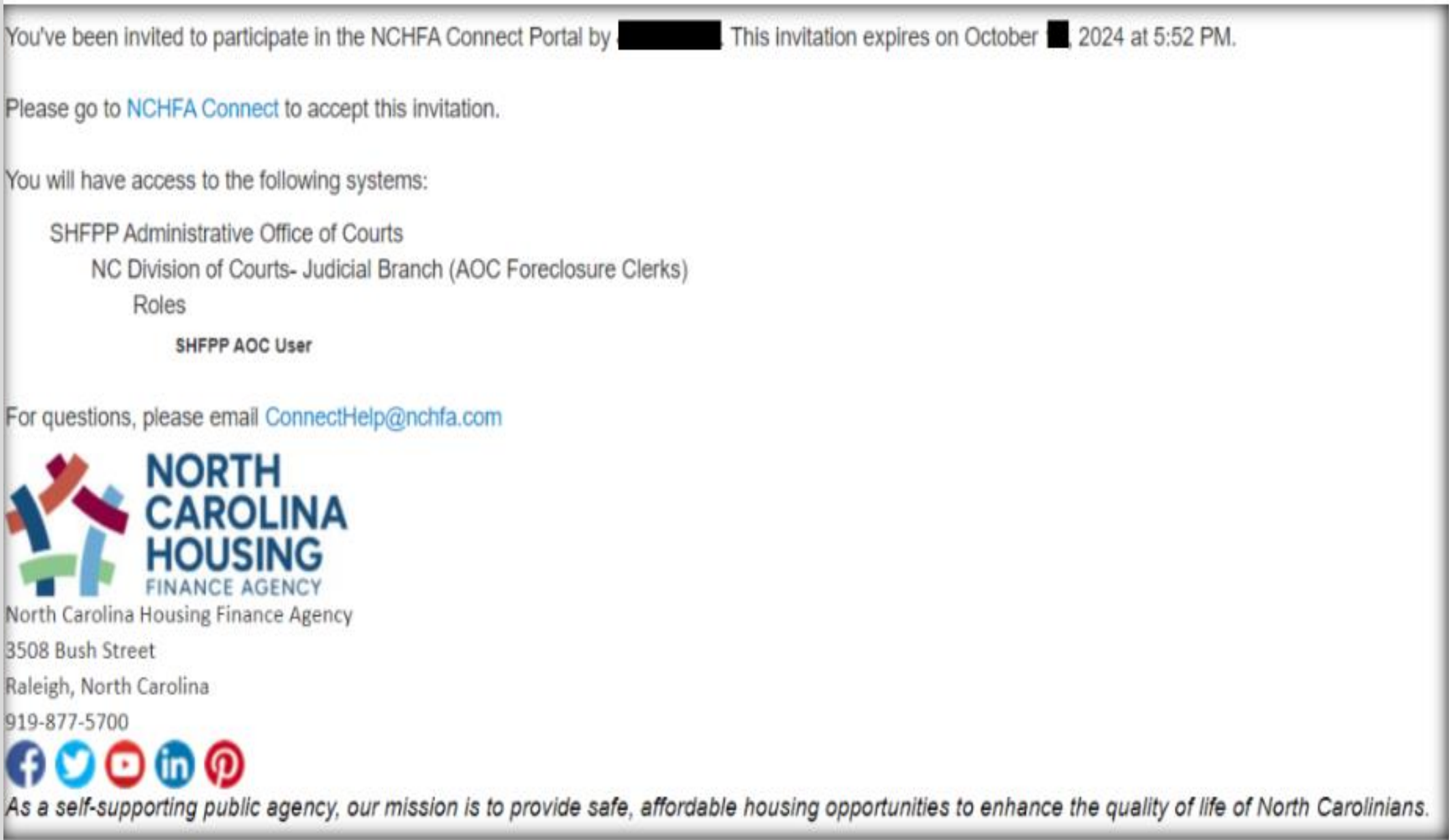
NOTE: The "New User Access Requests" section does not pertain to companies or individual note holders requesting access to submit pre foreclosure filings. Please use the next section to request that type of access.

New Company/Individual Note Holder Access Requests
[Request Pre Foreclosure Filing Access](#)

- ❑ Complete the form to receive an email invitation with a link to create a portal account to access the SHFPP database. If you do not see the email when reviewing your "In Box," please check the "Junk or Spam" folder.

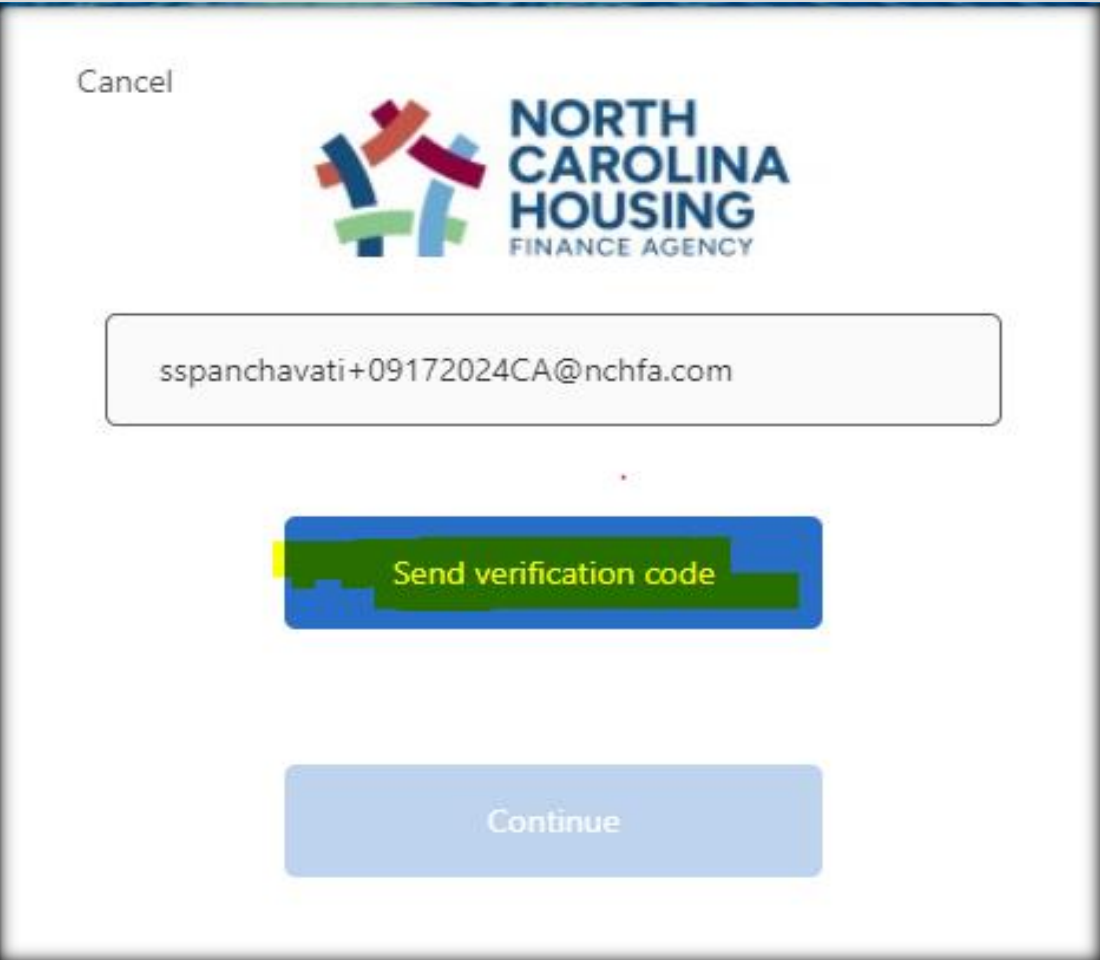
NCHFA Connect System Access

Users will receive an invitation email from donotreply@nchfa.com with the subject “Request to participate in the NCHFA Connect Portal.”

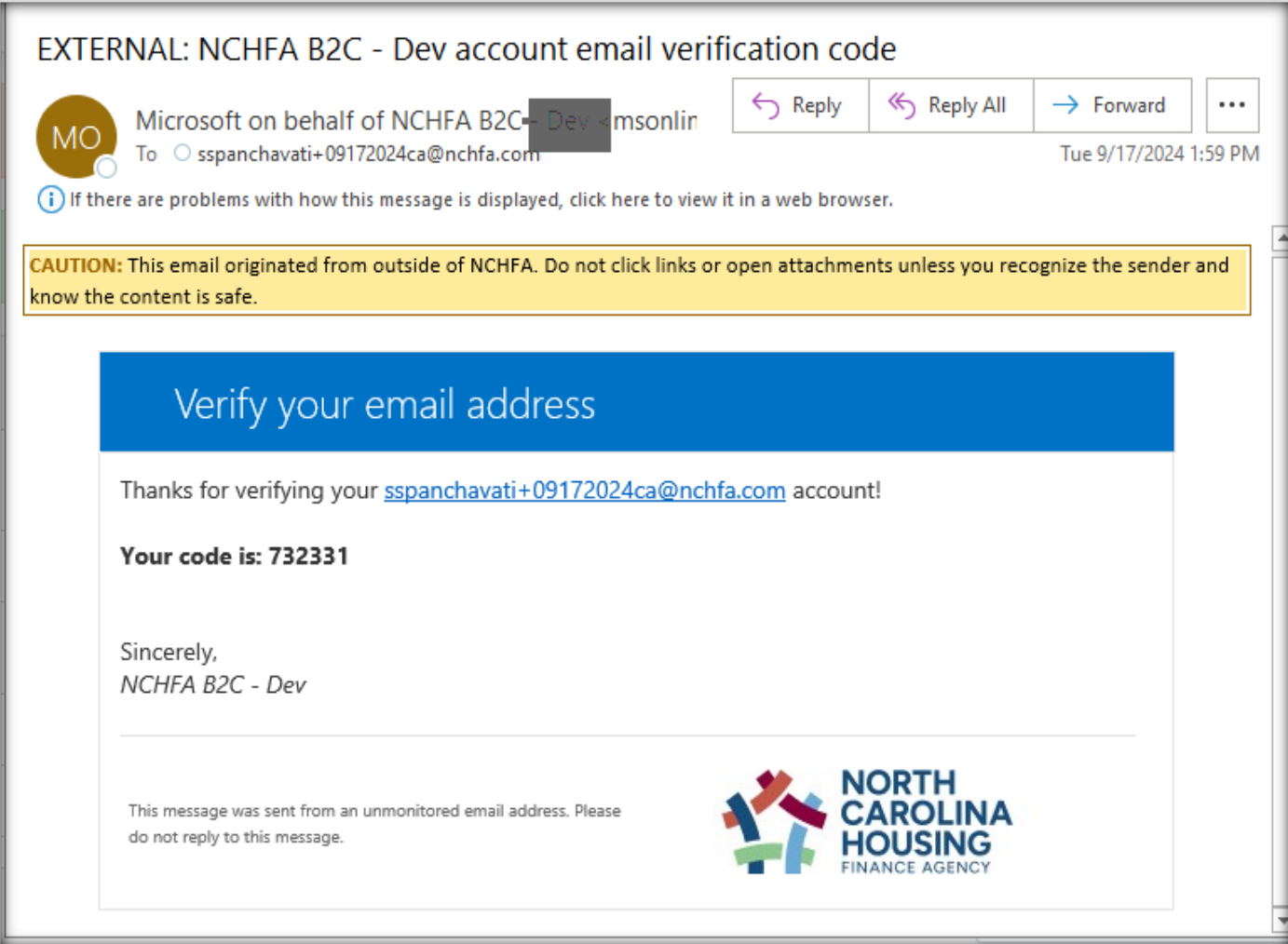


Please accept the invitation before the expiration date.

Click the “Send verification code” button.




You will receive an email that contains a verification code to confirm your email address.



Enter the Verification Code from the email

Cancel




Verification code has been sent to your inbox. Please copy it to the input box below.

Verify code Send new code

Continue

➔ Click Verify Code

Cancel



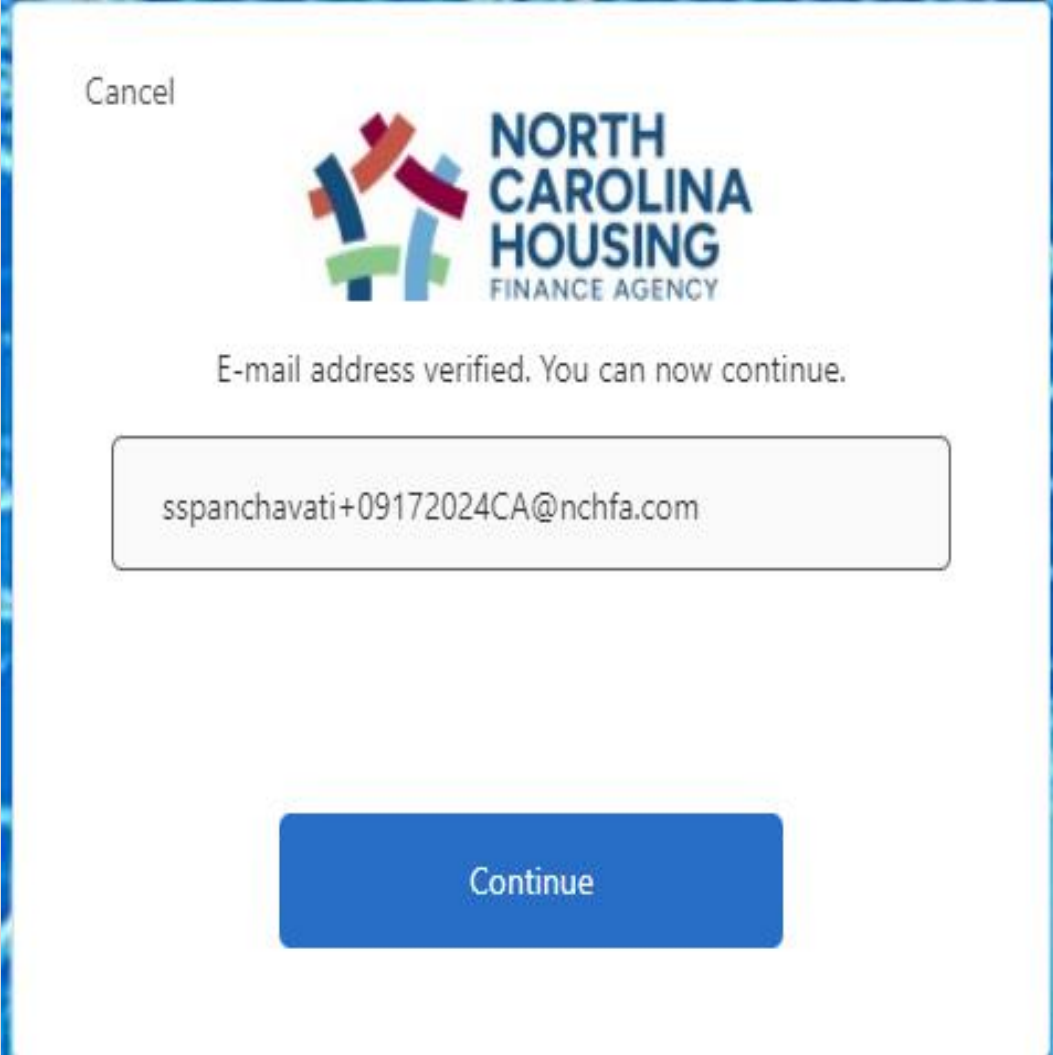
Verification code has been sent to your inbox. Please copy it to the input box below.

Verify code Send new code

Continue

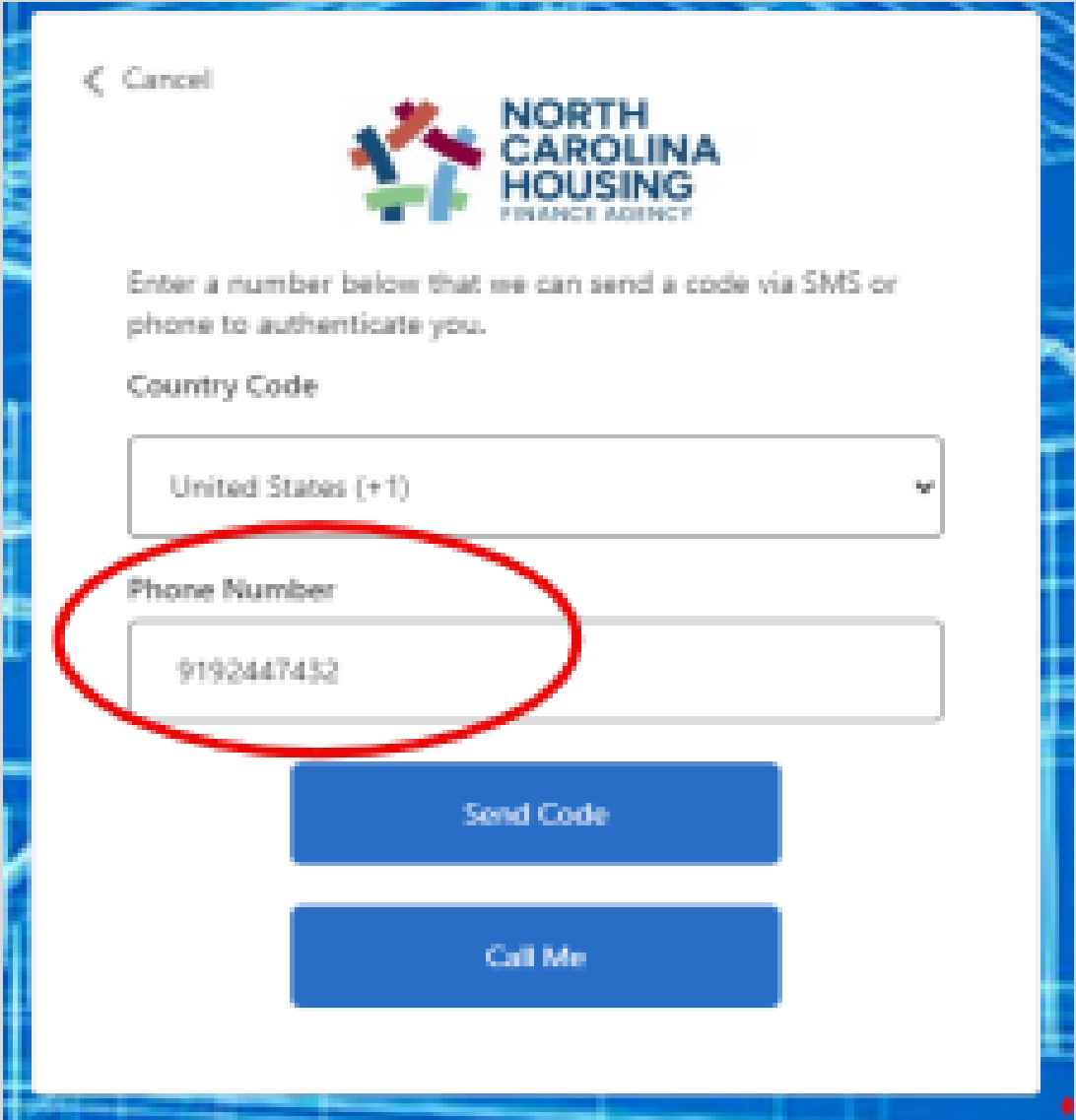
The browser page will refresh, and you will receive confirmation that your email has been verified.

Click the Continue button.

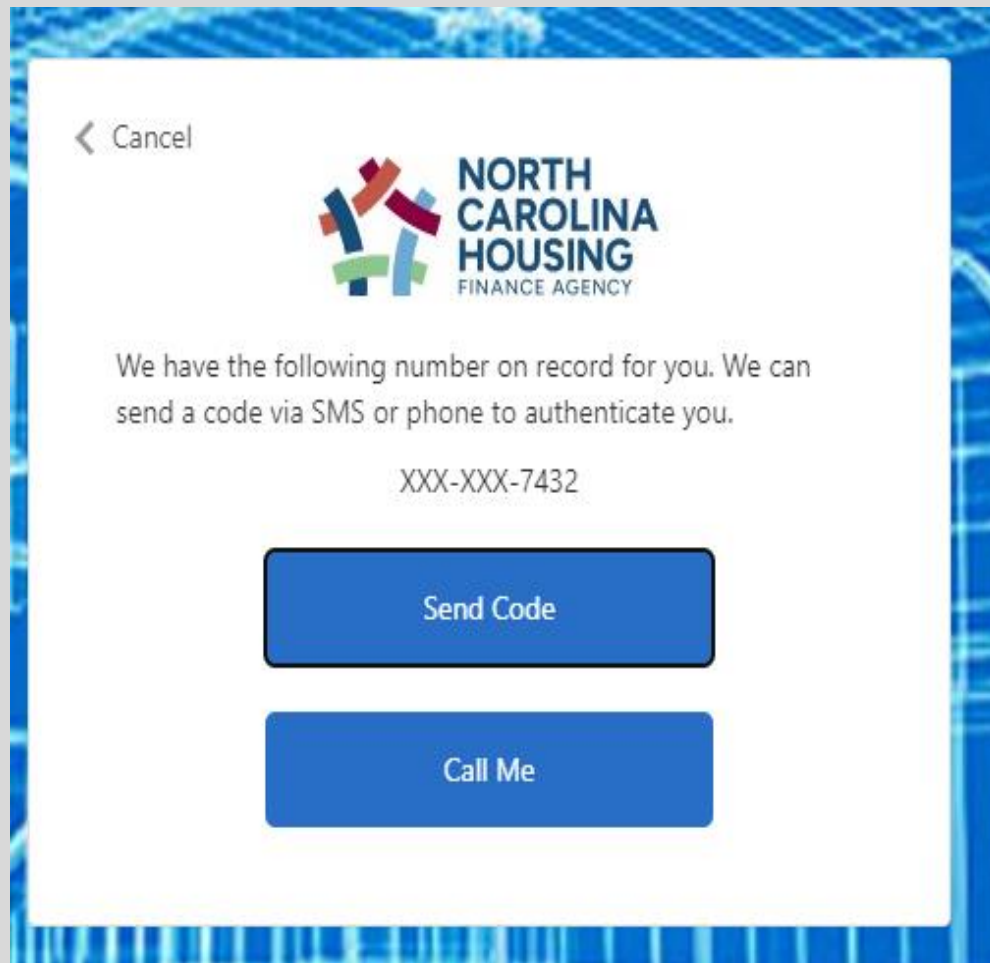


You will be asked for your phone number to complete a **2nd level** authentication.

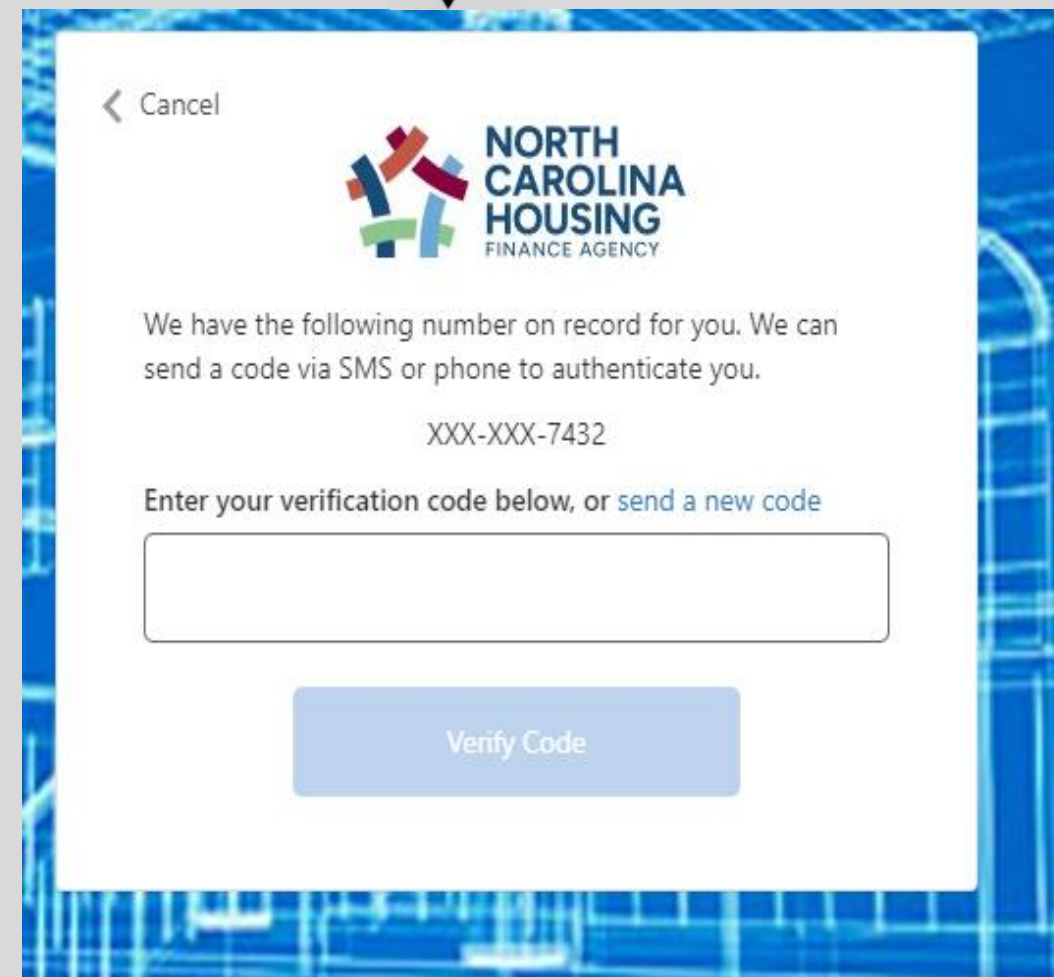
Enter your mobile phone number, including area code, in the Phone Number text box.



2nd Identity Authentication Request




1. The [**Call Me**] option will result in a call from the system to the mobile number entered when the account was created (verify the last 4 digits). Follow the prompted instructions from the phone call.
2. If the [**Send Code**] option is selected, a verification code will be sent via text to the mobile phone displayed on the screen (verify the last 4 digits).



Once your identity has been authenticated, the [My Systems] home page will appear.

Creating a New Connect Access Password

Cancel



NORTH CAROLINA HOUSING
FINANCE AGENCY


New Password

Confirm New Password

Continue



Cancel



NORTH CAROLINA HOUSING
FINANCE AGENCY

The password must be between 12 and 64 characters.
The password must have at least 4 of the following:

- a lowercase letter
- an uppercase letter
- a digit
- a symbol

....

The password must be between 12 and 64 characters.
The password must have at least 4 of the following:


- a lowercase letter
- an uppercase letter
- a digit
- a symbol

....

Continue

New Connect Password Confirmation

Cancel




Confirm New Password

Continue



Cancel




Continue

New Connect Access Granted

www.nchfa.org/MySystems

Enter your email address and newly created password



 NORTH CAROLINA HOUSING FINANCE AGENCY

Sign in with your email address

Email Address

Password

[Forgot your password?](#)

Sign in

New Connect Access

After you Sign in, you will see the TERMS and CONDITIONS.

NCHFA Connect - My Systems Minnie Mouse

Please review our Terms and Conditions and click "Accept" to continue using NCHFA systems.

TERMS and CONDITIONS

NCHFA Connect ("Site") is owned and operated by the North Carolina Housing Finance Agency, 3508 Bush Street, Raleigh, North Carolina, 27609, which is referred to herein as "NCHFA", "Agency", "We", "Us", or "Our". All rights, title and interest in and to the materials provided on the Site, including but not limited to information, documents, logos,

Read the TERMS and CONDITIONS, and click the Accept button.

DISCLAIMERS

THE INFORMATION AVAILABLE THROUGH THIS WEBSITE IS PROVIDED "AS IS" AND WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW. NCHFA disclaims all warranties of any kind. The information presented is obtained from what are considered reliable sources; however, its accuracy, completeness or reliability cannot be guaranteed and therefore should not be relied upon as such. NCHFA shall not be deemed liable for any special, incidental, indirect or consequential damages of any kind including but not limited to injury, claim, liability or loss of use, data or profits in connection with these Sites or any linked sites.

My Systems Home Page

SHFPP Pre-Foreclosure Filing System- Access Link

NCHFA Connect - My Systems [Redacted]

QA Environment: Please do NOT enter production data x

My Organizations and Systems

Hello [Redacted] Listed below are links to agency system(s) that you can access through your organization. Each link, when clicked, will launch that agency system. For help send an email to ConnectHelp@nchfa.com.

NC Division of Courts- Judicial Branch (AOC Foreclosure Clerks)

[State Home Foreclosure Prevention Program \(SHFPP\)](#) [View my roles](#)
[View organization administrators](#)

Once you click the SHFPP link, the system will take you to the access home page within the SHFPP filing system.

AOC FC Clerks of Court Pre-Foreclosure Filing Access-Home Page Example Snapshot

NORTH CAROLINA HOUSING FINANCE AGENCY

State Home Foreclosure Prevention Project

Search

Name : [Contact Us](#)

File #: County:

Servicer: Street:


Borrower First Name: City:

Borrower Last Name: Zip:

The fastest searches are those that look for results beginning with the text being searched for. It takes longer to find results that don't begin with the text you're looking for. Use the options below to choose the method suiting your need.

Starts With (faster) Contains (slower)

AOC FC Clerks of Court Access Pre-Foreclosure Filing Access-Filing Summary Page Example Snapshot



State Home Foreclosure Prevention Project

File Summary

File#: [REDACTED] Primary Borrower: [REDACTED] Date Received: 07/01/2024 Status: Pending
 Address: [REDACTED] Earliest Possible Court Filing Date: 08/10/2024

'HOME LOAN':YES

[Back to Search](#)

Servicer: [REDACTED]
 Servicer Email: [REDACTED]

Property Information

Address: [REDACTED]
 Date of 45-102 pre-foreclosure notice: 6/26/2024
 Earliest Possible Court Filing Date: 8/10/2024
 Due Date of Last Scheduled Payment Made: 4/1/2024


Borrower	Mailing Address	Day Time Phone	Cell Phone	Home Phone	Email
[REDACTED]			[REDACTED]		[REDACTED]

Ongoing Access Process

Once your account is set up, you will be able to log in using the Connect access link, www.nchfa.org/MySystems. Bookmark the link for easy access.

Enter your email address and password



 NORTH CAROLINA HOUSING FINANCE AGENCY

Sign in with your email address

Email Address

Password

[Forgot your password?](#)

Sign in

Program Contacts- Questions & Assistance

Mary M. Holder mmholder@nchfa.com or (919) 981-2511

Foreclosure Prevention Program Manager

Tab:

Military Status

Protections for Military Service in Chapter 45 Foreclosures

Nicole Brinkley, NC Administrative
Office of the Courts

Meredith Smith, UNC School of
Government

1

Training Goals

Understand the laws that apply to a power of sale foreclosure related to military service

Practice applying those laws to the clerk's determination of whether to authorize or not authorize a foreclosure sale

2



The Foreclosure Hearing – GS 45-21.16(d)

To enter an order authorizing the foreclosure sale, the clerk must find competent evidence of the following:

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one, loss mitigation.

3

G.S. 45-21.16(d)

If the clerk finds the existence of

(vi) that the sale is not barred by **G.S. 45-21.12A**, then the clerk shall authorize the mortgagee or trustee to proceed...

4

Compliance with Three Key Laws to Authorize Sale

1. The Servicemembers Civil Relief Act, 50 U.S.C. ch. 50
2. The North Carolina Servicemembers Civil Relief Act, Chapter 127B, Article 4
3. G.S. 45-21.12A

5

The Servicemembers Civil Relief Act

Purpose of the SCRA

1 – Strengthen national defense by enabling servicemembers to focus on defense

2 – Provide for temporary suspension of proceedings that may adversely affect the civil rights of servicemembers during service

Remember: It's a shield, not a sword.



6

SCRA: The Layer Cake



**Section 3953:
Foreclosure
only**

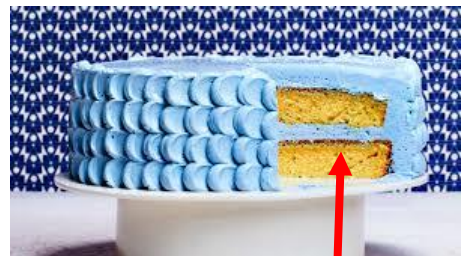
**Section 3931
(appearance) and
Section 3932
(stay) – all non-
criminal**

7

SCRA: The First Layer

It applies to all non-criminal proceedings....

- Default Judgments
- **Foreclosure**
- Estate Proceedings (and related SPs)
- Incompetency Proceedings
- Private Condemnation
- Legitimation
- Adoptions
- Partitions
- **And the list goes on....**



**Section 3931 and
3932: All non-
criminal**

50 U.S.C. sec. 3912(b)

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SCRA: The First Layer (Sec. 3931)

Obligation is on the **court** to ensure compliance.

The SCRA imposes an obligation on the court if the defendant/respondent has **not made an appearance** to require an **affidavit** *before* entering **judgment for the plaintiff**, temporary or permanent.

*Applies regardless of when the loan, deed of trust, or mortgage originated.

50 U.S.C. ch. 50, sec. 3931(b)(1).

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SCRA: The First Layer (Sec. 3931)

If the defendant **does not appear**, court shall require an affidavit from the plaintiff stating whether the defendant is:

1. In military service + necessary facts to support – **STOP AND ACT!**
 - Must appoint counsel (50 U.S.C. sec. 3931(b)(2)), and
 - Consider stay (50 U.S.C. sec. 3931(d))
2. Unable to determine – **CAUTION, BUT GO**
 - Consider bond to compensate (50 U.S.C. sec. 3931(b)(3)), or
 - Consider other order to protect rights (50 U.S.C. sec. 3931(b)(3))
3. Not in military service + necessary facts to support – **KEEP TRUCKIN'**

50 U.S.C. sec. 3931

Refer to: *On the Civil Side* Blog, Cheryl Howell, dated February 13, 2015.

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STATE OF NORTH CAROLINA File No. _____

_____ County In The General Court Of Justice

Name And Address Of Plaintiff

VERSUS

Name And Address Of Defendant

**SERVICEMEMBERS CIVIL RELIEF ACT
DECLARATION**

G.S. Ch. 127B, Art. 4; 50 U.S.C. 3901 to 4043

NOTE: *Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.*

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

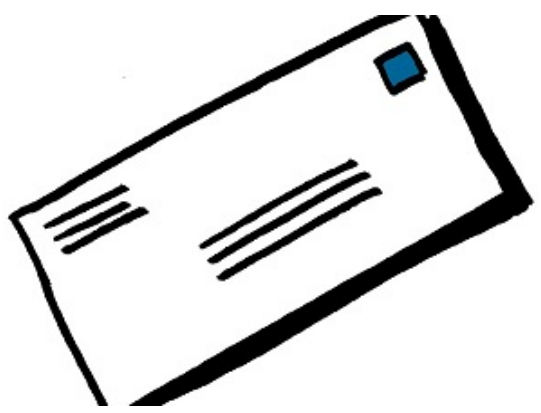
- As of the current date: *(check one of the following)*
 - a. I have personal knowledge that the defendant named above is in military service.*
 - b. I have personal knowledge that the defendant named above is **not** in military service.*
 - c. I am unable to determine whether the defendant named above is in military service.*
- As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).
- I used did not use the Servicemembers Civil Relief Act Website (<https://scra.dmdc.osd.mil/>) to determine the defendant's federal military service.
 - The results from my use of that website are attached.

(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)
- The following facts support my statement as to the defendant's military service: *(State how you know the defendant is or is not in the*

SCRA Form,
AOC-G-250

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SCRA: The First Layer (Sec. 3932)



Respondent in military service or within 90 days after termination.

Servicemember received notice of the foreclosure proceeding.

Letters provided to the court....

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SCRA: The First Layer (Sec. 3932)

At any stage before final judgment, the court may on its own motion and shall, upon application by the servicemember, **stay the action** for a period of not less than 90 days, if:

1. A letter or other communication establishes that a servicemember's military duty requirements materially affect the servicemember's ability to appear and gives a date when the servicemember will be available to appear; and
2. A letter or other communication from the servicemember's commanding officer shows that the servicemember's military duty prevents appearance and that leave is not authorized for the servicemember at the time of the letter.

50 U.S.C. sec. 3932(b).

*Applies regardless of when the loan, deed of trust, or mortgage originated.

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SCRA: The Second Layer



Section 3953:
Foreclosure
only

- Additional protections in the SCRA applicable to **certain** foreclosures
- Applies **only** to an obligation on real property owned by servicemember that
 - Originated *before* the period of military service, and
 - Is secured by mortgage, deed of trust, or other security in nature of mortgage

50 U.S.C. sec. 3953

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SCRA: The Second Layer (Sec. 3953)

- Protection during and within one year **after** a period of military service
- More than just **current** military service status (Section 3931 applies to current military service; Section 3932 applies to current plus 90 days)

50 U.S.C. sec. 3953(b)

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SCRA: The Second Layer (Sec. 3953)

A foreclosure shall not be valid if made during, or within one year after a period of military service, EXCEPT

1. Upon **court order** granted before the sale and a return made and approved by the court, or
2. **Waiver** pursuant to section 3918 of the SCRA.

50 U.S.C. sec. 3953(c)

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SCRA: The Second Layer (Sec. 3953)

If a foreclosure is filed during or within one year after a period of military service **and** the servicemember's ability to comply with the obligation is materially affected by military service the court may on the court's own motion after a hearing and shall on application of servicemember:

1. **Stay** the proceeding for a period of time as justice and equity require, or
2. **Adjust** the obligation to preserve interests of all parties.

50 U.S.C. sec. 3953(b)

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N.C. Servicemembers Civil Relief Act

Effective October 1, 2019 under S.L. 2019-161, amended November 6, 2019 under S.L. 2019-243

Dual purpose of the NCSCRA:

- Incorporates into state law the rights, benefits, and protections of the federal SCRA
- Extends the rights, benefits, and protections to members of
 - NC National Guard on State active duty under an order of the Governor for a period of more than 30 consecutive days *and*
 - National Guard of other states under similar orders of the governor of those states for a period of more than 30 consecutive days who reside in NC

to the extent the servicemember's military service materially affects the ability to comply with his or her obligations.

G.S. Chapter 127B, Article 4

18

NC SCRA and Sec. 3931 of the SCRA

***NOTE:** The term "military service" includes the following: active duty service as a member of the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard; service as a member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency; active service as a commissioned officer of the Public Health Service or of the National Oceanic and Atmospheric Administration; any period of service during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. 3911(2). The term "military service" also includes the following: State active duty as a member of the North Carolina National Guard under an order of the Governor pursuant to Chapter 127A of the General Statutes, for a period of more than 30 consecutive days; service as a member of the National Guard of another state who resides in North Carolina and is under an order of the governor of that state that is similar to State active duty, for a period of more than 30 consecutive days. G.S. 127B-27(3) and G.S. 127B-27(4).

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Date	Signature Of Declarant	Name Of Declarant (type or print)

NOTE TO COURT: Do not proceed to enter judgment in a non-criminal case in which the defendant has not made an appearance until a Servicemembers Civil Relief Act affidavit or declaration (whether on this form or not) has been filed, and if it appears that the defendant is in military service, do not proceed to enter judgment until such time that you have appointed an attorney to represent him or her.

(Over)

AOC-G-250, Rev. 4/24
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Limits of the DOD Database

Protection against default judgments under 50 U.S.C. sec. 3931:

- The Department of Defense SCRA database search results are frequently relied upon and attached to the G-250.
- The results of the SCRA database search is a fact to support the statement of whether a defendant *is* or *is not* in **federal** military service or has been in **federal** military service in the previous 367 days.
- Members of the National Guard in military service under the order of a governor will not appear in this database.
- There is no independent way to confirm.

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_____ County

Name And Address Of Plaintiff	SERVICEMEMBERS CIVIL RELIEF ACT DECLARATION
VERSUS	
Name And Address Of Defendant	

G.S. Ch. 127B, Art. 4; 50 U.S.C. 3901 to 4043

NOTE: Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

- As of the current date: (check one of the following)
 - a. I have personal knowledge that the defendant named above is in military service.*
 - b. I have personal knowledge that the defendant named above is **not** in military service.*
 - c. I am unable to determine whether the defendant named above is in military service.*
- As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).
- I used did not use the Servicemembers Civil Relief Act Website (<https://scra.dmdc.osd.mil/>) to determine the defendant's federal military service.
 - The results from my use of that website are attached.

(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)
- The following facts support my statement as to the defendant's military service: (State how you know the defendant is or is not in the military. Be specific.)

NC SCRA
and Sec.
3931 of the
SCRA

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NC SCRA and §3931 of the SCRA

#2 - new question added

Why is the G-250 now asking this question?

2. As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).

The response to this question provides a fact that supports the statement that a defendant *is* or *is not* in military service under the NC SCRA (NG servicemember serving under the order of a governor).

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NC SCRA and Sec. 3931 of the SCRA

#4 – Any other facts to support whether a respondent *is* or *is not* in military service.

4. The following facts support my statement as to the defendant’s military service: *(State how you know the defendant is or is not in the military. Be specific.)*

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SCRA and G.S. 45-21.12A: “Military Service”

1. **Active duty** who are a member of the Army, Navy, AF, Marines, Space Force, or Coast Guard;
2. **National Guard** under call to active service authorized by President or Sec. of Defense for more than 30 consecutive days responding to a national emergency;
3. Active service, commissioned officers of the **Public Health Service** (DHHS) or the **National Oceanic and Atmospheric Administration** (Dept. of Commerce)
4. Periods absent from duty due to **sickness, wounds, leave**, or other lawful cause.

50 USC ch. 50, sec. 3911(2)

G.S. 45-21.12A(d)(1)

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NC SCRA: “Military Service”

As defined in the SCRA, **plus**:

1. Active duty in the NC National Guard under an order of the Governor for period of more than 30 consecutive days, and
2. Service in another state’s National Guard under the order of the governor of another that is similar to active duty for period of more than 30 consecutive days

G.S. 127B-27(3)



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NC SCRA: When a person is “subject to”

In the case of a servicemember engaged in military service as NC National Guard or another state’s National Guard, a person is not subject to the remedies or penalties of the NCSCRA **unless...**

the servicemember gives to the person a written or electronic copy of the military order no later than 30 days after the military service terminates.

G.S. 127B-28(b)

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U.S. Dept. of Defense Database

The DOD database may be accessed at: <https://scra.dmdc.osd.mil/scra/>

More information on "Active Duty Status"

Active duty status as reported in this certificate is defined in accordance with 10 USC ? 101(d)(1). Prior to 2010 only some of the active duty periods less than 30 consecutive days in length were available. In the case of a member of the National Guard, this includes service under a call to active service authorized by the President or the Secretary of Defense under 32 USC ? 502(f) for purposes of responding to a national emergency declared by the President and supported by Federal funds. All Active Guard Reserve (AGR) members must be assigned against an authorized mobilization position in the unit they support. This includes Navy Training and Administration of the Reserves (TARs), Marine Corps Active Reserve (ARs) and Coast Guard Reserve Program Administrator (RPAs). Active Duty status also applies to Uniformed Services member who is an active duty commissioned officer of the U.S. Public Health Service or the National Oceanic and Atmospheric Administration (NOAA Commissioned Corps).

Coverage Under the SCRA is Broader in Some Cases

Coverage under the SCRA is broader in some cases and includes some categories of persons on active duty for purposes of the SCRA who would not be reported as on Active Duty under this certificate. SCRA protections are for Title 10 and Title 14 active duty records for all the Uniformed Services periods. Title 32 periods of Active Duty are not covered by SCRA, as defined in accordance with 10 USC ? 101(d)(1).

Many times orders are amended to extend the period of active duty. However, not all SCRA protections. Persons seeking to rely on this website certification should check to make sure the orders on which SCRA protections are based have not been amended to extend the inclusive dates of service. Furthermore, some protections of the SCRA may extend to persons who have received orders to report for active duty or to be inducted, but who have not actually begun active duty or actually reported for induction. The Last Date on Active Duty entry is important because a number of protections of the SCRA extend beyond the last dates of active duty.

Those who could rely on this certificate are urged to seek qualified legal counsel to ensure that all rights guaranteed to Service members under the SCRA

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NC Law: G.S. 45-21.12A

- Additional protections under Chapter 45
- Applies only to mortgages and deeds of trust that originated *before* the mortgagor's or trustor's period of military service.

G.S. 45-21.12A

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NC Law: G.S. 45-21.12A

Power of Sale **Barred**.

A mortgagee, trustee, or other creditor shall not exercise a power of sale contained in a mortgage or deed of trust, or provided by statute, **during, or within 90 days after**, a mortgagor's, trustor's, or debtor's period of military service.

Does not apply to National Guard service in state active duty under the order of a Governor under NC SCRA. *See* definition of military service in G.S. 45-21.12A(d)(1).

G.S. 45-21.12A(a)

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NC Law: G.S. 45-21.12A

Power of Sale **Barred**.

The clerk **shall not conduct a hearing pursuant to G.S. 45-21.16(d)** unless the mortgagee, trustee or other creditor....files with the clerk a **certification** that the hearing will take place at a time that is not during, or within 90 days after, a period of military service for the mortgagor, trustor or debtor.

G.S. 45-21.12A

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NC Law: G.S. 45-21.12A


Finding #6

Clerk may not authorize trustee to proceed to sale unless the clerk finds “that the sale is **not barred by G.S. 45-21.12A**” (hearing may not take place during or within 90 days after a period of military service).

#3 of the G-250 form:

a. I have personal knowledge that the defendant named above is in military service.* 

b. I have personal knowledge that the defendant named above is **not** in military service.* 

c. I am unable to determine whether the defendant named above is in military service.* 

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Foreclosure Hearing: The Clerk’s Role

To authorize a power of sale foreclosure, there must be compliance with:

1. G.S. 45-21.12A – (“the sale is not barred by G.S. 45-21.12A”)
2. SCRA
3. NC SCRA – GS 127A, Article 4



‘Excellent! It’s the disclosure documents for your hearing on Monday.’

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Breakout Instructions

1. Identify one person to be the recorder and another person to report out the group answers
2. Use the time to complete as many problems as possible. We will discuss the results and ask for volunteers to discuss your group's responses.
3. Focus on the content of the documents and for each case problem answer the following questions:

a. **Would you authorize the foreclosure sale based on the information presented?**

b. **If you authorize the sale, identify what elements in each document satisfy the requirements of (i) the SCRA, (ii) the NCSCRA, and (iii) G.S. 45-21.12A.**

c. **If you do not authorize the sale, identify what is missing based on the requirements of (i) the SCRA, (ii) the NCSCRA, and (iii) G.S. 45-21.12A.**

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Case #1 - Authorize or Not Authorize?

Trustee files the following AOC-G-250 and separate certification as evidence of the debtor/mortgagor's military service status:

U.S. GOVERNMENT PRINTING OFFICE: 2010 O 452-112A

NOTE: Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

1. As of the current date: (check one of the following)
 - a. I have personal knowledge that the defendant named above is in military service.*
 - b. I have personal knowledge that the defendant named above is not in military service.*
 - c. I am unable to determine whether the defendant named above is in military service.*
2. As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).
3. I used did not use the Servicemembers Civil Relief Act Website (<https://scra.dmdc.osd.mil/>) to determine the defendant's federal military service.
 - The results from my use of that website are attached.(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)
4. The following facts support my statement as to the defendant's military service: (State how you know the defendant is or is not in the military. Be specific.)

Trustee Certification

On August 1, 2022, I personally conducted an online search through the Department of Defense Manpower Data Center which indicated the respondent was not in military service and was not in military service during the 90 days prior to my search. I, trustee, hereby certify the foreclosure hearing will take place at a time that is not during, or within 90 days after, a period of military service for the mortgagor, trustor or debtor.

/s/ Trustee

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GS 45-21.12A Certification

The mortgagee, trustee or other creditor must file a certification that the hearing will take place at a time that is not during, or **within 90 days after**, a period of military service for the mortgagee, trustor or debtor.

- May be written on the G-250
- May be attached on a separate document

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Trustee files the following AOC-G-250 as evidence of the debtor/mortgagor's military status:

NOTE: *Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.*

AFFIDAVIT

I, the undersigned Affiant, under penalty of perjury declare the following to be true:

1. As of the current date: *(check one of the following)*

- a. I have personal knowledge that the defendant named above is in military service.*
 b. I have personal knowledge that the defendant named above is **not** in military service.*
 c. I am unable to determine whether the defendant named above is in military service.*

2. As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).

3. I used did not use the Servicemembers Civil Relief Act Website (<https://scra.dmdc.osd.mil/>) to determine the defendant's federal military service.

The results from my use of that website are attached.

(NOTE: *The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will **not** appear in the SCRA Website database.*)

4. The following facts support my statement as to the defendant's military service: *(State how you know the defendant is or is not in the military. Be specific.)*

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G-250 defines the term military service to include the definitions under both the SCRA (which is the same definition as under GS 45-21.12A) and the NC SCRA so that when the affiant attests that the defendant is not in military service it is clear what the affiant is swearing to.

AFFIDAVIT	
I, the undersigned Affiant, under penalty of perjury declare the following to be true:	
1. As of the current date: (check one of the following)	
<input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*	
<input type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*	
<input type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*	
2. As of the current date, I <input type="checkbox"/> have <input checked="" type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).	
<input type="checkbox"/> used <input type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.	
<input checked="" type="checkbox"/> The results from my use of that website are attached.	
<small>(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)</small>	
3. The following facts support my statement as to the defendant's military service: (State how you know the defendant is or is not in the military. Be specific.)	
4. The term "military service" includes the following: active duty service as a member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard; service as a member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency; active service as a commissioned officer of the Public Health Service or of the National Oceanic and Atmospheric Administration; any period of service during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. 3911(2). The term "military service" also includes the following: State active duty as a member of the North Carolina National Guard under an order of the Governor pursuant to Chapter 127A of the General Statutes, for a period of more than 30 consecutive days; service as a member of the National Guard of another state who resides in North Carolina and is under an order of the governor of that state that is similar to State active duty, for a period of more than 30 consecutive days. G.S. 127B-27(3) and G.S. 127B-27(4).	

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AFFIDAVIT	
I, the undersigned Affiant, under penalty of perjury declare the following to be true:	
1. As of the current date: (check one of the following)	
<input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*	
<input checked="" type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*	
<input type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*	
2. As of the current date, I <input type="checkbox"/> have <input checked="" type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).	
<input checked="" type="checkbox"/> used <input type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.	
<input checked="" type="checkbox"/> The results from my use of that website are attached.	
<small>(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)</small>	
3. The following facts support my statement as to the defendant's military service: (State how you know the defendant is or is not in the military. Be specific.)	
4. **or other necessary facts to support the statement defendant is not in military service, as defined in the NC SCRA (G.S. Chapter 127B, Article 4).	

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Case #2: Authorize or Not Authorize

Substitute Trustee files the following "Affidavit Regarding Military Service"

[Redacted] (Affiant) in her capacity as Trustee, on oath, states the following:

1. I have personal knowledge of the facts stated herein and give this affidavit based upon such personal knowledge.
2. I make this affidavit with respect to the foreclosure of a claim of lien in favor of Petitioner against the above-referenced property owned by Respondent.
3. Petitioner is the secured party to the above-captioned claim of lien.
To the best of my knowledge and belief, Respondent [Redacted] is not a member of the Armed Forces of the United States of America and that this hearing will not take place during, or within one (1) year thereafter, a period of military service for Respondent.
4. To confirm the above, I have searched the online records of the Department of Defense Manpower Data Center using the social security number, date of birth and name of said Respondent (copy of search results attached).
5. Based on the results of my search as defined herein, foreclosure of this real property will not be subject to the provisions of 50 U.S.C. 3901, et seq. (the Servicemembers Civil Relief Act) or N.C.G.S. §45-21.12A. *ll - 1*

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Things to Consider

- No reference to NC SCRA or its extended protections.
- Who is included in "Armed forces" and "military service"?
 - Armed forces is not a defined term in the SCRA
 - DOD database search – covers SCRA + GS 45-21.12A
 - Does not cover NC SCRA

40

G-250 defines the term military service to include the definitions under both the SCRA (which is the same definition as under GS 45-21.12A) and the NC SCRA so that when the affiant attests that the defendant is not in military service it is clear what the affiant is swearing to.

AFFIDAVIT
<p>undersigned Affiant, under penalty of perjury declare the following to be true:</p> <p>As of the current date: <i>(check one of the following)</i></p> <p><input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*</p> <p><input type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*</p> <p><input type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*</p> <p>As of the current date, I <input type="checkbox"/> have <input type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).</p> <p><input type="checkbox"/> used <input type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.</p> <p><input type="checkbox"/> The results from my use of that website are attached.</p> <p>NOTE: <i>The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)</i></p> <p>The following facts support my statement as to the defendant's military service: <i>(State how you know the defendant is or is not in the military. Be specific.)</i></p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>E: The term "military service" includes the following: <i>active duty service as a member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard; service as a member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency; active service as a commissioned officer of the Public Health Service or of the National Oceanic and Atmospheric Administration; any period of service during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. 3911(2). The term "military service" also includes the following:</i> <i>State active duty as a member of the North Carolina National Guard under an order of the Governor pursuant to Chapter 127A of the General Statutes, for a period of more than 30 consecutive days; service as a member of the National Guard of another state who resides in North Carolina and is under an order of the governor of that state that is similar to State active duty, for a period of more than 30 consecutive days. G.S. 127B-27(3) and G.S. 127B-27(4).</i></p>

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Case #3: Authorize or Not Authorize

3

Trustee files the following AOC-G-250 as evidence of the debtor/mortgagor's military service status:

DECLARATION
<p>NOTE: <i>Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.</i></p> <p>I, the undersigned Declarant, under penalty of perjury declare the following to be true:</p> <p>1. As of the current date: <i>(check one of the following)</i></p> <p><input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*</p> <p><input checked="" type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*</p> <p><input type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*</p> <p>2. As of the current date, I <input type="checkbox"/> have <input checked="" type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).</p> <p>3. I <input type="checkbox"/> used <input checked="" type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.</p> <p><input type="checkbox"/> The results from my use of that website are attached.</p> <p>NOTE: <i>The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)</i></p> <p>4. The following facts support my statement as to the defendant's military service: <i>(State how you know the defendant is or is not in the military. Be specific.)</i></p> <p style="padding-left: 20px;">The borrower is an 86 year old man who is retired and lives in Advanced Care Nursing facility in <u>Faketown, NC</u>.</p>

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DOD Database

Department of Defense Manpower Data Center

Results as of : Jan-21-2020 03:18:27 PM 48 PM

SCRA 5.3 RA 5.3



Status Report Pursuant to Servicemembers Civil Relief Act

SSN: **XXX-XX-2334**
 Birth Date:
 Last Name: SMITH
 First Name:
 Middle Name:
 Status As Of: Jan-21-2020
 Certificate ID: FFN8YTWR6L9LBCP

On Active Duty On Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects the individual's active duty status based on the Active Duty Status Date			
Left Active Duty Within 367 Days of Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects where the individual left active duty status within 367 days preceding the Active Duty Status Date			

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NOTE: Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

- As of the current date: (check one of the following)
 - a. I have personal knowledge that the defendant named above is in military service.*
 - b. I have personal knowledge that the defendant named above is not in military service.*
 - c. I am unable to determine whether the defendant named above is in military service.*
- As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).
- I used did not use the Servicemembers Civil Relief Act Website (<https://scra.dmdc.osd.mil/>) to determine the defendant's federal military service.
 - The results from my use of that website are attached.

(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certifications are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)
- The following facts support my statement as to the defendant's military service: (State how you know the defendant is or is not in the military. Be specific.)
 The borrower is an 86 year old man who is retired and lives in Advanced Care Nursing facility in Faketown, NC

Not in Military – Things to Consider

- SCRA
 - Definition of military service
 - Facts supporting statement not in military service (i.e. DOD search or personal knowledge)
- GS 45-21.12A
 - Definition of military service (same as SCRA)
 - **Certification not currently in service plus previous 90 days**
 - Plus facts supporting statement (i.e. DOD search or personal knowledge)
- NC SCRA
 - Definition of military service – **extended protections for state service**
 - Plus facts supporting statement not in military service (**DOD search insufficient** – need other facts)

44

Remember

Caution: Q1 on the G-250 only tells you about **current** military service status.

GS 45-21.12A (Power of Sale **Barred**)

The clerk **shall not conduct a hearing pursuant to G.S. 45-21.16(d)** unless the mortgagee, trustee or other creditor....files with the clerk a **certification** that the hearing will take place at a time that is not during, **or within 90 days after, a period of military service** for the mortgagor, trustor or debtor.

G.S. 45-21.12A

45

G.S. 45-21.12A, Art. 4, Ch. 45-21.12A-495

NOTE: Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

- As of the current date: (check one of the following)
 - a. I have personal knowledge that the defendant named above is in military service.*
 - b. I have personal knowledge that the defendant named above is **not** in military service.*
 - c. I am unable to determine whether the defendant named above is in military service.*
- As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).
- I used did not use the Servicemembers Civil Relief Act Website (<https://scra.dmdc.osd.mil/>) to determine the defendant's federal military service.
 The results from my use of that website are attached.
(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will **not appear in the SCRA Website database.)**
- The following facts support my statement as to the defendant's military service: (State how you know the defendant is or is not in the military. Be specific.)
The borrower is an 86 year old man who is retired and lives in Advanced Care Nursing Facility in ~~Faketown~~, NC.

I hereby certify that the hearing will take place at a time that is not during, or within 90 days after, a period of military service for the defendant.

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Case #4: Authorize or Not Authorize

Substitute Trustee files the following:

AFFIDAVIT AS TO NON-MILITARY SERVICE
[for judicial foreclosure actions]

The undersigned, first being duly sworn, deposes and says:

1. I am the Collections Officer for [REDACTED] Credit Union.
2. I make this affidavit based upon my review of the attached true copy(ies) of the Military Status Report(s), through an on-line search of the information data banks of the Department of Defense Manpower Data Center, an on-line service provided by the Department of Defense for ascertaining the military status of individuals.
3. As reflected in the Military Status Report, [REDACTED] is (are) not currently, and for the 367 days preceding the date of the Report, has (have) not been, on active duty status in any branch of the Uniformed Services of the United States Military.
4. Furthermore, I have not received any written or electronic military orders from [REDACTED] pursuant to N.C.G.S § 127B-28(b).

FURTHER AFFIANT SAYETH NOT

47

Substitute Trustee files the following:

AFFIDAVIT AS TO NON-MILITARY SERVICE
[for judicial foreclosure actions]

The undersigned, first being duly sworn, deposes and says:

1. I am the Collections Officer for [REDACTED] Credit Union.
2. I make this affidavit based upon my review of the attached true copy(ies) of the Military Status Report(s), through an on-line search of the information data banks of the Department of Defense Manpower Data Center, an on-line service provided by the Department of Defense for ascertaining the military status of individuals.
3. As reflected in the Military Status Report, [REDACTED] is (are) not currently, and for the 367 days preceding the date of the Report, has (have) not been, on active duty status in any branch of the Uniformed Services of the United States Military.
4. Furthermore, I have not received any written or electronic military orders from [REDACTED] pursuant to N.C.G.S § 127B-28(b).

FURTHER AFFIANT SAYETH NOT

Not in Military – Things to Consider

- SCRA
 - Definition of military service
 - Facts supporting statement not in military service (i.e. DOD search or personal knowledge)
- GS 45-21.12A
 - Definition of military service (same as SCRA)
 - Certification not currently in service plus previous 90 days
 - Plus facts supporting statement (i.e. DOD search or personal knowledge)
- NC SCRA
 - Definition of military service – **extended protections for state service**
 - Plus facts supporting statement not in military service (**DOD search insufficient** –need other facts)

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Case #5: Authorize or Not Authorize

Substitute Trustee files the following:

AFFIDAVIT OF CERTIFICATION AS TO MILITARY SERVICE

██████████, being of lawful age and being first duly sworn on oath, states and deposes as follows:

1. I am a legal assistant at ██████████
2. On October 23, 2020, I personally conducted an online search through the Department of Defense Manpower Data Center at <https://www.dmdc.osd.mil/scra/owa/home>, which indicated that ██████████ was not in the military service of the United States as of the date I conducted the search and had not been in the military service of the United States during the ninety (90) days prior to my conduct of the search. A true and accurate copy of the printout of the online search results from the Department of Defense Manpower Data Center is attached hereto.

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Substitute Trustee files the following:

AFFIDAVIT OF CERTIFICATION AS TO MILITARY SERVICE

██████████, being of lawful age and being first duly sworn on oath, states and deposes as follows:

1. I am a legal assistant at ██████████
2. On October 23, 2020, I personally conducted an online search through the Department of Defense Manpower Data Center at <https://www.dmdc.osd.mil/scra/owa/home>, which indicated that ██████████ was not in the military service of the United States as of the date I conducted the search and had not been in the military service of the United States during the ninety (90) days prior to my conduct of the search. A true and accurate copy of the printout of the online search results from the Department of Defense Manpower Data Center is attached hereto.

Not in Military – Things to Consider

- SCRA
 - Definition of military service
 - Facts supporting statement not in military service (i.e. DOD search or personal knowledge)
- GS 45-21.12A
 - Definition of military service (same as SCRA)
 - **Certification not currently in service plus previous 90 days**
 - Plus facts supporting statement (i.e. DOD search or personal knowledge)
- **NC SCRA**
 - **Definition of military service – extended protections for state service**
 - **Plus facts supporting statement not in military service (DOD search insufficient –need other facts)**

50

Case #6: Authorize or Not Authorize

NOTE: *I though this form may be used in a Chapter 45 H-oreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.*

	DECLARATION	
<p>I, the undersigned Declarant, under penalty of perjury declare the following to be true:</p>		
<p>1. As of the current date: <i>(check one of the following)</i></p> <p><input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*</p> <p><input type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*</p> <p><input checked="" type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*</p>		
<p>2. As of the current date, I <input type="checkbox"/> have <input checked="" type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. <i>See G.S. 127B-27 and G.S. 127B-28(b).</i></p>		
<p>3. I <input type="checkbox"/> used <input checked="" type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.</p> <p><input type="checkbox"/> The results from my use of that website are attached.</p> <p>(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)</p>		
<p>4. The following facts support my statement as to the defendant's military service: <i>(State how you know the defendant is or is not in the military. Be specific.)</i></p> <div style="background-color: #e0e0ff; height: 40px; width: 100%;"></div>		

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DOD Database

Department of Defense Manpower Data Center

Results as of : Jan-21-2020 03:09:35 PM

SCRA 5.3



Status Report Pursuant to Servicemembers Civil Relief Act

SSN:
 Birth Date: Mar-XX-1981
 Last Name: SMITH
 First Name:
 Middle Name:
 Status As Of: Jan-21-2020

On Active Duty On Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
BASED ON THE PERSONAL INFORMATION YOU PROVIDED, THERE ARE MULTIPLE RECORDS; ACCORDINGLY, DMDC CANNOT DEFINITELY IDENTIFY THE INDIVIDUAL AND IS UNABLE TO RELEASE ANY INFORMATION. WE STRONGLY RECOMMEND IN THIS CASE THAT YOU CALL THE SERVICE SCRA FOR ADDITIONAL VERIFICATION. A URL FOR THE SERVICE SCRA POINTS-OF-CONTACT IS PROVIDED BELOW.			

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NOTE: Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A

AFFIDAVIT

I, the undersigned Affiant, under penalty of perjury declare the following to be true:

- As of the current date: (check one of the following)
 - a. I have personal knowledge that the defendant named above is in military service.*
 - b. I have personal knowledge that the defendant named above is **not** in military service.*
 - c. I am unable to determine whether the defendant named above is in military service.*
- As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).
- I used did not use the Servicemembers Civil Relief Act Website (<https://scra.dmdc.osd.mil/>) to determine the defendant's federal military service.
 The results from my use of that website are attached.
(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will **not** appear in the SCRA Website database.)
- The following facts support my statement as to the defendant's military service: (State how you know the defendant is or is not in the military. Be specific.)

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Case #7: Authorize or Not Authorize

9

G.S. CH. 127B, ART. 4, 50 U.S.C. 3501 (b) 4-4-03

NOTE: Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

- As of the current date: (check one of the following)
 - a. I have personal knowledge that the defendant named above is in military service.*
 - b. I have personal knowledge that the defendant named above is **not** in military service.*
 - c. I am unable to determine whether the defendant named above is in military service.*
- As of the current date, I have have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).
- I used did not use the Servicemembers Civil Relief Act Website (<https://scra.dmdc.osd.mil/>) to determine the defendant's federal military service.
 The results from my use of that website are attached.
(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will **not** appear in the SCRA Website database.)
- The following facts support my statement as to the defendant's military service: (State how you know the defendant is or is not in the military. Be specific.)
|

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Status Report
Pursuant to Servicemembers Civil Relief Act

SSN:
Birth Date: May-XX-1996
Last Name: MCKEE
First Name:
Middle Name:
Status As Of: Jan-21-2020
Certificate ID: S5NV0D4MZZD198W

DOD
Database
shows on
active duty

On Active Duty On Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
Aug-12-2019	Still Serving	Yes	Army National Guard
This response reflects the individuals' active duty status based on the Active Duty Status Date			
Left Active Duty Within 367 Days of Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects where the individual left active duty status within 367 days preceding the Active Duty Status Date			

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Foreclosure Hearing: Evidence to Authorize

If an affidavit states that the action is filed **during, or within one year after**, a servicemember's period of military service, court may authorize if **waiver** of G.S. 45-21.12A, SCRA, and the NC SCRA protections that complies with G.S. 45-21.12A(b) and 50 U.S.C. sec. 3918.

56

Waiver of Rights under SCRA, NCSCRA, and NC Law

Waiver must be pursuant to a written agreement of the parties that

1. Is executed during or after the mortgagor's, trustor's, or debtor's period of military service,
2. Is an instrument separate from the obligation or liability to which the waiver applies,
3. In at least 12-point type
4. Specifies the legal instrument creating the obligation or liability to which the waiver applies.

G.S. 45-21.12A(b)

G.S. 127B-28

50 U.S.C. sec. 3918

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Case #8: Authorize or Not Authorize

10

Mortgagor, trustor, or debtor does not make an appearance.

Affidavit says in active military service but **obligation arose during a period of military service** therefore the protections of 50 U.S.C. sec. 3953 and G.S. 45-21.12A do not apply.

- May court authorize foreclosure?

See 50 U.S.C. sec. 3931...

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SCRA: The First Layer (Sec. 3931)

Affidavit says currently in military service + did not make an appearance:

The court may not enter a judgment until after the **court appoints an attorney** to represent the defendant.

50 U.S.C. sec. 3931(b)(2).

The court shall grant a **stay** of proceedings for a minimum period of 90 days upon application of counsel, or on the court's own motion, if the court determines that

1. there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or
2. after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

50 U.S.C. sec. 3931(d).

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Case #9: Authorize or Not Authorize

Affidavit of Military Status + DOD Database Search Results

The undersigned, being of lawful and first being duly sworn, deposes and says:

1. I am a certified paralegal with John Doe Law Firm, PLLC.
2. Prior to the filing of this action, a search was conducted of the database maintained by the Department of Defense Manpower Data Center to determine if the Respondent in this action is in the United States Military Service. No listing was found for the Respondent. Attached are the results from this search.
3. Upon information and belief and based on the attached record, the Respondent is not in military service as defined by the Servicemembers Civil Relief Act.
4. I hereby certify that a hearing will not take place at a time during, or within 90 days after, a period of military service for the mortgagor, trustor, or debtor.
5. I am unable to determine whether the Respondent is in military service under the North Carolina Servicemembers Civil Relief Act.

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Trustee files Affidavit of Military Status + DOD Database Search Results

11

The undersigned, being of lawful and first being duly sworn, deposes and says:

1. I am a certified paralegal with John Doe Law Firm, PLLC.
2. Prior to the filing of this action, a search was conducted of the database maintained by the Department of Defense Manpower Data Center to determine if the Respondent in this action is in the United States Military Service. No listing was found for the Respondent. Attached are the results from this search.
3. Upon information and belief and based on the attached record, the Respondent is not in military service as defined by the Servicemembers Civil Relief Act.
4. I hereby certify that a hearing will not take place at a time during, or within 90 days after, a period of military service for the mortgagor, trustor, or debtor.
5. I am unable to determine whether the Respondent is in military service under the North Carolina Servicemembers Civil Relief Act.

- SCRA
 - Definition of military service
 - Facts supporting statement not in military service (i.e. DOD search or personal knowledge)
- GS 45-21.12A
 - Definition of military service (same as SCRA)
 - Certification not currently in service plus previous 90 days
 - Plus facts supporting statement (i.e. DOD search or personal knowledge)
- NC SCRA
 - Unable to determine – that’s ok!
 - Clerk to consider bond under Section 3931(b)(3)

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NC SCRA Incorporates SCRA Sec. 3931

If the defendant **does not appear**, court shall require an affidavit from the plaintiff stating whether the defendant is:

1. In military service + necessary facts to support – **STOP AND ACT!**
 - Must appoint counsel (50 U.S.C. sec. 3931(b)(2)), and
 - Consider stay (50 U.S.C. sec. 3931(d))
2. Unable to determine – **CAUTION, BUT GO**
 - Consider bond to compensate, or
 - Consider other order to protect rights
3. Not in military service + necessary facts to support – **KEEP TRUCKIN’**

50 U.S.C. sec. 3931

Refer to: *On the Civil Side* Blog, Cheryl Howell, dated February 13, 2015.

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**Determining Military Service Status in
Power of Sale Foreclosure Proceedings Before the Clerk**

Breakout Instructions

1. Identify one person to be the recorder and another person to report out the group answers
2. Use the time to complete as many problems as possible. We will discuss the results and ask for volunteers to discuss your group's responses.
3. Focus on the content of the documents and for each case problem answer the following questions:
 - a. **Would you authorize the foreclosure sale based on the information presented?**
 - b. **If you authorize the sale, identify what elements in each document that satisfy the requirements of (i) the SCRA, (ii) the NCSCRA, and (iii) G.S. 45-21.12A.**
 - c. **If you do not authorize the sale, identify what is missing based on the requirements of (i) the SCRA, (ii) the NCSCRA, and (iii) G.S. 45-21.12A.**

Case Problems for Breakout Sessions

Case Problem #1

Trustee files the following documents as evidence of the debtor’s/mortgagor’s military service status:

AOC-G-250 Declaration

	G.S. CH. 127B, ART. 4, §§ 127B-27 TO 127B-28
NOTE: Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.	
DECLARATION	
<p>I, the undersigned Declarant, under penalty of perjury declare the following to be true:</p> <p>1. As of the current date: <i>(check one of the following)</i></p> <p><input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*</p> <p><input checked="" type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*</p> <p><input type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*</p> <p>2. As of the current date, I <input type="checkbox"/> have <input checked="" type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).</p> <p>3. I <input checked="" type="checkbox"/> used <input type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant’s federal military service.</p> <p><input checked="" type="checkbox"/> The results from my use of that website are attached.</p> <p><small>(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)</small></p> <p>4. The following facts support my statement as to the defendant’s military service: <i>(State how you know the defendant is or is not in the military. Be specific.)</i></p> <div style="background-color: #e0e0ff; height: 150px; width: 100%;"></div>	

[Assume DOD database search results are attached to the affidavit and they show that the debtor/mortgagor is not in military service or within 367 days of military service. The respondent did not make an appearance in the proceeding.]

Trustee Certification

On August 1, 2022, I personally conducted an online search through the Department of Defense Manpower Data Center which indicated the respondent was not in military service and was not in military service during the 90 days prior to my search. I, trustee, hereby certify the foreclosure hearing will take place at a time that is not during, or within 90 days after, a period of military service for the mortgagor, trustor or debtor.

/s/ Trustee

Case Problem #2

Trustee files the following "Affidavit Regarding Military Service" as evidence of the debtor's/mortgagor's military service status:

Affidavit Regarding Military Service

[REDACTED] (Affiant) in her capacity as Trustee, on oath, states the following:

1. I have personal knowledge of the facts stated herein and give this affidavit based upon such personal knowledge.
2. I make this affidavit with respect to the foreclosure of a claim of lien in favor of Petitioner against the above-referenced property owned by Respondent.
3. Petitioner is the secured party to the above-captioned claim of lien.
To the best of my knowledge and belief, Respondent [REDACTED] is not a member of the Armed Forces of the United States of America and that this hearing will not take place during, or within one (1) year thereafter, a period of military service for Respondent.
4. To confirm the above, I have searched the online records of the Department of Defense Manpower Data Center using the social security number, date of birth and name of said Respondent (copy of search results attached).
5. Based on the results of my search as defined herein, foreclosure of this real property will not be subject to the provisions of 50 U.S.C. 3901, et seq. (the Servicemembers Civil Relief Act) or N.C.G.S. §45-21.12A. *ll* *—* *∧*

[Assume DOD database search results are attached to the affidavit and they show that the respondent is not in military service or within 367 days of military service. The respondent did not make an appearance in the proceeding.]

Case Problem #3

Trustee files the following document as evidence of the debtor's/mortgagor's military service status:

AOC-G-250

NOTE: <i>Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.</i>	
DECLARATION	
I, the undersigned Declarant, under penalty of perjury declare the following to be true:	
1. As of the current date: <i>(check one of the following)</i>	
<input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*	
<input checked="" type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*	
<input type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*	
2. As of the current date, I <input type="checkbox"/> have <input checked="" type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).	
3. I <input type="checkbox"/> used <input checked="" type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.	
<input type="checkbox"/> The results from my use of that website are attached.	
(NOTE: <i>The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.</i>	
4. The following facts support my statement as to the defendant's military service: <i>(State how you know the defendant is or is not in the military. Be specific.)</i>	
The borrower is an 86 year old man who is retired and lives in Advanced Care Nursing facility in <u>Faketown, NC.</u>	

[The respondent did not make an appearance in the proceeding.]

Case Problem #4

Trustee files the following document as evidence of the debtor's/mortgagor's military service status:

AFFIDAVIT AS TO NON-MILITARY SERVICE

[for judicial foreclosure actions]

The undersigned, first being duly sworn, deposes and says:

1. I am the Collections Officer for [REDACTED] Credit Union.
2. I make this affidavit based upon my review of the attached true copy(ies) of the Military Status Report(s), through an on-line search of the information data banks of the Department of Defense Manpower Data Center, an on-line service provided by the Department of Defense for ascertaining the military status of individuals.
3. As reflected in the Military Status Report, [REDACTED] is (are) not currently, and for the 367 days preceding the date of the Report, has (have) not been, on active duty status in any branch of the Uniformed Services of the Unites States Military.
4. Furthermore, I have not received any written or electronic military orders from [REDACTED] pursuant to N.C.G.S § 127B-28(b).

FURTHER AFFIANT SAYETH NOT

[Assume DOD search results are attached to the affidavit and they show that the respondent is not in military service or within 367 days of military service. The respondent did not make an appearance in the proceeding.]

Case Problem #5

Trustee files the following document as evidence of the debtor's/mortgagor's military service status:

AFFIDAVIT OF CERTIFICATION AS TO MILITARY SERVICE

██████████, being of lawful age and being first duly sworn on oath, states and deposes as follows:

1. I am a legal assistant at ██████████
2. On October 23, 2020, I personally conducted an online search through the Department of Defense Manpower Data Center at <https://www.dmdc.osd.mil/scra/owa/home>, which indicated that ██████████ was not in the military service of the United States as of the date I conducted the search and had not been in the military service of the United States during the ninety (90) days prior to my conduct of the search. A true and accurate copy of the printout of the online search results from the Department of Defense Manpower Data Center is attached hereto.

[Assume DOD search results are attached to the affidavit and they show that the respondent is not in military service or within 367 days of military service. The respondent did not make an appearance in the proceeding.]

Case Problem #6

Trustee files the following document as evidence of the debtor's/mortgagor's military service status:

NOTE: *Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.*

DECLARATION	
<p>I, the undersigned Declarant, under penalty of perjury declare the following to be true:</p> <ol style="list-style-type: none">As of the current date: <i>(check one of the following)</i><ol style="list-style-type: none"><input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*<input type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*<input checked="" type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*As of the current date, I <input type="checkbox"/> have <input checked="" type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).I <input type="checkbox"/> used <input checked="" type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service. <input type="checkbox"/> The results from my use of that website are attached. (NOTE: <i>The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.</i>)The following facts support my statement as to the defendant's military service: <i>(State how you know the defendant is or is not in the military. Be specific.)</i> <div style="background-color: #e0e0ff; height: 40px; width: 100%;"></div>	

[The respondent did not make an appearance in the proceeding.]

Case Problem #7

The respondent did not make an appearance in the proceeding. Trustee files the following document as evidence of the debtor's/mortgagor's military service status:

G.S. Ch. 127B, Art. 4, 50 U.S.C. 3901 to 4043

NOTE: Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.

DECLARATION
<p>I, the undersigned Declarant, under penalty of perjury declare the following to be true:</p> <p>1. As of the current date: <i>(check one of the following)</i></p> <p><input checked="" type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*</p> <p><input type="checkbox"/> b. I have personal knowledge that the defendant named above is not in military service.*</p> <p><input type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*</p> <p>2. As of the current date, I <input type="checkbox"/> have <input checked="" type="checkbox"/> have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).</p> <p>3. I <input checked="" type="checkbox"/> used <input type="checkbox"/> did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.</p> <p><input checked="" type="checkbox"/> The results from my use of that website are attached.</p> <p><i>(NOTE: The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.)</i></p> <p>4. The following facts support my statement as to the defendant's military service: <i>(State how you know the defendant is or is not in the military. Be specific.)</i></p> <p> </p>

Department of Defense Manpower Data Center

Results as of : Jan-21-2020 03:16:00 PM

SCRA 5.3



**Status Report
Pursuant to Servicemembers Civil Relief Act**

SSN:

Birth Date: May-XX-1996

Last Name: MCKEE

First Name:

Middle Name:

Status As Of:

Certificate ID: S5NV0D4MZZD198W

On Active Duty On Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
Aug-12-2019	Still Serving	Yes	Army National Guard
This response reflects the individuals' active duty status based on the Active Duty Status Date			

Left Active Duty Within 367 Days of Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects where the individual left active duty status within 367 days preceding the Active Duty Status Date			

Case Problem #8

Debtor/mortgagor does not make an appearance at the foreclosure hearing.

Affidavit filed by the trustee says that the debtor/mortgagor is in active military service but **obligation arose during a period of military service** therefore the protections of the SCRA, the NCSCRA, and G.S. 45-21.12A do not apply. The trustee does not file anything else related to the mortgagor/debtor's military service.

- May court authorize foreclosure?

Case Problem #9

Debtor/mortgagor does not make an appearance at the foreclosure hearing.

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
BEFORE THE CLERK OF SUPERIOR COURT
19 SP 8001

IN THE MATTER OF THE FORECLOSURE OF A)
DEED OF TRUST EXECUTED BY)
NICOLE BRINKLEY DATED SEPTEMBER 9, 2011)
AND RECORDED IN BOOK 9876 AT PAGE 321,)
WAKE COUNTY REGISTRY)

AFFIDAVIT OF MILITARY STATUS

The undersigned, being of lawful and first being duly sworn, deposes and says:

1. I am a certified paralegal with John Doe Law Firm, PLLC.
2. Prior to the filing of this action, a search was conducted of the database maintained by the Department of Defense Manpower Data Center to determine if the Respondent in this action is in the United States Military Service. No listing was found for the Respondent. Attached are the results from this search.
3. Upon information and belief and based on the attached record, the Respondent is not in military service as defined by the Servicemembers Civil Relief Act.
4. I hereby certify that a hearing will not take place at a time during, or within 90 days after, a period of military service for the mortgagor, trustor, or debtor.
5. I am unable to determine whether the Respondent is in military service under the North Carolina Servicemembers Civil Relief Act.

This the 30th day of July, 2022.

Jane Jackson

Sworn to and subscribed before me

This _____ day of July, 2022.

Julie Blue, Notary Public

My Commission Expires: _____

Department of Defense Manpower Data Center

Results as of : Nov-09-2020 08:01:37 PM

SCRA 5.6



Status Report
Pursuant to Servicemembers Civil Relief Act

SSN:

Birth Date: Oct-XX-1973
Last Name: BRINKLEY
First Name: NICOLE
Middle Name: NEWMAN
Status As Of: Nov-09-2020
Certificate ID: RWWDX2S3Z7RLNJY

On Active Duty On Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects the individuals' active duty status based on the Active Duty Status Date			

Left Active Duty Within 367 Days of Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects where the individual left active duty status within 367 days preceding the Active Duty Status Date			

The Member or His/Her Unit Was Notified of a Future Call-Up to Active Duty on Active Duty Status Date			
Order Notification Start Date	Order Notification End Date	Status	Service Component
NA	NA	No	NA
This response reflects whether the individual or his/her unit has received early notification to report for active duty			

Upon searching the data banks of the Department of Defense Manpower Data Center, based on the information that you provided, the above is the status of the individual on the active duty status date as to all branches of the Uniformed Services (Army, Navy, Marine Corps, Air Force, NOAA, Public Health, and Coast Guard). This status includes information on a Servicemember or his/her unit receiving notification of future orders to report for Active Duty. HOWEVER, WITHOUT A SOCIAL SECURITY NUMBER, THE DEPARTMENT OF DEFENSE MANPOWER DATA CENTER CANNOT AUTHORITATIVELY ASSERT THAT THIS IS THE SAME INDIVIDUAL THAT YOUR QUERY REFERS TO. NAME AND DATE OF BIRTH ALONE DO NOT UNIQUELY IDENTIFY AN INDIVIDUAL.

Michael V. Sorrento, Director
Department of Defense - Manpower Data Center
400 Gigling Rd.
Seaside, CA 93955

§ 45-21.12A. Power of sale barred during periods of military service.

(a) Power of Sale Barred. – A mortgagee, trustee, or other creditor shall not exercise a power of sale contained in a mortgage or deed of trust, or provided by statute, during, or within 90 days after, a mortgagor's, trustor's, or debtor's period of military service. The clerk of court shall not conduct a hearing pursuant to G.S. 45-21.16(d) unless the mortgagee, trustee or other creditor seeking to exercise a power of sale under a mortgage or deed of trust, or provided by statute, files with the clerk a certification that the hearing will take place at a time that is not during, or within 90 days after, a period of military service for the mortgagor, trustor or debtor. This subsection applies only to mortgages and deeds of trust that originated before the mortgagor's or trustor's period of military service.

(b) Waiver. – This section shall not apply if the mortgagor, trustor, or debtor waives his or her rights under this section pursuant to a written agreement of the parties executed during or after the mortgagor's, trustor's, or debtor's period of military service, as an instrument separate from the obligation or liability to which the waiver applies. Any waiver in writing of a right or protection provided by this section must be in at least 12 point type and shall specify the legal instrument creating the obligation or liability to which the waiver applies.

(c) Purpose. – The purpose of this section is to supplement and complement the provisions of the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501, et seq., and to afford greater peace and security for persons in federal active duty.

(d) Definitions. – The following definitions apply in this section:

(1) Military service. –

a. In the case of a member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard:

1. Active duty, as defined in 10 U.S.C. § 101(d)(1), and
2. In the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under 32 U.S.C. § 502(f), for purposes of responding to a national emergency declared by the President and supported by federal funds.

b. In the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service, and

c. Any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) Period of military service. – The period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service.

(3) Servicemember. – A member of the United States Army, Navy, Air Force, Marine Corps, Coast Guard, the commissioned corps of the National Oceanic and Atmospheric Administration, or the commissioned corps of the Public Health Service. (2010-190, s. 1; 2011-183, s. 127(b).)

50 USC Ch. 50: SERVICEMEMBERS CIVIL RELIEF

From Title 50—WAR AND NATIONAL DEFENSE

CHAPTER 50—SERVICEMEMBERS CIVIL RELIEF

- Sec.
3901. Short title.
3902. Purpose.

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3913. Protection of persons secondarily liable.
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3915. Notification of benefits.
3916. Information for members of the Armed Forces and their dependents on rights and protections of the Servicemembers Civil Relief Act.
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- 3995. Mineral permits and leases.
- 3996. Perfection or defense of rights.
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SUBCHAPTER VI—ADMINISTRATIVE REMEDIES

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- 4021. Anticipatory relief.
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- 4023. Professional liability protection.
- 4024. Health insurance reinstatement.
- 4025. Guarantee of residency for military personnel and spouses of military personnel.
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SUBCHAPTER VIII—CIVIL LIABILITY

- 4041. Enforcement by the Attorney General.
- 4042. Private right of action.
- 4043. Preservation of remedies.

EDITORIAL NOTES

CODIFICATION

The Servicemembers Civil Relief Act, comprising this chapter, was originally enacted as act Oct. 17, 1940, ch. 888, 54 Stat. 1178, known as the Soldiers' and Sailors' Civil Relief Act of 1940, and amended by acts Oct. 6, 1942, ch. 581, 56 Stat. 769; July 3, 1944, ch. 397, 58 Stat. 722; Apr. 3, 1948, ch. 170, 62 Stat. 160; June 23, 1952, ch. 450, 66 Stat. 151; July 11, 1956, ch. 570, 70 Stat. 528; Pub. L. 85–857, Sept. 2, 1958, 72 Stat. 1105; Pub. L. 86–721, Sept. 8, 1960, 74 Stat. 820; Pub. L. 87–771, Oct. 9, 1962, 76 Stat. 768; Pub. L. 89–358, Mar. 3, 1966, 80 Stat. 12; Pub. L. 92–540, Oct. 24, 1972, 86 Stat. 1074; Pub. L. 102–12, Mar. 18, 1991, 105 Stat. 34; Pub. L. 104–106, Feb. 10, 1996, 110 Stat. 186; Pub. L. 107–107, Dec. 28, 2001, 115 Stat. 1012; Pub. L. 107–330, Dec. 6, 2002, 116 Stat. 2820. Sections of the act Oct. 17, 1940, are shown herein, however, as having been added by Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2835, without reference to the intervening amendments listed above because of the extensive revision of act Oct. 17, 1940, by Pub. L. 108–189.

Act Oct. 17, 1940, ch. 888, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2835, comprising this chapter, was formerly set out in the Appendix to this title, prior to the elimination of the Appendix to this title and the editorial reclassification of the Act as this chapter. For disposition of sections of the former Appendix to this title, see Table II, set out preceding section 1 of this title.

§3901. Short title

This chapter may be cited as the "Servicemembers Civil Relief Act".
(Oct. 17, 1940, ch. 888, §1(a), as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2835.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 501 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 1 of act [Oct. 17, 1940, ch. 888](#), 54 Stat. 1178, provided that this Act could be cited as the Soldiers' and Sailors' Relief Act of 1940, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Pub. L. 108–189, [§3, Dec. 19, 2003](#), 117 Stat. 2866, provided that: "The amendment made by section 1 [enacting this chapter] shall apply to any case that is not final before the date of the enactment of this Act [Dec. 19, 2003]."

SHORT TITLE OF 2021 AMENDMENT

Pub. L. 116–285, [§1, Jan. 5, 2021](#), 134 Stat. 4878, provided that: "This Act [amending section 3956 of this title] may be cited as the 'Protecting Families of Fallen Servicemembers Act'."

SHORT TITLE OF 2016 AMENDMENT

Pub. L. 114–142, [§1, Mar. 31, 2016](#), 130 Stat. 326, provided that: "This Act [amending section 3953 of this title and provisions set out as notes under section 3953 of this title] may be cited as the 'Foreclosure Relief and Extension for Servicemembers Act of 2015'."

SHORT TITLE OF 2014 AMENDMENT

Pub. L. 113–286, [§1, Dec. 18, 2014](#), 128 Stat. 3093, provided that: "This Act [amending provisions set out as notes under section 3953 of this title] may be cited as the 'Foreclosure Relief and Extension for Servicemembers Act of 2014'."

SHORT TITLE OF 2010 AMENDMENT

Pub. L. 111–346, [§1, Dec. 29, 2010](#), 124 Stat. 3622, provided that: "This Act [amending provisions set out as a note under section 3953 of this title] may be cited as the 'Helping Heroes Keep Their Homes Act of 2010'."

SHORT TITLE OF 2009 AMENDMENT

Pub. L. 111–97, [§1, Nov. 11, 2009](#), 123 Stat. 3007, provided that: "This Act [amending sections 3998, 4001, and 4025 of this title and enacting provisions set out as notes under sections 3998, 4001, and 4025 of this title] may be cited as the 'Military Spouses Residency Relief Act'."

SHORT TITLE OF 1991 AMENDMENT

Pub. L. 102–12, [§1, Mar. 18, 1991](#), 105 Stat. 34, provided that: "This Act [see Tables for classification] may be cited as the 'Soldiers' and Sailors' Civil Relief Act Amendments of 1991'."

SHORT TITLE OF 1942 AMENDMENT

Act [Oct. 6, 1942, ch. 581, §1](#), 56 Stat. 769, provided: "That this Act [see Tables for classification] may be cited as the 'Soldiers' and Sailors' Civil Relief Act Amendments of 1942'."

§3902. Purpose

The purposes of this chapter are—

(1) to provide for, strengthen, and expedite the national defense through protection extended by this chapter to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 502 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

Provisions similar to this section were contained in section 100 of act [Oct. 17, 1940, ch. 888, art. I, 54 Stat. 1179](#), prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

SUBCHAPTER I—GENERAL PROVISIONS

§3911. Definitions

For the purposes of this chapter:

(1) Servicemember

The term "servicemember" means a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10.

(2) Military service

The term "military service" means—

(A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard—

(i) active duty, as defined in section 101(d)(1) of title 10, and

(ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32 for purposes of responding to a national emergency declared by the President and supported by Federal funds;

(B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service; and

(C) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(3) Period of military service

The term "period of military service" means the period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service.

(4) Dependent

The term "dependent", with respect to a servicemember, means—

(A) the servicemember's spouse;

(B) the servicemember's child (as defined in section 101(4) of title 38); or

(C) an individual for whom the servicemember provided more than one-half of the individual's support for 180 days immediately preceding an application for relief under this chapter.

(5) Court

The term "court" means a court or an administrative agency of the United States or of any State (including any political subdivision of a State), whether or not a court or administrative agency of record.

(6) State

The term "State" includes—

- (A) a commonwealth, territory, or possession of the United States; and
- (B) the District of Columbia.

(7) Secretary concerned

The term "Secretary concerned"—

- (A) with respect to a member of the armed forces, has the meaning given that term in section 101(a)(9) of title 10;
- (B) with respect to a commissioned officer of the Public Health Service, means the Secretary of Health and Human Services; and
- (C) with respect to a commissioned officer of the National Oceanic and Atmospheric Administration, means the Secretary of Commerce.

(8) Motor vehicle

The term "motor vehicle" has the meaning given that term in section 30102(a)(6) of title 49.¹

(9) Judgment

The term "judgment" means any judgment, decree, order, or ruling, final or temporary.

(Oct. 17, 1940, ch. 888, title I, §101, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2836; amended Pub. L. 108–454, title VII, §701, Dec. 10, 2004, 118 Stat. 3624; Pub. L. 118–31, div. A, title XVII, §1742(c)(1), Dec. 22, 2023, 137 Stat. 681.)

EDITORIAL NOTES

REFERENCES IN TEXT

Section 30102(a)(6) of title 49, referred to in par. (8), was redesignated section 30102(a)(7) of title 49 by Pub. L. 114–94, div. B, title XXIV, §24109(b)(2), Dec. 4, 2015, 129 Stat. 1706.

CODIFICATION

Section was formerly classified to section 511 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 101 of act Oct. 17, 1940, ch. 888, art. I, 54 Stat. 1179; Pub. L. 92–540, title V, §504(1), Oct. 24, 1972, 86 Stat. 1098; Pub. L. 102–12, §9(1), Mar. 18, 1991, 105 Stat. 38; Pub. L. 107–330, title III, §305, Dec. 6, 2002, 116 Stat. 2826, related to definitions, prior to the general amendment of this Act by Pub. L. 108–189.

AMENDMENTS

2023—Par. (2)(A). Pub. L. 118–31 inserted "Space Force," after "Marine Corps," in introductory provisions.

2004—Par. (9). Pub. L. 108–454 added par. (9).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

¹ See *References in Text* note below.

§3912. Jurisdiction and applicability of chapter

(a) Jurisdiction

This chapter applies to—

- (1) the United States;
- (2) each of the States, including the political subdivisions thereof; and
- (3) all territory subject to the jurisdiction of the United States.

(b) Applicability to proceedings

This chapter applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this chapter. This chapter does not apply to criminal proceedings.

(c) Court in which application may be made

When under this chapter any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court which would otherwise have jurisdiction over the matter.

(Oct. 17, 1940, ch. 888, title I, §102, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2837.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 512 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 102 of act Oct. 17, 1940, ch. 888, art. I, 54 Stat. 1179; Pub. L. 102–12, §9(2), Mar. 18, 1991, 105 Stat. 39, related to territorial application, jurisdiction of courts, and form of procedure, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3913. Protection of persons secondarily liable

(a) Extension of protection when actions stayed, postponed, or suspended

Whenever pursuant to this chapter a court stays, postpones, or suspends (1) the enforcement of an obligation or liability, (2) the prosecution of a suit or proceeding, (3) the entry or enforcement of an order, writ, judgment, or decree, or (4) the performance of any other act, the court may likewise grant such a stay, postponement, or suspension to a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily subject to the obligation or liability the performance or enforcement of which is stayed, postponed, or suspended.

(b) Vacation or set-aside of judgments

When a judgment or decree is vacated or set aside, in whole or in part, pursuant to this chapter, the court may also set aside or vacate, as the case may be, the judgment or decree as to a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily liable on the contract or liability for the enforcement of the judgment or decree.

(c) Bail bond not to be enforced during period of military service

A court may not enforce a bail bond during the period of military service of the principal on the bond when military service prevents the surety from obtaining the attendance of the principal. The court may discharge the surety and exonerate the bail, in accordance with principles of equity and justice, during or after the period of military service of the principal.

(d) Waiver of rights

(1) Waivers not precluded

This chapter does not prevent a waiver in writing by a surety, guarantor, endorser, accommodation maker, comaker, or other person (whether primarily or secondarily liable on an obligation or liability) of the protections provided under subsections (a) and (b). Any such waiver is effective only if it is executed as an instrument separate from the obligation or liability with respect to which it applies.

(2) Waiver invalidated upon entrance to military service

If a waiver under paragraph (1) is executed by an individual who after the execution of the waiver enters military service, or by a dependent of an individual who after the execution of the waiver enters military service, the waiver is not valid after the beginning of the period of such military service unless the waiver was executed by such individual or dependent during the period specified in section 3917 of this title.

(Oct. 17, 1940, ch. 888, title I, §103, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2838.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 513 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 103 of acts [Oct. 17, 1940, ch. 888, art. I, 54 Stat. 1179](#); [Oct. 6, 1942, ch. 581, §§2, 3, 56 Stat. 769](#); [Pub. L. 102–12, §9\(3\), Mar. 18, 1991, 105 Stat. 39](#), related to protection of persons secondarily liable, prior to the general amendment of this Act by [Pub. L. 108–189](#).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of [Pub. L. 108–189](#), set out as a note under section 3901 of this title.

§3914. Extension of protections to citizens serving with allied forces

A citizen of the United States who is serving with the forces of a nation with which the United States is allied in the prosecution of a war or military action is entitled to the relief and protections provided under this chapter if that service with the allied force is similar to military service as defined in this chapter. The relief and protections provided to such citizen shall terminate on the date of discharge or release from such service.

([Oct. 17, 1940, ch. 888, title I, §104, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2839](#).)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 514 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 104 of act [Oct. 17, 1940, ch. 888, art. I, as added Oct. 6, 1942, ch. 581, §4, 56 Stat. 770](#), related to extension of benefits to citizens serving with forces of war allies, prior to the general amendment of this Act by [Pub. L. 108–189](#).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of [Pub. L. 108–189](#), set out as a note under section 3901 of this title.

§3915. Notification of benefits

The Secretary concerned shall ensure that notice of the benefits accorded by this chapter is provided in writing to persons in military service and to persons entering military service.

([Oct. 17, 1940, ch. 888, title I, §105, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2839](#).)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 515 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 105 of act Oct. 17, 1940, ch. 888, art. I, as added Oct. 6, 1942, ch. 581, §4, 56 Stat. 770; amended Pub. L. 102–12, §9(4), Mar. 18, 1991, 105 Stat. 39, related to notice of benefits to persons in and persons entering military service, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3916. Information for members of the Armed Forces and their dependents on rights and protections of the Servicemembers Civil Relief Act

(a) Outreach to members

The Secretary concerned shall provide to each member of the Armed Forces under the jurisdiction of the Secretary pertinent information on the rights and protections available to members and their dependents under the Servicemembers Civil Relief Act [50 U.S.C. 3901 et seq.].

(b) Time of provision

The information required to be provided under subsection (a) to a member shall be provided at the following times:

- (1) During the initial orientation training of the member.
- (2) In the case of a member of a reserve component, during the initial orientation training of the member and when the member is mobilized or otherwise individually called or ordered to active duty for a period of more than one year.
- (3) At such other times as the Secretary concerned considers appropriate.

(c) Outreach to dependents

The Secretary concerned may provide to the adult dependents of members under the jurisdiction of the Secretary pertinent information on the rights and protections available to members and their dependents under the Servicemembers Civil Relief Act [50 U.S.C. 3901 et seq.].

(d) Definitions

In this section, the terms "dependent" and "Secretary concerned" have the meanings given such terms in section 101 of the Servicemembers Civil Relief Act [50 U.S.C. 3911].

(Pub. L. 109–163, div. A, title VI, §690, Jan. 6, 2006, 119 Stat. 3337.)

EDITORIAL NOTES

REFERENCES IN TEXT

The Servicemembers Civil Relief Act, referred to in subsecs. (a) and (c), is act Oct. 17, 1940, ch. 888, 54 Stat. 1178, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 3901 of this title and Tables.

CODIFICATION

Section was formerly classified to section 515a of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

Section was enacted as part of the National Defense Authorization Act for Fiscal Year 2006, and not as part of the Servicemembers Civil Relief Act which comprises this chapter.

§3917. Extension of rights and protections to reserves ordered to report for military service and to persons ordered to report for induction

(a) Reserves ordered to report for military service

A member of a reserve component who is ordered to report for military service is entitled to the rights and protections of this subchapter and subchapters II and III during the period beginning on the date of the member's receipt of the order and ending on the date on which the member reports for military service (or, if the order is revoked before the member so reports, or the date on which the order is revoked).

(b) Persons ordered to report for induction

A person who has been ordered to report for induction under the Military Selective Service Act [50 U.S.C. 3801 et seq.] is entitled to the rights and protections provided a servicemember under this subchapter and subchapters II and III during the period beginning on the date of receipt of the order for induction and ending on the date on which the person reports for induction (or, if the order to report for induction is revoked before the date on which the person reports for induction, on the date on which the order is revoked).

(c) Member of the Space Force ordered to report for military service

The provisions of subsection (a) apply to a member of the Space Force who is ordered to report for military service in the same manner as to a member of a reserve component who is ordered to report for military service.

(Oct. 17, 1940, ch. 888, title I, §106, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2839; amended Pub. L. 118–31, div. A, title XVII, §1742(c)(2), Dec. 22, 2023, 137 Stat. 681.)

TERMINATION OF INDUCTION FOR TRAINING AND SERVICE

For provisions relating to termination of induction for training and service in the Armed Forces after July 1, 1973, see section 3815(c) of this title.

EDITORIAL NOTES

REFERENCES IN TEXT

The Military Selective Service Act, referred to in subsec. (b), is act [June 24, 1948, ch. 625](#), 62 Stat. 604. For complete classification of this Act to the Code, see References in Text note set out under section 3801 of this title and Tables.

CODIFICATION

Section was formerly classified to section 516 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 106 of act Oct. 17, 1940, ch. 888, art. I, as added [Oct. 6, 1942, ch. 581, §4](#), 56 Stat. 770; amended Pub. L. 102–12, [§9\(5\)](#), [Mar. 18, 1991](#), 105 Stat. 39, related to extension of benefits to persons ordered to report for induction or military service, prior to the general amendment of this Act by Pub. L. 108–189.

AMENDMENTS

2023—Subsec. (c). Pub. L. 118–31 added subsec. (c).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3918. Waiver of rights pursuant to written agreement

(a) In general

A servicemember may waive any of the rights and protections provided by this chapter. Any such waiver that applies to an action listed in subsection (b) of this section is effective only if it is in writing and is executed as an instrument separate from the obligation or liability to which it applies. In the case of a waiver that permits an action described in subsection (b), the waiver is effective only if made pursuant to a written agreement of the parties that is executed during or after the servicemember's period of military service. The written agreement shall specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned.

(b) Actions requiring waivers in writing

The requirement in subsection (a) for a written waiver applies to the following:

- (1) The modification, termination, or cancellation of—
 - (A) a contract, lease, or bailment; or
 - (B) an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage.

- (2) The repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that—
 - (A) is security for any obligation; or

(B) was purchased or received under a contract, lease, or bailment.

(c) Prominent display of certain contract rights waivers

Any waiver in writing of a right or protection provided by this chapter that applies to a contract, lease, or similar legal instrument must be in at least 12 point type.

(d) Coverage of periods after orders received

For the purposes of this section—

(1) a person to whom section 3917 of this title applies shall be considered to be a servicemember; and

(2) the period with respect to such a person specified in subsection (a) or (b), as the case may be, of section 3917 of this title shall be considered to be a period of military service.

(Oct. 17, 1940, ch. 888, title I, §107, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2839; amended Pub. L. 108–454, title VII, §702, Dec. 10, 2004, 118 Stat. 3624.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 517 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 107 of act Oct. 17, 1940, ch. 888, art. I, as added Oct. 6, 1942, ch. 581, §4, 56 Stat. 770, related to effect on rights and remedies pursuant to written agreements entered after commencement of military service, prior to the general amendment of this Act by Pub. L. 108–189.

AMENDMENTS

2004—Subsec. (a). Pub. L. 108–454, §702(1), inserted after first sentence: "Any such waiver that applies to an action listed in subsection (b) of this section is effective only if it is in writing and is executed as an instrument separate from the obligation or liability to which it applies."

Subsecs. (c), (d). Pub. L. 108–454, §702(2), (3), added subsec. (c) and redesignated former subsec. (c) as (d).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3919. Exercise of rights under chapter not to affect certain future financial transactions

Application by a servicemember for, or receipt by a servicemember of, a stay, postponement, or suspension pursuant to this chapter in the payment of a tax, fine, penalty, insurance premium, or other civil obligation or liability of that servicemember shall not itself (without regard to other considerations) provide the basis for any of the following:

(1) A determination by a lender or other person that the servicemember is unable to pay the civil obligation or liability in accordance with its terms.

(2) With respect to a credit transaction between a creditor and the servicemember—

(A) a denial or revocation of credit by the creditor;

(B) a change by the creditor in the terms of an existing credit arrangement; or

(C) a refusal by the creditor to grant credit to the servicemember in substantially the amount or on substantially the terms requested.

(3) An adverse report relating to the creditworthiness of the servicemember by or to a person engaged in the practice of assembling or evaluating consumer credit information.

(4) A refusal by an insurer to insure the servicemember.

(5) An annotation in a servicemember's record by a creditor or a person engaged in the practice of assembling or evaluating consumer credit information, identifying the servicemember as a member of the National Guard or a reserve component or as a member of the Space Force.

(6) A change in the terms offered or conditions required for the issuance of insurance.

(Oct. 17, 1940, ch. 888, title I, §108, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2840; amended Pub. L. 118–31, div. A, title XVII, §1742(c)(3), Dec. 22, 2023, 137 Stat. 681.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 518 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 108 of act Oct. 17, 1940, ch. 888, art. I, as added Pub. L. 102–12, §7, Mar. 18, 1991, 105 Stat. 38, related to the effect of certain future financial transactions on the exercise of rights, prior to the general amendment of this Act by Pub. L. 108–189.

AMENDMENTS

2023—Par. (5). Pub. L. 118–31 inserted "or as a member of the Space Force" before period at end.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3920. Legal representatives

(a) Representative

A legal representative of a servicemember for purposes of this chapter is either of the following:

- (1) An attorney acting on the behalf of a servicemember.
- (2) An individual possessing a power of attorney.

(b) Application

Whenever the term "servicemember" is used in this chapter, such term shall be treated as including a reference to a legal representative of the servicemember.

(Oct. 17, 1940, ch. 888, title I, §109, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2840.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 519 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

SUBCHAPTER II—GENERAL RELIEF

§3931. Protection of servicemembers against default judgments

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit—

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

(2) Appointment of attorney to represent defendant in military service

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

(3) Defendant's military status not ascertained by affidavit

If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this chapter.

(4) Satisfaction of requirement for affidavit

The requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.

(c) Penalty for making or using false affidavit

A person who makes or uses an affidavit permitted under subsection (b) (or a statement, declaration, verification, or certificate as authorized under subsection (b)(4)) knowing it to be false, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

(d) Stay of proceedings

In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that—

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

(e) Inapplicability of section 3932 procedures

A stay of proceedings under subsection (d) shall not be controlled by procedures or requirements under section 3932 of this title.

(f) Section 3932 protection

If a servicemember who is a defendant in an action covered by this section receives actual notice of the action, the servicemember may request a stay of proceeding under section 3932 of this title.

(g) Vacation or setting aside of default judgments

(1) Authority for court to vacate or set aside judgment

If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that—

(A) the servicemember was materially affected by reason of that military service in making a defense to the action; and

(B) the servicemember has a meritorious or legal defense to the action or some part of it.

(2) Time for filing application

An application under this subsection must be filed not later than 90 days after the date of the termination of or release from military service.

(h) Protection of bona fide purchaser

If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this chapter, that action shall not impair a right or title acquired by a bona fide purchaser for value under the default judgment.

(Oct. 17, 1940, ch. 888, title II, §201, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2840; amended Pub. L. 110–181, div. A, title V, §584(a), Jan. 28, 2008, 122 Stat. 128.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 521 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 201 of act Oct. 17, 1940, ch. 888, art. II, 54 Stat. 1181, related to stay of proceedings where military service affects conduct thereof, prior to the general amendment of this Act by Pub. L. 108–189. See section 3932 of this title.

Provisions similar to this section were contained in section 200 of act Oct. 17, 1940, ch. 888, art. II, 54 Stat. 1180; Pub. L. 86–721, §§1, 2, Sept. 8, 1960, 74 Stat. 820, prior to the general amendment of this Act by Pub. L. 108–189.

AMENDMENTS

2008—Subsec. (a). Pub. L. 110–181 inserted ", including any child custody proceeding," after "proceeding".

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3932. Stay of proceedings when servicemember has notice

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section—

- (1) is in military service or is within 90 days after termination of or release from military service; and
- (2) has received notice of the action or proceeding.

(b) Stay of proceedings

(1) Authority for stay

At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.

(2) Conditions for stay

An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

(c) Application not a waiver of defenses

An application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).

(d) Additional stay

(1) Application

A servicemember who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear. Such an application may be made by the servicemember at the time of the initial application under subsection (b) or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required under subsection (b)(2) shall be included in an application under this subsection.

(2) Appointment of counsel when additional stay refused

If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.

(e) Coordination with section 3931

A servicemember who applies for a stay under this section and is unsuccessful may not seek the protections afforded by section 3931 of this title.

(f) Inapplicability to section 3951

The protections of this section do not apply to section 3951 of this title.

(Oct. 17, 1940, ch. 888, title II, §202, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2842; amended Pub. L. 108–454, title VII, §703, Dec. 10, 2004, 118 Stat. 3624; Pub. L. 110–181, div. A, title V, §584(b), Jan. 28, 2008, 122 Stat. 128.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 522 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 202 of act [Oct. 17, 1940, ch. 888, art. II](#), 54 Stat. 1181, related to fines and penalties on contracts, prior to the general amendment of this Act by Pub. L. 108–189. See section 3933 of this title.

AMENDMENTS

2008—Subsec. (a). Pub. L. 110–181 inserted ", including any child custody proceeding," after "civil action or proceeding" in introductory provisions.

2004—Subsec. (a). Pub. L. 108–454 inserted "plaintiff or" before "defendant" in introductory provisions.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

STAY OF JUDICIAL PROCEEDINGS

Pub. L. 102–12, §6, [Mar. 18, 1991](#), 105 Stat. 37, provided that:

"(a) **STAY OF ACTION OR PROCEEDING.**—In any judicial action or proceeding (other than a criminal proceeding) in which a member of the Armed Forces described in subsection (b) is involved (either as plaintiff or defendant), the court shall, upon application by such member (or some other person on the member's behalf) at any stage before final judgment is entered, stay the action or proceeding until a date after June 30, 1991.

"(b) **MEMBERS COVERED.**—A member of the Armed Forces is covered by subsection (a) if at the time of application for the stay of a judicial action or proceeding the member—

"(1) is on active duty; and

"(2) is serving outside the State in which the court having jurisdiction over the action or proceeding is located.

"(c) **DEFINITION.**—For purposes of this section, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam."

§3933. Fines and penalties under contracts

(a) Prohibition of penalties

When an action for compliance with the terms of a contract is stayed pursuant to this chapter, a penalty shall not accrue for failure to comply with the terms of the contract during the period of the stay.

(b) Reduction or waiver of fines or penalties

If a servicemember fails to perform an obligation arising under a contract and a penalty is incurred arising from that nonperformance, a court may reduce or waive the fine or penalty if—

- (1) the servicemember was in military service at the time the fine or penalty was incurred; and
- (2) the ability of the servicemember to perform the obligation was materially affected by such military service.

(Oct. 17, 1940, ch. 888, title II, §203, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2843.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 523 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 203 of act Oct. 17, 1940, ch. 888, art. II, 54 Stat. 1181, related to stay or vacation of execution of judgments and attachments, prior to the general amendment of this Act by Pub. L. 108–189. See section 3934 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3934. Stay or vacation of execution of judgments, attachments, and garnishments

(a) Court action upon material affect determination

If a servicemember, in the opinion of the court, is materially affected by reason of military service in complying with a court judgment or order, the court may on its own motion and shall on application by the servicemember—

- (1) stay the execution of any judgment or order entered against the servicemember; and
- (2) vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment.

(b) Applicability

This section applies to an action or proceeding commenced in a court against a servicemember before or during the period of the servicemember's military service or within 90 days after such service terminates.

(Oct. 17, 1940, ch. 888, title II, §204, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2843.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 524 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 204 of act Oct. 17, 1940, ch. 888, art. II, 54 Stat. 1181, related to duration and term of stays and codefendants not in service, prior to the general amendment of this Act by Pub. L. 108–189. See section 3935 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3935. Duration and term of stays; codefendants not in service

(a) Period of stay

A stay of an action, proceeding, attachment, or execution made pursuant to the provisions of this chapter by a court may be ordered for the period of military service and 90 days thereafter, or for any part of that period. The court may set the terms and amounts for such installment payments as is considered reasonable by the court.

(b) Codefendants

If the servicemember is a codefendant with others who are not in military service and who are not entitled to the relief and protections provided under this chapter, the plaintiff may proceed against those other defendants with the approval of the court.

(c) Inapplicability of section

This section does not apply to sections 3932 and 4021 of this title.
(Oct. 17, 1940, ch. 888, title II, §205, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2844.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 525 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 205 of act Oct. 17, 1940, ch. 888, art. II, 54 Stat. 1181; Oct. 6, 1942, ch. 581, §5, 56 Stat. 770; Pub. L. 102–12, §9(6), Mar. 18, 1991, 105 Stat. 39, related to statutes of limitations as affected by period of service, prior to the general amendment of this Act by Pub. L. 108–189. See section 3936 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3936. Statute of limitations

(a) Tolling of statutes of limitation during military service

The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

(b) Redemption of real property

A period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax, or assessment.

(c) Inapplicability to internal revenue laws

This section does not apply to any period of limitation prescribed by or under the internal revenue laws of the United States.

(Oct. 17, 1940, ch. 888, title II, §206, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2844.)

STATUTORY NOTES AND RELATED SUBSIDIARIES

CODIFICATION

Section was formerly classified to section 526 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 206 of act Oct. 17, 1940, ch. 888, art. II, as added Oct. 6, 1942, ch. 581, §6, 56 Stat. 771; amended Pub. L. 102–12, §9(7), Mar. 18, 1991, 105 Stat. 39, related to maximum rate of interest, prior to the general amendment of this Act by Pub. L. 108–189. See section 3937 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3937. Maximum rate of interest on debts incurred before military service

(a) Interest rate limitation

(1) Limitation to 6 percent

An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent—

(A) during the period of military service and one year thereafter, in the case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage; or

(B) during the period of military service, in the case of any other obligation or liability.

(2) Forgiveness of interest in excess of 6 percent

Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven.

(3) Prevention of acceleration of principal

The amount of any periodic payment due from a servicemember under the terms of the instrument that created an obligation or liability covered by this section shall be reduced by the amount of the interest forgiven under paragraph (2) that is allocable to the period for which such payment is made.

(b) Implementation of limitation

(1) Proof of military service

(A) In general

Not later than 180 days after the date of a servicemember's termination or release from military service, in order for an obligation or liability of the servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall provide to the creditor written notice and a copy of—

(i) the military orders calling the servicemember to military service and any orders further extending military service; or

(ii) any other appropriate indicator of military service, including a certified letter from a commanding officer.

(B) Independent verification by creditor

(i) In general

A creditor may use, in lieu of notice and documentation under subparagraph (A), information retrieved from the Defense Manpower Data Center through the creditor's normal business reviews of such Center for purposes of obtaining information indicating that the servicemember is on active duty.

(ii) Safe harbor

A creditor that uses the information retrieved from the Defense Manpower Data Center under clause (i) with respect to a servicemember has not failed to treat the debt of the servicemember in accordance with subsection (a) if—

(a) if—

(I) such information indicates that, on the date the creditor retrieves such information, the servicemember is not on active duty; and

(II) the creditor has not, by the end of the 180-day period under subparagraph (A), received the written notice and documentation required under that subparagraph with respect to the servicemember.

(2) Limitation effective as of date of order to active duty

Upon receipt of written notice and a copy of orders calling a servicemember to military service, the creditor shall treat the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service.

(c) Creditor protection

A court may grant a creditor relief from the limitations of this section if, in the opinion of the court, the ability of the servicemember to pay interest upon the obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of the servicemember's military service.

(d) Definitions

In this section:

(1) Interest

The term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability.

(2) Obligation or liability

The term "obligation or liability" includes an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage.

(e) Penalty

Whoever knowingly violates subsection (a) shall be fined as provided in title 18, imprisoned for not more than one year, or both.

(Oct. 17, 1940, ch. 888, title II, §207, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2844; amended Pub. L. 110–289, div. B, title II, §2203(b), July 30, 2008, 122 Stat. 2849; Pub. L. 110–389, title VIII, §807, Oct. 10, 2008, 122 Stat. 4189; Pub. L. 111–275, title III, §303(b)(1), Oct. 13, 2010, 124 Stat. 2877; Pub. L. 115–232, div. A, title V, §600, Aug. 13, 2018, 132 Stat. 1793.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 527 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 207 of act Oct. 17, 1940, ch. 888, art. II, as added Oct. 21, 1942, ch. 619, title V, §507(b)(2)(B), 56 Stat. 964, related to limitations prescribed by internal revenue laws as affected by period of service, prior to the general amendment of this Act by Pub. L. 108–189. See section 3936 of this title.

AMENDMENTS

2018—Subsec. (b)(1). Pub. L. 115–232 amended par. (1) generally. Prior to amendment, text read as follows: "In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service."

2010—Subsec. (f). Pub. L. 111–275 struck out subsec. (f). Text read as follows: "The penalties provided under subsection (e) are in addition to and do not preclude any other remedy available under law to a person claiming relief under this section, including any award for consequential or punitive damages."

2008—Subsec. (a)(1). Pub. L. 110–289, §2203(b)(1), substituted "in excess of 6 percent—" for "in excess of 6 percent per year during the period of military service." and added subpars. (A) and (B).

Subsec. (d). Pub. L. 110–289, §2203(b)(2), added subsec. (d) and struck out former subsec. (d). Prior to amendment, text read as follows: "As used in this section, the term 'interest' includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability."

Subsecs. (e), (f). Pub. L. 110–389 added subsecs. (e) and (f).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3938. Child custody protection

(a) Duration of temporary custody order based on certain deployments

If a court renders a temporary order for custodial responsibility for a child based solely on a deployment or anticipated deployment of a parent who is a servicemember, the court shall require that the temporary order shall expire not later than the period justified by the deployment of the servicemember.

(b) Limitation on consideration of member's deployment in determination of child's best interest

If a motion or a petition is filed seeking a permanent order to modify the custody of the child of a servicemember, no court may consider the absence of the servicemember by reason of deployment, or the possibility of deployment, as the sole factor in determining the best interest of the child.

(c) No Federal jurisdiction or right of action or removal

Nothing in this section shall create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal.

(d) Preemption

In any case where State law applicable to a child custody proceeding involving a temporary order as contemplated in this section provides a higher standard of protection to the rights of the parent who is a deploying servicemember than the rights provided under this section with respect to such temporary order, the appropriate court shall apply the higher State standard.

(e) Deployment defined

In this section, the term "deployment" means the movement or mobilization of a servicemember to a location for a period of longer than 60 days and not longer than 540 days pursuant to temporary or permanent official orders—

- (1) that are designated as unaccompanied;
- (2) for which dependent travel is not authorized; or
- (3) that otherwise do not permit the movement of family members to that location.

(Oct. 17, 1940, ch. 888, title II, §208, as added Pub. L. 113–291, [div. A, title V, §566\(a\)](#), [Dec. 19, 2014](#), 128 Stat. 3384.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 528 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

§3938a. Annual notice to members of the Armed Forces regarding child custody protections guaranteed by the Servicemembers Civil Relief Act

The Secretaries of each of the military departments shall ensure that each member of the Armed Forces with dependents receives annually, and prior to each deployment, notice of the child custody protections afforded to members of the Armed Forces under the Servicemembers Civil Relief Act (50 U.S.C. 3901 et seq.).

(Pub. L. 114–328, [div. A, title V, §573](#), [Dec. 23, 2016](#), 130 Stat. 2141.)

EDITORIAL NOTES

REFERENCES IN TEXT

The Servicemembers Civil Relief Act, referred to in text, is act [Oct. 17, 1940, ch. 888](#), 54 Stat. 1178, which is classified principally to this chapter. For complete classification of this Act to the Code, see Tables.

CODIFICATION

Section was enacted as part of the National Defense Authorization Act for Fiscal Year 2017, and not as part of the Servicemembers Civil Relief Act which comprises this chapter.

SUBCHAPTER III—RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS, ASSIGNMENT, LEASES, COMMUNICATIONS SERVICE CONTRACTS

EDITORIAL NOTES

CODIFICATION

Pub. L. 115-407, title III, §304(b)(2)(A), Dec. 31, 2018, 132 Stat. 5375, substituted "RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS, ASSIGNMENT, LEASES, COMMUNICATIONS SERVICE CONTRACTS" for "RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS, ASSIGNMENT, LEASES, TELEPHONE SERVICE CONTRACTS" in heading.

Pub. L. 111-275, title III, §302(b), Oct. 13, 2010, 124 Stat. 2876, inserted ", TELEPHONE SERVICE CONTRACTS" after "LEASES" in heading.

§3951. Evictions and distress

(a) Court-ordered eviction

(1) In general

Except by court order, a landlord (or another person with paramount title) may not—

(A) evict a servicemember, or the dependents of a servicemember, during a period of military service of the servicemember, from premises—

(i) that are occupied or intended to be occupied primarily as a residence; and

(ii) for which the monthly rent does not exceed \$2,400, as adjusted under paragraph (2) for years after 2003;

or

(B) subject such premises to a distress during the period of military service.

(2) Housing price inflation adjustment

(A) For calendar years beginning with 2004, the amount in effect under paragraph (1)(A)(ii) shall be increased by the housing price inflation adjustment for the calendar year involved.

(B) For purposes of this paragraph—

(i) The housing price inflation adjustment for any calendar year is the percentage change (if any) by which—

(I) the CPI housing component for November of the preceding calendar year, exceeds

(II) the CPI housing component for November of 1984.

(ii) The term "CPI housing component" means the index published by the Bureau of Labor Statistics of the Department of Labor known as the Consumer Price Index, All Urban Consumers, Rent of Primary Residence, U.S. City Average.

(3) Publication of housing price inflation adjustment

The Secretary of Defense shall cause to be published in the Federal Register each year the amount in effect under paragraph (1)(A)(ii) for that year following the housing price inflation adjustment for that year pursuant to paragraph (2). Such publication shall be made for a year not later than 60 days after such adjustment is made for that year.

(b) Stay of execution

(1) Court authority

Upon an application for eviction or distress with respect to premises covered by this section, the court may on its own motion and shall, if a request is made by or on behalf of a servicemember whose ability to pay the agreed rent is materially affected by military service—

(A) stay the proceedings for a period of 90 days, unless in the opinion of the court, justice and equity require a longer or shorter period of time; or

(B) adjust the obligation under the lease to preserve the interests of all parties.

(2) Relief to landlord

If a stay is granted under paragraph (1), the court may grant to the landlord (or other person with paramount title) such relief as equity may require.

(c) Misdemeanor

Except as provided in subsection (a), a person who knowingly takes part in an eviction or distress described in subsection (a), or who knowingly attempts to do so, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

(d) Rent allotment from pay of servicemember

To the extent required by a court order related to property which is the subject of a court action under this section, the Secretary concerned shall make an allotment from the pay of a servicemember to satisfy the terms of such order, except that any such allotment shall be subject to regulations prescribed by the Secretary concerned establishing the maximum amount of pay of servicemembers that may be allotted under this subsection.

(e) Limitation of applicability

Section 3932 of this title is not applicable to this section.

(Oct. 17, 1940, ch. 888, title III, §301, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2845; amended Pub. L. 111–275, title III, §303(b)(2), Oct. 13, 2010, 124 Stat. 2877.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 531 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 301 of act Oct. 17, 1940, ch. 888, art. III, 54 Stat. 1182; Oct. 6, 1942, ch. 581, §9(a), (c), (d), 56 Stat. 771; Pub. L. 102–12, §9(9), Mar. 18, 1991, 105 Stat. 40, related to installment contracts for purchase of property, prior to the general amendment of this Act by Pub. L. 108–189. See section 3952 of this title.

Provisions similar to this section were contained in section 300 of act Oct. 17, 1940, ch. 888, art. III, 54 Stat. 1181; Oct. 6, 1942, ch. 581, §8, 56 Stat. 771; Pub. L. 89–358, §10, Mar. 3, 1966, 80 Stat. 28; Pub. L. 102–12, §§2(a), (b), 9(8), Mar. 18, 1991, 105 Stat. 34, 39, prior to the general amendment of this Act by Pub. L. 108–189.

AMENDMENTS

2010—Subsec. (c). Pub. L. 111–275 amended subsec. (c) generally. Prior to amendment, subsec. (c) related to penalties.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3952. Protection under installment contracts for purchase or lease

(a) Protection upon breach of contract

(1) Protection after entering military service

After a servicemember enters military service, a contract by the servicemember for—

- (A) the purchase of real or personal property (including a motor vehicle); or
- (B) the lease or bailment of such property,

may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person's military service, nor may the property be repossessed for such breach without a court order.

(2) Applicability

This section applies only to a contract for which a deposit or installment has been paid by the servicemember before the servicemember enters military service.

(b) Misdemeanor

A person who knowingly resumes possession of property in violation of subsection (a), or in violation of section 3918 of this title, or who knowingly attempts to do so, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

(c) Authority of court

In a hearing based on this section, the court—

- (1) may order repayment to the servicemember of all or part of the prior installments or deposits as a condition of terminating the contract and resuming possession of the property;
- (2) may, on its own motion, and shall on application by a servicemember when the servicemember's ability to comply with the contract is materially affected by military service, stay the proceedings for a period of time as, in the opinion of the court, justice and equity require; or
- (3) may make other disposition as is equitable to preserve the interests of all parties.

(Oct. 17, 1940, ch. 888, title III, §302, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2846; amended Pub. L. 111–275, title III, §303(b)(3), Oct. 13, 2010, 124 Stat. 2878.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 532 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 302 of act Oct. 17, 1940, ch. 888, art. III, 54 Stat. 1182; Oct. 6, 1942, ch. 581, §§9(b), (c), 10, 56 Stat. 771, 772; June 23, 1952, ch. 450, 66 Stat. 151; Pub. L. 102–12, §9(9), (10), Mar. 18, 1991, 105 Stat. 40, related to mortgages and trust deeds, prior to the general amendment of this Act by Pub. L. 108–189. See section 3953 of this title.

AMENDMENTS

2010—Subsec. (b). Pub. L. 111–275 amended subsec. (b) generally. Prior to amendment, subsec. (b) related to penalties.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3953. Mortgages and trust deeds

(a) Mortgage as security

This section applies only to an obligation on real or personal property owned by a servicemember that—

- (1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and
- (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

(b) Stay of proceedings and adjustment of obligation

In an action filed during, or within one year after, a servicemember's period of military service to enforce an obligation described in subsection (a), the court may after a hearing and on its own motion and shall upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service

- (1) stay the proceedings for a period of time as justice and equity require, or
- (2) adjust the obligation to preserve the interests of all parties.

(c) Sale or foreclosure

A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within one year after, the period of the servicemember's military service except—

- (1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or
- (2) if made pursuant to an agreement as provided in section 3918 of this title.

(d) Misdemeanor

A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (c), or who knowingly attempts to do so, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

(Oct. 17, 1940, ch. 888, title III, §303, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2847; amended Pub. L. 110–289, div. B, title II, §2203(a), July 30, 2008, 122 Stat. 2849; Pub. L. 111–275, title III, §303(b)(4), Oct. 13, 2010, 124 Stat. 2878; Pub. L. 112–154, title VII, §710(a), (b), (d)(3), Aug. 6, 2012, 126 Stat. 1208; Pub. L. 115–174, title III, §313, May 24, 2018, 132 Stat. 1356.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 533 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 303 of act Oct. 17, 1940, ch. 888, art. III, as added Oct. 6, 1942, ch. 581, §12, 56 Stat. 772, related to settlement of cases involving stayed proceedings to foreclose mortgage on, resume possession of, or terminate contract for purchase of, personal property, prior to the general amendment of this Act by Pub. L. 108–189. See section 3954 of this title.

Another prior section 303 of act Oct. 17, 1940, ch. 888, art. III, 54 Stat. 1183, related to stay of action to resume possession of motor vehicle, tractor, or their accessories, encumbered by purchase money mortgage, conditional sales contract, etc., prior to repeal by act Oct. 6, 1942, ch. 581, §11, 56 Stat. 772.

AMENDMENTS

2018—Subsecs. (b), (c). Pub. L. 115–174 repealed Pub. L. 112–154, §710(d)(1), (3). See 2012 Amendment notes below.

2012—Subsecs. (b), (c). Pub. L. 112–154, §710(d)(3), as amended, which would have revived the provisions of subsecs. (b) and (c) as in effect on July 29, 2008, was repealed by Pub. L. 115–174, §313.

Pub. L. 112–154, §710(a), (b), substituted "within one year" for "within 9 months" in introductory provisions.

2010—Subsec. (d). Pub. L. 111–275 amended subsec. (d) generally. Prior to amendment, subsec. (d) related to penalties.

2008—Subsecs. (b), (c). Pub. L. 110–289 substituted "9 months" for "90 days" in introductory provisions.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE AND TERMINATION DATES OF 2012 AMENDMENT; REVIVAL

Pub. L. 112–154, title VII, §710(c), Aug. 6, 2012, 126 Stat. 1208, provided that: "The amendments made by subsections (a) and (b) [amending this section] shall take effect on the date that is 180 days after the date of the enactment of this Act [Aug. 6, 2012]."

Pub. L. 112–154, title VII, §710(d)(1), Aug. 6, 2012, 126 Stat. 1208, as amended by Pub. L. 113–286, §2(1), Dec. 18, 2014, 128 Stat. 3093; Pub. L. 114–142, §2(1), Mar. 31, 2016, 130 Stat. 326; Pub. L. 115–91, div. A, title V, §557(1), Dec. 12, 2017, 131 Stat. 1405, which provided that the amendments made by subsecs. (a) and (b) of section 710 of Pub. L. 112–154 (amending this section) would expire on Dec. 31, 2019, was repealed by Pub. L. 115–174, title III, §313, May 24, 2018, 132 Stat. 1356.

Pub. L. 112–154, title VII, §710(d)(3), Aug. 6, 2012, 126 Stat. 1208, as amended by Pub. L. 113–286, §2(2), Dec. 18, 2014, 128 Stat. 3093; Pub. L. 114–142, §2(2), Mar. 31, 2016, 130 Stat. 326; Pub. L. 115–91, div. A, title V, §557(2), Dec. 12, 2017, 131 Stat. 1405, which provided that, effective Jan. 1, 2020, the provisions of subsecs. (b) and (c) of this section, as in effect on July 29, 2008, would be revived, was repealed by Pub. L. 115–174, title III, §313, May 24, 2018, 132 Stat. 1356.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–289, div. B, title II, §2203(c), July 30, 2008, 122 Stat. 2850, as amended by Pub. L. 111–346, §2, Dec. 29, 2010, 124 Stat. 3622; Pub. L. 112–154, title VII, §710(d)(2), Aug. 6, 2012, 126 Stat. 1208, provided that: "The amendments made by subsection (a) [amending this section] shall take effect on the date of the enactment of this Act [July 30, 2008]."

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3954. Settlement of stayed cases relating to personal property

(a) Appraisal of property

When a stay is granted pursuant to this chapter in a proceeding to foreclose a mortgage on or to repossess personal property, or to rescind or terminate a contract for the purchase of personal property, the court may appoint three disinterested parties to appraise the property.

(b) Equity payment

Based on the appraisal, and if undue hardship to the servicemember's dependents will not result, the court may order that the amount of the servicemember's equity in the property be paid to the servicemember, or the servicemember's dependents, as a condition of foreclosing the mortgage, repossessing the property, or rescinding or terminating the contract.

(Oct. 17, 1940, ch. 888, title III, §304, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2848.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 534 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 304 of act Oct. 17, 1940, ch. 888, art. III, as added Oct. 6, 1942, ch. 581, §12, 56 Stat. 772; amended Pub. L. 102–12, §9(9), Mar. 18, 1991, 105 Stat. 40, related to termination of leases by lessees, prior to the general amendment of this Act by Pub. L. 108–189. See section 3955 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3955. Termination of residential or motor vehicle leases

(a) Termination

(1) Termination by lessee

The lessee on a lease described in subsection (b) may, at the lessee's option, terminate the lease at any time after

- (A) the lessee's entry into military service;
- (B) the date of the lessee's military orders described in paragraph (1)(B) or (2)(B) of subsection (b), as the case may be; or
- (C) the date of the lessee's stop movement order described in paragraph (1)(C) or (2)(C) of subsection (b), as the case may be.

(2) Joint leases

A lessee's termination of a lease pursuant to this subsection shall terminate any obligation a dependent of the lessee may have under the lease.

(3) Death of lessee

The spouse or dependent of the lessee on a lease described in subsection (b) may terminate the lease during the one-year period beginning on the date of the death of the lessee, if the lessee dies while in military service or while performing full-time National Guard duty, active Guard and Reserve duty, or inactive-duty training (as such terms are defined in section 101(d) of title 10).

(4) Catastrophic injury or illness of lessee

(A) Termination

If the lessee on a lease described in subsection (b) incurs a catastrophic injury or illness during a period of military service or while performing covered service, during the one-year period beginning on the date on which the lessee incurs such injury or illness—

- (i) the lessee may terminate the lease; or
- (ii) in the case of a lessee who lacks the mental capacity to contract or to manage his or her own affairs (including disbursement of funds without limitation) due to such injury or illness, the spouse or dependent of the lessee may terminate the lease.

(B) Definitions

In this paragraph:

- (i) The term "catastrophic injury or illness" has the meaning given that term in section 439(g) of title 37.
- (ii) The term "covered service" means full-time National Guard duty, active Guard and Reserve duty, or inactive-duty training (as such terms are defined in section 101(d) of title 10).

(b) Covered leases

This section applies to the following leases:

(1) Leases of premises

A lease of premises occupied, or intended to be occupied, by a servicemember or a servicemember's dependents for a residential, professional, business, agricultural, or similar purpose if—

(A) the lease is executed by or on behalf of a person who thereafter and during the term of the lease enters military service;

(B) the servicemember, while in military service, executes the lease and thereafter receives military orders for a permanent change of station or to deploy with a military unit, or as an individual in support of a military operation, for a period of not less than 90 days; or

(C) the servicemember, while in military service—

(i) executes a lease upon receipt of military orders for a permanent change of station or to deploy with a military unit, or as an individual in support of a military operation, for a period of not less than 90 days; and

(ii) thereafter receives a stop movement order issued by the Secretary concerned in response to a local, national, or global emergency, effective for an indefinite period or for a period of not less than 30 days, which prevents the servicemember or servicemember's dependents from occupying the lease for a residential, professional, business, agricultural, or similar purpose.

(2) Leases of motor vehicles

A lease of a motor vehicle used, or intended to be used, by a servicemember or a servicemember's dependents for personal or business transportation if—

(A) the lease is executed by or on behalf of a person who thereafter and during the term of the lease enters military service under a call or order specifying a period of not less than 180 days (or who enters military service under a call or order specifying a period of 180 days or less and who, without a break in service, receives orders extending the period of military service to a period of not less than 180 days);

(B) the servicemember, while in military service, executes the lease and thereafter receives military orders—

(i) for a change of permanent station—

(I) from a location in the continental United States to a location outside the continental United States; or

(II) from a location in a State outside the continental United States to any location outside that State; or

(ii) to deploy with a military unit, or as an individual in support of a military operation, for a period of not less than 180 days; or

(C) the servicemember, while in military service—

(i) executes a lease upon receipt of military orders described in subparagraph (B); and

(ii) thereafter receives a stop movement order issued by the Secretary concerned in response to a local, national, or global emergency, effective for an indefinite period or for a period of not less than 30 days, which prevents the servicemember, or the servicemember's dependents, from using the vehicle for personal or business transportation.

(c) Manner of termination

(1) In general

Termination of a lease under subsection (a) is made—

(A) by delivery by the lessee of written notice of such termination, and a copy of the servicemember's military orders, to the lessor (or the lessor's grantee), or to the lessor's agent (or the agent's grantee); and

(B) in the case of a lease of a motor vehicle, by return of the motor vehicle by the lessee to the lessor (or the lessor's grantee), or to the lessor's agent (or the agent's grantee), not later than 15 days after the date of the delivery of written notice under subparagraph (A).

(2) Delivery of notice

Delivery of notice under paragraph (1)(A) may be accomplished—

(A) by hand delivery;

(B) by private business carrier;

(C) by placing the written notice in an envelope with sufficient postage and with return receipt requested, and addressed as designated by the lessor (or the lessor's grantee) or to the lessor's agent (or the agent's grantee), and depositing the written notice in the United States mails; or

(D) by electronic means, including—

(i) the direct delivery of material to an electronic address designated by the lessor (or the lessor's grantee) or the lessor's agent (or the agent's grantee);

(ii) the posting of material to a website or other internet or electronic-based information repository to which access has been granted to the lessee, the lessor (or the lessor's grantee), or the lessor's agent (or the agent's grantee); and

(iii) other electronic means reasonably calculated to ensure actual receipt of the material by the lessor (or the lessor's grantee) or the lessor's agent (or the agent's grantee).

(d) Effective date of lease termination

(1) Lease of premises

(A) Entrance to military service, permanent change of station, or deployment

In the case of a lease described in subparagraph (A) or (B) of subsection (b)(1) that provides for monthly payment of rent, termination of the lease under subsection (a) is effective 30 days after the first date on which the next rental payment is due and payable after the date on which the notice under subsection (c) is delivered. In the case of any other lease described in subparagraphs (A) and (B) of subsection (b)(1) termination of the lease under subsection (a) is effective on the last day of the month following the month in which the notice is delivered.

(B) Stop movement orders

In the case of a lease described in subsection (b)(1)(C), termination of the lease under subsection (a) is effective on the date on which the requirements of subsection (c) are met for such termination.

(2) Lease of motor vehicles

In the case of a lease described in subsection (b)(2), termination of the lease under subsection (a) is effective on the day on which the requirements of subsection (c) are met for such termination.

(e) Arrearages and other obligations and liabilities

(1) Leases of premises

Rent amounts for a lease described in subsection (b)(1) that are unpaid for the period preceding the effective date of the lease termination shall be paid on a prorated basis. The lessor may not impose an early termination charge, but any taxes, summonses, or other obligations and liabilities of the lessee in accordance with the terms of the lease, including reasonable charges to the lessee for excess wear, that are due and unpaid at the time of termination of the lease shall be paid by the lessee.

(2) Leases of motor vehicles

Lease amounts for a lease described in subsection (b)(2) that are unpaid for the period preceding the effective date of the lease termination shall be paid on a prorated basis. The lessor may not impose an early termination charge, but any taxes, summonses, title and registration fees, or other obligations and liabilities of the lessee in accordance with the terms of the lease, including reasonable charges to the lessee for excess wear or use and mileage, that are due and unpaid at the time of termination of the lease shall be paid by the lessee.

(f) Rent paid in advance

Rents or lease amounts paid in advance for a period after the effective date of the termination of the lease shall be refunded to the lessee by the lessor (or the lessor's assignee or the assignee's agent) within 30 days of the effective date of the termination of the lease.

(g) Relief to lessor

Upon application by the lessor to a court before the termination date provided in the written notice, relief granted by this section to a servicemember may be modified as justice and equity require.

(h) Misdemeanor

Any person who knowingly seizes, holds, or detains the personal effects, security deposit, or other property of a servicemember or a servicemember's dependent who lawfully terminates a lease covered by this section, or who knowingly interferes with the removal of such property from premises covered by such lease, for the purpose of subjecting or attempting to subject any of such property to a claim for rent accruing subsequent to the date of termination of such lease, or attempts to do so, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

(i) Definitions

In this section:

(1) Military orders

The term "military orders", with respect to a servicemember, means official military orders (including orders for separation or retirement), or any notification, certification, or verification from the servicemember's commanding officer, with respect to the servicemember's current or future military duty status.

(2) ConUS

The term "continental United States" means the 48 contiguous States and the District of Columbia.

(3) Permanent change of station

The term "permanent change of station" includes separation or retirement from military service.

(Oct. 17, 1940, ch. 888, title III, §305, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2848; amended Pub. L. 108–454, title VII, §704, Dec. 10, 2004, 118 Stat. 3624; Pub. L. 111–275, title III, §§301, 303(b)(5), Oct. 13, 2010, 124 Stat. 2875, 2878; Pub. L. 115–407, title III, §301, Dec. 31, 2018, 132 Stat. 5373; Pub. L. 116–92, div. A, title V, §§545, 546, Dec. 20, 2019, 133 Stat. 1377; Pub. L. 116–158, §1(a)–(d), Aug. 14, 2020, 134 Stat. 706, 707; Pub. L. 116–283,

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 535 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 305 of act Oct. 17, 1940, ch. 888, art. III, as added Oct. 6, 1942, ch. 581, §12, 56 Stat. 773; amended Pub. L. 102–12, §9(9), Mar. 18, 1991, 105 Stat. 40, related to protection of assignor of life insurance policy, enforcement of storage liens, and penalties, prior to the general amendment of this Act by Pub. L. 108–189. See sections 3957 and 3958 of this title.

AMENDMENTS

2021—Subsec. (a)(3). Pub. L. 116–283, §549(b), substituted "The spouse or dependent of the lessee" for "The spouse of the lessee".

Subsec. (a)(4). Pub. L. 116–283, §549(a), amended par. (4) generally. Prior to amendment, text read as follows: "The spouse of the lessee on a lease described in subsection (b) may terminate the lease during the one-year period beginning on the date on which the lessee incurs a catastrophic injury or illness (as that term is defined in section 439(g) of title 37, if the lessee incurs the catastrophic injury or illness during a period of military service or while performing full-time National Guard duty, active Guard and Reserve duty, or inactive-duty training (as such terms are defined in section 101(d) of title 10)."

Subsec. (b)(1)(C)(ii), (2)(C)(ii). Pub. L. 116–315, §7202(a), substituted "Secretary concerned" for "Secretary of Defense".

Subsec. (c)(2)(D). Pub. L. 116–315, §7201(a), added subpar. (D).

2020—Subsec. (a)(1)(C). Pub. L. 116–158, §1(a), added subpar. (C).

Subsec. (b)(1)(C). Pub. L. 116–158, §1(b)(1), added subpar. (C).

Subsec. (b)(2)(C). Pub. L. 116–158, §1(b)(2), added subpar. (C).

Subsec. (d)(1). Pub. L. 116–158, §1(c), amended par. (1) generally. Prior to amendment, text read as follows: "In the case of a lease described in subsection (b)(1) that provides for monthly payment of rent, termination of the lease under subsection (a) is effective 30 days after the first date on which the next rental payment is due and payable after the date on which the notice under subsection (c) is delivered. In the case of any other lease described in subsection (b)(1), termination of the lease under subsection (a) is effective on the last day of the month following the month in which the notice is delivered."

Subsec. (i). Pub. L. 116–158, §1(d), which directed amendment of subsec. (i) by inserting "In this section:" before par. (1) without specifying the section being amended, was executed to subsec. (i) of this section, to reflect the probable intent of Congress.

2019—Subsec. (a)(3). Pub. L. 116–92, §545(b), substituted "in subsection (b)" for "in subsection (b)(1)".

Subsec. (a)(4). Pub. L. 116–92, §545(a), added par. (4).

Subsec. (i)(1). Pub. L. 116–92, §546(1), inserted "(including orders for separation or retirement)" after "official military orders".

Subsec. (i)(3). Pub. L. 116–92, §546(2), added par. (3).

2018—Subsec. (a). Pub. L. 115–407, §301(1), struck out "by lessee" after "Termination" in heading.

Subsec. (a)(1). Pub. L. 115–407, §301(2), substituted "Termination by lessee" for "In general" in heading.

Subsec. (a)(3). Pub. L. 115–407, §301(3), added par. (3).

2010—Subsec. (e). Pub. L. 111–275, §301, amended subsec. (e) generally. Prior to amendment, text read as follows: "Rents or lease amounts unpaid for the period preceding the effective date of the lease termination shall be paid on a prorated basis. In the case of the lease of a motor vehicle, the lessor may not impose an early termination charge, but any taxes, summonses, and title and registration fees and any other obligation and liability of the lessee in accordance with the terms of the lease, including reasonable charges to the lessee for excess wear, use and mileage, that are due and unpaid at the time of termination of the lease shall be paid by the lessee."

Subsec. (h). Pub. L. 111–275, §303(b)(5), amended subsec. (h) generally. Prior to amendment, subsec. (h) related to penalties.

2004—Subsec. (a). Pub. L. 108–454, §704(a), amended subsec. (a) generally, designating existing provisions as par. (1), inserting par. heading, and adding par. (2).

Subsec. (b)(1)(B). Pub. L. 108–454, §704(c), inserted ", or as an individual in support of a military operation," after "deploy with a military unit".

Subsec. (b)(2)(B). Pub. L. 108–454, §704(b)(1), substituted "military orders—" for "military orders for a permanent change of station outside of the continental United States or to deploy", added cl. (i), and inserted "(ii) to deploy" before "with a military unit".

Subsec. (b)(2)(B)(ii). Pub. L. 108–454, §704(c), inserted ", or as an individual in support of a military operation," after "deploy with a military unit".

Subsec. (i). Pub. L. 108–454, §704(b)(2), added subsec. (i).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2021 AMENDMENT

Pub. L. 116–315, title VII, §7201(b), Jan. 5, 2021, 134 Stat. 5063, provided that: "The amendments made by subsection (a) [amending this section] shall apply to delivery of notice of lease terminations on or after the date the enactment of this Act [Jan. 5, 2021]."

Pub. L. 116–315, title VII, §7202(b), Jan. 5, 2021, 134 Stat. 5064, provided that: "The amendments made by this section [amending this section] shall apply to stop movement orders issued on or after March 1, 2020."

EFFECTIVE DATE OF 2020 AMENDMENT

Pub. L. 116–158, §1(e), Aug. 14, 2020, 134 Stat. 708, provided that: "The amendments made by this section [amending this section] shall apply to stop movement orders issued on or after March 1, 2020."

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3956. Termination of certain consumer contracts

(a) Termination by servicemember or dependent of a servicemember

(1) Termination

A servicemember may terminate a contract described in subsection (b) at any time after—

(A) the date the servicemember receives military orders to relocate for a period of not less than 90 days to a location that does not support the contract; or

(B) the date the servicemember, while in military service, receives military orders for a permanent change of station, thereafter enters into the contract, and then receives a stop movement order issued by the Secretary of Defense or the Secretary of Homeland Security in response to a local, national, or global emergency, effective for an indefinite period or for a period of not less than 30 days, that prevents the servicemember from using the services provided under the contract.

(2) Notice

In the case that a servicemember terminates a contract as described in paragraph (1), the service provider under the contract shall provide such servicemember with written or electronic notice of the servicemember's rights under such paragraph.

(3) Manner of termination

Termination of a contract under paragraph (1) shall be made by delivery of a written or electronic notice of such termination and a copy of the servicemember's military orders to the service provider, delivered in accordance with industry standards for notification of terminations, together with the date on which the service is to be terminated.

(4) Additional individuals covered

For purposes of this section, the following individuals shall be treated as a servicemember covered by paragraph (1):

(A) A spouse or dependent of a servicemember who dies while in military service or a spouse or dependent of a member of the reserve components who dies while performing duty described in subparagraph (C).

(B) A spouse or dependent of a servicemember who incurs a catastrophic injury or illness (as that term is defined in section 439(g) of title 37), if the servicemember incurs the catastrophic injury or illness while in military service or performing duty described in subparagraph (C).

(C) A member of the reserve components performing military service or performing full-time National Guard duty, active Guard and Reserve duty, or inactive-duty training (as such terms are defined in section 101(d) of title 10).

(D) The spouse or dependent of a servicemember, described in paragraph (1)(B), who accompanies such servicemember during the period of relocation.

(b) Covered contracts

A contract described in this subsection is a contract—

- (1) for—
 - (A) commercial mobile service;
 - (B) telephone exchange service;
 - (C) internet access service;
 - (D) multichannel video programming service;
 - (E) a gym membership or fitness program; or
 - (F) home security services; and

(2) entered into by a servicemember before receiving the military orders referred to in subsection (a)(1).

(c) Retention of telephone number

In the case of a contract for commercial mobile service or telephone exchange service terminated under subsection (a) by a servicemember whose period of relocation is for a period of three years or less, the service provider under the contract shall, notwithstanding any other provision of law, allow the servicemember to keep the telephone number the servicemember has under the contract if the servicemember re-subscribes to the service during the 90-day period beginning on the last day of such period of relocation.

(d) Family plans

In the case of a contract for commercial mobile service entered into by any individual in which a servicemember is a designated beneficiary of the contract, the individual who entered into the contract may terminate the contract—

- (1) with respect to the servicemember if the servicemember is eligible to terminate contracts pursuant to subsection (a); and
- (2) with respect to all of the designated beneficiaries of such contract if all such beneficiaries accompany the servicemember during the servicemember's period of relocation.

(e) Other obligations and liabilities

(1) In general

For any contract terminated under this section, the service provider under the contract may not impose an early termination charge, but any tax or any other obligation or liability of the servicemember that, in accordance with the terms of the contract, is due and unpaid or unperformed at the time of termination of the contract shall be paid or performed by the servicemember.

(2) Reinstatement of service

If the servicemember re-subscribes to the service provided under a covered contract during the 90-day period beginning on the last day of the servicemember's period of relocation, the service provider may not impose a charge for reinstating service, other than the usual and customary charges for the installation or acquisition of customer equipment imposed on any other subscriber.

(3) Return of provider-owned equipment

If a servicemember terminates a contract under subsection (a), the servicemember shall return any provider-owned consumer premises equipment to the service provider not later than 10 days after the date on which service is disconnected.

(f) Return of advance payments

Not later than 60 days after the effective date of the termination of a contract under this section, the service provider under the contract shall refund to the servicemember any fee or other amount to the extent paid for a period extending until after such date, except for the remainder of the monthly or similar billing period in which the termination occurs.

(g) Definitions

For purposes of this section:

- (1) The term "commercial mobile service" has the meaning given that term in section 332(d) of title 47.
- (2) The terms "military orders" and "permanent change of station" have the meanings given such terms in section 3955 of this title.
- (3) The term "multichannel video programming service" means a subscription video service offered by a multichannel video programming distributor, as that term is defined in section 522 of title 47, over a system the distributor owns or controls.
- (4) The term "provider-owned consumer premises equipment" means any equipment that a provider of internet access service or multichannel video programming service rents or loans to a customer during the provision of that service, including gateways, routers, cable modems, voice-capable modems, CableCARDS, converters, digital adapters, remote controls, and any other equipment provided.
- (5) The term "telephone exchange service" has the meaning given that term under section 153 of title 47.

(Oct. 17, 1940, ch. 888, title III, §305A, as added Pub. L. 110–389, title VIII, §805(a), Oct. 10, 2008, 122 Stat. 4188; amended Pub. L. 111–275, title III, §302(a), Oct. 13, 2010, 124 Stat. 2875; Pub. L. 115–407, title III, §304(a), Dec. 31, 2018, 132 Stat. 5374; Pub. L. 116–285, §2, Jan. 5, 2021, 134 Stat. 4878; Pub. L. 117–333, §17(a), Jan. 5, 2023, 136 Stat. 6136.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 535a of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

2023—Pub. L. 117–333, §17(a)(1), substituted "certain consumer" for "telephone, multichannel video programming, and internet access service" in section catchline.

Subsec. (a). Pub. L. 117–333, §17(a)(2)(A), inserted "or dependent of a servicemember" after "servicemember" in heading.

Subsec. (a)(1). Pub. L. 117–333, §17(a)(2)(B), substituted "after—" for "after the date the servicemember receives military orders to relocate for a period of not less than 90 days to a location that does not support the contract." and added subpars. (A) and (B).

Subsec. (a)(4)(D). Pub. L. 117–333, §17(a)(2)(C), added subpar. (D).

Subsec. (b). Pub. L. 117–333, §17(a)(3), added subsec. (b) and struck out former subsec. (b). Prior to amendment, text read as follows: "A contract described in this subsection is a contract for commercial mobile service, telephone exchange service, internet access service, or multichannel video programming service entered into by the servicemember before receiving the military orders referred to in subsection (a)(1)."

Subsec. (g)(2) to (5). Pub. L. 117–333, §17(a)(4), added par. (2) and redesignated former pars. (2) to (4) as (3) to (5), respectively.

2021—Subsec. (a)(4). Pub. L. 116–285 added par. (4).

2018—Pub. L. 115–407, §304(a)(1), inserted ", multichannel video programming, and internet access" after "telephone" in section catchline.

Subsec. (b). Pub. L. 115–407, §304(a)(2), substituted "commercial mobile service, telephone exchange service, internet access service, or multichannel video programming service" for "cellular telephone service or telephone exchange service".

Subsec. (c). Pub. L. 115–407, §304(a)(3), inserted "for commercial mobile service or telephone exchange service" before "terminated".

Subsec. (d). Pub. L. 115–407, §304(a)(4), substituted "commercial mobile service" for "cellular telephone service" in introductory provisions.

Subsec. (e). Pub. L. 115–407, §304(a)(5), designated first sentence of existing provisions as par. (1) and second sentence of existing provisions as par. (2), inserted headings, and added par. (3).

Subsec. (g). Pub. L. 115–407, §304(a)(6), added pars. (1) to (3), redesignated former par. (2) as (4), and struck out former par. (1) which read as follows: "The term 'cellular telephone service' means commercial mobile service, as that term is defined in section 332(d) of title 47."

2010—Pub. L. 111–275 amended section generally, substituting provisions relating to termination of telephone service contracts for provisions relating to termination or suspension of contracts for cellular telephone service.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2023 AMENDMENT; RETROACTIVE APPLICATION

Pub. L. 117–333, §17(b), Jan. 5, 2023, 136 Stat. 6137, provided that: "The amendments made by this section [amending this section] shall apply to stop movement orders issued on or after March 1, 2020."

§3957. Protection of life insurance policy

(a) Assignment of policy protected

If a life insurance policy on the life of a servicemember is assigned before military service to secure the payment of an obligation, the assignee of the policy (except the insurer in connection with a policy loan) may not exercise, during a period of military service of the servicemember or within one year thereafter, any right or option obtained under the assignment without a court order.

(b) Exception

The prohibition in subsection (a) shall not apply—

- (1) if the assignee has the written consent of the insured made during the period described in subsection (a);

- (2) when the premiums on the policy are due and unpaid; or
- (3) upon the death of the insured.

(c) Order refused because of material affect

A court which receives an application for an order required under subsection (a) may refuse to grant such order if the court determines the ability of the servicemember to comply with the terms of the obligation is materially affected by military service.

(d) Treatment of guaranteed premiums

For purposes of this subsection, premiums guaranteed under the provisions of subchapter IV of this chapter shall not be considered due and unpaid.

(e) Misdemeanor

A person who knowingly takes an action contrary to this section, or attempts to do so, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

(Oct. 17, 1940, ch. 888, title III, §306, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2850; amended Pub. L. 111–275, title III, §303(b)(6), Oct. 13, 2010, 124 Stat. 2878.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 536 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 306 of act Oct. 17, 1940, ch. 888, art. III, as added Oct. 6, 1942, ch. 581, §12, 56 Stat. 773, related to extension of benefits to dependents, prior to the general amendment of this Act by Pub. L. 108–189. See section 3959 of this title.

AMENDMENTS

2010—Subsec. (e). Pub. L. 111–275 amended subsec. (e) generally. Prior to amendment, subsec. (e) related to penalties.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3958. Enforcement of storage liens

(a) Liens

(1) Limitation on foreclosure or enforcement

A person holding a lien on the property or effects of a servicemember may not, during any period of military service of the servicemember and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement.

(2) Lien defined

For the purposes of paragraph (1), the term "lien" includes a lien for storage, repair, or cleaning of the property or effects of a servicemember or a lien on such property or effects for any other reason.

(b) Stay of proceedings

In a proceeding to foreclose or enforce a lien subject to this section, the court may on its own motion, and shall if requested by a servicemember whose ability to comply with the obligation resulting in the proceeding is materially affected by military service—

- (1) stay the proceeding for a period of time as justice and equity require; or
- (2) adjust the obligation to preserve the interests of all parties.

The provisions of this subsection do not affect the scope of section 3953 of this title.

(c) Misdemeanor

A person who knowingly takes an action contrary to this section, or attempts to do so, shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

(Oct. 17, 1940, ch. 888, title III, §307, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2851; amended Pub. L. 111–275, title III, §303(b)(7), Oct. 13, 2010, 124 Stat. 2878.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 537 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

2010—Subsec. (c). Pub. L. 111–275 amended subsec. (c) generally. Prior to amendment, subsec. (c) related to penalties.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3959. Extension of protections to dependents

Upon application to a court, a dependent of a servicemember is entitled to the protections of this subchapter if the dependent's ability to comply with a lease, contract, bailment, or other obligation is materially affected by reason of the servicemember's military service.

(Oct. 17, 1940, ch. 888, title III, §308, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2851.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 538 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

SUBCHAPTER IV—LIFE INSURANCE

§3971. Definitions

For the purposes of this subchapter:

(1) Policy

The term "policy" means any individual contract for whole, endowment, universal, or term life insurance (other than group term life insurance coverage), including any benefit in the nature of such insurance arising out of membership in any fraternal or beneficial association which—

(A) provides that the insurer may not—

(i) decrease the amount of coverage or require the payment of an additional amount as premiums if the insured engages in military service (except increases in premiums in individual term insurance based upon age); or

(ii) limit or restrict coverage for any activity required by military service; and

(B) is in force not less than 180 days before the date of the insured's entry into military service and at the time of application under this subchapter.

(2) Premium

The term "premium" means the amount specified in an insurance policy to be paid to keep the policy in force.

(3) Insured

The term "insured" means a servicemember whose life is insured under a policy.

(4) Insurer

The term "insurer" includes any firm, corporation, partnership, association, or business that is chartered or authorized to provide insurance and issue contracts or policies by the laws of a State or the United States.

(Oct. 17, 1940, ch. 888, title IV, §401, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2851.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 541 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 401 of act Oct. 17, 1940, ch. 888, art. IV, 54 Stat. 1183; Oct. 6, 1942, ch. 581, §13, 56 Stat. 774; Pub. L. 102–12, §9(12), Mar. 18, 1991, 105 Stat. 40, related to persons entitled to benefits, applications, and amount of insurance protected, prior to the general amendment of this Act by Pub. L. 108–189. See section 3972 of this title.

Provisions similar to this section were contained in section 400 of act Oct. 17, 1940, ch. 888, art. IV, 54 Stat. 1183; Oct. 6, 1942, ch. 581, §13, 56 Stat. 773; July 11, 1956, ch. 570, §1, 70 Stat. 528; Pub. L. 102–12, §9(11), Mar. 18, 1991, 105 Stat. 40, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3972. Insurance rights and protections

(a) Rights and protections

The rights and protections under this subchapter apply to the insured when—

- (1) the insured,
- (2) the insured's legal representative, or
- (3) the insured's beneficiary in the case of an insured who is outside a State,

applies in writing for protection under this subchapter, unless the Secretary of Veterans Affairs determines that the insured's policy is not entitled to protection under this subchapter.

(b) Notification and application

The Secretary of Veterans Affairs shall notify the Secretary concerned of the procedures to be used to apply for the protections provided under this subchapter. The applicant shall send the original application to the insurer and a copy to the Secretary of Veterans Affairs.

(c) Limitation on amount

The total amount of life insurance coverage protection provided by this subchapter for a servicemember may not exceed \$250,000, or an amount equal to the Servicemember's Group Life Insurance maximum limit, whichever is greater, regardless of the number of policies submitted.

(Oct. 17, 1940, ch. 888, title IV, §402, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2852.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 542 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 402 of act [Oct. 17, 1940, ch. 888, art. IV](#), 54 Stat. 1183; [Oct. 6, 1942, ch. 581, §13](#), 56 Stat. 774; Pub. L. 102–12, [§9\(13\)](#), [Mar. 18, 1991](#), 105 Stat. 40, related to form of application, reports to Secretary of Veterans Affairs by insurer, and deeming of policy modified upon application for protection, prior to the general amendment of this Act by Pub. L. 108–189. See section 3973 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3973. Application for insurance protection

(a) Application procedure

An application for protection under this subchapter shall—

- (1) be in writing and signed by the insured, the insured's legal representative, or the insured's beneficiary, as the case may be;
- (2) identify the policy and the insurer; and
- (3) include an acknowledgement that the insured's rights under the policy are subject to and modified by the provisions of this subchapter.

(b) Additional requirements

The Secretary of Veterans Affairs may require additional information from the applicant, the insured and the insurer to determine if the policy is entitled to protection under this subchapter.

(c) Notice to the Secretary by the insurer

Upon receipt of the application of the insured, the insurer shall furnish a report concerning the policy to the Secretary of Veterans Affairs as required by regulations prescribed by the Secretary.

(d) Policy modification

Upon application for protection under this subchapter, the insured and the insurer shall have constructively agreed to any policy modification necessary to give this title full force and effect.

(Oct. 17, 1940, ch. 888, title IV, §403, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2852.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 543 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 403 of act [Oct. 17, 1940, ch. 888, art. IV](#), 54 Stat. 1184; [Oct. 6, 1942, ch. 581, §13](#), 56 Stat. 775; Pub. L. 102–12, [§9\(14\)](#), [Mar. 18, 1991](#), 105 Stat. 40, related to determination of policies entitled to protection, notice to parties, and lapse of policies for nonpayment of premiums, prior to the general amendment of this Act by Pub. L. 108–189. See section 3974 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3974. Policies entitled to protection and lapse of policies

(a) Determination

The Secretary of Veterans Affairs shall determine whether a policy is entitled to protection under this subchapter and shall notify the insured and the insurer of that determination.

(b) Lapse protection

A policy that the Secretary determines is entitled to protection under this subchapter shall not lapse or otherwise terminate or be forfeited for the nonpayment of a premium, or interest or indebtedness on a premium, after the date on which the application for protection is received by the Secretary.

(c) Time application

The protection provided by this subchapter applies during the insured's period of military service and for a period of two years thereafter.

(Oct. 17, 1940, ch. 888, title IV, §404, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2853.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 544 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 404 of act Oct. 17, 1940, ch. 888, art. IV, 54 Stat. 1184; Oct. 6, 1942, ch. 581, §13, 56 Stat. 775; Pub. L. 102–12, §9(15), Mar. 18, 1991, 105 Stat. 40, related to restrictions on payment of dividends and insured's right to change beneficiary, prior to the general amendment of this Act by Pub. L. 108–189. See section 3975 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3975. Policy restrictions

(a) Dividends

While a policy is protected under this subchapter, a dividend or other monetary benefit under a policy may not be paid to an insured or used to purchase dividend additions without the approval of the Secretary of Veterans Affairs. If such approval is not obtained, the dividends or benefits shall be added to the value of the policy to be used as a credit when final settlement is made with the insurer.

(b) Specific restrictions

While a policy is protected under this subchapter, cash value, loan value, withdrawal of dividend accumulation, unearned premiums, or other value of similar character may not be available to the insured without the approval of the Secretary. The right of the insured to change a beneficiary designation or select an optional settlement for a beneficiary shall not be affected by the provisions of this subchapter.

(Oct. 17, 1940, ch. 888, title IV, §405, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2853.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 545 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 405 of act [Oct. 17, 1940, ch. 888, art. IV, 54 Stat. 1184](#); [Oct. 6, 1942, ch. 581, §13, 56 Stat. 775](#); Pub. L. 102–12, [§9\(16\), Mar. 18, 1991, 105 Stat. 40](#), related to deduction of unpaid premiums upon settlement of policies maturing during protection, prior to the general amendment of this Act by Pub. L. 108–189. See section 3976 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3976. Deduction of unpaid premiums

(a) Settlement of proceeds

If a policy matures as a result of a servicemember's death or otherwise during the period of protection of the policy under this subchapter, the insurer in making settlement shall deduct from the insurance proceeds the amount of the unpaid premiums guaranteed under this subchapter, together with interest due at the rate fixed in the policy for policy loans.

(b) Interest rate

If the interest rate is not specifically fixed in the policy, the rate shall be the same as for policy loans in other policies issued by the insurer at the time the insured's policy was issued.

(c) Reporting requirement

The amount deducted under this section, if any, shall be reported by the insurer to the Secretary of Veterans Affairs. (Oct. 17, 1940, ch. 888, title IV, §406, as added Pub. L. 108–189, [§1, Dec. 19, 2003, 117 Stat. 2853](#).)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 546 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 406 of act [Oct. 17, 1940, ch. 888, art. IV, 54 Stat. 1184](#); [Oct. 6, 1942, ch. 581, §13, 56 Stat. 775](#); [Apr. 3, 1948, ch. 170, §6, 62 Stat. 160](#), related to guaranty of premiums and interest by United States, settlement of amounts due upon expiration of protection, subrogation of United States, and crediting debt repayments, prior to the general amendment of this Act by Pub. L. 108–189. See section 3977 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3977. Premiums and interest guaranteed by United States

(a) Guarantee of premiums and interest by the United States

(1) Guarantee

Payment of premiums, and interest on premiums at the rate specified in section 3976 of this title, which become due on a policy under the protection of this subchapter is guaranteed by the United States. If the amount guaranteed is not paid to the insurer before the period of insurance protection under this subchapter expires, the amount due shall be treated by the insurer as a policy loan on the policy.

(2) Policy termination

If, at the expiration of insurance protection under this subchapter, the cash surrender value of a policy is less than the amount due to pay premiums and interest on premiums on the policy, the policy shall terminate. Upon such

termination, the United States shall pay the insurer the difference between the amount due and the cash surrender value.

(b) Recovery from insured of amounts paid by the United States

(1) Debt payable to the United States

The amount paid by the United States to an insurer under this subchapter shall be a debt payable to the United States by the insured on whose policy payment was made.

(2) Collection

Such amount may be collected by the United States, either as an offset from any amount due the insured by the United States or as otherwise authorized by law.

(3) Debt not dischargeable in bankruptcy

Such debt payable to the United States is not dischargeable in bankruptcy proceedings.

(c) Crediting of amounts recovered

Any amounts received by the United States as repayment of debts incurred by an insured under this subchapter shall be credited to the appropriation for the payment of claims under this subchapter.

(Oct. 17, 1940, ch. 888, title IV, §407, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2853.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 547 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 407 of act [Oct. 17, 1940, ch. 888, art. IV](#), 54 Stat. 1185; [Oct. 6, 1942, ch. 581, §13](#), 56 Stat. 775; Pub. L. 85–857, [§14\(76\)](#), [Sept. 2, 1958](#), 72 Stat. 1272; Pub. L. 102–12, [§9\(17\)](#), [Mar. 18, 1991](#), 105 Stat. 40, related to regulations and finality of determinations, prior to the general amendment of this Act by Pub. L. 108–189. See sections 3978 and 3979 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3978. Regulations

The Secretary of Veterans Affairs shall prescribe regulations for the implementation of this subchapter.

(Oct. 17, 1940, ch. 888, title IV, §408, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2854.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 548 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 408 of act [Oct. 17, 1940, ch. 888, art. IV](#), 54 Stat. 1185; [Oct. 6, 1942, ch. 581, §13](#), 56 Stat. 776, related to law governing applications for protection prior to Oct. 6, 1942, prior to repeal by Pub. L. 102–12, [§9\(18\)](#), [Mar. 18, 1991](#), 105 Stat. 40.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3979. Review of findings of fact and conclusions of law

The findings of fact and conclusions of law made by the Secretary of Veterans Affairs in administering this subchapter are subject to review on appeal to the Board of Veterans' Appeals pursuant to chapter 71 of title 38 and to judicial review only as provided in chapter 72 of such title.

(Oct. 17, 1940, ch. 888, title IV, §409, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2854.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 549 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

Prior sections 409 to 414 of article IV of act Oct. 17, 1940, ch. 888, 54 Stat. 1185, 1186, were omitted in the general amendment of article IV by act Oct. 6, 1942, ch. 581, §13, 56 Stat. 773.

Section 409 related to deduction of unpaid premiums from proceeds of policies.

Section 410 related to lapsing of policy for failure to pay past due premiums upon termination of service.

Section 411 related to accounts stated between insurers and United States.

Section 412 related to payment of balances due insurers by Secretary of the Treasury.

Section 413 related to policies excepted from application of article.

Section 414 related to insurers within application of article.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

SUBCHAPTER V—TAXES AND PUBLIC LANDS

§3991. Taxes respecting personal property, money, credits, and real property

(a) Application

This section applies in any case in which a tax or assessment, whether general or special (other than a tax on personal income), falls due and remains unpaid before or during a period of military service with respect to a servicemember's—

(1) personal property (including motor vehicles); or

(2) real property occupied for dwelling, professional, business, or agricultural purposes by a servicemember or the servicemember's dependents or employees—

(A) before the servicemember's entry into military service; and

(B) during the time the tax or assessment remains unpaid.

(b) Sale of property

(1) Limitation on sale of property to enforce tax assessment

Property described in subsection (a) may not be sold to enforce the collection of such tax or assessment except by court order and upon the determination by the court that military service does not materially affect the servicemember's ability to pay the unpaid tax or assessment.

(2) Stay of court proceedings

A court may stay a proceeding to enforce the collection of such tax or assessment, or sale of such property, during a period of military service of the servicemember and for a period not more than 180 days after the termination of, or

release of the servicemember from, military service.

(c) Redemption

When property described in subsection (a) is sold or forfeited to enforce the collection of a tax or assessment, a servicemember shall have the right to redeem or commence an action to redeem the servicemember's property during the period of military service or within 180 days after termination of or release from military service. This subsection may not be construed to shorten any period provided by the law of a State (including any political subdivision of a State) for redemption.

(d) Interest on tax or assessment

Whenever a servicemember does not pay a tax or assessment on property described in subsection (a) when due, the amount of the tax or assessment due and unpaid shall bear interest until paid at the rate of 6 percent per year. An additional penalty or interest shall not be incurred by reason of nonpayment. A lien for such unpaid tax or assessment may include interest under this subsection.

(e) Joint ownership application

This section applies to all forms of property described in subsection (a) owned individually by a servicemember or jointly by a servicemember and a dependent or dependents.

(Oct. 17, 1940, ch. 888, title V, §501, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2854.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 561 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 501 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1187, related to rights in public lands and grazing lands, prior to the general amendment of this Act by Pub. L. 108–189. See section 3992 of this title.

Provisions similar to this section were contained in section 500 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1186; [Oct. 6, 1942, ch. 581, §14](#), 56 Stat. 776, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3992. Rights in public lands

(a) Rights not forfeited

The rights of a servicemember to lands owned or controlled by the United States, and initiated or acquired by the servicemember under the laws of the United States (including the mining and mineral leasing laws) before military service, shall not be forfeited or prejudiced as a result of being absent from the land, or by failing to begin or complete any work or improvements to the land, during the period of military service.

(b) Temporary suspension of permits or licenses

If a permittee or licensee under the Act of June 28, 1934 (43 U.S.C. 315 et seq.), enters military service, the permittee or licensee may suspend the permit or license for the period of military service and for 180 days after termination of or release from military service.

(c) Regulations

Regulations prescribed by the Secretary of the Interior shall provide for such suspension of permits and licenses and for the remission, reduction, or refund of grazing fees during the period of such suspension.

(Oct. 17, 1940, ch. 888, title V, §502, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2855.)

EDITORIAL NOTES

REFERENCES IN TEXT

Act of June 28, 1934, referred to in subsec. (b), is act [June 28, 1934, ch. 865](#), 48 Stat. 1269, popularly known as the Taylor Grazing Act, which is classified principally to subchapter I (§315 et seq.) of chapter 8A of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 315 of Title 43 and Tables.

CODIFICATION

Section was formerly classified to section 562 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 502 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1187, related to homestead entries and settlement claims, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3993. Desert-land entries

(a) Desert-land rights not forfeited

A desert-land entry made or held under the desert-land laws before the entrance of the entryman or the entryman's successor in interest into military service shall not be subject to contest or cancellation—

- (1) for failure to expend any required amount per acre per year in improvements upon the claim;
- (2) for failure to effect the reclamation of the claim during the period the entryman or the entryman's successor in interest is in the military service, or for 180 days after termination of or release from military service; or
- (3) during any period of hospitalization or rehabilitation due to an injury or disability incurred in the line of duty.

The time within which the entryman or claimant is required to make such expenditures and effect reclamation of the land shall be exclusive of the time periods described in paragraphs (2) and (3).

(b) Service-related disability

If an entryman or claimant is honorably discharged and is unable to accomplish reclamation of, and payment for, desert land due to a disability incurred in the line of duty, the entryman or claimant may make proof without further reclamation or payments, under regulations prescribed by the Secretary of the Interior, and receive a patent for the land entered or claimed.

(c) Filing requirement

In order to obtain the protection of this section, the entryman or claimant shall, within 180 days after entry into military service, cause to be filed in the land office of the district where the claim is situated a notice communicating the fact of military service and the desire to hold the claim under this section.

(Oct. 17, 1940, ch. 888, title V, §503, as added Pub. L. 108–189, [§1, Dec. 19, 2003](#), 117 Stat. 2856.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 563 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 503 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1187, related to death or incapacity during or resulting from service as affecting rights and perfection of rights, prior to the general amendment of this Act by Pub. L. 108–189. See section 3996 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3994. Mining claims

(a) Requirements suspended

The provisions of section 28 of title 30 specified in subsection (b) shall not apply to a servicemember's claims or interests in claims, regularly located and recorded, during a period of military service and 180 days thereafter, or during any period of hospitalization or rehabilitation due to injuries or disabilities incurred in the line of duty.

(b) Requirements

The provisions in section 28 of title 30 that shall not apply under subsection (a) are those which require that on each mining claim located after May 10, 1872, and until a patent has been issued for such claim, not less than \$100 worth of labor shall be performed or improvements made during each year.

(c) Period of protection from forfeiture

A mining claim or an interest in a claim owned by a servicemember that has been regularly located and recorded shall not be subject to forfeiture for nonperformance of annual assessments during the period of military service and for 180 days thereafter, or for any period of hospitalization or rehabilitation described in subsection (a).

(d) Filing requirement

In order to obtain the protections of this section, the claimant of a mining location shall, before the end of the assessment year in which military service is begun or within 60 days after the end of such assessment year, cause to be filed in the office where the location notice or certificate is recorded a notice communicating the fact of military service and the desire to hold the mining claim under this section.

(Oct. 17, 1940, ch. 888, title V, §504, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2856.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 564 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 504 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1187; Pub. L. 102–12, §9(19), [Mar. 18, 1991](#), 105 Stat. 40, related to desert-land entries and the suspension of requirements, prior to the general amendment of this Act by Pub. L. 108–189. See section 3993 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3995. Mineral permits and leases

(a) Suspension during military service

A person holding a permit or lease on the public domain under the Federal mineral leasing laws who enters military service may suspend all operations under the permit or lease for the duration of military service and for 180 days thereafter. The term of the permit or lease shall not run during the period of suspension, nor shall any rental or royalties be charged against the permit or lease during the period of suspension.

(b) Notification

In order to obtain the protection of this section, the permittee or lessee shall, within 180 days after entry into military service, notify the Secretary of the Interior by registered mail of the fact that military service has begun and of the desire to hold the claim under this section.

(c) Contract modification

This section shall not be construed to supersede the terms of any contract for operation of a permit or lease.

(Oct. 17, 1940, ch. 888, title V, §505, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2857.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 565 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 505 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1188; Pub. L. 102–12, [§9\(20\)](#), Mar. 18, 1991, 105 Stat. 41, related to mining claims and the suspension of requirements, prior to the general amendment of this Act by Pub. L. 108–189. See section 3994 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3996. Perfection or defense of rights

(a) Right to take action not affected

This subchapter shall not affect the right of a servicemember to take action during a period of military service that is authorized by law or regulations of the Department of the Interior, for the perfection, defense, or further assertion of rights initiated or acquired before entering military service.

(b) Affidavits and proofs

(1) In general

A servicemember during a period of military service may make any affidavit or submit any proof required by law, practice, or regulation of the Department of the Interior in connection with the entry, perfection, defense, or further assertion of rights initiated or acquired before entering military service before an officer authorized to provide notary services under section 1044a of title 10 or any superior commissioned officer.

(2) Legal status of affidavits

Such affidavits shall be binding in law and subject to the same penalties as prescribed by section 1001 of title 18. (Oct. 17, 1940, ch. 888, title V, §506, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2857.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 566 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 506 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1188; Pub. L. 102–12, [§9\(21\)](#), Mar. 18, 1991, 105 Stat. 41, related to mineral permits and leases and the suspension of operations and term of permits and leases, prior to the general amendment of this Act by Pub. L. 108–189. See section 3995 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3997. Distribution of information concerning benefits of subchapter

(a) Distribution of information by Secretary concerned

The Secretary concerned shall issue to servicemembers information explaining the provisions of this subchapter.

(b) Application forms

The Secretary concerned shall provide application forms to servicemembers requesting relief under this subchapter.

(c) Information from Secretary of the Interior

The Secretary of the Interior shall furnish to the Secretary concerned information explaining the provisions of this subchapter (other than sections 3991, 4000, and 4001 of this title) and related application forms.

(Oct. 17, 1940, ch. 888, title V, §507, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2857.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 567 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 507 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1188; Pub. L. 102–12, §9(22), [Mar. 18, 1991](#), 105 Stat. 41, related to right to take action for perfection and defense of rights as unaffected, and affidavits and proofs, prior to the general amendment of this Act by Pub. L. 108–189. See section 3996 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3998. Land rights of servicemembers

(a) No age limitations

Any servicemember under the age of 21 in military service shall be entitled to the same rights under the laws relating to lands owned or controlled by the United States, including mining and mineral leasing laws, as those servicemembers who are 21 years of age.

(b) Residency requirement

Any requirement related to the establishment of a residence within a limited time shall be suspended as to entry by a servicemember in military service or the spouse of such servicemember until 180 days after termination of or release from military service.

(c) Entry applications

Applications for entry may be verified before a person authorized to administer oaths under section 1044a of title 10 or under the laws of the State where the land is situated.

(Oct. 17, 1940, ch. 888, title V, §508, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2857; amended Pub. L. 111–97, §4(a), Nov. 11, 2009, 123 Stat. 3008.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 568 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 508 of act [Oct. 17, 1940, ch. 888, art. V](#), 54 Stat. 1189, related to irrigation rights and suspension of residence requirements, prior to the general amendment of this Act by Pub. L. 108–189.

AMENDMENTS

2009—Subsec. (b). Pub. L. 111–97 inserted "or the spouse of such servicemember" after "a servicemember in military service".

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111–97, §4(b), Nov. 11, 2009, 123 Stat. 3008, provided that: "The amendment made by subsection (a) [amending this section] shall apply with respect to servicemembers in military service (as defined in section 101 of such Act (50 U.S.C. App. 511) [now 50 U.S.C. 3911]) on or after the date of the enactment of this Act [Nov. 11, 2009]."

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§3999. Regulations

The Secretary of the Interior may issue regulations necessary to carry out this subchapter (other than sections 3991, 4000, and 4001 of this title).

(Oct. 17, 1940, ch. 888, title V, §509, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2858.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 569 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 509 of act Oct. 17, 1940, ch. 888, art. V, 54 Stat. 1189; Oct. 6, 1942, ch. 581, §15, 56 Stat. 776, related to distribution of information concerning benefits of tax and public lands provisions and forms, prior to the general amendment of this Act by Pub. L. 108–189. See section 3997 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4000. Income taxes

(a) Deferral of tax

Upon notice to the Internal Revenue Service or the tax authority of a State or a political subdivision of a State, the collection of income tax on the income of a servicemember falling due before or during military service shall be deferred for a period not more than 180 days after termination of or release from military service, if a servicemember's ability to pay such income tax is materially affected by military service.

(b) Accrual of interest or penalty

No interest or penalty shall accrue for the period of deferment by reason of nonpayment on any amount of tax deferred under this section.

(c) Statute of limitations

The running of a statute of limitations against the collection of tax deferred under this section, by seizure or otherwise, shall be suspended for the period of military service of the servicemember and for an additional period of 270 days thereafter.

(d) Application limitation

This section shall not apply to the tax imposed on employees by section 3101 of title 26.

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 570 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 510 of act Oct. 17, 1940, ch. 888, art. V, 54 Stat. 1189; Pub. L. 102–12, §9(23), Mar. 18, 1991, 105 Stat. 41, related to leave of absence for homestead entrymen to perform farm labor, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4001. Residence for tax purposes

(a) Residence or domicile

(1) In general

A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.

(2) Spouses

A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders.

(3) Election

For any taxable year of the marriage, a servicemember and the spouse of such servicemember may elect to use for purposes of taxation, regardless of the date on which the marriage of the servicemember and the spouse occurred, any of the following:

- (A) The residence or domicile of the servicemember.
- (B) The residence or domicile of the spouse.
- (C) The permanent duty station of the servicemember.

(b) Military service compensation

Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.

(c) Income of a military spouse

Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.

(d) Personal property

(1) Relief from personal property taxes

The personal property of a servicemember or the spouse of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders.

(2) Exception for property within member's domicile or residence

This subsection applies to personal property or its use within any tax jurisdiction other than the servicemember's or the spouse's domicile or residence.

(3) Exception for property used in trade or business

This section does not prevent taxation by a tax jurisdiction with respect to personal property used in or arising from a trade or business, if it has jurisdiction.

(4) Relationship to law of State of domicile

Eligibility for relief from personal property taxes under this subsection is not contingent on whether or not such taxes are paid to the State of domicile.

(e) Increase of tax liability

A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction.

(f) Federal Indian reservations

An Indian servicemember whose legal residence or domicile is a Federal Indian reservation shall be taxed by the laws applicable to Federal Indian reservations and not the State where the reservation is located.

(g) Definitions

For purposes of this section:

(1) Personal property

The term "personal property" means intangible and tangible property (including motor vehicles).

(2) Taxation

The term "taxation" includes licenses, fees, or excises imposed with respect to motor vehicles and their use, if the license, fee, or excise is paid by the servicemember in the servicemember's State of domicile or residence.

(3) Tax jurisdiction

The term "tax jurisdiction" means a State or a political subdivision of a State.

(Oct. 17, 1940, ch. 888, title V, §511, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2858; amended Pub. L. 111–97, §3(a), Nov. 11, 2009, 123 Stat. 3008; Pub. L. 115–407, title III, §302(a), Dec. 31, 2018, 132 Stat. 5373; Pub. L. 117–333, §18, Jan. 5, 2023, 136 Stat. 6137.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 571 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 511 of act Oct. 17, 1940, ch. 888, art. V, 54 Stat. 1189, related to land rights of persons under 21. See section 3998 of this title.

Prior sections 512 to 514 of act Oct. 17, 1940, ch. 888, were omitted in the general amendment of this Act by Pub. L. 108–189.

Section 512, act Oct. 17, 1940, ch. 888, art. V, 54 Stat. 1190; Oct. 6, 1942, ch. 581, §16, 56 Stat. 776, related to extension of benefits to persons serving with war allies of the United States. See section 3914 of this title.

Section 513, act Oct. 17, 1940, ch. 888, art. V, 54 Stat. 1190, related to deferral of income tax collection and the statute of limitations. See section 4000 of this title.

Section 514, act Oct. 17, 1940, ch. 888, art. V, as added Oct. 6, 1942, ch. 581, §17, 56 Stat. 777; amended July 3, 1944, ch. 397, §1, 58 Stat. 722; Pub. L. 87–771, Oct. 9, 1962, 76 Stat. 768; Pub. L. 102–12, §9(24), Mar. 18, 1991, 105 Stat. 41, related to residence for tax purposes. See section 4001 of this title.

AMENDMENTS

2023—Subsec. (a)(2), (3). Pub. L. 117–333 added pars. (2) and (3) and struck out former par. (2) which related to residence of spouses of servicemembers for tax purposes.

2018—Subsec. (a)(2). Pub. L. 115–407 designated existing provisions as subpar. (A), inserted heading, and added subpar. (B).

2009—Subsec. (a). Pub. L. 111–97, §3(a)(1), designated existing provisions as par. (1), inserted heading, and added par. (2).

Subsec. (c). Pub. L. 111–97, §3(a)(3), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 111–97, §3(a)(2), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (d)(1). Pub. L. 111–97, §3(a)(4)(A), inserted "or the spouse of a servicemember" after "The personal property of a servicemember".

Subsec. (d)(2). Pub. L. 111–97, §3(a)(4)(B), inserted "or the spouse's" after "servicemember's".

Subsecs. (e) to (g). Pub. L. 111–97, §3(a)(2), redesignated subsecs. (d) to (f) as (e) to (g), respectively.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2018 AMENDMENT

Pub. L. 115–407, title III, §302(b), Dec. 31, 2018, 132 Stat. 5373, provided that: "The amendments made by subsection (a) [amending this section] shall apply with respect to any return of State or local income tax filed for any taxable year beginning with the taxable year that includes the date of the enactment of this Act [Dec. 31, 2018]."

EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111–97, §3(b), Nov. 11, 2009, 123 Stat. 3008, provided that: "Subsections (a)(2) and (c) of section 511 of such Act [Servicemembers Civil Relief Act] (50 U.S.C. App. 571) [now 50 U.S.C. 4001], as added by subsection (a) of this section, and the amendments made to such section 511 by subsection (a)(4) of this section [amending this section], shall apply with respect to any return of State or local income tax filed for any taxable year beginning with the taxable year that includes the date of the enactment of this Act [Nov. 11, 2009]."

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

SUBCHAPTER VI—ADMINISTRATIVE REMEDIES

§4011. Inappropriate use of chapter

If a court determines, in any proceeding to enforce a civil right, that any interest, property, or contract has been transferred or acquired with the intent to delay the just enforcement of such right by taking advantage of this chapter, the court shall enter such judgment or make such order as might lawfully be entered or made concerning such transfer or acquisition.

(Oct. 17, 1940, ch. 888, title VI, §601, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2859.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 581 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 601 of act Oct. 17, 1940, ch. 888, art. VI, 54 Stat. 1190; Jan. 20, 1942, ch. 10, §§1, 2, 56 Stat. 10; Pub. L. 102–12, §9(26), Mar. 18, 1991, 105 Stat. 41, related to certificates of service and persons reported missing, prior to the general amendment of this Act by Pub. L. 108–189. See section 4012 of this title.

Provisions similar to this section were contained in section 600 of act Oct. 17, 1940, ch. 888, art. VI, 54 Stat. 1190; Pub. L. 102–12, §9(25), Mar. 18, 1991, 105 Stat. 41, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4012. Certificates of service; persons reported missing

(a) Prima facie evidence

In any proceeding under this chapter, a certificate signed by the Secretary concerned is prima facie evidence as to any of the following facts stated in the certificate:

- (1) That a person named is, is not, has been, or has not been in military service.
- (2) The time and the place the person entered military service.
- (3) The person's residence at the time the person entered military service.
- (4) The rank, branch, and unit of military service of the person upon entry.
- (5) The inclusive dates of the person's military service.
- (6) The monthly pay received by the person at the date of the certificate's issuance.
- (7) The time and place of the person's termination of or release from military service, or the person's death during military service.

(b) Certificates

The Secretary concerned shall furnish a certificate under subsection (a) upon receipt of an application for such a certificate. A certificate appearing to be signed by the Secretary concerned is prima facie evidence of its contents and of the signer's authority to issue it.

(c) Treatment of servicemembers in missing status

A servicemember who has been reported missing is presumed to continue in service until accounted for. A requirement under this chapter that begins or ends with the death of a servicemember does not begin or end until the servicemember's death is reported to, or determined by, the Secretary concerned or by a court of competent jurisdiction.

(Oct. 17, 1940, ch. 888, title VI, §602, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2859.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 582 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 602 of act [Oct. 17, 1940, ch. 888, art. VI](#), 54 Stat. 1191, related to revocation of interlocutory orders, prior to the general amendment of this Act by Pub. L. 108–189. See section 4013 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4013. Interlocutory orders

An interlocutory order issued by a court under this chapter may be revoked, modified, or extended by that court upon its own motion or otherwise, upon notification to affected parties as required by the court.

(Oct. 17, 1940, ch. 888, title VI, §603, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2860.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 583 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 603 of act Oct. 17, 1940, ch. 888, art. VI, 54 Stat. 1191, related to separability, prior to the general amendment of this Act by Pub. L. 108–189.

Prior sections 604 and 605 of act Oct. 17, 1940, ch. 888, were omitted in the general amendment of this Act by Pub. L. 108–189.

Section 604 of act Oct. 17, 1940, ch. 888, art. VI, 54 Stat. 1191; Pub. L. 102–12, §9(27), Mar. 18, 1991, 105 Stat. 41, related to termination date.

Section 605 of act Oct. 17, 1940, ch. 888, art. VI, 54 Stat. 1191, related to the inapplicability of act Mar. 8, 1918, ch. 20, 40 Stat. 440, to military service performed after Oct. 17, 1940.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

SUBCHAPTER VII—FURTHER RELIEF

§4021. Anticipatory relief

(a) Application for relief

A servicemember may, during military service or within 180 days of termination of or release from military service, apply to a court for relief—

- (1) from any obligation or liability incurred by the servicemember before the servicemember's military service; or
- (2) from a tax or assessment falling due before or during the servicemember's military service.

(b) Tax liability or assessment

In a case covered by subsection (a), the court may, if the ability of the servicemember to comply with the terms of such obligation or liability or pay such tax or assessment has been materially affected by reason of military service, after appropriate notice and hearing, grant the following relief:

(1) Stay of enforcement of real estate contracts

(A) In the case of an obligation payable in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, the court may grant a stay of the enforcement of the obligation—

- (i) during the servicemember's period of military service; and
- (ii) from the date of termination of or release from military service, or from the date of application if made after termination of or release from military service.

(B) Any stay under this paragraph shall be—

- (i) for a period equal to the remaining life of the installment contract or other instrument, plus a period of time equal to the period of military service of the servicemember, or any part of such combined period; and
- (ii) subject to payment of the balance of the principal and accumulated interest due and unpaid at the date of termination or release from the applicant's military service or from the date of application in equal installments during the combined period at the rate of interest on the unpaid balance prescribed in the contract or other instrument evidencing the obligation, and subject to other terms as may be equitable.

(2) Stay of enforcement of other contracts

(A) In the case of any other obligation, liability, tax, or assessment, the court may grant a stay of enforcement—

- (i) during the servicemember's military service; and
- (ii) from the date of termination of or release from military service, or from the date of application if made after termination or release from military service.

(B) Any stay under this paragraph shall be—

- (i) for a period of time equal to the period of the servicemember's military service or any part of such period; and
- (ii) subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination or release from military service, or the date of application, in equal periodic installments during this extended period at the rate of interest as may be prescribed for this obligation, liability, tax, or assessment, if paid when due, and subject to other terms as may be equitable.

(c) Affect ¹ of stay on fine or penalty

When a court grants a stay under this section, a fine or penalty shall not accrue on the obligation, liability, tax, or assessment for the period of compliance with the terms and conditions of the stay.

(Oct. 17, 1940, ch. 888, title VII, §701, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2860.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 591 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 701 of act Oct. 17, 1940, ch. 888, art. VII, as added Pub. L. 92–540, title V, §504(2), Oct. 24, 1972, 86 Stat. 1098; amended Pub. L. 102–12, §3, Mar. 18, 1991, 105 Stat. 34, related to power of attorney, prior to the general amendment of this Act by Pub. L. 108–189. See section 4022 of this title.

Provisions similar to this section were contained in section 700 of act Oct. 17, 1940, ch. 888, art. VII, as added Oct. 6, 1942, ch. 581, §18, 56 Stat. 777, prior to the general amendment of this Act by Pub. L. 108–189.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

¹ *So in original. Probably should be "Effect".*

§4022. Power of attorney

(a) Automatic extension

A power of attorney of a servicemember shall be automatically extended for the period the servicemember is in a missing status (as defined in section 551(2) of title 37) if the power of attorney—

(1) was duly executed by the servicemember—

(A) while in military service; or

(B) before entry into military service but after the servicemember—

(i) received a call or order to report for military service; or

(ii) was notified by an official of the Department of Defense that the person could receive a call or order to report for military service;

(2) designates the servicemember's spouse, parent, or other named relative as the servicemember's attorney in fact for certain, specified, or all purposes; and

(3) expires by its terms after the servicemember entered a missing status.

(b) Limitation on power of attorney extension

A power of attorney executed by a servicemember may not be extended under subsection (a) if the document by its terms clearly indicates that the power granted expires on the date specified even though the servicemember, after the date of execution of the document, enters a missing status.

(Oct. 17, 1940, ch. 888, title VII, §702, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2861.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 592 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 702 of act Oct. 17, 1940, ch. 888, art. VII, as added Pub. L. 102–12, §4, Mar. 18, 1991, 105 Stat. 34; amended Pub. L. 104–106, div. A, title XV, §1501(e)(3), Feb. 10, 1996, 110 Stat. 501, related to

professional liability protection for certain persons ordered to active duty in armed forces, prior to the general amendment of this Act by Pub. L. 108–189. See section 4023 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4023. Professional liability protection

(a) Applicability

This section applies to a servicemember who—

(1) after July 31, 1990, is ordered to active duty (other than for training) pursuant to sections 688, 12301(a), 12301(g), 12302, 12304, 12306, or 12307 of title 10 or who is ordered to active duty under section 12301(d) of such title during a period when members are on active duty pursuant to any of the preceding sections; and

(2) immediately before receiving the order to active duty—

(A) was engaged in the furnishing of health-care or legal services or other services determined by the Secretary of Defense to be professional services; and

(B) had in effect a professional liability insurance policy that does not continue to cover claims filed with respect to the servicemember during the period of the servicemember's active duty unless the premiums are paid for such coverage for such period.

(b) Suspension of coverage

(1) Suspension

Coverage of a servicemember referred to in subsection (a) by a professional liability insurance policy shall be suspended by the insurance carrier in accordance with this subsection upon receipt of a written request from the servicemember by the insurance carrier.

(2) Premiums for suspended contracts

A professional liability insurance carrier—

(A) may not require that premiums be paid by or on behalf of a servicemember for any professional liability insurance coverage suspended pursuant to paragraph (1); and

(B) shall refund any amount paid for coverage for the period of such suspension or, upon the election of such servicemember, apply such amount for the payment of any premium becoming due upon the reinstatement of such coverage.

(3) Nonliability of carrier during suspension

A professional liability insurance carrier shall not be liable with respect to any claim that is based on professional conduct (including any failure to take any action in a professional capacity) of a servicemember that occurs during a period of suspension of that servicemember's professional liability insurance under this subsection.

(4) Certain claims considered to arise before suspension

For the purposes of paragraph (3), a claim based upon the failure of a professional to make adequate provision for a patient, client, or other person to receive professional services or other assistance during the period of the professional's active duty service shall be considered to be based on an action or failure to take action before the beginning of the period of the suspension of professional liability insurance under this subsection, except in a case in which professional services were provided after the date of the beginning of such period.

(c) Reinstatement of coverage

(1) Reinstatement required

Professional liability insurance coverage suspended in the case of any servicemember pursuant to subsection (b) shall be reinstated by the insurance carrier on the date on which that servicemember transmits to the insurance carrier a written request for reinstatement.

(2) Time and premium for reinstatement

The request of a servicemember for reinstatement shall be effective only if the servicemember transmits the request to the insurance carrier within 30 days after the date on which the servicemember is released from active duty. The insurance carrier shall notify the servicemember of the due date for payment of the premium of such insurance. Such premium shall be paid by the servicemember within 30 days after receipt of that notice.

(3) Period of reinstated coverage

The period for which professional liability insurance coverage shall be reinstated for a servicemember under this subsection may not be less than the balance of the period for which coverage would have continued under the insurance policy if the coverage had not been suspended.

(d) Increase in premium

(1) Limitation on premium increases

An insurance carrier may not increase the amount of the premium charged for professional liability insurance coverage of any servicemember for the minimum period of the reinstatement of such coverage required under subsection (c)(3) to an amount greater than the amount chargeable for such coverage for such period before the suspension.

(2) Exception

Paragraph (1) does not prevent an increase in premium to the extent of any general increase in the premiums charged by that carrier for the same professional liability coverage for persons similarly covered by such insurance during the period of the suspension.

(e) Continuation of coverage of unaffected persons

This section does not—

(1) require a suspension of professional liability insurance protection for any person who is not a person referred to in subsection (a) and who is covered by the same professional liability insurance as a person referred to in such subsection; or

(2) relieve any person of the obligation to pay premiums for the coverage not required to be suspended.

(f) Stay of civil or administrative actions

(1) Stay of actions

A civil or administrative action for damages on the basis of the alleged professional negligence or other professional liability of a servicemember whose professional liability insurance coverage has been suspended under subsection (b) shall be stayed until the end of the period of the suspension if—

(A) the action was commenced during the period of the suspension;

(B) the action is based on an act or omission that occurred before the date on which the suspension became effective; and

(C) the suspended professional liability insurance would, except for the suspension, on its face cover the alleged professional negligence or other professional liability negligence or other professional liability of the servicemember.

(2) Date of commencement of action

Whenever a civil or administrative action for damages is stayed under paragraph (1) in the case of any servicemember, the action shall have been deemed to have been filed on the date on which the professional liability insurance coverage of the servicemember is reinstated under subsection (c).

(g) Effect of suspension upon limitations period

In the case of a civil or administrative action for which a stay could have been granted under subsection (f) by reason of the suspension of professional liability insurance coverage of the defendant under this section, the period of the suspension of the coverage shall be excluded from the computation of any statutory period of limitation on the commencement of such action.

(h) Death during period of suspension

If a servicemember whose professional liability insurance coverage is suspended under subsection (b) dies during the period of the suspension—

(1) the requirement for the grant or continuance of a stay in any civil or administrative action against such servicemember under subsection (f)(1) shall terminate on the date of the death of such servicemember; and

(2) the carrier of the professional liability insurance so suspended shall be liable for any claim for damages for professional negligence or other professional liability of the deceased servicemember in the same manner and to the same extent as such carrier would be liable if the servicemember had died while covered by such insurance but before the claim was filed.

(i) Definitions

For purposes of this section:

(1) Active duty

The term "active duty" has the meaning given that term in section 101(d)(1) of title 10.

(2) Profession

The term "profession" includes occupation.

(3) Professional

The term "professional" includes occupational.

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 593 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 703 of act Oct. 17, 1940, ch. 888, art. VII, as added Pub. L. 102–12, §5(b), Mar. 18, 1991, 105 Stat. 37, related to reinstatement of health coverage upon release from service, prior to the general amendment of this Act by Pub. L. 108–189. See section 4024 of this title.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4024. Health insurance reinstatement

(a) Reinstatement of health insurance

A servicemember who, by reason of military service as defined in section 4023(a)(1) of this title, is entitled to the rights and protections of this chapter shall also be entitled upon termination or release from such service to reinstatement of any health insurance that—

- (1) was in effect on the day before such service commenced; and
- (2) was terminated effective on a date during the period of such service.

(b) No exclusion or waiting period

The reinstatement of health care insurance coverage for the health or physical condition of a servicemember described in subsection (a), or any other person who is covered by the insurance by reason of the coverage of the servicemember, shall not be subject to an exclusion or a waiting period, if—

- (1) the condition arose before or during the period of such service;
 - (2) an exclusion or a waiting period would not have been imposed for the condition during the period of coverage;
- and
- (3) in a case in which the condition relates to the servicemember, the condition has not been determined by the Secretary of Veterans Affairs to be a disability incurred or aggravated in the line of duty (within the meaning of section 105 of title 38).

(c) Exceptions

Subsection (a) does not apply to a servicemember entitled to participate in employer-offered insurance benefits pursuant to the provisions of chapter 43 of title 38.

(d) Time for applying for reinstatement

An application under this section must be filed not later than 120 days after the date of the termination of or release from military service.

(e) Limitation on premium increases

(1) Premium protection

The amount of the premium for health insurance coverage that was terminated by a servicemember and required to be reinstated under subsection (a) may not be increased, for the balance of the period for which coverage would have been continued had the coverage not been terminated, to an amount greater than the amount chargeable for such coverage before the termination.

(2) Increases of general applicability not precluded

Paragraph (1) does not prevent an increase in premium to the extent of any general increase in the premiums charged by the carrier of the health care insurance for the same health insurance coverage for persons similarly covered by such insurance during the period between the termination and the reinstatement.

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 594 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

PRIOR PROVISIONS

A prior section 704 of act Oct. 17, 1940, ch. 888, art. VII, as added Pub. L. 107–107, [div. A, title XVI, §1603, Dec. 28, 2001](#), 115 Stat. 1276, related to guarantee of residency for military personnel, prior to the general amendment of this Act by Pub. L. 108–189. See section 4025 of this title.

AMENDMENTS

2006—Subsec. (b)(3). Pub. L. 109–233, §302(b), substituted "in a case in which the" for "if the".
Subsec. (e). Pub. L. 109–233, §302(a), added subsec. (e).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4025. Guarantee of residency for military personnel and spouses of military personnel

(a) In general

For the purposes of voting for any Federal office (as defined in section 30101 of title 52) or a State or local office, a person who is absent from a State in compliance with military or naval orders shall not, solely by reason of that absence—

- (1) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;
- (2) be deemed to have acquired a residence or domicile in any other State; or
- (3) be deemed to have become a resident in or a resident of any other State.

(b) Spouses

For the purposes of voting for any Federal office (as defined in section 30101 of title 52) or a State or local office—

- (1) a person who is absent from a State because the person is accompanying the person's spouse who is absent from that same State in compliance with military or naval orders shall not, solely by reason of that absence—
 - (A) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;
 - (B) be deemed to have acquired a residence or domicile in any other State; or
 - (C) be deemed to have become a resident in or a resident of any other State; and

(2) the spouse of a servicemember may elect to use the same residence as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.

(Oct. 17, 1940, ch. 888, title VII, §705, as added Pub. L. 108–189, [§1, Dec. 19, 2003](#), 117 Stat. 2865; amended Pub. L. 111–97, [§2\(a\), Nov. 11, 2009](#), 123 Stat. 3007; Pub. L. 115–407, [title III, §303\(a\), Dec. 31, 2018](#), 132 Stat. 5373.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 595 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

2018—Subsec. (b). Pub. L. 115–407 substituted "State or local office—" for "State or local office, a person who is absent from a State because the person is accompanying the person's spouse who is absent from that same State in compliance with military or naval orders shall not, solely by reason of that absence—"

in introductory provisions, added pars. (1) and (2), and struck out former pars. (1) to (3) which read as follows:

"(1) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;

"(2) be deemed to have acquired a residence or domicile in any other State; or

"(3) be deemed to have become a resident in or a resident of any other State."

2009—Pub. L. 111–97 inserted "and spouses of military personnel" after "military personnel" in section catchline, designated existing provisions as subsec.(a), inserted heading, and added subsec. (b).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2018 AMENDMENT

Pub. L. 115–407, title III, §303(b), Dec. 31, 2018, 132 Stat. 5374, provided that: "The amendments made by subsection (a) [amending this section] shall take effect on the date that is 90 days after the date of the enactment of this Act [Dec. 31, 2018]."

EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111–97, §2(c), Nov. 11, 2009, 123 Stat. 3007, provided that: "Subsection (b) of section 705 of such Act [Servicemembers Civil Relief Act] (50 U.S.C. App. 595) [now 50 U.S.C. 4025], as added by subsection (a) of this section, shall apply with respect to absences from States described in such subsection (b) on or after the date of the enactment of this Act [Nov. 11, 2009], regardless of the date of the military or naval order concerned."

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4025a. Portability of professional licenses of servicemembers and their spouses

(a) In general

In any case in which a servicemember or the spouse of a servicemember has a covered license and such servicemember or spouse relocates his or her residency because of military orders for military service to a location that is not in the jurisdiction of the licensing authority that issued the covered license, such covered license shall be considered valid at a similar scope of practice and in the discipline applied for in the jurisdiction of such new residency for the duration of such military orders if such servicemember or spouse—

(1) provides a copy of such military orders to the licensing authority in the jurisdiction in which the new residency is located;

(2) remains in good standing with—

(A) the licensing authority that issued the covered license; and

(B) every other licensing authority that has issued to the servicemember or the spouse of a servicemember a license valid at a similar scope of practice and in the discipline applied in the jurisdiction of such licensing authority; ¹

(3) submits to the authority of the licensing authority in the new jurisdiction for the purposes of standards of practice, discipline, and fulfillment of any continuing education requirements.

(b) Interstate licensure compacts

If a servicemember or spouse of a servicemember is licensed and able to operate in multiple jurisdictions through an interstate licensure compact, with respect to services provided in the jurisdiction of the interstate licensure compact by a licensee covered by such compact, the servicemember or spouse of a servicemember shall be subject to the requirements of the compact or the applicable provisions of law of the applicable State and not this section.

(c) Covered license defined

In this section, the term "covered license" means a professional license or certificate—

(1) that is in good standing with the licensing authority that issued such professional license or certificate;

(2) that the servicemember or spouse of a servicemember has actively used during the two years immediately preceding the relocation described in subsection (a); and

(3) that is not a license to practice law.

(Oct. 17, 1940, ch. 888, title VII, §705A, as added Pub. L. 117–333, §19(a), Jan. 5, 2023, 136 Stat. 6137.)

¹ *So in original. Probably should be followed by "and".*

§4026. Business or trade obligations

(a) Availability of non-business assets to satisfy obligations

If the trade or business (without regard to the form in which such trade or business is carried out) of a servicemember has an obligation or liability for which the servicemember is personally liable, the assets of the servicemember not held in connection with the trade or business may not be available for satisfaction of the obligation or liability during the servicemember's military service.

(b) Relief to obligors

Upon application to a court by the holder of an obligation or liability covered by this section, relief granted by this section to a servicemember may be modified as justice and equity require.

(Oct. 17, 1940, ch. 888, title VII, §706, as added Pub. L. 108–189, §1, Dec. 19, 2003, 117 Stat. 2865.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 596 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section applicable to any case not final before Dec. 19, 2003, see section 3 of Pub. L. 108–189, set out as a note under section 3901 of this title.

§4027. Guarantee of residency for spouses of servicemembers

For the purposes of establishing the residency of a spouse of a servicemember for any purpose (including the registration of a business), the spouse of a servicemember may elect to use the same residence as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.

(Oct. 17, 1940, ch. 888, title VII, §707, as added Pub. L. 116–92, div. A, title XVII, §1739(a), Dec. 20, 2019, 133 Stat. 1820; amended Pub. L. 117–81, div. A, title X, §1081(c), Dec. 27, 2021, 135 Stat. 1922.)

EDITORIAL NOTES

AMENDMENTS

2021—Pub. L. 117–81 made technical amendment to directory language of Pub. L. 116–92, §1739(a).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF OF 2021 AMENDMENT

Pub. L. 117–81, div. A, title X, §1081(c), Dec. 27, 2021, 135 Stat. 1922, provided that the amendment made by section 1081(c) is effective Dec. 20, 2019.

SUBCHAPTER VIII—CIVIL LIABILITY

§4041. Enforcement by the Attorney General

(a) Civil action

The Attorney General may commence a civil action in any appropriate district court of the United States against any person who—

- (1) engages in a pattern or practice of violating this chapter; or
- (2) engages in a violation of this chapter that raises an issue of significant public importance.

(b) Relief

In a civil action commenced under subsection (a), the court may—

- (1) grant any appropriate equitable or declaratory relief with respect to the violation of this chapter;
- (2) award all other appropriate relief, including monetary damages, to any person aggrieved by the violation; and
- (3) may, to vindicate the public interest, assess a civil penalty—
 - (A) in an amount not exceeding \$55,000 for a first violation; and
 - (B) in an amount not exceeding \$110,000 for any subsequent violation.

(c) Intervention

Upon timely application, a person aggrieved by a violation of this chapter with respect to which the civil action is commenced may intervene in such action, and may obtain such appropriate relief as the person could obtain in a civil action under section 4042 of this title with respect to that violation, along with costs and a reasonable attorney fee.

(Oct. 17, 1940, ch. 888, title VIII, §801, as added Pub. L. 111–275, title III, §303(a), Oct. 13, 2010, 124 Stat. 2877.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 597 of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

§4042. Private right of action

(a) In general

Any person aggrieved by a violation of this chapter may in a civil action—

- (1) obtain any appropriate equitable or declaratory relief with respect to the violation;
- (2) recover all other appropriate relief, including monetary damages; and
- (3) be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary.

(b) Costs and attorney fees

The court may award to a person aggrieved by a violation of this chapter who prevails in an action brought under subsection (a) the costs of the action, including a reasonable attorney fee.

(Oct. 17, 1940, ch. 888, title VIII, §802, as added Pub. L. 111–275, title III, §303(a), Oct. 13, 2010, 124 Stat. 2877; amended Pub. L. 116–92, div. A, title V, §547(a), Dec. 20, 2019, 133 Stat. 1378.)

EDITORIAL NOTES

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (a)(3), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

CODIFICATION

Section was formerly classified to section 597a of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

2019—Subsec. (a)(3). Pub. L. 116–92 added par. (3).

STATUTORY NOTES AND RELATED SUBSIDIARIES

CONSTRUCTION

Pub. L. 116–92, div. A, title V, §547(b), Dec. 20, 2019, 133 Stat. 1378, provided that: "The amendments made by subsection (a) [amending this section] shall not be construed to imply that a person aggrieved by a violation of such Act [the Servicemembers Civil Relief Act (50 U.S.C. 3901 et seq.)] did not have a right to bring a civil action as a representative party on behalf of members of a class or be a member of a class in a civil action before the date of the enactment of this Act [Dec. 20, 2019]."

§4043. Preservation of remedies

Nothing in section 4041 or 4042 of this title shall be construed to preclude or limit any remedy otherwise available under other law, including consequential and punitive damages.

(Oct. 17, 1940, ch. 888, title VIII, §803, as added Pub. L. 111–275, title III, §303(a), Oct. 13, 2010, 124 Stat. 2877.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 597b of the former Appendix to this title prior to editorial reclassification and renumbering as this section.

Article 4.

North Carolina Servicemembers Civil Relief Act.

§ 127B-25. Title.

This Article may be cited as the North Carolina Servicemembers Civil Relief Act. (2019-161, s. 1(a).)

§ 127B-26. Purpose.

This Article is intended to incorporate into State law the rights, benefits, and protections of the federal Servicemembers Civil Relief Act, Chapter 50 of Title 50 of the United States Code, and to extend those rights, benefits, and protections to members of the North Carolina National Guard serving on State active duty and to members of the National Guard of other states serving on state active duty who reside in North Carolina. Nothing in this Article is a restriction or limitation on any of the rights, benefits, and protections granted to a servicemember under federal law. (2019-161, s. 1(a).)

§ 127B-27. Definitions.

The following definitions apply in this Article:

- (1) Dependent. – As defined in 50 U.S.C. § 3911(4).
- (2) Military order. – Official military orders, or any notification, certification, or verification from the servicemember's commanding officer, with respect to the servicemember's current or future military service. In the case of a member of the North Carolina National Guard, this term includes an order from the Governor pursuant to Chapter 127A of the General Statutes, and, in the case of a member of the National Guard of another state, this term includes an order from the governor of that state.
- (3) Military service. – Any of the following:
 - a. As defined in 50 U.S.C. § 3911(2).
 - b. In the case of a member of the North Carolina National Guard, State active duty under an order of the Governor pursuant to Chapter 127A of the General Statutes, for a period of more than 30 consecutive days.
 - c. In the case of a member of the National Guard of another state, service under an order of the governor of that state that is similar to State active duty, for a period of more than 30 consecutive days.
- (4) Servicemember. – Any of the following:
 - a. A servicemember, as defined in 50 U.S.C. § 3911(1), who resides in this State.
 - b. A member of the North Carolina National Guard. (2019-161, s. 1(a).)

§ 127B-28. Incorporation and expansion of federal Servicemembers Civil Relief Act; copy of military order.

(a) The rights, benefits, and protections of the federal Servicemembers Civil Relief Act, Chapter 50 of Title 50 of the United States Code, apply to a servicemember engaged in military service to the extent the servicemember's military service materially affects the servicemember's ability to comply with his or her obligations.

(b) In the case of a servicemember engaged in military service under G.S. 127B-27(3)b. or c., a person is not subject to the remedies or penalties of this Article unless the servicemember

gives to the person a written or electronic copy of the military order no later than 30 days after the military service terminates.

(c) To the extent this section conflicts with another section in this Article, the other section controls.

(d) A violation of the federal Servicemembers Civil Relief Act, as expanded by this section, is a violation of this Article. (2019-161, s. 1(a).)

§ 127B-29. Dependent's rights and protections.

A dependent of a servicemember engaged in military service has the same rights and protections provided to a servicemember under G.S. 127B-30 and a dependent under Subchapter III of Chapter 50 of Title 50 of the United States Code. (2019-161, s. 1(a); 2019-243, s. 29.5(a).)

§ 127B-30. Termination of contract upon receipt of military order; requirements.

(a) It is the policy of this State that servicemembers who have entered into certain service contracts and who later receive military orders to relocate to a location that does not support those contracts as determined by the service provider should not be penalized for terminating those contracts.

(b) Termination of Contract. – In addition to the rights and protections regarding consumer transactions, contracts, and service providers provided to a servicemember under Subchapter III of Chapter 50 of Title 50 of the United States Code, a servicemember may terminate a contract described in subsection (c) of this section if the servicemember receives a military order to relocate for a period of military service of at least 90 days to a location that does not support the contract.

(c) Applicability. – This section applies to a prepaid entertainment contract as defined in G.S. 66-118. This section also applies to a contract to provide any of the following services:

- (1) Telecommunication service.
- (2) Internet service.
- (3) Television service.
- (4) Satellite radio service.

(d) Notices. – A servicemember shall give to the service provider under the contract written or electronic notice of the termination and a written or electronic copy of the military order. The notice shall state the effective date of the termination. If a servicemember terminates a contract, the service provider shall give to the servicemember written, electronic, or oral notice of the servicemember's rights.

(e) No Early Termination Charge. – For any contract terminated under this section, the service provider shall not impose an early termination charge.

(f) Refund. – Not later than 60 days after the termination date of the contract, the service provider shall refund to the servicemember any fee paid for a service that extends beyond the termination date of the contract.

(g) Unpaid Obligation. – Any tax, liability, or other obligation due and unpaid at the time of the termination remains the obligation of the servicemember.

(h) Resubscription. – If the servicemember resubscribes to the service provided under the contract, the service provider shall not impose any charge or fee other than the usual and customary charges and fees for the installation or acquisition of customer equipment imposed on any other subscriber. (2019-161, s. 1(a).)

§ 127B-31. Stay of court proceedings because of military service.

(a) At any stage of any civil action or proceeding in which a servicemember engaged in military service is a party, the court may stay the action or proceeding on its own motion and shall stay the action or proceeding on application by the servicemember, or by a person acting on behalf of the servicemember, unless the court finds that the ability of the servicemember to litigate is not materially affected by his or her military service.

(b) This section applies during the servicemember's military service and within 60 days after the military service terminates. (1997-153, s. 5; 2011-195, s. 1(a); 2019-161, s. 1(b).)

§ 127B-32. Eviction; penalty or fee; extension of lease.

(a) If a servicemember who is a member of the North Carolina National Guard, or who is a member of the National Guard of another state who resides in this State, has a lease agreement on the servicemember's residence and the lease agreement expires while the servicemember is engaged, for any period of time, in State active duty or service under an order of the governor of another state that is similar to State active duty, the servicemember is entitled to extend the lease agreement to terminate 10 days after the servicemember's State active duty or service terminates upon providing written or electronic notice to the landlord or the landlord's representative. The terms of the lease agreement during this period of extension shall be the same terms that applied during the month before the expiration.

(b) This section applies only to servicemembers who are current on all rents and security deposits required and in good standing regarding the lease agreement. Nothing in this section relieves the servicemember of the obligation to pay rent, fees, dues, or other monies required in the lease agreement on time and in full. (2019-161, s. 1(a).)

§ 127B-33. No waiver.

This Article supersedes any agreement that reduces, limits, or eliminates any right or benefit provided by this Article. (2019-161, s. 1(a).)

§ 127B-34. Violation is unfair or deceptive trade practice.

A knowing violation of this Article is an unfair or deceptive trade practice for purposes of Chapter 75 of the General Statutes. (2019-161, s. 1(a).)

§ 127B-35. Action by Attorney General.

(a) Civil Action. – The Attorney General may commence a civil action against any person that violates any provision of this Article.

(b) Remedies. – The court may order any of the following remedies:

(1) Injunction.

(2) Payment of restitution to a servicemember in the amount of money unlawfully received from, or required to be refunded to, the servicemember.

(3) Any other remedy provided under Chapter 75 of the General Statutes.

(c) Civil Penalty. – The court may assess a civil penalty not to exceed five thousand dollars (\$5,000) per violation. The clear proceeds of civil penalties imposed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (2019-161, s. 1(a).)

§ 127B-36. Private right of action.

- (a) Civil Action. – A servicemember aggrieved by a person's violation of any provision of this Article may commence a civil action against that person.
- (b) Remedies. – The court may order any of the following remedies:
 - (1) Injunction.
 - (2) Payment of restitution to a servicemember in the amount of money unlawfully received from, or required to be refunded to, the servicemember.
 - (3) Damages.
 - (4) Any other remedy provided under Chapter 75 of the General Statutes.
- (c) Costs. – A servicemember who prevails in an action under this section may recover attorneys' fees and court costs. (2019-161, s. 1(a).)

Tab:
Panel

Foreclosure by Power of Sale

Top 10 Hearing Tips and Tricks

1. You don't have to know everything – it is ok to ask a party or a lawyer to explain something further.
2. Take a decision under advisement – deliberate; think about decision when you have time away from the hearing room lights.
3. In response to an objection, ask the person objecting the basis for that objection. Put the responsibility back on them.
4. After an objection is made and explained, if you are still unclear whether the testimony or evidence is admissible, note the objection and allow the testimony. You can take the decision under advisement and do some additional research. If you later determine it is inadmissible, don't rely on the evidence in your decision.
5. If a point of law is unclear at the end of a hearing, ask the attorneys to follow up with additional research in the form of a memorandum of law – just make sure that they copy all sides on any email or other correspondence with the court.
6. Do not rule on things that aren't before you. "If I did this..." or "Would you do that..." are not proper questions of a clerk presiding over a pending matter.
7. The court does not have to accept as true any statement that is in an affidavit and is never bound by a statement that makes a conclusion of law such as "X is the holder of the note."
8. Affidavits must be based on personal knowledge – the person making the affidavit should have observed the matters which they testify about.
9. Remember it is your courtroom and you are in charge – it is your job to ensure everyone is treated fairly and has an opportunity to be heard.
10. Prepare, prepare, prepare – read the clerk's manual, the statute and the filings before entering the hearing. Know what you are stepping into before you walk in the door.

Tab:

Mock Hearing

Clerk's Hearing Hit List

1. **Limited Role of the Clerk and the Six Factors.** Identify the clerk's role as a judicial officer at the hearing and that the clerk is limited to determining the existence of six elements: valid debt and holder status, default, right to foreclose, notice, home loan compliance, and military service.
2. **Action to Enjoin is Available.** Inform the borrower/record owner that if they have any other legal or equitable argument the proper forum to raise those arguments is through an action to enjoin the foreclosure sale pursuant to G.S. 45-21.34.
3. **Role of the Substitute Trustee.** Describe the role of the substitute trustee as a neutral party who is charged with carrying out the foreclosure process for the benefit of the lender and the borrower. The trustee may not advocate for either side. The trustee has no duty of confidentiality and does not represent either party. The trustee must remain neutral while serving as trustee.
4. **Primary Residence.** Inquire as to whether the debtor occupies the property as his or her principal residence. Ask any questions appropriate for the debtor under GS 45-21.16C as to the efforts made to communicate with the debtor and to attempt to resolve the matter voluntarily before the foreclosure proceeding.

Notice of Hearing

Questions

Prior to the hearing, review the attached notice of hearing and using the Notice of Hearing checklist provided, confirm it meets the required elements to initiate the foreclosure proceeding.

- 1. Is the notice of hearing legally sufficient?**
- 2. If the notice of hearing is missing information, what do you do?**

Once you have answered the above questions, complete the first page of the Foreclosure Hearing Checklist with the information about the deed of trust and promissory note from the notice of hearing.

FILED
PRICE COUNTY
CLERK OF COURT
9/15/2024
11:43AM

STATE OF NORTH CAROLINA
COUNTY OF PRICE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24-SP-1234

IN THE MATTER OF THE FORECLOSURE of a Deed of Trust from December 5, 2006 dated and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Register of Deeds by Sunshine Trustee Services, LLC (Substitute Trustee)	NOTICE OF HEARING ON FORECLOSURE OF DEED OF TRUST
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To: Bob Barker and Belinda Barker

YOU ARE HEREBY NOTIFIED that the Clerk of Superior Court of Price County, North Carolina, shall conduct a hearing pursuant to North Carolina General Statutes Section 45-21.16 with respect to the foreclosure of certain real property, as hereinafter set forth.

THE ABOVE HEARING SHALL BE CONDUCTED IN THE OFFICE OF THE CLERK OF SUPERIOR COURT IN THE CLINTON COUNTY COURTHOUSE, 1234 Wheel Way, Showdown, NC, Room 234, on **November 22, 2024 at 2:00 PM**. THE HEARING MAY BE CONTINUED TO A LATER TIME OR DATE IN WHICH EVENT YOU WILL RECEIVE WRITTEN NOTICE.

- (1) The particular real estate security interest being foreclosed is a Deed of Trust from Bob and Belinda Barker (collectively, "Grantor") to PRLAP, Inc. (the "Original Trustee") for the benefit of Capital One FSB ("Original Lender"), as beneficiary dated December 5, 2006 and recorded on December 22, 2006 in Book 6569, Page 1029 of the Price County Public Registry, as assigned to securing indebtedness in the original principal amount of \$417,000.00 (the "Deed of Trust").
- (2) The real property secured by the above described Deed of Trust and being foreclosed on is described on Exhibit A attached hereto and incorporated herein by reference and located in Price County at:
 - a. 1212 Wheel Way, Showdown, NC 27692
 - b. 716 Woodland Road, Showdown, NC
- (3) The Original Lender was the original holder of the Deed of Trust and the debt secured thereby. The Lender assigned its interest to Happy Lending LLC ("Holder"). The Holder's address is 6204 Money Drive, Angeles, NV 29472.
- (4) The Holder has confirmed in writing to the undersigned that, within 30 days of the date of the notice, the debtor was sent by first-class mail at the debtor's last known address a detailed written statement of the amount of principal, interest and any other fees, expenses and disbursements that the Holder in good faith is claiming to be due together with daily interest charge based on the contract rate as of the date of the written statement.

- (5) The Holder has confirmed to the undersigned in writing that the Grantor has in the two years preceding the date of the written statement described above made any requests for information pursuant to GS 45-93. The Holder has confirmed that such requests have been complied with.
- (6) The Holder has instructed Sunshine Trustee Services, LLC as Substitute Trustee in the Deed of Trust, substituted as the trustee in the place and stead of the Original Trustee by instrument recorded in Book 3636, Page 2512 of the Price County Register of Deeds (the "Substitute Trustee") to institute foreclosure proceedings pursuant to the power of sale provision contained therein, because of default and the failure to make payments of principal and interest as and when due as required by the Promissory Note dated December 5, 2006 in the principal amount of \$417,000 (the "Note") which is secured by the Deed of Trust. I, as Substitute Trustee, am a neutral party in this matter and, while holding this position in the foreclosure proceeding, I may not advocate for the secured creditor or for you in the foreclosure proceeding.
- (7) The Grantor is in default under the terms of the Note for failure to pay the monthly installments of principal and interest when due and the Holder has accelerated the indebtedness evidenced by the Note and made demand for payment under the note and the indebtedness due under the Note remains unpaid.
- (8) You have the right in accordance with GS 45-21.20 to terminate the power of sale being exercised in this foreclosure proceeding if you pay in full, or tender payment in full of the indebtedness secured by the Deed of Trust and the expenses incurred in this matter (including compensation for the Substitute Trustee's services as specified by the Deed of Trust), prior to the time fixed for sale or prior to the expiration of time for submitting any upset bid after sale or resale has been held.
- (9) You have the right to appear before the Clerk of Superior Court for Price County at the above hearing at which time you shall be afforded the opportunity to contest the evidence that the clerk is to consider under GS 45-21.16(d) to authorize the foreclosure or to further show cause why the foreclosure should not be allowed to be held. In order to authorize the foreclosure the clerk must find the existence of: (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A. If you do not intend to contest the Holder's allegations of default, you do not have to appear at the hearing and your failure to attend said hearing will not affect your right to pay the indebtedness and thereby prevent the proposed sale, or your right to attend the actual sale, should you elect to do so. If you fail to appear at the hearing, Sunshine Trustee Services, LLC, Substitute Trustee, will ask the clerk for an order to sell the property being foreclosed.
- (10) The loan is evidenced by the Note and Deed of Trust is a Home Loan as that term is defined in GS 45-101(1b). At least forty-five days prior to the filing of this notice, the Lender provided the Grantor with the pre-foreclosure notice and information required by GS 45-102. Within three business days of mailing the pre-foreclosure notice, the Lender or Mortgage Servicer filed with the Administrative Office of the Courts the pre-foreclosure information required by 45-103.
- (11) You have the right to apply to a judge of the superior court pursuant to GS 45-21.34 to enjoin the sale, upon any legal or equitable ground that the court may deem sufficient prior to the time that the rights of the parties to the sale become fixed, provided you comply with requirements of GS 45-21.34.

- (12) The real property shall be sold by the Substitute Trustee at the appropriate place for foreclosure sales at the Price County Courthouse, 1235 Justice Way, Showdown, North Carolina or at such other location as may be set forth in the Notice of Sale and will be at a date and time specified therein, should the obligations not be earlier satisfied. If the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of the Substitute Trustee's Deed, and if the prior record owner is still in possession at that time, he can then be evicted.
- (13) You should keep the Substitute Trustee or Holder notified in writing of your address so that you may be mailed copies of the notice of sale setting forth the terms under which the sale will be held, as well as notice of postponements of such sale or notice of resale. The name and address of the Substitute Trustee are listed below.

This the 13th day of September 2024.

Sunshine Trustee Services, LLC,
Substitute Trustee

BY: Sherry Samuels, Attorney
Sunshine Law LLC, Attorneys for
Sunshine Trustee Services, LLC
1235 Trustee Road
Showdown, NC 38474
919-569-5689
919-569-5689

Exhibit A

Lot 1212 of Map Book 56, Page 4947 of the Price County Register of Deeds.

Lot 716 of Map Book 48, Page 3947 of the Price County Register of Deeds.

Required Contents

Notice of Hearing

G.S. 45-21.16(a), (c), and (c2)

1. Time and place for the hearing before the clerk	<input type="checkbox"/>
2. Description of property subject to foreclosure	<input type="checkbox"/>
3. Date of the deed of trust	<input type="checkbox"/>
4. Original amount of the note	<input type="checkbox"/>
5. Original holder of the note	<input type="checkbox"/>
6. Book and page number of the recorded deed of trust	<input type="checkbox"/>
7. Name of the holder at the time the notice of hearing filed	<input type="checkbox"/>
8. Address of the holder at the time the notice of hearing filed	<input type="checkbox"/>
9. Nature of the default	<input type="checkbox"/>
10. Statement the debt was accelerated (only required if debt accelerated)	<input type="checkbox"/>
11. Right of debtor to pay debt or cure default (if permitted)	<input type="checkbox"/>
12. 30 day notice letter sent	<input type="checkbox"/>
13. Statement regarding compliance with Borrower requests for information	<input type="checkbox"/>
14. Right of the borrower to appear at the hearing	<input type="checkbox"/>
15. Statement that if borrower does not contest, does not have to appear and failure to appear does not impact obligation to pay the debt or sale of the property	<input type="checkbox"/>
16. The Substitute Trustee is a neutral party and may not advocate	<input type="checkbox"/>
17. The Borrower may enjoin the sale on any legal or equitable ground, provided they comply with GS 45-21.34 (bond)	<input type="checkbox"/>
18. Right of the Borrower to contest the foreclosure at the hearing and to authorize the foreclosure the clerk must find existence certain factors	<input type="checkbox"/>
19. If Borrower fails to appear, substitute trustee will ask for an order to sell the property	<input type="checkbox"/>
20. Borrower has right to seek the advice and counsel of an attorney and free services may be available through Legal Aid	<input type="checkbox"/>
21. If sale held, then purchaser at sale is entitled to possession of the property and Borrower may be evicted if still on property	<input type="checkbox"/>
22. Name of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>
23. Telephone number of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>
24. Address of current trustee or mortgagee under the deed of trust	<input type="checkbox"/>
25. Request that the Borrower keep trustee up to date on his or her address so that the trustee can mail notices to the borrower	<input type="checkbox"/>
26. Hearing may be on a date later in the notice and if notice will be sent of the new date	<input type="checkbox"/>
27. If the Borrower is on military duty, the foreclosure may be prohibited	<input type="checkbox"/>
28. Certification that the 45-day letter provided in all material respects, requisite information was registered with AOC, and all applicable time periods have elapsed (G.S. 45-107; G.S. 45-21.16(d)(v))	<input type="checkbox"/>

Foreclosure Hearings for Clerks

Mock Hearing

In re the Foreclosure of Barker

Price County, NC

STUDENT SCRIPT

THE PARTIES

Clerk:

Original Borrowers:

Belinda Barker (and Bob Barker, not present at hearing)

Counsel for Borrowers:

Kathryn Small

Counsel for Substitute Trustee:

Sherry Samuels, Sunshine Law LP (Hearing #1)
Barbara Boswell, Boswell Law LLP (Hearing #2)

Counsel for Lender:

Sherry Samuels, Sunshine Law LP (Hearing #2)

THE HEARING

CLERK: *Shakes hands with Sherry Samuels.* Well, hi Sherry. How are you? Are you looking forward to the holidays with the kids?

SAMUELS: Yes they are so excited. The kids have already made their Christmas lists. How are you doing? Did little Janie start pre-school this year?

CLERK: Yes, she's loving it so far. Thanks for giving us that recommendation we needed, it was such a lifesaver.

Ok, well, let's get started then. Good afternoon. This hearing will come to order. My name is _____ and I am the [elected/assistant] clerk of court here in Price County. It is my understanding that today we are here regarding the matter of the Foreclosure of the Deed of Trust executed by Bob Barker and wife, Belinda Barker. Let's begin by having everyone who is here today and plans on addressing the court introduce themselves and state their purpose for being here.

ATTORNEY SAMUELS: Good afternoon, your Honor. I am Sherry Samuels. I represent Sunshine Trustee Services, LLC. Sunshine Trustee is serving as the trustee in this matter.

BELINDA BARKER (B): Um, hello, good afternoon. I am Belinda Barker. I am listed as a borrower in the notice I received with my husband, Bob Barker.

CLERK: Ok, thank you both. Mrs. Barker, before we go any farther, I want you to understand that Mrs. Samuels a neutral party in this action and she does not represent you or the lender. She is in charge of carrying out the foreclosure and was appointed by the lender to do that. Do you understand?

MRS. BARKER: Well, I guess, sort of. I guess I'm confused because we received a letter from Mrs. Samuels saying she represents the lender and we are in default? And now she is supposed to be neutral? That doesn't seem fair. My husband, Bob, well he is very ill and can't be here at the hearing today. I am just here today asking for more time. We have been trying to get an attorney to stop this foreclosure but it has been hard to find an attorney who will take our case. We don't have money to pay a fancy attorney because we've been making payments on the loan and trying to also pay medical bills. Plus, we don't have copies of the all the foreclosure documents to show an attorney because the lender isn't responding to us, so none of them know what kind of case we really have, other than taking our word for it of course. We don't even have a copy of our loan documents.

CLERK: Ok, Mrs. Barker, I'm going to stop you right there. Do you occupy this property as your primary residence?

MRS. BARKER: Yes, your honor, we live there. We've lived there for 30 years.

CLERK: Ok, have you submitted an application to the lender to obtain a loan modification or other relief?

MRS. BARKER: I believe so. But my husband has been handling it. I don't know much about it. He just keeps saying that he is bounced around from person to person and has a hard time finding out about the status.

SUBSTITUTE TRUSTEE: Your honor, there is absolutely no reason for a continuance in this case. The Barkers have had plenty of time to get an attorney since the notice of hearing was filed and these foreclosure documents set forth the six factors clearly and without question. The Barkers have known about this foreclosure for months and are just dragging their feet delaying the inevitable. At the very least, we'd ask that the court enter the order for sale and if there are ongoing talks with the borrower about a modification we will agree not to set the sale date and allow those talks to continue. In addition, I have an affidavit with me today regarding loss mitigation I would like to submit into evidence. I'll just save you the trouble of having to ask any of these questions about loan modifications. May I approach?



HEARING #2

CLERK: Good afternoon. This hearing will come to order. My name is _____ and I am the [elected/assistant] clerk of court here in Price County. It is my understanding that today we are here for the second time now regarding the matter of the Foreclosure of the Deed of Trust executed by Bob Barker and wife, Belinda Barker. Let's begin by having everyone who is here today and plans on addressing the court introduce themselves and tell me who you represent.

ATTORNEY BOSWELL (ST Counsel): Good afternoon, your honor. I am Barbara Boswell and I represent Sunshine Trustee Services, LLC.

ATTORNEY SAMUELS (Lender's Counsel): I'm Sherry Samuels and I represent Happy Lending LLC in this matter.

ATTORNEY SMALL (Borrower's Counsel): I'm Kathryn Small and I'm here today on behalf of the Barkers, Bob and Belinda. Here with me today is Belinda Barker.

CLERK: Ok, Mrs. Small. Let's get started then. I know we are in a conference room, but I would like everyone to keep in mind that this is a court proceeding. I want to make clear that my findings in this foreclosure proceeding are limited to six factors.

If the lender is able to show that it is the holder of a valid debt, default, notice to those people entitled to it, right to foreclose, any required home loan notice was sent, and that the sale is not barred due to the borrower's military service, then I will enter the order authorizing sale. This hearing is not the proper forum for equitable arguments, which are arguments about fairness, or other legal arguments. If the argument does not relate to those six factors, I am going to stop you and get us back on track. The proper way to address those issues is for the borrower to file a different action to enjoin the sale that would be heard by a superior court judge. Everyone understand?

(Everyone nods.)

CLERK: Ok, because this is contested, I will ask the lender to go first and present to the court and then we'll hear from borrower's counsel. Please proceed, Mrs. Samuels.

SAMUELS: Your honor, good afternoon. Again, I'm Sherry Samuels and I'm here on behalf of the petitioning lender in this matter....

SMALL: Excuse me, your Honor, there is a procedural matter that I need to take up and need for the Court to make a decision. I do not think that Mrs. Samuels can represent the lender in this case because she previously represented the substitute trustee in the earlier hearing on this matter. Mrs. Samuels also signed the notice of hearing as trustee and now she's here appearing on behalf of the lender. It seems to me that just based on appearances alone this is a terrible message she's sending.

SAMUELS: In all due respect your Honor, I would contend that the argument Mrs. Small is raising is outside of this proceeding and the elements the court is charged with finding under the statute. As you just noted, the court can only consider those six elements you identified. I contend this is irrelevant to the proceeding and is outside the scope of the foreclosure. But I do want to be heard on the actual foreclosure, should we get to that point, your Honor?

SMALL: I'm sorry your Honor. But this is an ethical issue and I'm just uncomfortable without some type of ruling from this court. It just troubles me that the trustee is supposed to be neutral. And here we have Mrs. Samuels' law firm drafting all the documents, including appointing the trustee so they were clearly representing the lender before the substitution of trustee was filed. Then they represented the trustee at the original hearing before you, supposedly being neutral. And now they are back to the lender again. It just flies in the face of a trustee being a neutral party.



CLERK: Ok, let's continue then. Mrs. Samuels, please proceed.

SAMUELS: Your Honor, this matter began on December 5, 2006. Bob and Belinda Barker executed a promissory note in favor of Capital One, FSB to evidence the repayment of the original principal amount of \$417,000. Along with the execution of that promissory note, the Barkers executed a deed of trust encumbering two properties here in Price County. The note bears an indorsement from Capital One, FSB to Countrywide Home Loans, Inc. and then Countrywide indorsed the note in blank.

After the execution of that promissory note, the note was transferred to my client, Happy Lending, LLC, and Happy Lending has been in possession of that promissory note indorsed in blank since that time. A copy of the note is attached to this affidavit I am submitting into evidence from the servicer.

CLERK: Mrs. Samuels, would you like this marked as the lender's exhibit A and admitted into evidence?

SAMUELS: Yes.

SMALL: Objection your Honor, that affidavit is hearsay and inadmissible as is the note attached to it. Plus we haven't even had a chance to review it yet. This is the first I've seen of it. Furthermore, I would like this hearing continued until the time that the lender can produce an original note and deed of trust. How do we even know that these are accurate copies?

SAMUELS: Mrs. Small, here is a copy of the affidavit for you and for the court (*hands a copy up to the clerk and gives a copy to Mrs. Small*).

SMALL: Well, your honor, objection again - now that I'm looking through this, look at this note, I mean there is an indorsement on here made by Treasury Bank as attorney in fact for Capital One FSB - where is their authority to act - Treasury Bank - where is the evidence of their authority to make that indorsement?



SAMUELS: Your Honor, I actually brought the original note with me today. Happy Lending has entrusted me with the original as their custodian. I am happy to make it available to the court

for inspection. You will see that the copy attached to the affidavit is in fact an accurate copy of the original note.

SMALL: Objection your honor, how do we know that is the original note? Mr. Samuels is the attorney for the holder – where is someone from the holder who can testify that this is in fact the original and lay a proper foundation for this note so it can be admitted into evidence? I want to see it!



SAMUELS: The last payment made on the loan was in February of 2021. As evidenced by this payment history (*Holds up a copy of payment history*).

SMALL: Objection! Your honor, Mr. Samuels is the attorney in this case, not a witness and not an employee of the Servicer. Shouldn't someone be here from the servicer or at least provide an affidavit laying the foundation for this payment history? Plus, it is hearsay.



SAMUELS: Nationstar Loan Servicing, the servicer of the loan, sent the borrowers a 45-day pre-foreclosure notice as required by the North Carolina General Statutes. A copy of that letter is attached to the affidavit from the servicer marked as Exhibit C. No further payments were made by the borrowers on the loan and it remains due for February 2021 and all subsequent months.

Your Honor, as to a valid debt, you will see testimony in the affidavit that the debt is valid and there is as I mentioned a copy of the note.

The power-of-sale clause contained in the deed of trust is contained in a paragraph entitled "Default" on page three of the deed of trust. A copy of the deed of trust is also attached to the servicer's affidavit as Exhibit B. The paragraph entitled "Default" allows the property to -- the loan to be accelerated in the event of a default and for the property to be sold at foreclosure.

All parties were given notice that were entitled to notice as shown by the affidavit of service we are filing today as well.

CLERK: Would you like this affidavit of service marked as Exhibit B and admitted into evidence?

SAMUELS: Yes.

CLERK: Ok, so marked and so admitted.

SAMUELS: As you can see from the affidavit, attempted service was made on the Barkers at their home address, which is the Woodland property. And because service was not obtained at that address, the property was posted and the sheriff's return evidence is evidence of the posting of the property.

Pre-foreclosure notice was sent to the borrowers as required by Chapter 45. And there is no bar to foreclosure based on any type of protected military service. Copies of both the notice and certificate of compliance are attached to the servicer affidavit. I also am submitting as Exhibit C an affidavit from the trustee regarding the substitution of trustee and the fact that the Barkers are the record owners of the property.

CLERK: Any objection Mrs. Small?

SMALL: Yes your honor. In looking at this substitution of trustee, I do not see where the servicer has the authority to act on behalf of the lender? How did the servicer have the authority to appoint the substitute? They are not the holder of the loan.



SAMUELS: Your Honor, therefore, I would contend that each of the six elements have been met as required by, by the North Carolina General Statutes. And as Chapter 45-21.16 states if each of those elements has been met, then the Court shall enter an order authorizing the property to be sold at foreclosure. Therefore, I would ask this Court to enter an order to allow the property to be sold.



CLERK: Ok, thank you Mrs. Samuels. Do you have anything further?

ATTORNEY SAMUELS (Lender's Counsel): Not at this time your honor.

CLERK: Ok, Mrs. Small you may proceed.

SMALL: Your Honor, what we are contesting a lot of things. We don't believe Happy Lending has met their burden of establishing that they are the current holder of a valid note or that they have a right to foreclose under the deed of trust. Plus we think service was inadequate because the trustee did not use diligent efforts to locate the Barkers. The Barkers don't live at Woodland Road, they haven't lived there for years.

First, there is absolutely no evidence of possession by a valid holder that was presented by the lender. If you look at the note, after the Barkers signatures on the note there are two stamps on here. And one is to the order of Countrywide Homes by Capital One, F.S.B.; the other is by Countrywide to blank. But there's no date on either one. So we have no idea when they were made and when transfer of possession occurred to Happy Lending, if it ever did at all. Plus we have no idea about the authority of these people who signed the indorsements. One person, I think, Ms. Padilla, how she had the authority to act as attorney in fact for Capital One.

In addition, the fact that there is an original promissory note that that Mrs. Samuels has in her possession does not serve as evidence as to who gave her that. She's the attorney for the lender, not testifying here in court. There's no affidavit from Happy Lending or anybody as to possession. No one from the lender is even here today to testify they gave Mrs. Samuels the note. In fact, the servicer's affidavit is completely silent and does not mention the term possession at all. And I think if you can't show that you're a holder of a note by simply saying "Well, I've got it, so my client is the holder." That's just doesn't meet the burden. So my argument is that the lender failed to meet their burden of proof of the element of possession.

In addition, the only possible piece of actual evidence in this case from someone who isn't the trustee is this affidavit from the servicer. And I emphasize they are the servicer. They are not the lender who actually has the burden of proving they are the holder. There also is no evidence that they actually are the servicer for the loan and that Happy Lending authorized them to act on their behalf. I would contend that the affidavit is in fact hearsay and you shouldn't consider it, especially given that it does not tell us how Happy Lending got possession of the note or how they had the authority to sign the substitution of trustee on behalf of Happy Lending.

CLERK: Ok, Mrs. Small anything else.

SMALL: Well, of course your honor. I'd like to call my client, Belinda Barker to the stand.

DIRECT EXAMINATION OF BELINDA BARKER

(Clerk oversees swearing in, directs counsel to begin.)

SMALL: Please state your name and address.

BARKER: Belinda Barker. I live at 1212 Wheel Way, Showdown, NC 27692.

SMALL: Mrs. Barker is that your signature on the note?

BARKER: No, I was not with my husband when he signed these documents. He signed his name and my name. I never agreed to this loan. You can see that isn't my signature, if you look at the signatures it just looks like Bob signed twice. They are exactly the same.

SAMUELS: Objection your honor. This is outside the scope of this court's inquiry. Whether or not a document was forged is an equitable argument.



BARKER: Like I said, this is not my signature. I was sick the day of the loan closing. Bob told me that when he went to the closing by himself, the bank officer just told him to sign the note for me and he could make it so everything was fine.

SAMUELS: Objection your honor, hearsay.



CLERK: Mrs. Samuels, your objection is noted. Please continue Mrs. Small.

SMALL: Mrs. Barker, what have your communications been like with the servicer of this loan?

BARKER: Oh I'd say they've been very difficult. We can't seem to get a straight answer out of anyone. When Bob lost his job, we called and spoke with a Mr. John Johnson. We told him about Bob's job loss and he said the best thing for us would be to stop making payments because that is the only way we could qualify for a modification. He also said he would waive some of the late fees and other default interest charged on the loan as part of the modification. He said we would definitely qualify for a loan modification. So we stopped paying our loan then sent in all our paperwork and just waited to hear back.

SMALL: Did you hear back from them?

BARKER: Not for 4 months. Then they just responded that we need to resubmit information. Once we did that they denied our request for a modification. They also rejected our payments. We've been putting the payments into a separate account with you so that we can show that we've been trying to pay the loan, it is just that the lender won't take our payments.

SMALL: So you are saying you've been trying to make loan payments but the lender won't accept them?

BARKER: Yes. Well we've tried to make what we could. We are trying to make it right. We just need more time.

SMALL: And did the lender do that?

BARKER: Not to my knowledge.

SMALL: So do you feel that you've been misled by the lender Mrs. Barker?

BARKER: Yes, I just feel so yanked around. Plus, we just can't even figure out who owns our loan.

SMALL: Ok let's get to that Mrs. Barker. Have you received any notices from the lender as to who owns your loan?

BARKER: No we just received one notice right after the closing that our loan had been sold and Nationstar was now our servicer.

SMALL: And you've made payments directly to Nationstar?

BARKER: Yes. Well my husband made the payments because he's the only one we thought was on the loan.

SMALL: Ok, right, yes that is what you said earlier. But, you've never heard of Happy Lending LLC have you Mrs. Barker?

BARKER: No, never, not until this foreclosure proceeding was filed.

SMALL: And have they ever sent you anything noticing you that they owned your loan?

BARKER: No, never.

SMALL: *(Hands Mrs. Barker a piece of paper)* Mrs. Barker can you tell me what that document is I just handed you?

BARKER: It is a partial release. It shows that Mortgage Electronic Registration Systems Inc. released one of the lots they are foreclosing on 1212 Wheel Way.

SMALL: When was it recorded?

BARKER: It says in 2007. They can't foreclose on that property, we own it free and clear. Also we never granted a lien on 716 Woodland Road, Showdown, NC, which is the other property they say they have a lien on.

SMALL: Why is that Mrs. Barker?

BARKER: Well, they added the legal description with that property to the deed of trust after it was recorded. I mean look at the note, it looks like they just added that property with a typewriter at the top there and Exhibit A to the Deed of Trust looks like it was added after we signed it. Bob never intended for that property to be part of the loan transaction. That is a rental house we own and our daughter and her husband live there. We don't live there. In fact, Bob told the servicer that when he called trying to get them to send more information to us about modifications.

SAMUELS: Objection your honor. This smells an awful lot like a fraud argument and that is clearly outside the confines of what this court is charged with considering. If the borrower wants to raise this defense, they need to file an action to enjoin the foreclosure.



SMALL: Mrs. Barker is there anything else you want the court to know?

BARKER: Mrs. Samuels is right. We did stop paying back in 2021 but only because that is what our lender told us to do. We hit hard times and couldn't make our payments. But then my mom died and I inherited some money. I tried to bring the loan current and pay everything they told me to pay but I sent them a check and the bank sent it back to me. After that, the amount kept compounding with fees and everything else, it was so much I couldn't afford to catch the loan up. This whole thing just spiraled out of control. Then COVID hit and we got a break from payments but we still weren't able to catch up all the way. It just got to be too much. I don't know how you can be punished for trying to do the right thing.

SMALL: I'm sorry for all that you have been through Mrs. Barker. That truly sounds horrible. That is all your honor.

CLERK: Mrs. Samuels, any cross examination?

CROSS EXAMINATION OF BELINDA BARKER

SAMUELS: Yes, your honor.

CLERK: Ok then please proceed.

SAMUELS: Mrs. Barker, it is pretty convenient that your husband isn't here today isn't it?

Barker: Like I said, he's sick.

SAMUELS: Well, it seems pretty nice that he can't testify under oath about what happened at that loan closing. Did you ever execute a power of attorney allowing him to act on your behalf?

Barker: I don't recall.

SAMUELS: Have you made payments on the loan Mrs. Barker?

BARKER: Well, my husband has.

SAMUELS: And when you received notices regarding the loan – such as payments that were due or other information from the lender and your name was on them, did you ever question whether that was correct before today?

BARKER: Well, no, I didn't really handle that stuff, my husband did.

SAMUELS: And you have been living in the house located at Wheel Way, receiving mail there?

BARKER: Well yes.

SAMUELS: And you signed the deed of trust?

BARKER: Well yes.

SAMUELS: That is all your honor.

CLERK: Mrs. Samuels, anything else?

SAMUELS: No your honor. We think we have sufficiently shown a valid debt, default and right to foreclose by the affidavit submitted. Mrs. Small has not shown any affirmative evidence that the Barkers didn't sign the note or deed of trust or that the copies we've submitted are not true and accurate copies. The property is clearly encumbered by the lien of the deed of trust. We are not familiar with this release of the property she mentioned.

CLERK: Thanks Mrs. Samuels. Mrs. Small do you have anything else to add?

SMALL: Mrs. Barker didn't sign that note. Her husband signed for both of them. Also I think that release is pretty good evidence that lot shouldn't be included in their foreclosure. The lender also added property to the deed of trust after Bob Barker signed it. Finally, this servicer can't testify to the lender's possession of the note. All we have is the attorney for the holder here with an original note. There's no actual evidence regarding the servicer's connection to the lender and whether or not this attorney is even really here today on behalf of the lender and whether it is really the holder that has possession.

All of this coupled with the problems with possession and evidence authority support a dismissal of this case, your Honor.

CLERK: Ok. Does anyone have anything further?

(Everyone shakes their head no.)

There were a number of issues raised at today's hearing. I am going to review these documents provided by the lender's counsel and consider the arguments raised by each party and take my decision under advisement. I will enter an order within the next couple of days and send a copy to the parties as soon as I do.

ATTORNEY SAMUELS: Your honor, we would really prefer that you rule right now. There has been significant delay in this process already, it is just wasting more time and money to delay it any further. In addition, there is no authority for you to take a decision under advisement. You really must enter your order today.



Work with your group to go through the documents. As a group, decide whether or not to do one of the following:

1. Enter an order authorizing sale,
2. Enter an order denying request to authorize sale, or
3. Continue it to a later date.