

# SERVICING MANAGEMENT

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## Busy Year in North Carolina

The foreclosure and creditor's rights industry in North Carolina has seen significant change this year—from trustee-ship ruling and attorneys present at routine foreclosure hearings, to the Home Protection Pilot Program and pending legislation regarding recording a satisfaction of security instrument.

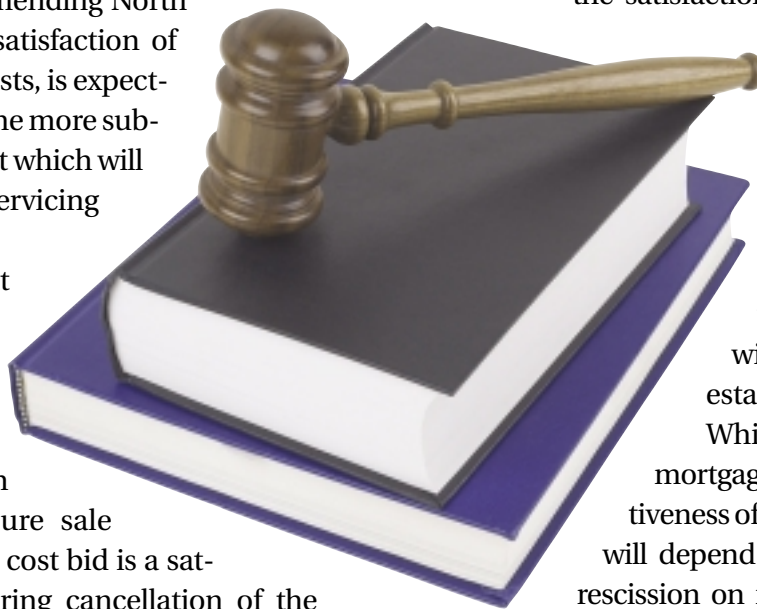
Senate Bill 738, an act amending North Carolina's law relating to satisfaction of mortgages and deeds of trusts, is expected to be enacted. Some of the more substantial provisions of the act which will likely impact mortgage servicing are noted below.

The act requires that mortgagees submit for recording a satisfaction of a security instrument within 30 days after the lien obligation has been fully satisfied. A foreclosure sale resulting in a full debt plus cost bid is a satisfaction of the lien requiring cancellation of the security instrument at the local registry. Creditors that fail to comply with the provisions of the act are liable to the landowner for the actual damages caused by the failure to do so, in addition to possible fines in excess of \$1,000, and reasonable attorney's fees.

The act also provided relief to note holders when a satisfaction of mortgage or deed of trust is filed wrongfully or erroneously. The act provides that a "document of rescission" may be filed, stating that a satisfaction

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However, the document of rescission will have no effect on the rights of a person filing a document at the local registry affecting an interest in the property after the filing of the satisfaction and before the filing of the document of rescission.

was filed wrongfully or erroneously, and that the secured obligation remains unsatisfied.

Upon the filing of the document of rescission, the security instrument will remain in force.

### **Quick recordation**

This provision of the act is significant in that before the act, most mortgagees were forced to resolve wrongful cancellation issues with litigation in an effort to re-establish a lien.

While the provision may assist mortgagees in some cases, the effectiveness of filing a document of rescission will depend on getting that document of rescission on record quickly and before the filing of an intervening document affecting title.

The act also speaks to Issues regarding payoff statement requests and their content. According to the act, a payoff statement must contain the date the statement was prepared and the payoff as of that date, including the amount by type of each fee, charge or other sum included within the payoff amount; the information reasonably necessary to calculate the payoff amount as of the requested

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payoff date, including per diem interest amounts; the payment cutoff time; the address or place where payment must be made; and any limitation as to the authorized method of payment.

Additionally, mortgagees may not qualify a payoff amount or state that the amount is subject to change before the payoff date, unless information is provided to allow the appropriate party to obtain updated payoff information on the payoff date or the immediately preceding business day. The act states that payoff statements may be obtained by the entitled person or their authorized agent, such as a closing attorney.

Mortgagees may rely on the representations regarding authorization made by written request for the payoff statement and, therefore, no additional duty is placed on the mortgagee to make inquiry as to whether the person making the request is an entitled person or an authorized agent. The payoff statement must be issued and sent to the place directed in the request within 10 days after the effective date of an appropriate request.

Regarding understated payoff statements, the act allows for the secured creditor to send a corrective payoff statement, and if the entitled person or their agent receives the same and has a reasonable opportunity to act upon the corrected statement, the corrected statement will supersede the earlier statement. However, if a party

other than those who are liable for the obligation reasonably and detrimentally rely upon the understated payoff statement and, thus, the creditor's recourse will be against those personally liable for payment.

#### ***A pilot program***

Servicers in North Carolina may find that their foreclosure actions and motions for relief from stay in bankruptcy proceedings are affected by a new, but little known, North Carolina law that became effective January 1, 2005,

The "North Carolina Home Protection Pilot Program and Loan Fund" is designed to help North Carolina workers avoid foreclosure. The program is administered by the North Carolina Housing and Finance Agency (NCHFA), and is currently available in Cabarrus, Cleveland, Cumberland, Edgecombe, Forsyth, Guilford, Rowan and Rutherford counties. Additional counties may be included based on the success of the pilot program.

To be eligible for assistance, a mortgagor must have lost his or her job through no fault of their own, be eligible for unemployment benefits through the N.C. Security Commission, and possess a stable employment and credit history prior to being dismissed from his or her last employer.

The key program component involves a 120-day stay of foreclosure. Once a mortgagor files a completed application with NCHFA, a stay is

imposed that prevents a lender from proceeding with foreclosure while the application is under consideration and, if approved, through the period of assistance. This stay is also being used in bankruptcy cases to prevent servicers from obtaining relief from the automatic stay.

In addition to staying the foreclosure proceeding and/or preventing relief from the automatic stay, the statute specifically prohibits acceleration of the mortgage obligation, taking possession of any collateral, procuring or receiving a deed in lieu, or entering a judgment of confession pursuant to a note.

Upon receipt of a mortgagor's application, NCHFA will mail a notice of application to the servicer within five business days, informing the servicer that the mortgagor has sought assistance from NCHFA. Within 120 days, NCHFA will notify the servicer of the mortgagor's acceptance or denial into the program.

#### ***Free to proceed***

If the application is denied, the stay imposed under the statute is lifted, and the lender is free to proceed with foreclosure. If approved, the mortgagor may choose from one of two zero-interest loan options. The first option is a lump-sum payment designed to cure the mortgage arrearage. The second option is in the form of ongoing assistance with the regular monthly mortgage payments for a period of no more than 18 months. The maximum loan

amount for either option is \$20,000, and may be applied toward loss mitigation.

Servicers receiving notice of the application process are obligated to stay their proceedings for the statutory period of 120 days, or until the application is denied. Violations of the stay entitle the mortgagor to injunctive relief without bond and any remedies available at law or equity.

Mortgage companies with loans in North Carolina should talk with their attorneys about these changes. The lawyer or mortgage company that fails to reconcile their foreclosure and bankruptcy practice to these new rules could face serious and costly consequences. (For more information regarding the N.C. Home Pilot Protection Program, visit [www.nchfacom.com](http://www.nchfacom.com).)

#### ***Attorneys required***

Earlier this year, the North Carolina State Bar and the Administrative Office of the Courts of North Carolina (AOC) addressed the issue of whether or not anyone other than an attorney licensed in the state of North Carolina could sign foreclosure pleadings or appear at foreclosure hearings on behalf of the trustee.

The state bar and the AOC concluded that unless the trustee is an individual and represents himself or herself, an attorney must represent the trustee at foreclosure hearings and sign all plead-

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ings. The rationale behind the decision rests in a determination by the state bar and the AOC that the necessary step in the process of a North Carolina power of sale foreclosure involving obtaining an order from the clerk of superior court authorizing the trustee to proceed to foreclosure sale is a “judicial act” under North Carolina law.

At the foreclosure hearing in a power of sale foreclosure, the clerk of court reviews the evidence presented to determine that: the party seeking to foreclose is the valid holder of tile debt; a default exists; the instrument contains the right to foreclose; and proper notice has been given to those entitled under the statute.

Therefore, since the clerk’s act of finding (or refusing to find) is, pursuant to the statute, a judicial act and may be appealed, the state bar and the AOC concluded that unless the trustee is an individual and appears to represent himself or herself, an attorney must represent the trustee at every stage of the litigation, which includes everything from signing the pleadings to appearing at the foreclosure hearings before the clerk.

Failure of parties to comply with these requirements could result in a finding that the party is engaged in the “unauthorized practice of law,” a crime in North Carolina.

Last year, the state bar—acting through its Unauthorized Practice of Law Committee and in response

to a complaint filed against a non-attorney corporate trustee—found that the corporate trustee was engaged in the unauthorized practice of law when it attempted to prosecute a foreclosure action as substitute trustee acting *pro se* (on behalf of itself).

The state bar determined that the clerk of court’s role in deciding whether or not to issue the order allowing the foreclosure sale was a judicial act the state bar relied on the case of *Lexis Nexis v. Travishan Corp.* (2002), which ruled that a corporation could not appear in court *pro se* except for very specific and limited instances, none of which involved foreclosure actions.

Therefore, the state bar ruled that only an individual who had been appointed as trustee could appear before the clerk in a foreclosure hearing without a lawyer. In all other instances, the trustee must either be a lawyer, or be represented by a lawyer, in order to appear before the clerk in a foreclosure hearing.

This year, the state bar reached the same decision and admonished another firm against appearing before the clerk as a corporate trustee without an attorney. This time, the AOC joined in with a detailed “suggested practice” guideline for the clerks to consult when questions arose about a trustee’s right to appear before the clerk in a foreclosure hearing.

These guidelines were distributed to the clerks of court in North Carolina, and most

clerks are following the guidelines. The AOC also reminded the clerks that it is within the clerk’s discretion to require attorneys at all hearings, even in those cases where the trustee was an individual. A growing number of clerks in North Carolina are now requiring attorneys at foreclosure hearings, even when the trustee is an individual acting *pro se*.

### ***Substitute trustees***

In response to these new guidelines, some law firms have appointed paralegals as substitute trustees in an effort to fit within the exception allowing individuals to appear at hearings *pro se*. However, this practice has little chance of acceptance by the state bar or the AOC, even if a clerk of court did not object, as it appears to violate the rules of professional conduct of the state bar.

Those rules prohibit a lawyer from representing the note holder and the trustee when the lawyer is also the trustee. The paralegal’s status as trustee would be imputed to the law firm and therefore violate this rule. It would appear that the only workable solution in the wake of these changes is for lawyers for the trustee to attend all of the hearings, whether contested or uncontested.

North Carolina has long been somewhat of an anomaly to the rest of the country so far as its foreclosure rules are concerned. It is well known, although sometimes disregarded, that in North

Carolina an attorney who serves as a trustee can not represent the note holder in a foreclosure. Now that a foreclosure hearing requires an attorney, lawyers in North Carolina who practice foreclosure law must be careful to avoid this conflict of interest rule.

One solution is to appoint a substitute trustee prior to the commencement of the foreclosure action. This substituted trustee should not be a related company or employee of the law firm. The law firm can then represent the note holder and the trustee in the foreclosure action.

In many respects, this is a better arrangement than that which most mortgage servicers have previously had with their lawyers in North Carolina. This is true because the law firm who now acts as the attorney for the trustee and the note holder can represent the note holder when the foreclosure becomes contested, a bankruptcy is filed or a lawsuit is filed challenging the mortgage company’s right to foreclosure. ■