Fall 2010

Carolina Update

NCLTA's Exclusive Report to its Members

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President's Message

By Tabatha Cruden

As the 2011 NCLTA President, my foremost thought is directed to my recent predecessors who have gone above and beyond the call of duty to serve the NCLTA. They have charted a path for us through some difficult times in our industry. Our organization will continue to provide education to its members, protection to consumers and loss prevention for our industry. I look forward to working together with all of you to carry on the initiatives that my predecessors have started.

We hosted a successful Annual Convention in September on the Outer Banks that was enjoyed by all who attended. Tim Quinlan, an economist with Wells Fargo, assured us that we are gradually recovering from the worst recession in decades, but cautioned that business conditions will likely remain challenging as consumers retrench. Joe Ritter delivered a great and timely presentation on Loan Workouts and Modifications. Rob McNeill instructed and entertained with stories of claims. Hunter Meacham provided a review of bankruptcy and the hazards to be navigated when insuring title transaction with debtor/creditor implications. Robert Hobbs presented a stellar case law update and David Ferrell, our fantastic lobbyist, brought us up to speed on the happenings in our Legislature. We also

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Looking Ahead: The 2011 Legislative Session

By David P. Ferrell, Esq., NCLTA Lobbyist

The legislature will convene the 2011 legislative session on Wednesday, January 26, 2011. This fall, all eyes were on the November 2nd election, where legislative insiders predicted that the Republicans could gain control of both the state Senate and House of Representatives. During the 2009-2010 legislative sessions, Democrats held a 30 to 20 majority in the Senate and a 68 to 52 majority in the House. The Republicans have not had control of both chambers of the state legislature since 1898. On Election Day, the control of the legislature shifted to the Republicans.

In the House, it appears the Republicans will gain at least a 67 to 53 seat majority. That 67-seat majority would include an unaffiliated candidate, Bert Jones, who beat Representative Nelson Cole (D-Rockingham). Jones, a former Republican, has said he would accept an invitation to join the House Republican caucus. The Republicans' margin in the House could grow to 68 to 52 if a vote canvas upholds Republican Harry Warren's win over incumbent Representative Lorene Coates (D-Rowan).

In the Senate, the Republicans appear to have gained a 30 to 20 seat majority, and the margin could grow to 31 to 19 depending on

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Record Low Mortgage Rates Are Not Yet Enticing Many Buyers

By Mark Vitner and Anika Khan

Record low mortgage rates have not yet produced much of a lift for home sales. Sales of both new and existing homes appear to have risen modestly following their sharp decline in July in the wake of the expiration of the homebuyer tax credits. With the decline, the supply of unsold homes remains uncomfortably high relative to sales. Sales normally weaken during the Fall on a non-seasonally adjusted basis. Because sales are already so low, however, they probably will not fall as much as they normally would, which means the seasonally adjusted data may show modest gains. No significant improvement in sales or construction is expected to take place until the spring home buying season. By then, the economy should have put up a fairly lengthy string of modest private-sector job gains, which should bolster confidence and household formations.

While sales and new home construction may rise on a sequential basis, year-to-year comparisons will be unusually tough because they will be compared with the run-up in sales and starts, which preceded the initial expiration of the homebuyer tax credits. Buyer traffic has stalled in recent weeks, as the potential buyer is running into roadblocks in selling their current home and qualifying for a mortgage. Closings have also been held up by tougher appraisals and larger down payment requirements.

The threat of foreclosures is again taking center stage, with anecdotal reports showing a surge in foreclosures occurring in August. The increased number of foreclosures and short sales is expected to pull prices lower during the second half of 2010, with price declines most problematic in the nation's most overbuilt markets. The large number of homes currently in foreclosure and the high percentage of homes with negative equity and/or seriously delinquent mortgages is keeping homebuyers and builders on the sidelines until they better understand the impact of this shadow inventory on prices, appraisals and mortgage underwriting.

While most of the housing data has turned negative in recent weeks, we continue to believe that a genuine recovery in home sales and new home construction will begin next Spring. By genuine, we mean a recovery driven by improving underlying economic fundamentals rather than government programs designed to incentivize buyers through tax incentives or relaxed underwriting standards. Such a recovery in home sales will likely be very slow because the underlying economic recovery is producing only modest gains in employment and income and the unemployment rate remains uncomfortably high.

Job growth is expected to strengthen over the next few years. We are expecting around 1.5 million private-sector jobs to be created in 2011, which should allow housing starts to rise to around a 810,000-unit pace. Job growth should strengthen further in 2012 and starts will likely rise back above the million-unit mark. A return to the 1.55 million-unit pace averaged from 1985 to 2005 will most likely not be seen until 2015 at the earliest.

New home construction is being limited by the still enormous supply of vacant homes for rent and for sale. We continue to believe this measure is the best gauge of the oversupply of housing on the market. The current inventory totals 4.4 million vacant homes for rent and 2 million vacant homes for sale. The normal inventory would be around 3.2 million vacant for rent and around 1.3 million vacant for sale. As sales recover over the next two or three years, this excess supply will gradually dissipate. During this period, new home construction will remain constrained relative to job growth and household formations.

The housing market is also fraught with structural impediments to a strong recovery. Homeownership was pushed beyond sustainable limits between 1995 and 2005. Gains in homeownership were achieved

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

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The Mutual Indemnity Agreement for Title Insurance in North Carolina

By James W. Williams III, Chicago Title Insurance Company

Resolving minor title defects which should have been cured in a previous closing has been an increasingly difficult problem for insurers in North Carolina. Underwriters and their agents often faced the prospect of insuring minor defects on the eve of closing and the notion of attempting to collect an indemnity letter from the prior insurer was daunting. Requests for indemnity letters would be submitted to the prior insurer who would then have to locate its underwriting file (often from storage) first to determine if the purported error was previously addressed in some fashion. If it was not, then the prior insurer would often have to submit the matter to its claims department for a determination that an indemnity letter was appropriate. This process was inefficient and frequently failed to timely address the issue on behalf of the consumer. Even if found and agreement to continue to insure was obtained, some insurers were unwilling to provide assurance to the chosen title insurer of the new buyer or new lender; in any event, this could cause delays in the new transaction.

At the 2010 North Carolina Land Title Association Annual Convention in September, many of the major underwriters finalized an agreement to alter and improve this process with regard to certain matters of title. The stated purpose of this North Carolina Inter-Underwriter Indemnification Agreement, often referred to as a "Mutual Indemnity" Treaty or Agreement is to "expedite the clearance of certain types of title insurance defects and limit the need to obtain individual letters of indemnity or performance." As of the writing of this article, the major underwriters who have executed the Mutual Indemnity include Commonwealth, Chicago, Fidelity National, First American, Investors, North American, Old Republic and Stewart.

Under the Mutual Indemnity, the procedure that the title company or agent must follow is not complicated. If an exception to title is a covered "Defect" as defined in the Mutual Indemnity, the new insurer being asked to provide new coverage has a copy of the prior title policy, that prior policy was issued more than one year prior to the new policy and the Defect is not shown as an exception (even if given affirmative coverage) in that prior, then, subject to certain limitations, the prior title insurer will be deemed to indemnify the new insurer without need of further action by either company.

Defects covered by the Mutual Indemnity include four specific title matters that are, unfortunately, routine in North Carolina. These Defects generally include the following:

1. Deeds of Trust that have not been effectively released (but not future advance deeds of trust).
2. Monetary liens docketed on the public records resulting from judgments or other statutory liens (but not Mechanics' Liens or Monetary liens against the vested owner).
3. Liens for federal and state estate, transfer or inheritance taxes; local government taxes; and liens for special assessments (but not liens against the vested owner).
4. Failure of any conveyance in the record to disclose the marital status of the grantor.

In order for the obligation of the indemnifying title insurer (Indemnitor) to arise, the "Prior Policy" must have been issued without exception to or affirmative coverage over the Defect. The Prior Policy must also have been either (1) an Owners Policy insuring the vested owner or seller or (2) a Loan Policy in which the named insured acquired the land by foreclosure or deed in lieu of foreclosure, is the seller in the current transaction and the current policy must be an owner's policy issued to an unrelated party. There are certain other requirements in the "Conditions" and in the "Stipulations" that any company relying on the Mutual Indemnity must give notice, cooperate, and other provisions (but an in-depth discussion is beyond the scope of this article). Title agents are also encouraged to work closely with their underwriters prior to acting in reliance on the Mutual Indemnity.

The Mutual Indemnity includes monetary caps under the "Limitation of Indemnity." Logically, the indemnity is limited to the amount of coverage or insurance in the prior policy as would be the case in any typical indemnity

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2010 NCLTA Annual Convention: Education on the Coast

The NCLTA Annual Convention was a great success thanks to the attendees, speakers and sponsors! The group assumed a casual attitude befitting the beach atmosphere. Thursday's Welcome Reception welcomed attendees to the Kitty Hawk Pier House for dramatic views of the Atlantic Ocean, offering attendees the opportunity to meet new folks or get reacquainted with old friends and colleagues.

NCLTA Lobbyist David Ferrell was pleased to present NCLTA President Carolyn Clark Snipes with the NCLTA Service Award.

The Educational Program was one of the best in recent years. Many thanks to Convention Chair Taby Cruden for securing top notch speakers to bring informative information to the group.

Free time spent golfing or at the beach was enjoyed by many and those on the beach saw some tremendous waves due to the hurricane circling out in the ocean. Many also enjoyed the uniqueness of the Outer Banks and took day drives up and down the island towns searching for quiet spots or treasures.

Friday night's Annual Banquet was full of fun and laughter featuring a wonderful meal with tempting desserts. NCLTA surprised Carolyn Clark Snipes with the newly created NCLTA Service Award. This was awarded in recognition of the excellent service and efforts she contributed to legislative issues during her NCLTA Presidency.

Saturday wrapped up the Annual Convention with the Annual Business Meeting where the 2010-2011 officers were nominated and elected. The next year promises to be successful.

Please make plans now to join us in Asheville, NC, at the Grove Park Inn for the 2011 Annual Convention. Registration information will be available in the Spring.

NCLTA Committees

Awards/Nominations
Carolyn Snipes
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Education
Sara A. Boshart
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Forms
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Legislative
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Kimberly B. Rosenberg
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Membership
Jay Williams
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Sara Boshart, Debbie Brittain and Kathy Speight enjoy the Annual Banquet.

Tara and Greg Eudy enjoying the Friday Annual Banquet and also celebrating a special personal milestone, Happy 25th Anniversary!

Attendees enjoy the resort casualness and camaraderie of the meeting, making the CLE a little more bearable!

Special Thanks to Our Sponsors!

Golf Tournament

Pendergrass Law Firm, LLC

Golf Prizes & Box Lunch

Poyner & Spruill, LLP

Thursday Welcome Reception

Boxley, Bolton, Garber & Haywood, LLC

SoftPro Corporation

Friday Breakfast & Refreshment Break

Horack Talley, Pharr & Lowdnes, P.A.

Saturday Breakfast & Refreshment Break

Roberts & Stevens, P.A.

CLE Binders

Carruthers & Roth, P.A.

Friday Pre-Dinner Reception

Smith Moore Leatherwood, LLP

Friday President's Reception

Johnston, Allison & Hord, P.A.

Musical Entertainment

Nelson Mullins Riley & Scarborough, LLP

Speaker Presentations

Brooks, Pierce, McLendon, Humphrey& Leonard, LLP

Nexsen Pruet, PLLC

Roberson, Haworth & Reese, PLLC

Ward and Smith, P.A.

Wishart, Norris, Henninger & Pittman, PA

Wyatt Early Harris Wheeler, LLP

Wyrick, Robbins, Yates & Ponton, LLP

Registration Packets

White & Allen, P.A.

2011 NCLTA Executive Committee: Carolyn Snipes, Jay Williams, Eric Spence, Matt Powers, Kim Rosenberg, Taby Cruden, and Ryan Wainio.

Attorney members enjoy the Attorney Section Breakfast.

Ken Howard and Ron Garber enjoy the Thursday reception at the Kitty Hawk Pier House.

Sponsorship Chair Debbie Brittain enjoys a whirl around the dance floor with Ryan Wainio.

A constant on the dance floor, Linda Carol and Chris Burti take their turn.

President's Message

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welcomed our colleague Dick Archie, Chair of the NCBA Real Property Section Council, to share highlights from activities in the Real Property Section, and ALTA board member, Herschel Beard, to fill us in on what our ALTA organization is doing at the national level.

The NCLTA Loss Prevention Committee is continuing to move forward with a plan to host a CLE on trust accounting and audits in cooperation with Campbell's Law School in February 2011. The NCLTA Forms Committee, led by Ryan Wainio, is close to finalizing NCLTA Form 4 Interim Lien Waiver wherein the parties agree to "reset" the date of first furnishing for lien purposes in exchange for payment through a specific date.

ALTA Convention photo by Greg Schenewerk

I recently returned from representing NCLTA at the Annual ALTA National Convention in San Diego. That was super tough duty, I must say, but I suffered through all the California mild weather, friendly dinners and cocktails in fabulous locations for the sake of our organization.

As one can imagine, the discourse was largely dominated by the recent foreclosure and REO problems as well as review of the newly implemented RESPA rules. I learned that ALTA has been working on our industry's behalf to negotiate with the federal regulators, Fannie Mae and Freddie Mac, for an indemnity that would run to title insurers for foreclosure defects that are brought to light in REO sales. Our industry group has wisely recognized the crisis as an opportunity in some ways to demonstrate the value of title insurance and the integral role that our industry plays in the process. Our industry has also been recognized as leaders nationally in educating all the players in implementing the new RESPA rules and adjusting our technology to the new HUD form.

I know it's been said before, but the best way to get the most value out of your NCLTA membership is to get involved! NCLTA is a dynamic organization and there are many opportunities for participation on the committees or shorter-term special projects that may interest you. A list of Committees and chairperson contact information is on page 4 of this newsletter. We look forward to receiving your ideas, participation and feedback.

The Mutual Indemnity Agreement for Title Insurance in North Carolina

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letter or agreement. Furthermore, there is a cap of $50,000.00 for Defects resulting from federal and state tax liens, including estate or inheritance taxes. The Mutual Indemnity also caps the cumulative value of the indemnity at $500,000.00.

The Mutual Indemnity as adopted in North Carolina was significantly modeled after the Model Inter-Underwriter Indemnification Agreement promulgated by the American Land Title Association in 2009. Some form of mutual indemnity treaties have been adopted in other states, including Florida, Alabama and New York. Reports are that these have worked successfully in other areas and have been expanded both as to the scope of matters covered and liability limitations. While the initial North Carolina agreement is fairly conservative, Kim Rosenberg, who chaired the Loss Prevention Committee of the NCLTA during the drafting of the Mutual Indemnity, indicated that the committee hopes that the current version might be expanded in the future to include additional title matters and increased monetary caps.

Rosenberg was also quick to give significant credit to both Jay Hedgpeth of The Title Company of North Carolina and to Nancy Ferguson of Chicago Title for the significant role that each played in bringing the Mutual Indemnity to reality.

The original, signed participation agreements will be housed at the office of the NC Land Title Association. Anyone needing to verify the participation of any particular insurer should contact the Association.

Looking Ahead: The 2011 Legislative Session

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a close race in District 50 between Democrat John Snow (attorney and retired judge) and Republican Jim Davis. There are close races involving several House and Senate candidates, which could be subject to recounts. It may be a few more weeks before these close races are finalized and a winner is confirmed.

The first order of business for Republicans will be to select who will serve in leadership positions. It is expected that former Senate Minority Leader Phil Berger (R-Rockingham) will be elected President Pro Tem of the Senate, the position held for the last 16 years by Marc Basnight. Senator Berger is a practicing attorney from Eden who will be entering his sixth term in the Senate. In the House, former Minority Leader Paul "Skip" Stam (R-Wake) and former Minority Whip Thom Tillis (R-Mecklenburg) are the frontrunners to be Speaker of the House. Rep. Stam is a practicing attorney from Apex entering his sixth term in the House. Rep. Tillis is a management consultant from Cornelius entering his third term. The House Republican Caucus is expected to hold their vote for the new Speaker of the House on November 20.

The legislature authorized a number of studies to be conducted before the 2011 legislative session convenes on January 26. It is unclear at this point how the shift in power at the legislature will affect the work of the legislative studies authorized by the Democrat-controlled 2010 legislature. NCLTA's Legislative Committee is monitoring and working with the following studies that are of interest to NCLTA members and real estate practitioners:

"Hidden" Mechanics' Liens

It continues to be a priority for NCLTA to address the "hidden" or "secret" mechanic's lien problem in North Carolina. As you may recall, at the request of NCLTA, Senate Bill 803, Protect Third Party Purchasers for Value, was introduced in the Senate by Senate Majority Leader Tony Rand (D-Cumberland) in 2009. Efforts were made in 2009 and 2010 to have some form of Senate Bill 803 enacted to address this issue. The latest version would have required a "notice of commencement" to be served and filed with the Register of Deeds by all those who intend to assert a lien on real property. Various construction trade associations and groups had concerns with the bill. The construction groups also pointed to a study that the NCBA Construction Law Section planned to undertake on the lien and bond law, as a reason to hold off enacting Senate Bill 803 in the 2010 session. NCLTA agreed not to push the bill in the 2010 session and agreed to participate in the Construction Law Section's study.

The NCBA Construction Law Section has formed a Lien and Bond Law Committee to review North Carolina's entire lien and bond law, and to propose changes to be considered by the legislature in the 2011 legislative session. The construction interest groups are well-represented on the committee, as are the lenders. I am on the committee as the title insurance representative. After several committee meetings, the plan is to hold a "summit" meeting of all construction, lending, and other interested trade groups to discuss the proposed changes and attempt to reach an agreement on changes to the lien and bond law.

At this point, among other things, the committee believes there should be a notice of commencement (which is similar to the notice NCLTA proposed in Senate Bill 803). Also, included in the committee's outline of key components to any revision of the lien and bond law is a statement as follows: "An Owner or Lender can rely upon a Contractor's Final Affidavit (submitted with a pay request for the final draw) in making final payment and any

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Convention Calendar

NCLTA 2011 Annual Convention
September 15-17, 2011
The Grove Park Inn Resort & Spa, Asheville, NC
www.groveparkinn.com

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

Looking Ahead: The 2011 Legislative Session

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participant in the project that has not served a Notice to Owner by the date of the Affidavit is cut off from asserting a Claim of Lien on Real Property." These are importation points to NCLTA and we will continue to work for their inclusion in any lien law change proposed by the committee.

The committee is still working on the details of a notice and of the ultimate changes to North Carolina's lien and bond law. I will continue to participate in the committee process and keep NCLTA's Legislative Committee updated on the committee's activities.

Railroad Corridor Management Study

The Studies Act of 2010 establishes the Railroad Study Commission, to consist of five Senators and five Representatives, to study "all issues related to railroads in the state, including passenger rail, freight rail, and corridor issues." For several years, the House has maintained a Railroad Corridor Management Commission made up on only House members that meet between legislative sessions. That House commission produced House Bill 116, Railroad Corridor Management, which NCLTA worked on in 2008 and 2009. House Bill 116 passed the House in 2009 but was not considered by the Senate this legislative session. I understand that the provisions of House Bill 116, among other issues, could be discussed by the new Railroad Study Commission before the 2011 legislative session.

Tax on Services?

The legislature is facing an estimated $3.2 billion budget shortfall in 2011. It was announced prior to the November 2nd election that some legislative leaders were considering ways to broaden the tax base, which may include a tax on professional services, to include legal services. Proposals affecting the state's revenue are typically considered by the Revenue Laws Study Committee, and standing legislative study committee that meets between legislative sessions. In past legislative sessions, a tax on professional services has been discussed, but not enacted. Some legislative tax advisors note that North Carolina relies on personal income tax revenue more heavily than other states, and revenue derived from income taxes are volatile, with wide swings as personal incomes rise and fall. Many legislators acknowledge that a tax on professional services could help stabilize tax revenue and lead to lower overall tax rates, but recognize that there will be heavy opposition to a tax on professional services. Also, given the shift in power to the Republicans, it seems unlikely the legislature will approve a new tax on professional services in 2011.

For more information about legislation described in this legislative report, feel free to contact me at dferrell@vanblk.com or (919) 754-1171. Information is also available on the General Assembly's website: www.ncga.state.nc.us.

Record Low Mortgage Rates Are Not Yet Enticing Many Buyers

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through the loosening of underwriting standards, the increased use of leverage and more generous tax treatment for residential real estate. Homeownership topped out at around 67 percent in 2005 and appears headed back toward 65 percent.

Not only was there a surge in homeownership but there was also an increase in demand for larger, higher-priced homes. Many of these homes were financed with little money down and interest-only payments. Such arrangements only make sense when housing prices are expected to increase. Following the most recent experience, with prices plunging 30 percent or more, neither lendersnor borrowers are interested in entering such relationships. As a result, there is a huge excess supply of higher-priced homes on the market and few potential buyers waiting in the wings to snatch up any "bargains." Taken together, the overhang of vacant units, the expected decline in homeownership and the glut of large, higher-priced homes means the housing recovery will likely drag on for the next several years.