



Carolina Update

NCLTA's Exclusive Report to its Members

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President's Message

By Sarah M. Friede



[Ed. Note: NCLTA President Sarah Friede was unexpectedly placed on maternity bed-rest in February, pending the birth of a second child later this spring. In the absence of the president, the NCLTA

bylaws call for the vice president to preside. In addition, the other Executive Committee members are also cooperating with various tasks and duties. The following article is a compilation of various reports from members of the Executive Committee.]

As we continue to watch developments on the national front with regard to court cases and RESPA violations; the head of the U.S. House Financial Services Committee, Michael Oxley, requesting that the Comptroller General have the Government Accountability Office investigate the title insurance industry (see related story on page 2); and the various political maneuverings at HUD, the title industry here at home has not been very quiet either. As you can tell from the number of staff and address changes in "Around the State," our industry is, literally, "on the move." Even the North Carolina Land Title Association (NCLTA) Executive Committee has not been immune to changes, with Vice President Jon Parce resigning barely before the year got underway and President Sarah Friede sent home by her doctor. Nevertheless, the rest of your Association leadership has plunged head forward, continuing to run our normal program of activities and taking on some new tasks as well.

Over the years, the Association has been asked on several occasions to submit *amicus curiae* briefs for various issues. After consideration, each request has been declined due to reasons including lack of sufficient Association resources, conflicts of interest among title company members, and perceived lack of urgency or importance of the issue at hand. However, this February, after two conference call discussions and consultation with several experts in the topic, the Executive Committee voted unanimously to support filing such a friend-of-the-court brief in the case of *American General Financial Services, Inc. v. Barnes* (NC Court of Appeals Case No. 05-478), *only if* the NC Supreme Court grants *certiorari* (discretionary review). The issue that is of importance to the title industry in North Carolina is the judicial interpretation of the doctrine of equitable subrogation (see related article on page 7). The equitable subrogation theory is often used by our industry in effectively resolving claims issues, and there is a concern that this case could destroy the effectiveness of that approach. Should the brief be filed, the cost will be equally pro-rated among the title underwriter members of NCLTA.

A number of legislative issues have arisen since the end of the 2005 Long Session, most particularly technical corrections to the Notary Act. NCLTA's 2006 Legislative Committee consists of Hunter Meacham (LandAmerica), chair; Chris Burti (State-wide), Ryan Wainio (Investors), and Mark Griffith (Chicago). NCLTA has retained Anne Winner as its lobbyist. She presented an overview of the legislative process to the

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Rep. Oxley Calls for GAO Investigation of Title Industry

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The Chair of the U.S. House Financial Services Committee, Representative Michael Oxley, sent a letter to the Government Accountability Office (GAO) — the independent, non-partisan, investigative, arm of Congress — asking GAO to examine and issue a report on the title industry. In his January 24 letter addressed to Comptroller General David Walker and head of the GAO, Oxley expressed concern about the rising cost of title insurance and wrote, “The Financial Services Committee is concerned about recent investigations by state regulators revealing that title companies have made payment for referrals to developers, mortgage lenders, and real estate agents in violation of the Real Estate Settlement Procedures Act (RESPRO) [sic]. Other investigations have revealed abuses of reinsurance agreements that have forced title companies to pay millions of dollars in settlements, and have uncovered anti-competitive practices within the title industry.”

Among the items Oxley requested the GAO investigate were:

1. to analyze the title insurance market to determine what factors impact the price of the product, including the associated claims, title search, overhead and marketing costs.
2. to determine the number of title insurers, their market share, how the product is marketed and sold, the extent to which title insurance is a nationwide business, and to what extent consumers benefit from a competitive title insurance marketplace.
3. to examine the relationship between title insurers, real estate agents, lenders and home builders for anti-competitive practices and investigate potential barriers to entry in the market.

ALTA Executive Vice President Jim Maher welcomed the investigation, calling it a “fact-finding mission” to help clarify the confusion in the marketplace. For a copy of Rep. Oxley’s letter and ALTA’s response, go to <http://www.alta.org/washington/news.cfm?newsID=3575>

ID Theft Protection Act Impacts Practice of Law in North Carolina

An amended state law, the Identity Theft Protection Act, went into effect last December 1, 2005, that includes numerous provisions impacting the practice of law in North Carolina.

Session Law 2005-414 (Senate Bill 1048) amends sections of Chapter 132 of the N.C.G.S. to prohibit the inclusion of Social Security, taxpayer ID, driver’s license and personal banking account numbers in documents “recorded or filed in the official records by the register of deeds or of the courts” ... “unless otherwise expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted.” Security breach notification and document destruction via amendments to Chapter 75 of the N.C.G.S. are also addressed by the legislation. A full copy of the statute is available at <http://www.ncleg.net/Sessions/2005/Bills/Senate/HTML/S1048v6.html>.

IRS Standardizes Procedures for Balance Due Requests and Release of the Notice of Federal Tax Lien

[Ed.Note: This information has been supplied directly by the Internal Revenue Service and is current through February 7, 2006. Since changes may have occurred after the publication date that would affect the accuracy of this document, no guarantees are made concerning the technical accuracy after that IRS "Headliner" publication date].

The Internal Revenue Service is required by law to timely release fully paid and unenforceable liens. Compliance with this requirement has figured prominently in the Service's transition to centralized lien filing.

The IRS has established standardized procedures to expedite requests for lien discharge, release, and subordination nationwide. If the taxpayer paid the tax, interest, and penalties and did not receive a copy of the Certificate of Release of Federal Tax Lien, the taxpayer or authorized representative may call the Centralized Lien Processing Unit at the toll free number 1-800-913-6050.

The Cincinnati IRS Campus centralized lien unit assists taxpayer representatives, lenders, and escrow or title companies requesting a balance due or payoff statement for a Notice of Federal Tax Lien.

Third parties must submit this request in writing using a properly completed [Form 2848, Power of Attorney and Declaration of Representative](#) (PDF) or [Form 8821, Tax Information Authorization](#), (PDF) signed by the taxpayer. Without a Form 2848 or 8821, the IRS cannot disclose taxpayer information to third parties.

Fax requests to the number listed in [Publication 1450, Instructions on How to Request a Certificate of Release of Federal Tax Lien](#) (PDF).

Mail requests to:

Internal Revenue Service
CCP - Lien Unit
P.O. Box 145595
Stop 8420G
Cincinnati, OH 45250-5595

When requesting a balance due for tax liabilities identified on a federal tax lien please provide the following:

- Name of Taxpayer
- Social Security Number and or Employer Identification Number
- The date for the requested computation to be computed through
- Identify yourself and include your telephone number and address

Two copies of all payoff letters will be mailed. Payoff letters cannot be faxed. One copy of the payoff letter must be returned with the payment to ensure proper application and timely release of the lien.

Payoff computations may take up to 14 calendar days to process. Your successfully completed fax transmission or mailing certification, serves as your acknowledgement.

Additional Resources:

[Publication 1450, Instructions on How to Request a Certificate of Release of Federal Tax Lien](#) (PDF). Publications and forms can be downloaded from IRS.gov or by calling 1-800-TAX-FORM (1-800-829-3676).

New Survey Standards

Last fall, the American Land Title Association and the National Society of Professional Surveyors adopted new Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys. Effective January 1, 2006, these new (2005) standards supersede previous versions of the Minimum Standards, last updated in 1999. A copy of the new Standards is available from http://www.alta.org/industry/ALTA2005_Standards.pdf



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Around the State

[Ed.Note: With the 2006 dues renewals, many address and staffing changes were reported. A 2006 Directory of Members is expected to be issued in March noting the following and other changes.]

Attorney member *David R. Shearon*, has moved his offices to another location: 3901 Computer Drive, Suite 110, Raleigh, NC 27609, phone (919) 571-9886, fax (919) 571-9774, email: Dauids@shearonlaw.com.

Carolyn Bolton of **Neuse Financial Services, Inc.** has become *Carolyn Coakley* and her office address is now: 4300 Six Forks Road, Ste. 200 (27609), P.O. Box 29635, Raleigh, NC 27626-0635.

New Underwriter member, **United General Title Insurance Company**, has moved its Raleigh headquarters to 150 Fayetteville Street, Suite 510 (27601), PO Box 229 (27602), Raleigh, NC, phone: (919) 861-1435, fax: (919) 861-1439, Email: bryanrosenberg@ugtic.com or kbrosenberg@ugtic.com. Both *Bryan Rosenberg* and *Kim Rosenberg* are located in the Raleigh office, where Bryan is State Manager. The company has also opened two branches. *Ed Urban* and *Kris Harmon Lang* are located at 525 N. Tryon St., Suite 1600, Charlotte, NC 28202, phone (704) 331-6522, fax (704) 331-6536, Email: eurban@ugtic.com. *Kim Rosenberg* is also the branch manager at 512 N. Grove St., Suite 100 (28792), P.O. Box 86 (28793), Hendersonville, NC, phone (828) 697-5942, fax (828) 696-8726, Email: kbrosenberg@ugtic.com.

Debbie Brittain, state manager for **Chicago Title Insurance Company**, is moving her headquarters from Chicago's Charlotte downtown office to its Raleigh downtown office. *Denise Bleggi* of the company's Jacksonville office is now *Denise Baker*. *Debbie Campbell* is the branch manager for Chicago's Cary office, located at 539 Keisler Dr., Suite 203, Cary, NC 27511, phone (919) 461-0077, fax (919) 380-9611, email

debbie.campbell@ctt.com. The mailing address remains P.O. Box 1507, Cary, NC 27512-1507. *James W. Williams III*, of Chicago's Wilmington branch has been named a Board Certified Specialist in Real Property Law - Residential, Business, Commercial and Industrial Transactions by the North Carolina State Bar. The branch office has moved to: 131 Racine Drive, Suite 102, Wilmington, NC 27403.



Jack Sawyer has joined the Raleigh office of **Fidelity National Title Insurance Co.** *Shannon Haire* is now *Shannon Wright*. *Kristen Foyles* has joined their Pinehurst office. The Charlotte office of Fidelity is now located in Suite 875 of 201 S. Tryon St.

At **Investors Title Insurance Company**, *Lisa Barry* is the new branch manager of the Durham office (email: lbarry@invtitle.com), while *Denise Ray-Eiland* is the branch manager of the Elliott Rd. office in Chapel Hill (email: dray@invtitle.com). The Gastonia office has moved to 432 E. Long Ave., Suite 3.

Tabitha Cruden (email: tcruden@landam.com) has joined the Raleigh office of **LandAmerica/Lawyers Title Insurance Co.** which has moved to Suite 1205 of Two Hannover Square. *Greg Henshaw* (email: ghenshaw@landam.com) is now counsel for the Greensboro and Winston-Salem offices. The latter's phone number has changed to (800) 457-0296.

The Title Company of North Carolina has standardized all its staff email addresses to *(first initial last name)@tcnc.biz*.

Attorney member *Amy R. Edge* has been named General Counsel/Business Manager for Tar River Land Conservancy, P.O. Box 1161, Louisburg, NC 27549, phone (919) 496-5902, fax (919) 496-6940, email: aedge@tarriver.org, web site: www.tarriver.org.

Calendar of Events

ALTA 2006 Tech Forum

April 30-May 2, 2006
Mandalay Bay
Resort & Casino
Las Vegas, NV

NCBA 2006 Real Property Section Convention

May 4-6, 2006
Kingston Plantation
Myrtle Beach, SC

NCLTA 2006 Annual Convention

September 14-16, 2006
Wild Dunes Resort
Isle of Palms, SC

<http://www.wilddunes.com/>
<http://www.sciway.net/city/islepalms.html>
<http://www.isle-of-palms.sc.us/action.lasso?-response=index2.html>

ALTA 2006 Annual Convention

October 11-14, 2006
Westin St. Francis
San Francisco, CA

<http://www.alta.org/meetings/annual/index.cfm>

NCLTA 2007 Annual Convention

August 8-11, 2007
Mid-Pines Resort
Southern Pines, NC

<http://www.pineneedles-midpines.com/page/216-7383.htm>

Executive Committee Starts Administrative Year with Full Agenda

Welcome New Member

At its November 15, 2005, meeting, the NCLTA Executive Committee approved the following as a new member:

Attorney Member

J. Anthony Penry
Taylor Penry Rash &
Riemann, PLLC
510 Glenwood Avenue
Suite 319
Raleigh, NC 27603
Wake
Phone: (919) 833-9449
FAX: (919) 833-9448
Email:
andy.penry@tprr.com
Web: www.tprr.com

The first order of business for the NC Land Title Association Executive Committee at its November 15, 2005, meeting was to accept with regret the resignation of Jon Parce as vice president. (Parce left employment with an NCLTA title company member that rendered him ineligible to serve on the Executive Committee.) The Nominating Committee recommended, and the Executive Committee accepted unanimously, Jeff Hrdlicka of Chicago Title (Greensboro) move up to the position of vice president and Kim Rosenberg of United General Title (Raleigh) join the Executive Committee as treasurer. The Executive Committee also ratified the appointment of L. Hunter Meacham, Jr., LandAmerica Financial Group, as general counsel.

The meeting was held at Mid-Pines Resort in Southern Pines because the conference room and reception areas of NCLTA's management firm were under renovation and because the Executive Committee was considering Mid-Pines as a potential 2007 convention location. Executive Director Penney De Pas and Immediate Past President Gary Whaley paid a site visit to the Holly Inn in Pinehurst as an alternative location for that convention.

After considering a proposed 2006 operating budget, the Executive Committee increased new Agent dues to \$300 (expecting 5 new agency members) while eliminating new Agent assessments, agreed to hold a year-end CPA financial review rather than an audit (every 5 years, rather than every 3 years), and reduce convention expenses to \$23,000 before approving the amended budget.

The Executive Committee also approved pledging \$7000 to the North Carolina Bar Association's Real Property Section

Convention for Friday's cocktail party along with securing a promise that NCLTA will receive an agenda slot for a title industry update. It was agreed that title companies may take their customers out for dinner after the cocktail party on Friday night upon individual invitations from the respective companies.

President Sarah Friede appointed a task force, to be headed by Kim Rosenberg, to develop recommendations to the Executive Committee by its next meeting with regards to developing study materials for the agent licensing exam and/or a certification program. Friede reported on her attendance at the American Land Title Association annual convention (see "President's Message" in Fall issue of *Carolina Update*.)

Jeff Hrdlicka was appointed as NCLTA's liaison to the Joint Land Records Task Force, while Matt Powers's appointment as NCLTA representative to the Secretary of State's Electronic Recording Council was ratified.

Hrdlicka reported on the October 21 Joint Land Records Task Force meeting. Chief topics of discussion were the Mortgage Satisfaction Act and indexing changes. The discussion also considered identity theft, monitoring legislation, changes in foreclosure provisions, and foreclosure sales (see related article on subsequent meeting on page 9).

Executive Committee members divided up surveillance on a monthly basis of the Department of Insurance's web site for Property and Casualty policy filings of mortgage impairment type products.

The Executive Committee's next meeting was scheduled for Tuesday, February 21, at the association's headquarters office in Raleigh.

ALTA Hires New Government Affairs Director

The American Land Title Association has announced the selection of Edward C. Miller as its new Chief Counsel and Director of Government Affairs. Miller was previously Senior Policy Representative for eight years at the National Association of Realtors® and Counsel for the American Council of Life Insurers.

Subrogation of the Position of One Deed of Trust to Another

By Ed Urban, Vice President and State Counsel, United General Title Insurance Company

Summary

Subrogation of the most recent deed of trust to an earlier deed of trust which was paid off by the proceeds of the most recent deed of trust is possible as noted below. This is particularly helpful when there is an intervening lien between the two deeds of trust. The law is a bit confusing and could be clarified by a statute similar to the one set forth below.

However, it seems fair to conclude that the leading North Carolina case, *Wallace v. Benner*, discussed below, allows “conventional subrogation” where the subrogating lender and borrower agree that the subrogating lender will fund a loan to pay off the earlier indebtedness secured by a prior deed of trust in exchange for the subrogating lender receiving a lien of the priority status of the prior discharged deed of trust. The case does not require the prior deed of trust to be uncanceled of record, although in *Wallace v. Benner* it was uncanceled. Clearly, the case does not require that the subrogating lender be “excusably ignorant” of any lien intervening between the recording of the prior deed of trust and the recording of the subrogating lender’s deed of trust.

However, it is noted that the *First Union* case discussed below imposed an “excusably ignorant” of intervening liens requirement and found that *First Union* was not excusably ignorant. However, the *First Union* case cited the *Peek* case, discussed below, in which the “excusably ignorant” requirement was *dicta*. The *First Union* case did not cite *Wallace v. Benner* which contained no such requirement. Therefore, it appears that *Wallace v. Benner* is the best authority available. However, the very recent case of *American General* discussed below has further muddied the waters. *Wallace v. Benner* is still the “guiding light” — such as it is.

While *Wallace v. Benner* does not require it, it is always best if the subrogating lender’s deed of trust contains a subrogation clause

specifying that the subrogating lender is subrogated to the priority position of any deed of trust the secured indebtedness of which is paid by the subrogating lender’s loan proceeds.

In using subrogation as a defense, it is advised that the attorney plead both conventional subrogation and equitable subrogation as an affirmative defense.

Legal Discussion

The subrogation of one deed of trust to the priority position of an earlier deed of trust is a helpful defense strategy, particularly in the context of when the intervening lien (that is, the lien that has an effective date of priority between the times of recording of the two deeds of trust) is a “mechanics” lien.’ However, the intervening lien can just as easily be a judgment lien, federal tax lien, or other recorded lien.

EXAMPLE: The following events occur in the following order with respect to O’s (the owner’s) land: M-1’s \$30,000 construction loan deed of trust is recorded and disbursed; C-1 first furnishes materials to the site encumbered by M-1’s deed of trust; C-2 first furnishes materials to the site; C-1 files a claim of lien; the federal government files a federal tax lien against O; M-2 records and funds his permanent deed of trust securing a \$40,000 loan and disburses \$30,000 to M-1 to obtain a satisfaction of M-1’s trust; and C-2 files a claim of lien.

The authorities discuss “conventional subrogation” and “equitable subrogation” (or, as the latter is sometimes called, “legal subrogation”). See R. Kratovil and R. Werner, *Modern Mortgage Law and Practice* (2d Ed., 1981), § 31.01; E. Urban and J. Miles, *Mechanics’ Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority*, 12 Wake Forest L. Rev. 283,347-349 (1976). For a recent annota-

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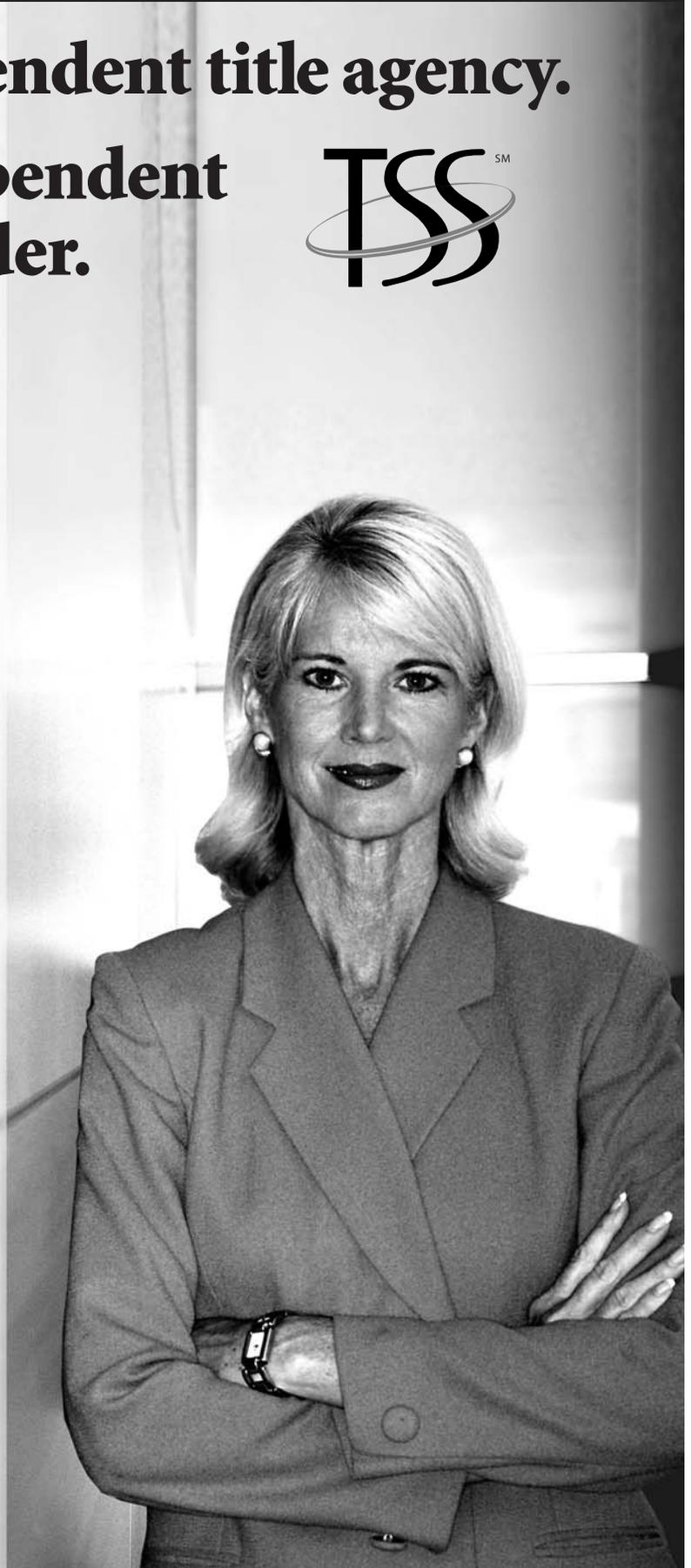
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Land Records Task Force Update

By Jeffrey I. Hrdlicka, Chicago Title Insurance Company, Greensboro, and NCLTA liaison to the Land Records Task Force

The Land Records Task Force met on January 9, 2006, at the offices of Young, Moore and Henderson, P.A. in Raleigh. The main focus of the meeting was the problems created by the new Notary Act. Concerns were expressed over the new requirements created, lack of guidance for implementation, and the general state of confusion of parties affected by the Act.

After discussion on the best process for correcting the current problems, the task force members decided to focus on attempting to correct the most problematic areas by drafting corrective provisions to the statute. Subsequently, the task force has asked the NCLTA, the Real Property Section of the Bar, and the North Carolina Bankers Association to lead the push for the passage of the corrections. Other matters discussed at the meeting included the Mortgage Satisfaction Act, E-Recording, and the Medicaid Lien.

President's Message

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Executive Committee during its February meeting, gave a summary of the Long Session's accomplishments, and discussed with our officers issues to watch during the Short Session.

In response to indications from the membership survey conducted last summer and to an increasing number of requests of headquarters to provide study materials for the Department of Insurance's title agent's examination, which was revised in September 2004 by members of NCLTA, President Friede appointed Treasurer Kim Rosenberg to head up a task force, consisting of Rosenberg, Marc Garren, Stacie Jacobs, Jay Williams, and John McLean, to make a recommendation to the Executive Committee. The task force's recommendation was approved by the Executive Committee to prepare a Study Guide for the title insurance underwriter's licensing test as a preliminary project.

The goal of the Study Guide is three-fold: 1) to provide basic knowledge of title insurance and, therefore, keep underwriting standards high; 2) to assist individuals taking the test in obtaining an underwriter's license; and 3) to raise money for NCLTA in the form of non-dues revenue. Using the licensing exam outline as a starting point for the Study Guide topics, each of the following member companies agreed to assist with preparing portions of the Study Guide: Attorney's Title, Chicago, Fidelity National,

First American, Investors, Lawyer's, State-wide, Stewart, The Title Company of NC, and United General. The goal is to complete the Study Guide by the NCLTA Annual Convention in September of this year. Once the Study Guide is prepared, NCLTA's leadership will be considering other education initiatives suggested by the task force.

Meanwhile, plans for the 2006 NCLTA Annual Convention at Wild Dunes Resort on the Isle of Palms in South Carolina are well underway. The slate of topics and speakers for the CLE is coming together. In addition to the ALTA and Real Property Section updates, Margaret Burnham of Nexsen, Pruitt, Adams, Kleemeier, PLLC, and Paul Stock of the North Carolina Bankers Association, have agreed to speak on Trusteeship matters and the Legislative Process, respectively. Other relevant and exciting topics are being lined up.

With regards to social and recreational activities, Wild Dunes offers two golf courses, top-rated tennis facilities, several swimming pools, and one heck of a big pond out front. Charleston — with its history, restaurants, and shopping — is a short drive away when a break from the beach is needed. A block of rooms have been reserved at the beautiful Boardwalk Inn.

Please mark your calendars for September 14th thru 16th and join us for a great time!

Subrogation of the Position of One Deed of Trust to Another

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tion pertaining to the impact on intervening liens, see *Annot.*, 43 A. L. R. 5th 519(1996). The case of *Dedes v. Strickland*, 414 S.E. 2d 134(S.C. 1992), is discussed (intervening lienor won). Mechanics' liens are discussed at 43 A. L. R. 5th 519, at §§ 6 and 12. For a discussion of wrap-around mortgages, see *Annot.*, 36 A. L. R. 4th 144. See E. Urban, *North Carolina Real Property Mechanics' Liens, Future Advances, And Equity Lines - Including Title Insurance* § 8-8 (Thomson * West 1998, Supp. 2004), citing *Wallace v. Benner*, 200 N.C. 124, 156 S.E. 795 (1931).

"Conventional subrogation" exists when *M-2's* security instrument expressly provides that *M-2* is to be subrogated to the lien of any security instrument or other lien discharged. R. Kratovil and R. Werner, *supra*. The agreement need not be set forth in the security instrument, apparently. "Equitable subrogation" or "legal subrogation" exists in absence of such an express agreement under certain circumstances. When "conventional subrogation" exists in the above example, *M-2* will have priority over the intervening lien to the extent of \$30,000. When "conventional subrogation" is applicable, it has been held that neither actual nor constructive notice nor knowledge of an intervening claim of lien will defeat the right to subrogation. *Providence Institution for Sav. v. Sims*, 441 S. W. 2d 516, 520 (Tex. 1969). Also, see R. Kratovil and R. Werner, *supra*, § 31.01; G. Nelson and D. Whitman, *Real Estate Finance Law*, § 10.6 (3rd Ed. 1994). When discussing "equitable subrogation," certain courts have held that the doctrine will not apply against an intervening lien if at the time of the making of the permanent loan, *M-2* had knowledge of an intervening lien. G. Osborne, *Mortgages* (2d Ed. 1970) §151.

The distinction between "conventional subrogation" and "equitable subrogation" that some courts seem to make by holding that *M-2's* actual knowledge of intervening liens precludes equitable subrogation but not conventional subrogation is not logical. As to either theory of subrogation, as to a prior lien for \$30,000, the intervening lienors are in no worse a priority position after subrogation than before. They have either relied

upon the record in ascertaining what their lien positions will be or have been charged with constructive notice of record of their positions as against the subsequently discharged deed of trust of *M-1*. *M-2* could have taken an assignment of the original note and deed of trust and prevailed over the intervening lienors. Since the amount of *M-2's* loan to the mortgager might have exceeded the amount of *M-1's* loan, therefore requiring the execution and recordation of a new deed of trust instead of taking an assignment of *M-1's* note and deed of trust, *M-2's* priority position to the extent of the amount of *M-1's* position should not be different whether "equitable" or "conventional" subrogation is involved. E. Urban, *supra*, §8-8.

In *Wallace v. Benner*, 200 N.C. 124, 156 S.E. 795 (1931), the owner encumbered the real property with a first and second deed of trust and a third mortgage recorded in that order. The owner applied to the Land Bank for a new first lien deed of trust loan to pay off all prior encumbrances, the first priority deed of trust obligation being in default. All prior existing liens were apparently disclosed in the loan application. The Land Bank's \$12,500 new deed of trust was recorded on April 26, 1923. Two days earlier, the Land Bank drew a loan proceeds check to the owner and the closing law firm and sent the check to the firm with instructions that prior encumbrances be removed before delivery of the check or the money was to be refunded. Unknown to the Land Bank, the attorney disregarded these instructions, obtained the owner's endorsement of the check, paid the taxes that were due and the attorney's fee and paid \$11,800.85 to Page Trust Company, the original holder of the first and second liens, but apparently did not cancel any of the existing encumbrances on the property. Page Trust Company was aware of the owner's instructions and what the Land Bank wanted. The North Carolina Supreme Court affirmed the lower court's ruling and granted the Land Bank subrogation to the priority position of the first and second priority deeds of trust as against Wallace's third mortgage. The court stated

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that while the principles of equitable subrogation do *not* apply to a “mere volunteer,” in defining “mere volunteer,” the court cited a text on mortgages which stated that equitable subrogation does not apply to “a case of ordinary borrowing,” where there is a fraud or misrepresentation, and the borrower creates in favor of the new lender a new and valid security, although the funds are used to discharge prior encumbrances. In such a case, the lender is the “mere volunteer.” The cited authority went on to state that, where money is expressly advanced by the new lender in order to extinguish a prior encumbrance and the money is used for that purpose with the new lender’s expectation of obtaining “a valid security,” the lender may be subrogated to the rights of the prior encumbrances since the doctrine of equitable subrogation does not allow the encumbrance to become satisfied as to the lender advancing the money but keeps it alive as if assigned to the lender for security. Where money is advanced to the owner-debtor pursuant to an express agreement that is to be used to retire the existing liens and that the lender loaning the money is to have a first lien upon the property for the advance, the cited authority states that the lender may be surrogated to the lienor whose debt has been paid as against an intervening lienor acquiring a lien with knowledge of the circumstances under which the surrogating lender advanced money. This is to prevent the intervening lienor from being accidentally raised to a first lien position. The court found that the subrogating lender was not a volunteer and was not guilty of culpable negligence and that Wallace, the intervening lienor, was not prejudiced. The lengthy opinion in *Wallace v. Benner* makes it somewhat confusing regarding whether equitable or conventional subrogation was applied. Clearly, the court found in the Land Bank’s agreement an intention to have a first lien. It may be that a version of equitable subrogation was applied since there was no discussion in the opinion of the subrogating lender’s deed of trust or other agreement specifying that the lender would be subrogated. Or, it could be argued that the court found either an express or implied agreement between the owner and the Land Bank that the Land

Bank would have a first lien — thus substantiating a case of conventional subrogation. Finally, the opinion’s full application is rendered somewhat uncertain by the fact that, as mentioned above, the intervening lender knew of the subrogating lender’s requirements. In the opinion of the author, this should not be a significant factor, however.

In *Peek v. Wachovia Bank*, 242 N.C. 1, 86 S.E. 2d 745 (1955), the North Carolina Supreme Court, without citing *Wallace v. Benner*, seems to have made the requirement that the lender seeking the benefit of subrogation must be excusably ignorant of the intervening lien. However, in the paragraph where that appears to be the case, the Peek court is merely quoting a subrogation rule. In fact, the court’s statement is *dicta*. Subrogation was not applied because Wachovia Bank failed to show that its loan proceeds were advanced with the intent and for the purpose of extinguishing the prior encumbrance. Thus, the court never got to the “excusably ignorant” issue.

In *Plymouth Fertilizer Co. v. Pitt-Greene Production Credit Association*, 58 N.C. App. 207, 292 S.E. 2d 732 (1982), O granted M-1 a deed of trust which was recorded, J obtained and docketed a judgment lien against O, O borrowed money from M-2, and M-2 paid off M-1 and obtained an assignment of M-1’s note and deed of trust. The court held: “Where ... [O] is personally liable to [M-1] and borrows funds from [M-2] to pay off [M-1], [O] cannot defeat the priority of [J], who is senior to [M-2], by substituting [M-2] for [M-1] ... [M-1’s] debt is discharged and [M-1’s] lien is extinguished.” The case would appear to be flatly incorrect or at least illogical for modern times. The case cited neither *Wallace v. Benner* nor the *Peek* case.

For a recent subrogation case, see *First Union National Bank of North Carolina v. Lindley Laboratories*, 132 N.C. App. 129, 510 S.E. 2d 187 (1999), where subrogation was denied because the subrogating lender was not excusably ignorant of the intervening lien (deed of trust) of record. The facts of the case were rather routine: on 11-9-94, the Cobbs gave a deed of trust to First Union on

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Lot 8 which was recorded; on 5-12-95, the Cobbs and Lindley Laboratories, Inc. (the defendant) executed a loan modification agreement which was recorded and which substituted Lot 8 for the property originally encumbered by the previously existing Lindley deed of trust; on 12-8-95, the Cobbs conveyed Lot 8 to the purchasers, the Tissots, and the deed was recorded; on 12-8-95 the Tissots gave a deed of trust to First Union encumbering Lot 8 and the deed of trust was recorded; the 11-9-94 deed of trust was marked satisfied as of 12-12-95 and was cancelled of record. The Cobbs defaulted on the 5-12-95 deed of trust and, after Lindley commenced foreclosure, First Union filed a declaratory judgment action requesting equitable subrogation of its deed of trust from the Tissots to the lien of the Cobbs' 11-9-94 deed of trust to First Union. In finding that First Union was not "excusably ignorant" of the intervening lien, citing *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745 (1955), but not citing *Wallace v. Benner*, supra, the court did not explain its holding at all. As noted above, however, the Peek court's reference to "excusably ignorant" is clearly *dicta*. Further, the term "excusably ignorant" does not appear in *Wallace v. Benner*.

The case of *In re Kline*, 242 B.R. 306 (W.D. N.C. 1999), should be noted. A deed of trust has priority as of its registration or recording in the county where the real property is located, as provided in G.S. 47-20 and G.S. 47-20.1. A deed or trust must be properly indexed in order to be considered properly and validly recorded. It is critical that this occur in view of 11 U.S.C. §544, a statute permitting the trustee to avoid transfers based on priority statutes. In the case, a first deed of trust was properly recorded and a second deed of trust was properly recorded; the defendant's subsequent deed of trust was recorded in the wrong county; the proceeds of the loan secured by the defendant's deed of trust paid off the indebtedness secured by the original first deed of trust, which first deed of trust was cancelled; and the owner-borrower filed bankruptcy. The court held that the trustee could avoid the defendant's deed of trust under 11 U.S.C. §544(a) (11U.S.C. §544(a)(3)

in particular) because on the date of the filing of the debtor's bankruptcy, the trustee had the status of a bona fide purchaser for value. Also, the court held that, pursuant to 11 U.S.C. §551, the trustee, through principles of equitable subrogation to the first deed of trust, was entitled to preserve the avoided deed of trust of the defendant for priority purposes over the validly recorded original second deed of trust. The trustee was entitled to subrogate to the priority position of the first deed of trust. Also, see *In re Price*, 97 B.R. 264 (E.D. N.C. 1999).

Further justification that we need a statute similar to the one proposed below is the hot off the press case of *American General Financial Services, Inc. and R. Forquer, Substitute Trustee v. Barnes and Pennsylvania National Mutual Casualty Insurance Company*. (No. COAO5-478 Ct. of App. filed 1-03-06). Mr. and Mrs. Barnes ("Barnes") encumbered their land with two deeds of trust to BB&T and American General. Those were recorded. Subsequently, there was docketed a \$430,230 confession of judgment by Barnes in favor of Pennsylvania National. Subsequently, Barnes gave a deed of trust to American General for \$116,819 which was recorded. Prior to that recording, American General had a title update performed. The judgment was not found. After the update and recording, American General paid the two prior outstanding deeds of trust indebtednesses in full and the deeds of trust were cancelled. An additional \$1573 was disbursed to Barnes. The plaintiffs commenced an action to quiet title and to obtain first lien priority. The lower court ruled against the plaintiffs. On appeal, the plaintiffs argued that equitable subrogation should apply. The court of appeals held that the doctrine of equitable subrogation did not apply in this case because Penn National had no liability for the plaintiff's inferior lien position. When Penn National docketed its judgment on January 17, 2002, its lien was subordinate to two prior deeds of trust. The plaintiffs failed to properly search the public records and caused Penn National's \$430,230 judgment to move from third priority to first priority by canceling the two prior deeds of

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trust, and Penn National did not compel them to refinance. Accordingly, Penn National was an innocent third party, and even assuming, *arguendo*, that American General was “excusably ignorant,” the equities do not favor subordinating Penn National’s judgment to American General’s lien, said the court. The court said that to subrogate Penn National’s judgment to American General’s second deed of trust would place Penn National in a worse position because it would be subordinate to the additional sum of \$1,573 that American General provided to the Barnes family. It would be inequitable to place an innocent third party in an inferior position.

The American General court misses the point. Certainly, conventional subrogation under the rule of *Wallace v. Benner* could have been found to have existed in this rather routine set of facts. And the fact that Barnes got \$1573 could have been handled by giving American General a third lien for that amount, in accord with treatises cited above.

Proposed Statutes

North Carolina could benefit from the enactment of a subrogation statute. See E. Urban and J. Miles, *Mechanics’ Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority*, 12 Wake Forest L. Rev. 283, 347-349 (1976), where the contents of a statute were suggested. In 2002, the author, then serving as NCLTA General Counsel, suggested the following:

G.S. 47-20.9. Subrogation

- (a) Definition — as used in this section, “mortgage” means any mortgage or deed of trust.
- (b) Subrogation — A subsequent recorded mortgage has the same priority as a prior recorded mortgage as against a lien or encumbrance intervening between the recording of the subsequent recorded mortgage and the prior recorded mortgage, to the extent that the proceeds of the indebtedness secured by the subsequent recorded mortgage

are used to pay the indebtedness secured by the prior recorded mortgage. Actual knowledge or constructive notice of record of the intervening lien or encumbrance shall not preclude the application of this section. Cancellation of record of the prior recorded mortgage after the recording of the subsequent mortgage shall not preclude the application of this section.

- (c) Conflict with Article 9 of Chapter 25. This section is subject to G.S. 25-9-334.

There is some precedent for such a statute. G.S. 25-9-334(h), pertaining to the priority of security interests in fixtures against other encumbrances, provides in part that:

A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.

The Federal Tax Lien Act, 26 U.S.C. §6323 (i) (2), recognizes subrogation to the extent local real property law does:

Subrogation — Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.

The only problem is, local law could be clearer — and, in modern times, should be statutory. The North Carolina Land Title Association and the Real Property Law Section should add this subject to their legislative agendas.