

LAND RECORDS

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Charles Szypszak, Editor

SESSION LAW 2005-123

■ Charles Szypszak

Session Law 2005-123 (S. 734) makes some of the most fundamental revisions in decades to North Carolina law governing registers' duties. Session Law 2005-123 captures some aspects of the Uniform Residential Mortgage Satisfaction Act, a product of the National Conference of Commissioners on Uniform State Laws, which is intended to reduce some of the transactional complexities in real estate transactions that result from idiosyncratic rules for recording mortgage satisfactions, and to provide a mechanism for dealing with difficulties encountered in obtaining satisfactions from uncooperative secured creditors. The bill goes beyond adopting parts of these uniform law approaches by changing North Carolina registers' responsibilities for handling instruments submitted for recording.

The changes resulting from Session Law 2005-123 include the following:

- **Registers no longer will certify that instruments to be recorded have been duly proved or acknowledged, or that the proof or acknowledgment is in due form—instead, registers review instruments for basic requirements and, if they are present, record**
- **Deeds of trust and mortgages can be satisfied on the record with a simple instrument prepared and signed by the trustee or secured creditor and acknowledged**
- **Borrowers' attorneys can prepare and record affidavits of satisfaction when secured creditors fail to provide satisfactions**
- **Registers' marginal notes are no longer authorized**

The changes resulting from Session Law 2005-123 are substantial and there are nuances that may only become apparent with experience. Registers, and anyone whose property interests are affected, should consult the applicable sections when appropriate.

Effective Date

The changes take effect on October 1, 2005. The law says that “[s]ecurity instruments satisfied of record pursuant to this subdivision [governing satisfactions] as it was in effect prior to October 1, 2005, shall be deemed satisfied of record, discharged, and released.” G.S. 45-37(a)(1), (5), (6) (2005). This means that instruments satisfied of record prior to October 1, 2005, pursuant to the law in effect prior to that date, are still deemed satisfied. It also means that instruments not yet recorded as of October 1, 2005, will be governed by the revised law on that date, regardless of when they were executed or acknowledged. Notices of satisfaction and certificates of satisfaction delivered to registers before October 1, 2005, but not yet recorded before that date, are likely to contain the information necessary for a satisfaction document under the new law.

Registers’ Review

Registers no longer “pass” on instruments in the manner previously required. Session Law 2005-123 has eliminated the requirement that registers certify that execution by one or more signers has been “duly proved or acknowledged” and that the proof or acknowledgment is “in due form.” The revised statute limits the register’s review to seeing if the instrument has a proof or acknowledgment if one is required, and then only checking that the proof or acknowledgment “by one or more signers appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgements, and the said proof or acknowledgement includes the officer’s signature, commission expiration date, and official seal, if required.” If these elements are present, registers simply record the instruments; if not, the instruments are not to be accepted for recording. G.S. 47-14(a) (2005).

The revised statute requires a register to verify the presence of an official seal “if required.” In the case of an acknowledgement or proof by a notary from a state other than North Carolina, the statutes still require either a seal or a sealed certificate from the county official before whom the notary qualifies confirming the notary’s status and signature. G.S. 47-2.2.

Note that the register checks for “apparent authority” and does not need to verify actual authority, and only checks the proof or acknowledgment for the specified items. The statute makes clear that “[t]he

register of deeds shall not be required to verify or make inquiry concerning (i) the legal sufficiency of any proof or acknowledgement, (ii) the authority of any officer who took a proof or acknowledgement, or (iii) the legal sufficiency of any document presented for registration.” G.S. 47-14(a) (2005).

The revised statute also contains the following provision: “Any document previously recorded or any certified copy of any document previously recorded may be rerecorded, regardless of whether it is being rerecorded pursuant to G.S. 47-36.1 [pertaining to correction of minor errors by explanation].” G.S. 47-14(a) (2005). This language indicates that a document need not be reviewed for compliance with recording requirements if it is the same document previously recorded or a certified copy of it.

All instruments still must comply with other format requirements regarding size, print, and similar matters as specified in G.S. 161-14.

Satisfaction of Security Instruments

Session Law 2005-123 provides for a simplified filing of a satisfaction instrument by the secured creditor or trustee, still allows satisfaction by presentation of instruments to the register, and eliminates some forms of satisfactions previously described in the statute.

Simplified Satisfaction Process

The revised statute provides new forms of satisfaction documents to be prepared and recorded by secured creditors or trustees. New provisions define the term “security instrument” to mean any document creating an interest in real property to secure an obligation, including a deed of trust and a mortgage, and the term “secured creditor” to refer to the holder of the interest, which does not include a trustee. G.S. 45-36.4 (16), (18) (2005).

A “satisfaction of security instrument” is to be provided by a secured creditor of a security instrument including a mortgage or deed of trust, or a “trustee’s satisfaction of a deed of trust” by the trustee or substitute trustee of a deed of trust. Either satisfaction document must identify the type of security instrument, the parties to the original instrument; the original instrument’s recording data, and the office in which it was recorded. The satisfaction document also must indicate that the person signing is the secured creditor, or the trustee for a trustee’s satisfaction, and it must contain language terminating the effectiveness of

the security instrument. It must be signed by the secured creditor in the case of a satisfaction of security instrument or the trustee in the case of a trustee's satisfaction, and be acknowledged. G.S. 45-36.10, .11, .20, .21 (2005). The revised law says that "[n]o particular phrasing is required for a satisfaction of a security instrument" or a trustee's satisfaction of a deed of trust, but provides forms with the minimum information. G.S. 45-36.11, .21 (2005).

The revised law says that there are only two reasons for a register to refuse to record a satisfaction of security instrument or trustee's satisfaction of a deed of trust: it "is submitted by a method or in a medium not authorized for registration by the register of deeds under applicable law," or it is not signed by the required party and acknowledged as required for a real estate conveyance. G.S. 45-36.10(b), .20(e) (2005). The statutes make clear that a register is not "required to verify or make inquiry concerning . . . the truth of the matters stated" in any satisfaction document or "the authority of the person executing" the document. G.S. 45-36.10(b)(2), .20(e)(2) (2005). These qualifications, together with the register's limited obligation to review acknowledgements only for the presence of certain items, narrows the register's review responsibilities from prior practice.

This narrowing of the registers' review obligations is further reflected in a change to the requirement that names be printed, stamped, or typed beneath signatures on satisfactions prepared under G.S. 45-37. That requirement remains, but the provision in the law allowing registers to reject documents based on the absence of such information has been deleted. G.S. 45-37(f) (2005).

The register is to index satisfactions as "subsequent instruments" as described below. G.S. 45-37.2 (b) (2005). No fee is to be charged for recording satisfactions. G.S. 45-37.2(a) (2005).

Other Satisfaction Methods

After October 1, 2005, security instruments still can be satisfied of record by methods known as presentation of instruments to the register. The retained methods include presentation by the secured creditor or trustee of the original security instrument and note endorsed by the creditor or trustee, G.S. 45-37(a)(2) (2005); by the grantor, mortgagor, or their attorney or agent of the original security instrument and the instrument it secures if the maturity date is more than ten years old, G.S. 45-37(a)(3) (2005); and by the bearer or holder of the original negotiable instrument and instrument it secures, signed and marked paid, provided no prior

notice was given of a loss or theft of the instruments. G.S. 45-37(a)(4) (2005). Upon presentation of the required documentation, the register prepares and records a record of satisfaction, which need not be in any particular form, but the statute provides an acceptable template for the register's use. G.S. 45-37.2(b)(2) (2005).

In the case of loss or theft of original bearer instruments, the burden remains on the secured creditor to submit an affidavit for recording. The law revised the language concerning a register's actions if such an affidavit is received. The revised law states that a "record of satisfaction" is to be recorded by the register "[u]pon receipt of an affidavit of loss or theft of the security instrument or evidences of indebtedness that identify the security instrument, the original parties to the security instrument, and the recording data for the security instrument." G.S. 45-37(4) (2005). In such a case the security instrument may not be presented for satisfaction of record until ownership of the instrument has been "lawfully determined." G.S. 45-37(4) (2005). Presumably, in this instance use of the title "record of satisfaction" to describe the document to be recorded by the register is a misnomer, because the register is reacting to receipt of an affidavit of loss or theft, not to notice that the secured obligation was shown to be satisfied.

When a satisfaction is based on presentation by the secured creditor or trustee of the original security instrument and endorsed note, the register may record all or a portion of the original security instrument that identifies the original parties and original instrument recording data, upon which must also appear the creditor's endorsement of payment or the register's endorsement as follows: "This security instrument is satisfied of record pursuant to G.S. 45-37(a)(2), the original security instrument and secured obligations having been presented to me with appropriate endorsement of payment and satisfaction appearing thereon as required by law." Alternatively, the register may sign and record a separate record of satisfaction in the form prescribed by G.S. 45-37.2(b)(2), which is described above. G.S. 45-37.2(b) (2005).

The revised law retains the presumption that certain instruments securing payment have been fulfilled fifteen years after the due date, unless a separate instrument is recorded describing circumstances that extend the due date, which must be witnessed by the register of deeds and recorded and indexed as a "subsequent instrument" as described below. The provision in the law for a register to make a marginal note of the affidavit on the original

instrument “whenever practicable” has been deleted. G.S. 45-37(b) (2005).

Session Law 2005-123 deletes from the statute the provision for a “notice of satisfaction” by a trustee or mortgagee, which effectively has been replaced by the satisfaction of security instrument and trustee’s satisfaction of a deed of trust. G.S. 45-37(a)(5). The satisfaction of security instrument document similarly effectively replaces the now-deleted provision for exhibition of a certificate of satisfaction by the note owner. G.S. 45-37(a)(6). The revisions also eliminate the provision for acknowledgment of satisfaction before the register by the trustee, mortgagee, or trustee’s or mortgagee’s legal representative, agent, or attorney. G.S. 45-37(a)(1).

The law still allows a mortgagee or trustee to satisfy of record a mortgage or deed of trust by quitclaim, release, or conveyance instrument signed, acknowledged, and recorded as required for deeds and mortgages. G.S. 45-39 (2005).

Satisfaction Rescission

The revised law authorizes anyone who erroneously records a satisfaction instrument or affidavit of satisfaction to record a document of rescission that identifies the erroneous satisfaction or affidavit and states that the error had been made, that the secured obligation remains unsatisfied, and that the security instrument remains in force. The statute does not expressly require the document of rescission to be acknowledged. The document of rescission does not affect the rights of those who acquired a real estate interest between the time the satisfaction or affidavit and the document of rescission were recorded, and subjects anyone who erroneously or wrongfully records such an instrument to liability for actual losses, attorneys’ fees, and costs. G.S. 45-36.6 (2005).

Self-Help Satisfaction

Session Law 2005-123 creates a mechanism for a borrower to make a record of satisfaction when the lender fails to do so.

The revised law requires secured creditors to submit for recording a satisfaction document, or to arrange for a recorded satisfaction by other authorized means, within thirty days of full payment or performance of the secured obligation. The law subjects the creditors to liability for actual damages for missing the deadline and, if the failure continues for

another thirty days after notice from the landowner, for an additional \$1,000 and attorneys’ fees and court costs. G.S. 45-36.9 (2005). The statute contains a sixty-day limit for recording or providing satisfactions for mortgages or deeds of trust satisfied before October 1, 2005. G.S. 45-36.3 (2005).

If the secured creditor fails to provide a satisfaction as required, an attorney licensed to practice law in North Carolina, acting as “satisfaction agent,” may give notice to the secured creditor of intent to record an “affidavit of satisfaction.” This notice must contain prescribed information and give the secured creditor thirty days to provide the satisfaction instrument or to give notice of nonpayment, assignment, or accomplishment of a recorded satisfaction by other permitted methods. G.S. 45-36.14 (2005). In the absence of an appropriate response, the satisfaction agent may record an affidavit of satisfaction containing prescribed information, including the type of instrument being satisfied, the original parties, the secured creditor, the security instrument’s recording data and the office in which it was recorded, the basis of the agent’s qualification as a satisfaction agent, a statement that the agent has reasonable grounds to believe that the secured creditor received full payment or performance, a statement that the agent, acting with the real estate owner’s authority, gave notice to the secured creditor of intent to sign and record the affidavit, a description of the notice that was given and the passage of the deadline for response, and the signature of the agent and an acknowledgment. G.S. 45-36.16 (2005). The statute says that “[n]o particular phrasing of an affidavit of satisfaction is required,” but provides a form that will be sufficient. G.S. 45-36.17 (2005).

The statute provides that a register may not refuse to accept an affidavit of satisfaction “substantially complying” with the requirements unless it “is submitted by a method or in a medium not authorized for registration by the register of deeds under applicable law,” or it is not signed by the satisfaction agent and acknowledged as required by law for a real estate conveyance. G.S. 45-36.18(c) (2005). The statute expressly states that a register is not “required to verify or make inquiry concerning” “the truth of the matters stated” in the affidavit or “the authority of the person executing” it. G.S. 36.18(c)(2) (2005).

The register is to index the affidavit as a “subsequent instrument,” as described below, and may not charge for recording it. G.S. 45-37.2(a) (2005).

Other Notable Revisions

Session Law 2005-123 contains a number of other significant revisions to existing law.

Recording and Indexing Subsequent Documents

“Subsequent instruments,” which are instruments that purport to modify, amend, supplement, assign, satisfy, terminate, revoke, or cancel a previously recorded instrument—such as satisfactions, affidavits of satisfaction, assignments, and designations of substitute trustees—are to be recorded separately. They are to be indexed in the name of the parties to the subsequent instrument and any original parties as they are named in it, and there is to be a reference to the recording data of the original instrument if it is stated in the subsequent instrument. The register does not need to look past the first two pages to determine if a document is a subsequent instrument, nor need the register verify the accuracy, sufficiency, or completeness of the information provided about the original instrument. The register may rely solely on the information contained in the subsequent instrument, including the names and recording data provided. G.S. 161-14.1 (2005).

Indexing Deeds of Trust

The revised law specifies that deeds of trust may be indexed in the names of the grantor and the beneficiary only. Prior law permitted the register to index deeds of

trust in the names of the grantor and trustee only. G.S. 161-22(d) (2005).

Notice of Foreclosure

The revised law has eliminated authority for making marginal notes about foreclosure on recorded deeds of trust or mortgages. The notice of foreclosure is recorded and indexed as a subsequent instrument. G.S. 45-38 (2005).

Good Faith

Session Law 2005-123 affirms the guiding principle that registers must perform and enforce their duties regarding satisfactions “in good faith.” G.S. 45-36.2 (2005). “Good faith” is defined as “[h]onesty in fact and the observance of reasonable commercial standards of fair dealing.” G.S. 45-36.4(6) (2005). This means registers are not expected to be tools of perfection when they process satisfactions, but they are accountable for exercising their duties reasonably, honestly, and fairly.

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