Foreclosure by Power of Sale

Essential Terminology

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

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

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

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

Maker – Borrower –Debtor
Party that signs the note and obtains a loan from a lender.

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

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

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

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

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

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

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

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

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

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

Record Owner
The owner of the property.

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

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

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

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

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

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

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

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

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

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

Ginnie Mae Fannie Mae, and Freddie Mac
Government owned or sponsored corporations whose purpose is to expand affordable housing the in the United States by purchasing loans from banks in order to allow them to make more loans.