



CHICAGO BULL

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DEEDS OF TRUST MISSING DATE OF NOTE

Recently, some lenders have begun using deed of trust forms requiring the actual entry of the date of the Note in lieu of language identifying the Note as being "of even date herewith." Clerks of Superior Court of several counties have indicated that without this entry, they would not proceed with foreclosure of the deed of trust, -- presumably on the basis that the debt as evidenced by the Note was not sufficiently specifically identified. A loan policy of title insurance insures a lender that it has not only lien priority but also that it can foreclose the insured deed of trust should a default under the terms of the note occur. Title insurance companies are being asked to provide affirmative coverage against loss or damage incurred by the insured lender as a result of failure of the Deed of Trust to contain the date of the Note in the requisite blank.

We consulted Pamela Weaver Best, counsel with the Administrative Office of the Courts and former real estate lawyer, for her views on this issue. Ms. Best indicated that she does not have the authority to mandate the Clerks' practices. *However, if consulted by individual clerks, Ms. Best would recommend as follows:*

If the actual Note and the Deed of Trust itself are dated the same, and if the amounts and parties are consistent, then the Clerk could presume the Deed of Trust secures the Note, notwithstanding the failure to include in the Deed of Trust the actual date of the Note. In cases of question, the Clerk could mandate that the lender provide an affidavit at the time of the foreclosure that the Note of that date was the only Note given by that borrower and, therefore, was clearly the Note secured by the Deed of Trust.

If the applicable county's Office of the Clerk of Superior Court expresses their willingness to follow Ms. Best's recommendation, the affirmative coverage can be issued. If the Office of the Clerk of Superior Court of the particular county expresses reservations about allowing foreclosure in the above situation notwithstanding Ms. Best's recommendation, the deed of trust should be corrected and re-recorded. This is necessary to assure that the lender-client will not be delayed in or prohibited from foreclosing should a default occur.

We hope that this assists those of you who may have inadvertently missed this blank, given the rush of a last minute closing!