

**Satisfactions, Recordings, Re-recordings, Indexing and More
Under the New North Carolina Mortgage Satisfaction Act
(SL 2005-123, S734)**

By Nancy Short Ferguson

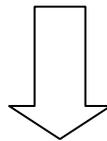
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By enacting Session Law 2005-123, Senate Bill 734, signed by Gov. Easley on June 29, 2005, North Carolina became one of the first states to adopt a version of the Uniform Residential Mortgage Satisfaction Act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Our North Carolina Act (the “Act”), however, applies to commercial as well as residential transactions, was organized to be integrated into the existing statutory framework of Chapter 45, and contains some related recording and indexing provisions affecting Registers of Deeds under Chapters 47 and 161 of the statutes. Otherwise, it remains substantially intact as the national act. (The N.C. Act is online at: www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S734v5.html, while the uniform act is available at www.mortgagebankers.org/industry/docs/04/nccusl_urmsa-final.pdf).

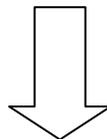
The creation of the uniform act involved prior publication of drafts to thousands of attorneys, lenders, software vendors, title insurers and others across the country; assimilation of thousands of e-mails, letters, faxes and phone calls amongst these parties; and, ultimately, a bill broad enough to encompass more than just a process to obtain a record satisfaction. Key elements include provisions for: a mandatory, reliable, and unconditional written payoff; a nondiscretionary penalty for failure to timely cancel (plus actual loss, court costs and attorneys’ fees); simplified trustee’s and secured creditor’s satisfaction forms; the ability of a N.C. licensed attorney to serve as satisfaction agent to cancel the deed of trust (after due notice and with evidence of payment); change from certification to verification by the Registers of Deeds in order to record a document; and more stringent subsequent instrument indexing requirements.

The Act itself is overall quite simple. The cancellation process would basically be:

Pre-closing: Request payoff
(Same method as always, but in writing)



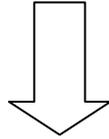
By closing: Receipt of Lender’s written payoff (within max. of 10 days)
Mortgage / deed of trust specific



At least 30 days post-closing:

Follow-up notice to lender that, if cancellation is not filed already or within next 30 days, statute provides for:

- (1) penalties, actual loss, costs or
- (2) self-help satisfaction or
- (3) both



After more than 30 days following follow-up notice:

If no objection by lender to self-help notice above, satisfaction agent is allowed to record affidavit of satisfaction (“self-help”).

If lender objects erroneously or has not yet canceled the mortgage / deed of trust, lender is liable for actual loss, costs, damages due to detrimental reliance and penalties attach if payment was made in reliance on written payoff statement.

This article should not be considered a substitute for a thorough reading of the Act itself. However, some of the key provisions of the Act are substantially as set forth below:

Reliable unconditional payoff (G.S. 45-36.7 and 45-36.8): Many of us have experienced either the lender’s refusal to provide any type of payoff in writing or its providing a payoff so condition-laden that it is totally unreliable (e.g., subject to post-closing and post-payoff audit that may increase the balance substantially, or subject to the lender’s decision to make a draw from escrow without notice). RESPA requires the lender to provide a balance outstanding, a statement of account—within 30 days. 24 CFR 203.558. The UCC similarly provides for a “request for accounting” which allows at least 14 days. N.C.G.S. 25-9-210. The written payoff statement must be unconditional and, once payment is made in reliance, third parties relying upon the statement are entitled to a cancellation of the deed of trust, even if amounts are still owed by the borrower (who does remain personally liable). It must be a full payoff amount for the security interest requested, not just an account number. A lender may correct an erroneous payoff statement, but if not delivered to the closing agent prior to closing, the lender cannot claim the notice of correction as a basis for refusing to cancel the deed of trust. For situations involving pre-closing conditions, such as equity lines or revolving lines of credit, the lender must provide a contact from whom the closing attorney may obtain current valid final payoff information within 24 hours prior to closing. A borrower is entitled to one payoff statement without charge every 6 months and cannot be charged for correction of any previous error by the lender. A lender may, however, charge a fee of up to \$25 for subsequent statements requested within the 6-month period as well as reasonable costs for expedited delivery.

Mandatory cancellation; nondiscretionary penalties (N.C.G.S. 45-36.9 *et seq.*): If a deed of trust is not canceled of record within 30 days following closing, and the lender thereafter fails to cancel after an additional 30-day notice, the lender is automatically subject to a \$1,000 penalty, plus actual loss, court costs and attorneys' fees incurred to pursue the cancellation. The only exception to this mandate is if the secured creditor had reasonable procedures in place, with which it complied, but was unable to obtain the satisfaction timely due to circumstances beyond its control. The uniform act's official comments make it clear that such circumstances would not be internal problems such as a shortage of staff or a computer crash on the last day of compliance. Instead, such "circumstances" could include a hurricane inflicting severe damage or a several-day blackout affecting broad geographical territory. The \$1,000 penalty is non-assignable, but is available to the "landowner" defined in the act to include the owner at the time of the enforcement as the holders of the equity of redemption, including a subsequent purchaser trying to clear their record title. The penalty provision is not retroactive, however, and will apply only to payoffs made on or after 10/1/05. For payoffs made prior to that time, the previously existing statute, G.S. 45-36.3, will continue to apply.

"Self-help" Satisfaction by N.C. licensed attorney as "satisfaction agent" (N.C.G.S. 45-36.13 *et seq.*): In addition to the penalties and costs outlined above, if a deed of trust remains uncanceled more than 30 days following closing, a N.C. licensed attorney acting on behalf of the landowner may (but *is not required to*) serve as satisfaction agent. In that capacity, the attorney would also notify the lender that if the lender does not cancel the lien within 30 days following this follow-up notice, the attorney will do so, thereby invoking the new "self-help" satisfaction provision. Before exercising self-help cancellation, the landowner's attorney must have "reasonable grounds" to believe that the lien has been paid in full. However, the attorney does not have to have been involved in the original closing in which the lien was paid. This self-help cancellation would constitute an additional professional service of the attorney, as with any other legal service. If the procedures outlined in the statute are followed and the lender does not file timely objection, the attorney is protected from liability even if the cancellation is eventually determined to be erroneous. If, upon receipt of the attorney's notice, the lender timely objects to the cancellation, it does so at its own risk because if the objection is unfounded the lender is subject to penalties. Whether objection without good cause or simply failing to cancel timely, the lender remains subject to the penalties and costs for failure to cancel outlined above as well. Most importantly, the satisfactory evidence of payment does not have to be a "reliable payoff statement" as provided earlier in the act in N.C.G.S. 45-36.7 (discussed above). In fact, a part of the basis for this particular provision was its availability to clear up old paid but uncanceled liens already cluttering the record. [CORRECTIONS on first and second sentences above.]

Simplified "safe harbor" forms: The act has modified G.S. 45-37(a) to provide for three (3) primary satisfaction forms under G.S. 45-37(a)(7):

(1) Trustee's Satisfaction (adding GS 45-36.20, safe harbor form at GS 45-36.21, deleting 45-37(a)(1) & (5), replacing them with GS 45-37(a)(7)c.).

“TRUSTEE’S SATISFACTION OF DEED OF TRUST
(G.S. 45 36.20; G.S. 45 37(a)(7)c.)

The undersigned is now serving as the trustee or substitute trustee under the terms of the deed of trust identified as follows:

Original Grantor(s): (Identify original grantor(s) or trustor(s))

Original Secured Party(ies): (Identify the original beneficiary(ies) or secured party(ies) in the deed of trust)

Recording Data: The deed of trust is recorded in Book _____ at Page _____ or as document number _____ in the office of the Register of Deeds for _____ County, North Carolina.

This satisfaction terminates the effectiveness of the deed of trust.

Date: _____

(Signature of trustee or substitute trustee)

[Acknowledgment before officer authorized to take acknowledgments]”

(2) Satisfaction by the Secured Creditor (adding GS 45-36.10, safe harbor form at GS 45-36.11, deleting GS 45-37(a)(6), replacing it with GS 45-37(a)(7)a.),

“SATISFACTION OF SECURITY INSTRUMENT
(G.S. 45 36.10; G.S. 45 37(a)(7)a.)

The undersigned is now the secured creditor in the security instrument identified as follows:

Type of Security Instrument: (identify type of security instrument, such as deed of trust or mortgage)

Original Grantor(s): (Identify original grantor(s), trustor(s), or mortgagor(s))

Original Secured Party(ies): (Identify the original beneficiary(ies), mortgagee(s), or secured party(ies) in the security instrument)

Recording Data: The security instrument is recorded in Book _____ at Page _____ or as document number _____ in the office of the Register of Deeds for _____ County, North Carolina.

This satisfaction terminates the effectiveness of the security instrument.

Date: _____

(Signature of secured creditor)

[Acknowledgment before officer authorized to take acknowledgments].”

(3) Affidavit of Satisfaction by the satisfaction agent (GS 45-36.13 *et seq.*)

“AFFIDAVIT OF SATISFACTION
(G.S. 45-36.16; G.S. 45-37(a)(7)b.)

(Date of Affidavit)

The undersigned hereby states as follows:

1. I am an attorney licensed to practice law in the State of North Carolina.
2. I am signing this Affidavit of Satisfaction to evidence full payment or performance of the obligations secured by real property covered by the following security instrument (the “security instrument”) currently held by _____ (the “secured creditor”):

Type of security instrument:

Original parties to security instrument:

County and state of recording:

Recording data for security instrument:

3. I have reasonable grounds to believe that the secured creditor has received full payment or performance of the balance of the obligations secured by the security instrument.
4. With the authorization of the owner of the real property described in the security instrument, I gave notification to the secured creditor by method authorized by G.S. 45 36.5 that provides proof of receipt that I would sign and record an affidavit of satisfaction of the security instrument if, within 30 days after the effective date of the notification, the secured creditor did not submit a satisfaction of the security interest for recording or give notification that the secured obligation remains unsatisfied.
5. [Check appropriate box]

The 30 day period identified in paragraph 4 has elapsed, I have no knowledge that the secured creditor has submitted a satisfaction for recording, and I have not received notification that the secured obligation remains unsatisfied.

The secured creditor responded to the notification in paragraph 4 by authorizing me to execute and record this Affidavit of Satisfaction.

(Signature of Satisfaction Agent)

[Acknowledgment before officer authorized to take acknowledgments]”

Though the existing Notice of Satisfaction (G.S. 47-46.1) and Certificate of Satisfaction (G.S. 47-46.2) will still be sufficient to comply, they are more detailed than the new, more streamlined, more nationally consistent forms. Ultimately, the Affidavit of Lost Note (G.S. 47-46.3) will not

be required at all in the future. Whichever form is used will be recorded and indexed as any other subsequent instrument (below), including a cross-index reference to the book and page referenced in the satisfaction document itself.

When combined with the simplified notary acknowledgment form under new G.S. 10B-26(a) which takes effect 12/1/05 under Senate Bill 671 (www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S671v6.html), the rejection rate for cancellations should be reduced significantly as well. Lenders will have increasing incentive to clear titles of their paid liens, a lower expense for generating the satisfactions, and a higher cost for failing to do so.

Rescission of Erroneous Satisfaction (N.C.G.S. 45-36.6): If a deed of trust is erroneously canceled of record, a document of rescission can be filed by either the secured creditor or the person who recorded the erroneous cancellation. However, this reinstatement of the security interest will not affect the rights of intervening lien creditors and purchasers for value. This provision is consistent with case law in North Carolina. See **G.E. Capital Mortg. Servs., Inc. v. Neely**, 135 N.C. App. 187; 519 S.E.2d 553 (1999).

Record of Satisfaction or Filing of Satisfaction (N.C.G.S. 45-37.2): Under the N.C. Act, the register of deeds will simply file any of the satisfaction forms above, cross-indexing them as a subsequent instrument (see below), without review of the prior instrument itself. This should reduce the delays and the number of “technical” rejections for matters such as variations in middle name or initials, etc. For the existing cancellations by original presentation, 10-year-old obligations, and bearer instruments under N.C.G.S. 45-37.2(a)(2), (3) and (4), the register will enter a record of satisfaction, again indexed as a subsequent instrument (below). Of course, recording is not and never has been a guarantee of the validity of the document for its intended purpose, as attorneys are well aware!

Verification versus Certification by the Registers of Deeds (N.C.G.S. 47-14): Upon presentation of documents to the registers for recording after 10/1/05, they will no longer be responsible for approving (“certifying” to) the *form* of the notary acknowledgment. They will review to verify that “the execution of the instrument 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.” The certification process has always been rather inconsistently followed, with some counties extremely restrictive and others more laissez faire. The adequacy of notary acknowledgments has always been a risk for attorneys not cautiously reviewing all documents in their chain of title, and will continue to be so. Under the new Act, as in the past, if a deed was incorrectly signed or notarized, it is invalid as record notice as to the party whose signature or notary acknowledgment was defective, even if recorded. (Again, recording is not and never has been a guarantee of the validity of the document for its intended purpose!)

Subsequent Instruments Cross-indexing and Re-recording (N.C.G.S. 47-14 and 161-14.1): A longer list of subsequent instruments (i.e., those referencing previously recorded instruments) is set forth in new N.C.G.S. 161-14.1(a)(3). These instruments must be indexed in the names of

the parties to the subsequent instrument, in the names of parties the subsequent instrument indicates to be parties to the original instrument and must include a cross-index reference to the book and page of the prior instrument as shown in the first 2 pages of the subsequent instrument. “The register of deeds is expressly authorized to rely solely on the information contained in the subsequent instrument, including, but not limited to, the names of the original parties to the original instrument and the recording data for the original instrument.” In the past, county registers had been inconsistent in this indexing and the statute was less than comprehensive in its approach. For example, assignments of deeds of trust were often not cross-indexed to the book and page of the deed of trust itself and were virtually unlocatable to title examiners relying on the public records.

Re-recordings (N.C.G.S. 47-14): In addition, re-recordings of an original document, even if no changes (such as re-recordings to place a deed of trust appropriately in the chain of title after a correction deed), were inconsistently treated, with some registers accepting them, some requiring a separate explanation statement from the drafting attorney (if available) erroneously relying on N.C.G.S. 47-36.1 and some requiring a statement on the front page explaining the reason for the re-recording. Pursuant to N.C.G.S. 47-14, as revised, “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. The 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.” This amendment does not change the provisions of N.C.G.S. 47-36.1 which continue to be applicable in cases of minor corrections by the attorney drafter (a subject of serious concern, but not addressed in this act.)

Conclusion and References: As always, an overview article such as this one is no substitute for reading the Act’s provisions or the views of others who will be administering its provisions. So, for further information, attorneys should consult and carefully review:

The N.C. Mortgage Satisfaction Act (with new recording/indexing requirements) can be accessed online: www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S734v4.html

The new Notary Public Act (including e-recording provisions) can be accessed online: www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S671v6.html

The NCCUSL Uniform Residential Mortgage Satisfaction Act with Official Comments can be accessed online: www.law.upenn.edu/bll/ulc/umsa/2004finalact.htm

Land Records Bulletin, Number 31, September 2005, by Charles Szypszak, editor, discussing these changes in detail from the perspective of the Registers of Deeds, can be ordered online from the UNC School of Government at: <http://php.unc.edu/sogcart/singlebook.php?id=901>

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