

October 27, 2010

FORECLOSURE DEBACLE COULD IMPACT ATTORNEYS

As you are likely aware, there has been a significant amount of recent press devoted to the foreclosure debacle, which stems from lender affidavits. The issues generally concern proving a legal right to foreclose, the failure of the affiant to read the affidavit or referenced documents, and notarizations without the notary witnessing the signature. This situation has potential ramifications on a number of levels.

Attorneys doing foreclosure work on behalf of lenders, including acting in the capacity of Trustee, may want to consider methods to insulate themselves from the risk of possible claims arising out of foreclosure-related issues. The ideal solution would be to obtain warranties from the lender concerning their paperwork as well as an indemnification agreement should the documentation or affidavit be challenged. The North Carolina State Bar has indicated that indemnity agreements would generally be permissible so long as fiduciary duties are not impaired and only cover matters not in control of Trustees. (We suggest contacting the State Bar with any questions about the permissibility of an indemnity agreement.) At a minimum, we suggest requiring the lender to provide documents evidencing its legal right to foreclose, which would include the promissory note and properly documented assignments, if any, as well as documentation that the lender has complied with the Emergency Foreclosure Prevention Act, as amended. As respects the latter, this would only be necessary if you are not responsible for ensuring compliance with the Act.