

CURING TITLE DEFECTS DURING FORECLOSURE

by Raighne Delaney*

Foreclosure is the process by which loan collateral is put up for sale by a creditor in the event of a default by a debtor on an underlying credit obligation. Foreclosure in Virginia can be initiated either judicially or, if there is a clause in the mortgage¹ providing for sale of the property in the event of default, non-judicially. In a judicial foreclosure, a lawsuit is filed to obtain a court order to foreclose, after which the property is usually auctioned off to the highest bidder. Whether the sale is judicial or non-judicial, the lender/foreclosure seller must have marketable title² to the property. This article addresses a number of common problems that prevent the lender/foreclosure seller from having a marketable title and the manner in which those problems can be resolved.

I. GENERAL PRINCIPLES OF FORECLOSURE SALES

A non-judicial foreclosure is governed by Virginia Code §§ 55-59 to 55-66.6. Specifically, Virginia statutes govern the notice of the sale,³ the advertisement of the sale,⁴ and the manner in which the sale is conducted.⁵ In the event that a debtor defaults, at the request of the beneficiary, the trustee shall proceed to sell the property pursuant to the terms of the deed of trust and Virginia law.⁶ Virginia Code § 55-59(6) grants the trustee discretion to "take possession of the property and proceed to sell the same at auction . . . as the trustee may select upon such terms and conditions as the trustee may deem best." The trustee must report the sale to the Commissioner of Accounts within six months after the sale.⁷

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¹ The terms "mortgage," "security deed" and "deed of trust" are used interchangeably throughout this document. The differences among the three instruments are: with a mortgage, legal title remains with the borrower and the lender is granted an interest in that property up to the amount of the indebtedness. A security deed passes legal title to the lender while reserving equitable title to the debtor and will pass legal title to the debtor upon repayment of the debt. A deed of trust conveys title to a third party (the trustee), who holds it in trust on the lender's behalf until the debt is re-paid or the property is sold.

² A marketable title is one which is free from liens or encumbrances; one which discloses no serious defects and is dependent for its validity upon no doubtful questions of law or fact; one which will not expose the purchaser to the hazard of litigation or embarrass him in the peaceable enjoyment of the land; one which a reasonably well-informed and prudent person, acting upon business principles and with full knowledge of the facts and their legal significance, would be willing to accept, with the assurance that he, in turn, could sell or mortgage the property at its fair value. *Haisfield v. Lape*, 264 Va. 632, 637 (Va. 2002).

³ Va. Code § 55-59.1 (outlining what must be included in the notice, when it must be given, and to whom).

⁴ Va. Code §§ 55-59.2 to -59.3 (outlining the advertisement's form, content and manner of distribution).

⁵ Va. Code §§ 55-59 to -59.4 (outlining the sale procedure and trustee's duties).

⁶ See generally 13A Michie's Jurisprudence ("M.J.") "Mortgages and Deeds of Trust," § 97.

⁷ Va. Code § 26-15.

In conducting a sale, the trustee is the agent of both the debtor and the creditor and is bound to act impartially between them.⁸ However, a trustee "only owes those duties that are listed in the deed of trust itself."⁹ For example, a trustee has no fiduciary duty to a third party such as a guarantor of a loan secured by the property to be sold.¹⁰

In any public sale of the property, the creditor, for his own protection, may bid at the sale and apply the amount of the debt upon his bid.¹¹ This is sometimes referred to as a "credit bid." If a third party bids more than the amount of the debt secured, the creditor will be paid in full from the sale proceeds; if the creditor is forced to buy the property at the amount of his debt or less, he has acquired the property in lieu of his debt. If the sale price is less than the amount owed, the creditor may pursue a deficiency judgment against the debtor for the difference between the foreclosure sale price and the amount remaining on the loan; thus, it is important that the trustee sell the property for an adequate price.¹²

A foreclosure sale is final when the trustee knocks the property down to the bidder, makes a memorandum of the sale and its terms, and signs the same.¹³ In such a transaction, there is no warranty of title and *caveat emptor* applies.¹⁴

If there is a cloud resting on the property's title, the trustee may apply to the court to remove the impediments to a fair sale.¹⁵ However, the trustee must only do so if it is "necessary."¹⁶

If the trustee does not seek court guidance, then any party claiming injury from a sale may seek an injunction until the impediments to a fair sale have been removed, as far as it is practicable to do so.¹⁷ Generally, a court may enjoin sales under a deed of trust where the complainant has no adequate remedy

⁸ *Whitlow v. Mountain Trust Bank*, 215 Va. 149, 207 S.E.2d 837 (1974); *Hudson v. Barham*, 101 Va. 63, 43 S.E. 189 (1903); see generally also 13A M.J. "Mortgages and Deeds of Trust," § 111.

⁹ *Gallant v. Deutsche Bank National Trust Co.*, 766 F. Supp. 2d 714 (W.D. Va. 2011); *Carter v. Countrywide Home Loans, Inc.*, 2008 U.S. Dist. LEXIS 67014, at *30 (E.D. Va. Sept. 3, 2008); see also *Fleet Finance v. Burke & Herbert Bank & Trust*, 27 Va. Cir. 98, 101 (Va. Cir. Ct. 1992) ("The Court finds on this issue that Virginia law does not impose fiduciary duties on trustees beyond those duties owed to the parties under the deed of trust.").

¹⁰ *Warner v. Clementson*, 254 Va. 356, 492 S.E.2d 655 (1997).

¹¹ *Title Ins. Co. v. Industrial Bank*, 156 Va. 322, 157 S.E. 710 (1931); *Rolen v. Southwest Va. Nat'l Bank*, 39 Bankr. 260, 264 (Bankr. W.D. Va. 1983).

¹² *Rohrer v. Strickland*, 116 Va. 755, 82 S.E. 711 (1914).

¹³ *In re Rolen*, 39 B.R. 260 (Bankr. W.D. Va. 1983), citing *Feldman v. Rucker*, 201 Va. 11, 109 S.E.2d 379 (1959).

¹⁴ *Powell v. Adams*, 179 Va. 170, 18 S.E.2d 261 (1942); *In re Rolen*, citing *Motley v. Hodges*, 120 Va. 498, 499, 91 S.E. 757 (1917).

¹⁵ *Hudson v. Barham*, 101 Va. 63, 43 S.E. 189 (1903).

¹⁶ *Hudson v. Barham*, 101 Va. 63, 43 S.E. 189 (1903); *Cherokee Corp. v. Chicago Title Ins. Co.*, 40 Va. Cir. 1 (Warren Cir. Ct. 1995); see also Casterline, Virginia Foreclosure Practice, § 2.6. According to Casterline, the modern approach recognizes that a foreclosure sale by its very nature is a distressed sale in which a certain amount of "chilling" of the sales price will take place. The duty of the trustee is to obtain the highest price for the property for the debtor. The duty may be satisfied in other ways, other than filing a suit, such as bonding of a lien or obtaining a title insurance company's commitment to insure over a lien.

¹⁷ *Hudson v. Barham*, 101 Va. 63, 43 S.E. 189 (1903).

at law.¹⁸ There are numerous grounds upon which one may enjoin a sale.¹⁹ Nevertheless, courts will not set sales aside except for weighty reasons, and the court will interpose “reluctance” before setting aside a sale.²⁰ For example, the court will not set aside a sale because of an inadequate price unless the bid shocks the court’s conscience.²¹

II. SOLVING COMMON PROBLEMS

In the foreclosure context, a number of common problems arise, as described below.

A. Indemnifying Prior Open Liens

When a lender forecloses on a property only to discover that there was a prior lien that had not been found at the time they made the loan, the lender will generally make a claim against the title insurance policy (if there is one). There are, however, circumstances that make a title insurance claim unnecessary.

1. Refinancing

Occasionally, when a first mortgage is refinanced, the borrower or the settlement agent fails to pay-off a valid second mortgage. When the refinance mortgagee tries to foreclose, it may discover that its mortgage is in second place. If the real estate does not contain more than one dwelling unit, and the principal of the valid second mortgage is no more than \$150,000, then, by statute, the refinancing mortgage retains the first mortgage’s priority if it meets the following three requirements:

1. Such refinance mortgage states on the first page thereof in bold or capitalized letters:

“THIS IS A REFINANCE OF A (DEED OF TRUST, MORTGAGE OR OTHER SECURITY INTEREST) RECORDED IN THE CLERK'S OFFICE, CIRCUIT COURT OF (NAME OF COUNTY OR CITY), VIRGINIA, IN DEED BOOK, PAGE, IN THE ORIGINAL PRINCIPAL AMOUNT OF, AND WITH THE OUTSTANDING PRINCIPAL BALANCE WHICH IS.”;

2. The principal amount secured by such refinance mortgage does not exceed the outstanding principal balance secured by the prior mortgage plus \$5,000; and

3. The interest rate is stated in the refinance mortgage at the time it is recorded and does not exceed the interest rate set forth in the prior mortgage.²²

If the refinancing mortgage does not meet those requirements, or otherwise fails to qualify for statutory protection, the refinance lender may still be able to retain the priority of the original loan through the doctrine of equitable subrogation.²³

¹⁸ 13A M.J. “Mortgages and Deeds of Trust,” § 116.

¹⁹ 13A M.J. “Mortgages and Deeds of Trust,” § 117 (e.g., death of grantor, fraud, impediment to fair sale, irregularity in appointment of substitute trustee, sale of part of entire tract).

²⁰ *Morriss v. Virginia State Ins. Co.*, 90 Va. 370, 375, 18 S.E. 843 (1893), *overruled on other grounds*; *Wilson v. Wall*, 99 Va. 353, 38 S.E. 181 (1901); 13A M.J. “Mortgages and Deeds of Trust,” § 147.

²¹ *Perdue v. Davis*, 176 Va. 102, 10 S.E.2d 558 (1940).

²² Va. Code § 55-58.3. Note also the limited exception to this rule in subsection D for subordinate mortgages financed pursuant to state or federal law governing affordable dwelling units for low-income persons or governing improvements to residential water supplies in response to an existing health hazard.

However, in *Centreville Car Care v. North American Mortgage Co.*, a lender had a second deed of trust on the property that the sellers wanted to have equitably subrogated. The mortgagee financed a purchase of the property by new owners, but the settlement agent negligently missed the existence of the lender's lien in the title search. The mortgagee paid off the first lien, but made no disbursements to the lender. It was found that subrogation would prejudice the lender because the lender had the right to anticipate that its lien would move into first place after the first lien was paid off, because payments were made from the mortgagee's loan over the lender to the sellers, and because the lender's obligors had no incentive to pay their debt as they no longer had equitable ownership of the property. Accordingly, the court found that the equities favored the lender and refused to apply equitable subrogation.

2. *Marshalling of Assets*

Additionally, the ability of the lien holder to foreclose may be restricted if their note is secured by multiple properties. If a lien holder's debt obligation is secured by more than one property and there is a second, junior lien holder on one of those properties, then, if the senior lien holder wishes to foreclose to satisfy his debt, he must foreclose first on the properties that lack a junior lien under the doctrine of marshalling of assets.²⁴

3. *Closing the Lien*

Once the lien has been paid off or otherwise satisfied, the lien holder is required to issue a release deed or file a certificate of satisfaction with the clerk within ninety days or be subject to a \$500 penalty payable to the obligor—and must pay any court costs and reasonable attorneys' fees associated with collection of the penalty.²⁵ For example, in *Sovereign Title Co. v. First Union National Bank*,²⁶ the court determined that the plaintiffs had paid off the lien against their property; accordingly, it granted plaintiffs a declaratory judgment releasing the lien and awarded the plaintiffs the \$500 fine as well as their costs and attorneys' fees.²⁷

B. **Open Equity Lines of Credit**

A particularly troublesome type of prior open lien is the open equity line of credit. When homeowners take out a line of credit against the equity in their home, they create an open equity line of credit. These equity lines of credit can be used for anything, but are generally used for big purchases or repairs or additions to the home. In order to secure clean title to the property, the equity lines of credit must be paid off and closed. Unfortunately, in many cases, the line of credit is reduced to zero, but not closed.

To close a home equity line of credit, the balance must be paid off and the line closed by the lender. Once it has been paid off and closed or otherwise satisfied, the lender must issue a release deed or

²³ See, e.g., *Blanton v. Keneipp*, 155 Va. 668 (Va. 1930); cf. *Centreville Car Care v. N. Am. Mortg. Co.*, 559 S.E.2d 870 (Va. 2002) (“Although no bright-line rule for the resolution of claims for subrogation can be formulated because the merits of such claims are necessarily fact specific, several principles or guidelines are uniformly established in our cases that assist in the proper analysis of such claims. First, subrogation is not appropriate where intervening equities are prejudiced. Second, ordinary negligence of the subrogee does not bar the application of subrogation where ‘an examination of the facts . . . shows that the equities strongly favor’ the subrogee”) (internal citation omitted).

²⁴ See, e.g., *Kidwell v. Henderson*, 150 Va. 829, 840 (Va. 1928).

²⁵ Va. Code § 55-66.3.

²⁶ 51 Va. Cir. 498 (Va. Cir. Ct. 2000).

²⁷ *Id.* at 511.

file a certificate of satisfaction with the clerk within ninety days or he will be subject to a \$500 fine payable to the obligor as well as any court costs and reasonable attorneys' fees associated with collection of the forfeiture.²⁸

If a prior equity line is not closed and released by the time of foreclosure, or if the foreclosing lender made a payment to reduce the equity line of credit, the doctrine of equitable subrogation might apply; however, these cases can be hopeless absent title insurance coverage and/or a payment from the settlement agent's errors and omissions carrier.

C. Resolving Tax Issues

In a foreclosure of real property, delinquent state or federal taxes may be a lien against the property. In Virginia, state real estate taxes constitute a lien on the property that has priority over any other encumbrances, regardless of when the liens were perfected.²⁹ In the event that the property is sold while still subject to a real estate tax lien, the proceeds of the sale will first be diverted to pay off the lien.³⁰ Such a lien can be released by payment; however, if payment of the state real estate tax has been delinquent for twenty years, by statute, it is no longer a lien against the property.³¹

Any failure by the property's owner to pay federal taxes will also result in a lien being filed against the property.³² Such a lien will "arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."³³ Additionally, a tax lien can only attach to a property in which the debtor has a sufficient interest as determined by state law; if the debtor lacks sufficient interest the lien is not valid.³⁴ Otherwise, the lien must be released or discharged in accordance with 26 U.S.C. § 6325.

Although most federal tax liens should be searchable, the parties should be careful about the presence of a federal estate tax lien, which arises on the death of the property owner, attaches to all of the owner's property, and can be perfected even if no notice of the lien is filed. It is thus sometimes referred to as a "secret lien."³⁵

D. Correcting Scrivener's Error

Scrivener's errors are mistakes in a document that do not reflect the agreement of the parties and are usually due to transcribing the agreement incorrectly. They "are demonstrably contradicted by all other documents."³⁶ Such errors "tend to occur singularly; they are not continuous, ongoing, and repeated."³⁷ A scrivener's error amounts to mutual mistake, and in order to correct such an error on a deed, the parties may either re-record the deed or file a bill in equity requesting that the court reform the

²⁸ Va. Code § 55-66.3.

²⁹ Va. Code § 58.1-3340.

³⁰ *See In re Polumbo*, 271 F. Supp. 640 (W.D. Va. 1967).

³¹ Va. Code § 58.1-3341.

³² 26 U.S.C. § 6321.

³³ *Id.* § 6322. The statute of limitations for federal tax liens can be found at 26 U.S.C. § 6502.

³⁴ *Aquilino v. United States*, 363 U.S. 509, 512 (U.S. 1960).

³⁵ 26 U.S.C. §§ 6323-6324; *see also Glass City Bank v. United States*, 326 U.S. 265 (U.S. 1945).

³⁶ *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 575 (Va. 2005) (internal citation omitted).

³⁷ *Id.*

deed.³⁸ If it can be shown by clear and convincing evidence that a mistake was made in the deed's drafting such that it does not express the true agreement of the parties, then the court will reform the deed.³⁹ In such a case, "parol evidence is always admissible to establish the fact of fraud or of a mistake and in what it consisted, and to show how the writing should be corrected."⁴⁰

If a deed makes reference to the property being conveyed and misspells the address but clearly describes a property owned by the transferor, upon discovering the error a deed should be re-executed and re-recorded reflecting the proper address. Should either party refuse to sign the reformed deed, a court could be asked to compel signature.

E. Unreleased Mortgages or Mortgages Recorded Out of Order

1. Unreleased Mortgages

In Virginia, a paid mortgage must be released.⁴¹ As previously stated, once a lien has been paid off or otherwise satisfied, the lien holder is required to issue a release deed or file a certificate of satisfaction with the clerk within ninety days or the holder will be subject to a \$500 penalty payable to the obligor and must pay any court costs and reasonable attorneys' fees associated with collection of the forfeiture.⁴²

Unreleased mortgages or open prior mortgages or liens can be resolved by obtaining and recording a release of satisfaction by the original lender or, in some situations, by the settlement agent who satisfied the lien at closing.⁴³ One problem in Virginia is that as the foreclosure process moves so quickly, it is sometimes not possible to do this before the sale of the property. The parties may be able to get the title insurance company to issue a mutual indemnification, thereby allowing the foreclosure sale to proceed.

If there is a lien on the property and the lien has been paid off, the seller should contact the lender and request that the lien be released. If the lien is not released as requested, the seller may sue under Virginia Code § 55-66.3 to have the lien released. If the threat of a lawsuit does not prompt a release and the delay necessary to bring suit would prejudice the closing, the seller may be able to get the title insurance company to provide indemnification against the possibility that the existing lien has some unseen outstanding debt. If the lien is old, there is a statute of limitations for its enforcement—typically ten years.⁴⁴

³⁸ See *Fiott v. Commonwealth*, 53 Va. 564, 578 (Va. 1855).

³⁹ See *id.*; accord *Wiltshire v. Warburton*, 59 F.2d 611, 615 (4th Cir. 1932) (interpreting Virginia law).

⁴⁰ *Wiltshire v. Warburton*, 59 F.2d at 616.

⁴¹ Va. Code § 55-66.3.

⁴² *Id.*

⁴³ Va. Code § 55-66.3(E).

⁴⁴ Va. Code § 8.01-241. The statute of limitations begins to run from the date a right to enforce the lien accrued. The statute does provide for a few narrow exceptions.

2. *Recorded Out of Order*

A mortgage is recorded out of order either when a homeowner secures two loans within days of one another or when a short search fails to discover prior liens that should have been satisfied and released and there is a failure to follow up on the release of liens satisfied at closing. In such circumstances, the second mortgage may end up being recorded in front of the first mortgage. However, if the second mortgage lender had notice that there was another mortgage taken out prior to his, the second lender will be subordinate to the other mortgage regardless of when the mortgages are recorded.⁴⁵

For example, if Leo intends to obtain a first mortgage from Alpha Bank and a second credit line deed of trust from Beta Bank, and the two banks are aware of the situation, but for whatever reason, Beta Bank's deed of trust is recorded first, Alpha Bank's lien will still be in first priority.

F. Unrecorded or Improperly Attested Security Deeds

1. *Unrecorded*

A deed of trust that is unrecorded is still enforceable against the seller like any other contract.⁴⁶ However, because the priority of a deed is established at time of recordation, an unrecorded deed will be junior to all perfected (recorded) liens against the property, unless these lienholders had prior notice of the unrecorded instrument.⁴⁷ If the priority that was bargained for can no longer be attained due to an intervening lien, the sale should be cancelled and a claim made against the title policy.⁴⁸ For example, if Lender A's deed of trust was never properly recorded, then when A tries to foreclose she may discover that another lien has priority over hers. In such a case, A should stop the foreclosure proceedings and make a claim against the title policy.

2. *Improperly Attested*

A deed of trust does not require witnesses to be properly recorded in Virginia, but it must be notarized.⁴⁹ Nevertheless, documents that require notarization under state law but lack that notarization are presumed to be in proper form for recording once they are recorded.⁵⁰ That presumption becomes conclusive three years after recording, except in cases of fraud.⁵¹

If Lender A recorded a deed of trust that was not properly notarized, it would be presumed valid. If Lender B brought suit and claimed that Lender A's deed of trust was invalid, B would have to prove that the deed was invalid. The lack of proper notarization would not prevent A from having good title. If three years had passed since A recorded the deed of trust, then B would have to prove fraud to invalidate Lender A's deed of trust.

⁴⁵ Va. Code § 55-96 (Virginia Recording Act); *see also White v. Lee*, 144 Va. 523, 132 S.E. 307 (1926) (notice may be actual or constructive, the result is the same).

⁴⁶ *Id.*

⁴⁷ Virginia is a race notice state. This means that a purchaser is only protected if he records his deed before someone else who does not know of it. There are exceptions, for example, in *Duty v. Duty*, 276 Va. 298, 661 S.E.2d 476 (2008), the Supreme Court noted that a purchaser with notice who takes from another purchaser without notice will actually take good title.

⁴⁸ *See generally* Va. Code § 55-96 (Virginia Recording Act).

⁴⁹ *See* Va. Code § 55-66.01.

⁵⁰ Va. Code § 55-106.2.

⁵¹ *Id.*

G. Break in the Chain of Title—Quiet Title Litigation Procedures

Sometimes there is a break in the chain of title, meaning that public records disclose the transfer of a deed from A to B and from C to D but not from B to C. An action to quiet title may be filed so that a person can demonstrate that he has good title to property and will not be subjected to future claims against that title.⁵² In such an action, “a plaintiff asks the court to declare that he has good title to the property in question and compels any adverse claimant to prove a competing ownership claim or forever be barred from asserting it.”⁵³

To obtain quiet title, an owner must show that he or she has good legal title to the property.⁵⁴ Absent fraud, first in time is first in right.⁵⁵ While possession is not a prerequisite to succeeding in a quiet title action,⁵⁶ it is presumptive proof of ownership.⁵⁷

H. Bankruptcy Notice Predating the Sale but Received After

Under 11 U.S.C. § 549, the bankruptcy trustee may avoid transfers made by the debtor after the filing of the bankruptcy petition, except, under 549(c), in the case of a sale of (1) real property made to (2) a good faith purchaser who (3) perfects the transfer (4) prior to receiving notice of the bankruptcy proceeding.⁵⁸

For a purchaser to utilize the 549(c) exception, he or she must prove that notice was not received and that a title examination of the property did not reveal notice of the seller’s bankruptcy proceeding.⁵⁹

A files for bankruptcy, and three days later B, a lien holder on A’s property, forecloses on and sells the property to a bona fide purchaser. If the deed is not recorded (perfected) prior to the date on which A files notice of her bankruptcy in the county land records, the sale may be avoided by the bankruptcy trustee.

I. Recovering Manufactured Housing

When foreclosing on a manufactured house (“MH”), it is important to consider first whether the MH is affixed to the real property at the time of foreclosure. If it is not, then it is not real estate and must be foreclosed on as personal property pursuant to Article 9 of the U.C.C. as amended and adopted by the Virginia General Assembly.⁶⁰ It is important to consider when the lien against the MH arose; whether a

⁵² *E.g., Maine v. Adams*, 277 Va. 230, 238 (Va. 2009); *Quality Properties Asset Management Company v. Trump Virginia Acquisitions, LLC*, 2011 U.S. Dist. Lexis 130335 (W.D. Va. 2011).

⁵³ *Id.* (internal citations omitted).

⁵⁴ *Id.*

⁵⁵ Va. Code § 55-96; *see also, Duty v. Duty*, 276 Va. 298, 304 (Va. 2008).

⁵⁶ Va. Code § 55-153.

⁵⁷ *E.g., Maine v. Adams*, 277 Va. at 238-239.

⁵⁸ 11 U.S.C. § 549.

⁵⁹ *See Phillips v. Whitaker (In re Phinney)*, 405 B.R. 170, 175 (E.D. Va. 2009); *accord Konowitz v. Commonwealth Mortgage Company of America*, 905 F.2d 55 (4th Cir. 1990) (interpreting MD law).

⁶⁰ A MH that has not been affixed to real property must be titled as a vehicle, and any effort to foreclose on it must be undergone in accordance with Virginia Code § 8.9A-601. A secured party in possession can foreclose and repossess (subject to limitations) under Virginia Code §§ 8.9A-620 to -621. A secured party may sell the collateral to satisfy the underlying debt, provided the sale is “commercially reasonable,” Va. Code § 8.9A-627, and proper notice is given to the debtor and certain other interested

lien against a MH was obtained before or after the MH was affixed to real property may also affect priority.

1. *Lien Obtained Before MH is Affixed*

If the lien was obtained prior to the MH being affixed to real property, it will have priority over any conflicting lien against real property, provided that the security interest was (1) created in a MH in a manufactured home transaction, and (2) was perfected pursuant to Virginia Code § 8.9A-311(a)(2).⁶¹ A manufactured home transaction is a secured transaction that (1) “creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory;” or (2) “in which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.”⁶² To perfect under Virginia Code § 8.9A-311(a)(2), it is neither necessary nor effective to file a financing statement; however, the security interest in the MH must be noted on the certificate of title.⁶³

2. *Lien Obtained After MH is Affixed*

To affix MH to real property, the wheels and any equipment previously used for mobility must be removed, and the MH’s vehicle title must be cancelled.⁶⁴ Once the MH is affixed to the real property, it becomes part of the real property and can only be transferred as such.⁶⁵ Security interests subsequently taken out against the real estate will also encumber the MH.⁶⁶ However, any security interest in the MH prior to it being affixed will retain its priority over liens against the real property that arose before or after the affixing.

A owns MH and has parked the MH on but has not affixed it to real property. B, a lender, gives a loan to A against his real property and assumes that the value of A’s MH is also collateral, but does not note the lien on the MH’s certificate of title. If B forecloses, he will be unable to foreclose on the MH, even if A has since affixed it to the real property.

III. CONCLUSION

Foreclosure sales often reveal title problems that otherwise would be undetected. Hopefully, you will find this article to be a useful guide in analyzing and solving them.

parties. *Id.* § 8.9A-613. A good faith transferee may take title despite defects in the sale procedure. *Id.* § 8.9A-617. Remedies for failing to comply with these provisions are set out in Virginia Code § 8.9A-625.

⁶¹ Va. Code § 8.9A-334.

⁶² Va. Code § 8.9A-102(54).

⁶³ Va. Code § 8.9A-311(a)(2).

⁶⁴ Va. Code § 46.2-653.

⁶⁵ *Id.*

⁶⁶ *Id.*