

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



[Jeff Rogers](#) is a partner in the firm and heads the firm's creditors' rights practice group. He concentrates his practice in the area of creditor representation, including collections, commercial litigation, real property litigation, foreclosure, collateral recovery, bankruptcy, and creditor defense. His clients include banks, credit unions, commercial lenders, finance companies, and businesses of all sizes.

Correcting a Defective Deed of Trust

May 21, 2020 | by

Secured loans are made every day by banks, credit unions, and other financial lenders. If the security for repayment of a loan is real estate, the security is taken in the form of a deed of trust recorded with the Register of Deeds of the county where the property is located. Usually, the deed of trust is properly prepared and executed, and once recorded, the deed of trust becomes a lien on the property securing repayment of the debt. If a default should occur under the debt, the property may be foreclosed.

However, mistakes do happen when loan documents are drafted or executed. If the deed of trust contains an error, the security in the property is threatened. What is believed to be a secured loan may, in fact, be unsecured because of the defective deed of trust. Most defects in deeds of trust are discovered when a default triggers foreclosure, and the lender hires an attorney to act as Trustee in the foreclosure. The Trustee's office will conduct a title search of the property, and the mistake is discovered. What then? Is the deed of trust valid? Does the lender have the lien it thought it had? Many times, the answer is "no." Fortunately, most mistakes can be fixed.

What mistakes do you ask?

Well, there are more errors than you may think, including incorrect or missing notary acknowledgments, inaccurate or incomplete legal descriptions, missing signatures, and incorrect public recording.

Some errors can be corrected by *curative statutes*. These statutes were enacted to correct certain mistakes contained in documents that have been recorded in the public records for a prescribed period of time where there has been no objection to the document raised by some other party. Defective notary acknowledgments can often be cured through the use of these curative statutes. Also, if the notary can be located, he or she may be able to essentially re-notarize the document and record an affidavit to that effect. Minor or typographical errors, called *Scrivener's errors*, can often be corrected through either re-recording of the deed of trust or by recording an instrument explaining and correcting the error.

However, many errors cannot be cured except by a lawsuit. Referred to as *Reformation*, this type of lawsuit requests a court to correct the deed of trust to reflect the intent of

the parties. Reformation is a recognized equitable remedy available to correct a mistake in a document where the document does not reflect the intention of the parties to the document.

Let's say Mr. Smith owns both Lots 1 and 2 in a subdivision. Both Mr. Smith and the lender intended both lots to be the collateral to secure repayment of a loan. Mistakenly, however, the property described in the deed of trust *only* included Lot 1. Now the lender has a lien on only part of the property; a mistake by both parties.

A deed of trust, which incorrectly or incompletely describes the secured property, is a relatively common occurrence. There are no curative statutes to correct this error, and this error is not considered a *minor or scrivener's* error, allowing for re-recording of the deed of trust absent the consent of Mr. Smith. A mistake of this significance can be corrected one of two ways: if the parties are in agreement, and there are no intervening liens attaching to the property, the parties can re-acknowledge and re-affirm the deed of trust by a written, notarized, and recorded document; or if the parties are not in agreement (let's say because of a delinquent debt and need for foreclosure) the lender can file a lawsuit to reform, *or correct*, the deed of trust.

Reformation is not limited to correcting errors in deeds of trust. Documents such as lease agreements, easements, rights-of-way, contracts, and deeds can also be corrected through Reformation.

Mistakes do happen during the drafting and recording of documents. When an error is discovered, remedies are usually available to fix the problem.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541