

## The Case of the Inexcusably Ignorant Refinance Loan

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In Midfirst Bank v. Brown, a refinancing lender cancelled a deed of trust that should have been assigned to it and failed to conduct, or heed, a title examination. This resulted in the bank making a loan secured by property subject to a large senior lien. When that lien creditor foreclosed, the bank's deed of trust was extinguished, and it was left with an unsecured loan. The bank pled "excusable ignorance," but the Court of Appeals rejected the plea.

Betty Brown owned a home in Charlotte. In 2004, she borrowed money from First Horizon, securing the loan with a deed of trust on her home. Separately, United General Title Insurance Company obtained a judgment against Brown in South Carolina, which it domesticated to Mecklenburg County in 2014. In 2016, Brown refinanced with Nationstar Mortgage, the predecessor to Midfirst Bank. Nationstar paid off the First Horizon loan, cancelled First Horizon's deed of trust, and recorded a new deed of trust.

Three years later, United General executed on its judgment by having the Mecklenburg County Sheriff sell Brown's home. At the sale, United General bid \$98,000. During the upset-bid period, Brown pooled funds from relatives and savings to bid \$102,900. No one placed another upset bid, and the sheriff deeded the property to Brown.

It is unclear if Midfirst did anything during the sheriff's sale, but sometime later, it must have dawned on them that the sale may have wiped out their deed of trust. So they sued Brown asking the Court to rule that their deed of trust remained valid. The trial court ruled for Midfirst Bank, but the Court of Appeals reversed.

The Court of Appeals re-affirmed the common understanding that a sheriff's sale extinguishes all subsequent liens. If your lien precedes the judgment lien, it rides through the sale. But if your lien arose after the judgment lien, it gets extinguished. It does not survive the sale.

A judgment becomes a lien against real estate when filed in the county where the judgment debtor's real estate is located. United General domesticated and filed its judgment with the Mecklenburg County Clerk of Court in 2014. It became a judgment lien on Brown's home at that point. Nationstar did not record its deed of trust until 2016. Thus, when United General executed on its judgment and had the sheriff sell the property, the Nationstar deed of trust was extinguished.

Unable to overcome the immutable facts as to the lien position, the bank argued that extinguishment

just wasn't fair. North Carolina recognizes the remedy of "equitable subrogation" in rare situations. If you lend money to pay off an encumbrance on property, for the owner or the holder of the encumbrance, and the loan is meant to be secured by a first lien on the property, and there's a prior lien of which you are excusably ignorant, then the court will grant you a first-position lien on the property.

But the key is that the lender must be excusably ignorant of the other lien. Equitable subrogation usually arises when a mistake results in the loss of, or failure to obtain, a valid lien. It's not your salvation if a title search would have revealed the lien. Since the United General judgment lien was a matter of public record, and Midfirst Bank could have discovered it with a title examination, their ignorance was inexcusable.

The case offers two lessons for refinance lenders: One, always do a proper title search before making a secured loan. And two, if the title search reveals liens junior to the loan being refinanced, either decline the loan, obtain subordinations from the junior lien holders, or structure the transaction, so the senior deed of trust is assigned to you instead of cancelled.

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