Real Property

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The Chair's Comments

Bob Sheppard

Welcome to the new "bar year"! I am honored to be the chair of the Real Property Section this year. I follow in the shoes of Katherine Wilkerson, who did a tremendous job last year, and who I thank on behalf of all of us for her skilled and energetic leadership.

The work of the North Carolina Bar Association is done in great measure through its sections and divisions. The Real Property Section was one of the first such sections to be established more than three decades ago and it currently has the third largest membership of any section or division.

Just as the work of the Bar Association is carried out through various committees, sections and divisions, the Real Property Section's work is carried out through its own committees. I can't think of a better way to start this new bar year than to tell you of the many activities being carried on by those committees. In discussing these activities, I also want to tell you who is working on each committee, both by way of thanking them for their service to the section, and also by way of encouraging you to contact them with any ideas or suggestions you may have in their respective areas. Contact information for all council members is available at ***//realproperty.ncbar.org***.

The Annual Meeting Committee is chaired by Joan Bergman of Greensboro. This committee will have a hard time topping the great meeting which we had only a few months ago at the Grandover in Greensboro. Our next annual meeting will be in Asheville May 10-11 at the Renaissance Hotel. The Renaissance is a great facility for meetings, and it offers the advantage of having all of downtown Asheville's activities literally at our doorstep. We will have our usual six hours of CLE spread over two mornings. Downtime can be spent with bus tours, a brewery tour, ziplining, whitewater rafting on the French

Silence is Golden in Whiskey Creek

By Terry M. Taylor & Kimberly A. Richards

N.C. Planned Community Act Grants HOAs Broad Powers to Use Member Funds

The North Carolina Court of Appeals recently confirmed that the North Carolina Planned Community Act (the Act), N.C.G.S. Chapter 47F, grants homeowners' associations (hereinafter "HOAs") extensive powers which are enforceable even when an HOA's bylaws and covenants are silent regarding such powers. An HOA can opt-out of the statutory scheme, but recent case law suggests such an opt-out may be subject to a "reasonableness standard." Therefore, when considering limitations on certain HOA powers under the Act, some provisions may not actually be eligible for an opt-out after all.

One such power in the Act is the power to use HOA dues for payment of common expenses such as accounting fees, attorneys fees, rental of a facility for annual meetings, liability insurance for officers, directors and employees, and allocations to reserves, all of which are included under N.C.G.S. Sections 47F-1-103 (Common expenses), 47F-3-102 (Powers of owners' association), and 47F-3-107 (Upkeep of planned community).

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NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

Comments, *continued from page 1*

Broad, golf and tennis.

The Forms Manual Committee is chaired by Jeff Johnson of Raleigh. Many of you have on your shelves the complete revision of our manual which was accomplished in 2003. Last year, our section published a supplement. This committee is studying whether it is appropriate to begin planning for a complete revision to be published in the 2013 – 14 time period.

The Commercial Committee, chaired by Chris Loeb of Charlotte, is busy at work finalizing a standard form of opinion letter for commercial transactions. Long in the making, this effort should be a boon for those of our members who are called upon to periodically opine on commercial transactions.

The Consumer Protection Committee is chaired by Holden Reeves in Fayetteville. Council member Annika Brock of Asheville is a member. The Consumer Protection Committee is unique, in that it not only has committee members drawn from the Section Council, but it also hires a consumer protection attorney. That role has been filled for a number of years now by Ben Kuhn of Raleigh, who has done an outstanding job of protecting the public against the unauthorized practice of law. The public is much better off now that Authorized Practice Advisory Opinion 2002-1 was revised January 26, 2012 and the legislature has passed the private cause of action statute allowing for those harmed by UPL to recover damages.

Our outstanding Continuing Legal Education efforts are co-chaired this year by Kim Coward of Cashiers and Kent Jones of Charlotte. Coming up October 5 in Cary (and webcast live to seven cities throughout the state) is our Advanced Topics CLE. Among the topics are survey issues, title issues, commercial leasing, new construction and mechanics liens, ethics, and real property litigation and dispute resolution. In the works are a Hot Topics CLE for February and six hours of CLE at our annual meeting in May. The CLE Committee continues to look for opportunities to again employ one-hour webinars for new and breaking topics.

The Community Associations Committee is ably chaired by Hope Carmichael of Raleigh. The Great Recession has brought to the fore many issues that in a good economy would have gone largely unnoticed. These include homeowners unable to pay association dues and assessments. On a larger scale these issues also include failed developments and questions of who picks up the pieces and moves forward. Many of these questions are being dealt with by this committee in conjunction with the Legislative Committee, and those efforts are discussed below.

The Ethics Committee is chaired by J. C. Hearne of Wilmington. Scott Holmes of Wilmington also serves on the committee. Ethics is of course a very large area and part of the challenge of this committee is to confine its efforts to those matters closely affecting real estate practitioners. Many of you will welcome the recently-blessed "CPA Exception" to the random trust account rules adopted by the North Carolina State Bar. One of the proposed ethics opinions currently being studied by the committee deals with the requirement that there be express consent before one attorney may copy opposing counsel's client in e-mail exchanges, even if the opposing attorney has impliedly approved this by copying her own client. This has obvious implications to the practice of copying everyone in the frequent back and forth e-mail exchanges often necessary to get a real estate matter closed.

The Standardized Forms Committee is co-chaired by Dan McMillan of Charlotte and Brock Mitchell of Elizabeth City. This is a big job, as these folks tend all of the "Bar" Forms. Their efforts require close coordination with the North Carolina Association of Realtors and the North Carolina Land Title Association. The committee hopes to make fewer revisions to forms this year in order to avoid the confusion inherent in frequent changes. One unavoidable change, however, is required by the recent fracking legislation which mandates certain oil and gas disclosures be present in many contracts.

With a long session of the legislature coming up, the Legislative Committee will have its hands full. The committee is chaired by Scott Schaaf of Winston-Salem. Council members Bob Ramseur of Raleigh and Thomas Hockman of Greensboro are also members. Our section's proposed legislative agenda is comprised of both previously-advanced efforts and new

initiatives. We will be seeking to have the notary curative statutes brought up to date. From last year's agenda, we will be seeking clarification of how declarant rights are handled after a developer bellies up and its declarant rights go through a foreclosure. We will also be seeking a technical correction to the recently-enacted transfer fee covenants legislation to make it clear that the customary functions of a Homeowners Association are exempted so that legitimate HOA fees and capital contributions are not barred. We are also advancing legislation to provide for a statutory, uniform method of HOA foreclosures. We will also be renewing our efforts to provide for a tax carve-out bill which will provide that tax collectors will separately assess newly-subdivided property, so that parcels can be selectively released on sale from the larger base tract liens. This will avoid the unfortunate situation where purchasers early in the year rely upon the developer to pay taxes on the entire base tract parcel at the end of the year, only to find the developer out of business at that point. Another initiative is to provide an alternate means of achieving cancellation of a paid deed of trust when the beneficiary provides the original note and deed of trust marked "paid." As cancellation by presentation is no longer available, we are seeking the ability for closing attorneys to expeditiously cancel such old mortgages by providing an affidavit reciting possession of the cancelled documents. Finally, we will be working with DENR to seek a technical correction to the recently-enacted fracking law to exempt attorneys from the definition of "landman." Unfortunately, the definition is so broadly drawn that it would include in the registration requirements attorneys who perform negotiations or title functions in connection with oil and gas interests.

The Membership and Diversity Committee is chaired by Pat Nystrom of Charlotte. Matt Powers of Raleigh is on the committee. Part of the work of this committee is helping us rebuild our membership, which fell during the last several years.

This newsletter that you are reading is the result of work of the Newsletter Committee chaired by Jay Williams in Raleigh. If you have anything at all about which you would like to write an article, please contact Jay. The articles need be neither lengthy nor scholarly (nor, as this column will evidence, especially well written), and all submissions are certainly appreciated.

The Paralegal Division of the Bar Association has 1,350 members, 100 of which are also members of our Section. Representing those folks as a liaison to our section is Virginia Burrows. Those folks were very helpful in our recent forms book supplement efforts, and they will also be assisting with our notary curative legislation efforts.

The Pro Bono Committee is chaired by Ryan Wainio of Chapel Hill. Tammy Nicholson of Fayetteville is also on the committee. Recent efforts to develop a section-specific pro-bono effort have been largely unsuccessful, but certainly not from lack of trying. In recent years, we have volunteered our help to land loss prevention efforts, only to find our efforts largely unused. Many of you may also remember tremendous outpouring of support which former chair Robert Allen had when the section answered the call to assist the Banking Commission with its foreclosure prevention efforts. Although many signed up for and received the training, few actually ended up being called upon to help. Many of our members do an outstanding job of participating in pro bono efforts, either through their firm or Legal Services of the Southern Piedmont or Legal Aid of North Carolina. Without question, the 4ALL Program has been a great help, as well. If any of you have ideas, for a section-specific effort we might undertake, please let Ryan or Tammy know.

The Residential Committee is chaired this year by Ned Manning of Kinston. His immediate task is to funnel practitioner input to the appropriate folks in Washington concerning the new HUD/GFE/TIL forms. Those of you who have a brisk residential practice will surely have opinions about these new forms. Please pass these on to Ned.

Finally, our Technology/Home Page/ListManager Committee is chaired by Allen Moseley of Boone. Allen rides herd on our home page on ***//realproperty.ncbar.org***, where you can find resources such as CLE schedules, newsletters, council meeting minutes, links to bar forms, and the like. This committee also works with the IT staff at the Bar Center on issues relating to our section's "list." As you know, the Bar Association recently terminated the old provider who furnished our Listserv list, replacing it with another provider who provides our ListManager list. Although the transition was bumpy at first, those of you who use the list will agree that it is a tremendous resource, especially for the sort of practical issues that you will not find treated elsewhere. Our section has the most active of the lists, and if you are not subscribed, I urge you to check it out. The myriad of messages every day can be controlled easily by instructing your e-mail client to place the list messages in a separate folder so they do not clutter your main inbox. You may also subscribe to a "digest" version which consolidates the day's messages into one daily message. Unfortunately, with the loss of the old provider, we have also suffered the loss of our valuable archives, which contained the wisdom of over a decade of postings. Be assured that the section is working with the IT people at the Bar Center to recover these archives.

As you can see, there is a tremendous amount of work going on. As you can also suspect, each of these committees is severely understaffed. I would like to reach out to each of you to consider whether you can spare a few hours a week, or maybe just a few hours a month, to assist any of these committees in their efforts to serve our section. If you can help with a committee's work, please give that committee's chair a call today.

Thanks, and I'll see you in the next newsletter. •

Robert H. Sheppard focuses his practice on commercial real estate and corporate law at James McElroy & Diehl P.A. in Charlotte.

Whiskey Creek, *cont. from page 1*

In **Williams v. Biesecker**, 2011 N.C. App. LEXIS 1005, the court considered the covenants, bylaws, and articles of a homeowners' association (HOA) which expressly allowed the HOA to collect road maintenance fees from lot owners. Even though the express provisions were limited to road maintenance, the court held that the Act, in N.C.G.S. Section 47F-1-102, gave the HOA the power to use the funds for non-road maintenance related expenses which would include but not be limited to utilities, tax preparation and taxes, social committees, and attorney's fees.

In order for lot owners to ever argue that the HOA's use of funds is restricted to road maintenance, the HOA would need to opt-out of the statutory scheme through an express document. The **Williams** court stated, "There is nothing in the Whiskey Creek bylaws or covenants that expressly states that the Association cannot assess, collect, or disburse funds for legal costs, accounting costs, insurance costs, utility costs, and the cost of renting a place to have an annual meeting." An express statement in the bylaws that "[e]ach interior lot owner shall pay One Hundred Twenty Dollars ($120.00) per year . . . for maintenance of the roads" is not enough to opt-out of the Act's provisions.

Even if the lot owners executed an express document opting out of the Act's broad powers to assess fees, would such a document be enforceable? Case law suggests a "reasonableness standard" would likely apply to an opt-out of the Act. In **Armstrong v. The Ledges Homeowners Association, Inc.**, 360 N.C. 547 (2006), the North Carolina Supreme Court held that "amendments to a declaration of restrictive covenants must be reasonable." *Id*. at 548. While Armstrong involved an HOA that did not qualify as a "planned community" as defined in the Act, an argument could certainly be made that such a "reasonableness standard" should apply to HOAs covered by the Act who attempt to amend their declarations to opt-out of certain provisions, such as the use of funds for appropriate common expenses (i.e., it certainly would be "unreasonable" to say that an HOA cannot use funds to pay an accountant, attorney or management company).

N.C.G.S. Section 47F-2-117 sets out the procedure for an HOA to amend its declaration, but it does not address substantive restrictions for amendments. After **Armstrong**, would it ever be reasonable for an HOA to opt-out of the Act by expressly agreeing, for example, that the HOA is not authorized to collect fees for required insurance or for taxes? One would likely conclude that only extreme examples would be considered unreasonable, such as an amendment trying to establish double the amount of normal member dues. In advising lot owners who may wish to opt-out of the Act's provisions, the reasonableness standard is certainly something to keep in mind. The Act grants broad powers to HOAs, even when the HOA's bylaws and covenants are silent as to these powers, and such powers may be not, in fact, be eligible for an opt-out. •

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Opinion Letters – Do's and Don'ts
(Ethics, Professionalism and Malpractice Avoidance)

By Margaret Shea Burnham

This article contains practical tips in the form of "do's" and "don'ts" when rendering an opinion letter given in connection with a real estate transaction.

1. Opinion letters subject the firm to liability – **don't** sign one unless you are authorized (partner signature would normally be required).

2. Opinion letters are subject to negotiation – **don't** sign what is submitted to you without making appropriate changes (don't be pressured by a client to sign a "bad" opinion letter just to get the deal closed).

3. Opinion letters are "custom" – **do** make sure the terms match "the deal."

4. Opinion letters "assume" certain facts – **do** include all the appropriate "assumptions."

5. Opinion letters need to be "qualified" – **do** include all the appropriate "qualifications."

6. From a borrower's counsel's perspective, a well drafted opinion letter limits the opinions rendered – **don't** give opinions without the limitations afforded by including appropriate "assumptions" and "qualifications."

7. Opinion letters rely upon verifications of many facts – **do** your "homework" (check with all in house attorneys with any information about the client (there is sometimes a disclaimer in an opinion letter as to the law firm only being obligated to check with those attorneys in the firm that would normally be expected to have information about that particular client); check the client's governing documents; make sure there is an entity "consent" for the transaction with incumbency language; check with the Secretary of State, etc.).

8. Borrower(s) and Guarantor(s) should verify in a "Certificate" to the law firm all of the necessary facts upon which you rely – **do** attach a "Borrower's Certificate" and a "Guarantor's Certificate" verifying the appropriate facts; also, when serving solely as "local counsel," it may be appropriate under the circumstances to qualify the opinion with a statement that you are relying upon the Borrower's regular counsel for factual statements (such as when the opinion is limited to the enforceability of the mortgage/deed of trust).

9. Opinion letters are not opinions on "title" – **do** incorporate a title policy for matters of title and priority and don't make our firm into the title insurer (for example, **don't** include a sentence that provides in essence that Borrower is granting bank a "first" priority deed of trust on a parcel). It may also be appropriate to incorporate the survey by reference.

10. Opinion letters reference certain documents described therein – **don't** draft an opinion letter without having read each document incorporated into the opinion (if you are reading only "drafts," make sure you disclose that and an "assumption" that the drafts will not change before being executed).

11. Opinion letters assume generally that you have seen the Borrower and Guarantor "sign" the documents; if you are mailing out any documents for signatures, **do** modify the assumption to disclose which signatures you did not personally witness (there are many war stories about attorneys who were lulled into a false sense of security when permitting a party to the transaction "to take" the originals "to be signed" by an absentee party … **don't** be trapped by this)(if it can't be avoided, disclose to, and obtain approval of, the bank; also, attach a notary page to the document being sent out of the office for execution; in some circumstances, it may be appropriate to have loan documents executed at an out-of-state law firm); if you are not the party responsible for having loan documents executed, make sure the assumptions include a provision that the loan documents will be duly authorized, executed and delivered by all parties.

12. The underlying loan documents need to be supported by valid "consideration" – if there is any question about that, **don't** sign the opinion letter without adding an "assumption" about the existence of adequate consideration (*see* **McLamb v. T.P., Inc.**, 173 N.C. App. 586, 619 S.E.2nd 577 (2005).

13. For a Guaranty, **don't** opine as to the consideration (there may be questions later when a guarantor tries to avoid liability under a guaranty for lack of consideration).

14. When a third party is pledging collateral, **do** require a "Hypothecation Agreement" (or proper hypothecation language in the mortgage/deed of trust) to back up consideration and then include a disclosure that you are relying upon the Hypothecation Agreement to support the consideration.

15. The loan documents must all be dated the same date to be enforceable – **don't** sign an opinion unless you are the one dating the loan documents or adding an "assumption" that the bank will date all the loan documents the same date (*see* **Beaman v. Head**, 353 BR 122 (Bankr EDNC 2006)).

16. The loan documents must themselves be complete with all ex-

hibits attached – **don't** sign an opinion unless you have verified the documents are all completed and all exhibits are attached (including the all too often "missing" legal description which is supposed to be attached as Exhibit A); if you are acting solely as local counsel, then include an assumption that Borrower's regular counsel will attach all exhibits.

17. The loan documents must be executed by the proper parties – **don't** sign an opinion letter without verifying that the proper parties are shown in the execution block and that the proper parties signed (as per the entity Consent)(also, review the entity's governing document, such as the LLC Operating Agreement, to verify any requirements on authority to bind the entity).

18. The Borrower must be in good standing – **don't** sign an opinion without verifying this (and if necessary, the entity who is the manager, which if is another entity, needs another entity to be verified); for example:

By: Nexsen Pruet's a Great Firm, LLC
By: Nexsen Pruet Clients Love Us, LLC,
Its sole member
By: Nexsen Pruet Works Harder, LP,
Its sole member
By: NP Lawyers Love the Law, LLC,
Its General Partner

19. **Do** clarify which party is responsible for verification of facts relevant to the opinion (and include an appropriate assumption or qualification if you are not the party responsible).

20. **Do** make a full disclosure of all known material facts.

21. If there are fact specific conditions to closing, and you are acting solely as local counsel, do include an assumption that you are not responsible for determining that the conditions have been satisfied and/or an assumption that the bank is satisfied that its conditions to close have been satisfied.

22. **Do** comply with the bank requirements in the closing instructions and get approval from the bank (in writing) for any changes required by the firm.

23. **Do** issue your draft opinion with a redline showing changes in ample time for review by the other side (*see* **Lefever v. Taylor**, ___ N.C. App. ___, ___ S.E.2nd ____ (2009)(2009 WL 2177323)(unpublished).

Lefever involved a dispute over an undisclosed change made in a deed, after it was first prepared, but before it was executed, in which the plaintiffs argued:

> [Plaintiffs' attorney] is in his 34th year of practicing law in the State of North Carolina and only once before in those 34 years has an attorney who submitted a deed for review before closing changed the deed that was tendered at the closing without the attorney mentioning to [the attorney] the changes the attorney made to the deed after it was reviewed and approved until this transaction…
>
> [The attorney] changed the deed that he had submitted for review and approval to the [other attorney] after it was reviewed and approved, but [the drafting attorney] failed to disclose to the [attorney] that a significant change had been made, and the [attorney] failed to notice the change before the deed was recorded.

The court commented on the accusation of unprofessionalism as follows:

> [If] there is any 'injustice' in this case, it was the failure of defendant's counsel to behave in the manner that plaintiff's counsel had come to expect based upon his many years of law practice, in accordance with the professional courtesy and cooperation normally extended from one member of the bar to another.

24. **Don't** forget the "golden rule" – sometimes the law firm represents the bank, and we want a "comprehensive" opinion letter with some other law firm being liable for any error; sometimes we represent the borrower, and we want a less "comprehensive" and, of course, far more "reasonable" opinion letter (in other words, don't ask for opinions you wouldn't give….).

25. **Don't** just "use" a "go-by" without reading carefully – there will be custom provisions to delete, custom provisions to add… it is very embarrassing to see a reference to another deal or another borrower or another bank in your client's opinion letter….

26. Whom do you represent and in what capacity? **Do** disclose this to all ("This firm is solely acting as special local counsel to ….").

27. What is the effective date of your opinion letter? **Do** make sure it matches the loan documents and "ends" with the transaction. ("This opinion letter is rendered through the date hereof and the firm accepts no responsibility for acts thereafter ….").

28. What state laws are you addressing? **Do** disclose that the opinion is limited to federal law and the laws of the State of North Carolina and never, ever, give an opinion about laws in a state for which you are not licensed – you associate another firm in that state for a "sub" opinion on whatever out of state issue is involved).

29. Who is allowed to rely on the opinion? Just the bank? Successors and assigns? Bank's counsel? Rating agencies? **Do** add a limitation on parties entitled to rely upon your opinion.

30. What is excluded from the opinion letter? **Do** disclose exclusions, such as land use/zoning, subdivision, environmental, tax laws,

"bankruptcy remote," etc. These types of opinions require "experts" in that area of law and expose the firm to liability.

31. What is new in the law? **Don't** fall prey to taking an opinion letter from the "forms" database without determining what is new? For example, has there been a change in the various usury laws? What about a new case that impacts the area of law covered by your opinion (for example, *see* **In re General Growth Properties, Inc.**, 409 BR 43 (Bankr SDNY 2009) and "General Growth: Special Purpose Entities (Barely) Survive First Bankruptcy Test" by W. Rodney Clement, Jr. and H. Scott Miller, ABA Probate & Property Journal (March/April 2011, Vol. 25, #2)).

32. Does your transaction involve corporate, tax or other areas of law? **Do** associate an attorney in another department for that part of the opinion.

33. **Do** exclude things that don't apply to your transaction, such as UCC provisions if no Security Agreement/UCCs.

34. **Don't** include any opinion on an unsettled area of law without adding a qualification that this is your "reasoned" opinion. North Carolina case law is well established that an attorney is not liable for a mere "error of judgment":

> An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.
>
> Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.

Hodges v. Carter, 239 N.C. 517, 80 S.E.2nd 144 (1954)(citations omitted); **Rorrer v. Cooke**, 313 N.C. 338,329 S.E.2nd 355 (1985). •

Author's note: This paper was prepared for an in-house CLE at Nexsen Pruet. At that time, handouts were distributed to explain these comments in context. References to attachments (and the attachments) were deleted from the original paper due to size constraints. If it would be helpful to you to see the attachments, please email Margaret at MBurnham@NexsenPruet.com to request copies.

Have We Seen the End of the Pre-Sale?
How Will Developers Get Their Condo Projects Built?

By Scott A. Miskimon, Wayne K. Maiorana & Toby R. Coleman

A recent federal court decision from the Western District of North Carolina threatens to eliminate the ability of developers and lenders to rely upon pre-construction sales of condominium units as the linchpin for construction financing for residential condominium projects. In **Berkovich v. The VUE-North Carolina, LLC**, 2011 U.S. Dist. LEXIS 123049, No. 3:10-cv-618-RJC-DSC (Oct. 14, 2011 W.D.N.C.), the court held that the purchasers could rescind a pre-construction sales contract and receive a refund of their earnest money deposit when the contract did not technically comply with the Interstate Land Sale Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* (commonly referred to as "ILSA"). ILSA regulates the sale of subdivided land that is marketed and sold through interstate commerce. While ILSA provides the purchaser with several remedies when the developer fails to comply with the act, it gives the purchaser a unilateral right to rescind a non-compliant purchase contract for two years from the date the contract was executed.

Sellers Beware

The purchasers in **Berkovich** contracted to buy a penthouse unit in a 51-story condominium project in Charlotte known as The VUE. In December 2008, they paid $145,485 as an earnest money deposit towards the $1.283 million purchase price. In October 2010, nearly 22 months later, the purchasers sent a "Notice of Cancellation of Contract" to the developer, invoking ILSA's two-year revocation option. The purchasers then sued the developer when it refused to return their earnest money deposit. In their suit, the purchasers alleged that the contract did not contain a recordable legal description of the condominium as required by ILSA. The contract described the condominium unit to be purchased as follows:

> BEING all of that Unit 5102 of the VUE Charlotte, a Condominium, as described in the Declaration of Condominium (the "Declaration"), recorded in Book _____, Page _____ in the Office of the Register of Deeds for Mecklenburg County, North Carolina, as shown on the plat and plans for the Condominium recorded in Unit File No. _____ in the Office of the Register of Deeds for Mecklenburg County, North Carolina; TOGETHER with the percentage interest in the Common Elements appurtenant to said Unit, as set forth in the Declaration.

Because the contract's legal description did not contain the condominium declaration's recording information, the purchasers contended that it did not comply with the general recording requirements under North Carolina law. Further, the purchasers argued that the purported legal description was "not in a form acceptable for recording by the appropriate public official responsible for maintaining land records in the jurisdiction in which the lot is located" as required by ILSA.

North Carolina law requires that the legal description of a condominium unit include the name of the condominium, the condominium declaration's recording data and the identifying number for the unit; or, it must otherwise comply with the general requirements of North Carolina law concerning the description of property. Pursuant to North Carolina law, before a condominium unit is created, the developer must record a declaration that legally establishes the condominium building and identifies all the units. This cannot occur until the condo building is substantially completed.

In **Berkovich**, the developer had not yet completed the condominium building at the time the purchasers entered the pre-sale contract. Instead, construction was not projected to be complete until December 2011—fully three years after the contract was signed. Therefore, the purchasers' unit had not yet come into legal or factual existence, and thus, no description could be recorded at the time of contracting. In the lawsuit, the developer acknowledged that the legal description was not yet recordable and that the unit purchased had not yet come into legal existence. However, the developer argued that it had provided the purchasers with the form of the legal description and considerable detailed information regarding the location of the unit, which should be sufficient under applicable law.

The **Berkovich** court disagreed and concluded that the property description in the contract was inadequate under ILSA. Therefore, the court entered judgment in favor of the purchasers, permitting them to rescind the pre-sale contract and recover their earnest money from the developer.

The Interstate Land Sale Full Disclosure Act

ILSA was originally enacted to aid land purchasers swindled into buying undevelopable swampland and inaccessible desert property. Among other things, ILSA provides that a purchaser has a two-year right to revoke his contract and obtain a refund of all money paid if the contract lacks certain provisions. 15 U.S.C. § 1703(d). In particular, ILSA's Section 1703(d) provides that the contract may be revoked if it does not provide "a description of the *lot* which makes such *lot* clearly identifiable which is in a form acceptable for recording by the appropriate public official responsible for maintaining land records in the jurisdiction in which the lot is located." Over the years, ILSA's scope has been expanded judicially to govern contracts for certain condominium developments. While the sale of condominium units

is not expressly included within the language of ILSA, courts have consistently applied it to such sales. *See, e.g.,* **Ndeh v. Midtown Alexandria, LLC**, 300 Fed. Appx. 203 (4th Cir. 2008).

ILSA's Section 1703(d)—as currently interpreted by the courts to apply to condominium sales—thus poses a quandary for lawyers, developers and bankers seeking to assess the enforceability of pre-construction sales contracts for condominiums in North Carolina. In a state where (i) condominium declarations cannot be recorded prior to construction, N.C.G.S. § 47-C-101, and (ii) condominium lot descriptions cannot be recorded unless they contain the declaration's recording data, N.C.G.S. § 47C-2-104, should ILSA be read as making *every single pre-construction contract* revocable? Or should the interpretation of ILSA's revocation remedy be practically interpreted in line with the disclosure requirements of North Carolina law, so that pre-construction sales contracts are binding in cases where the purchaser is provided with a proposed property description (with the recording information for the declarations left blank) and the proposed declarations?

The **Berkovich** decision adopts a textualist approach to ILSA, and holds that ILSA's right of revocation applies to all pre-construction contracts. It waives off arguments that such an interpretation is impractical and even "nonsensical," holding that Congress wanted purchasers to have the protection of being able to record their lot descriptions. 2011 U.S. Dist. LEXIS 123049 at *14-*15. "Where this protection is unavailable, section 1703 instead gives purchasers the right of revocation for two years." *Id*. at *16.

It is noteworthy that the **Berkovich** court's interpretation of ILSA conflicts with that of the **Middle District of Florida in Taplett v. TRG Oasis (Tower Two)**, 755 F.Supp.2d 1197 (2009 M.D. Fla.). In an almost identical fact pattern under Florida law, the court in **Taplett** held that a pre-construction condominium sales contract was not revocable because the developer had effectively met its ILSA obligations by providing the purchaser with sufficient information, including the proposed lot description and declarations, even though the declaration with the description had not been recorded. The **Taplett** court's interpretation was consciously practical: "To penalize a developer for giving the entire document rather than a mere identifying reference (required so the same document could be found) would be absurd." *Id*. at 1205.

Potential Fallout From Berkovich

The real estate industry has been hard-hit during and after the 2008-2010 recession. This is particularly true for the residential sector. It has become increasingly more difficult to obtain financing for projects. Lenders have traditionally required, and developers have relied upon, condo unit pre-sales to secure financing and to start projects. After the **Berkovich** decision, such pre-sale contracts in North Carolina may no longer be considered binding, essentially turning them into option contracts, and therefore making financing condo projects far more difficult.

While purchasers have not been immune to harm in the wake of the downturn, there is an increasing trend for purchasers to take advantage of ILSA as a tool to avoid their contractual obligations under a pre-sale purchase agreement. (More than half of the reported decisions interpreting the provisions of the 42-year-old law have been issued in the last five years.) ILSA suits like **Berkovich** appear to be a manifestation of buyer's remorse prompted by the decline in the market price of the condominium unit or the purchaser's inability to obtain financing to complete the purchase, resulting in purchasers seeking to cancel or invalidate pre-construction sales contracts on various ILSA grounds. *See, e.g.,* **Bacolitsas v. 86th & 3rd Owner, LLC**, 2010 WL 3734088 (S.D.N.Y. Sept. 21, 2010) (purchaser entitled to rescind contract because property description in sales contract failed to comply with ILSA); *see also* **Boynton Waterways Inv. Associates, LLC v. Bezkorovainijs**, 2011 WL 2694522 (Fla. Dist. Ct. App. July 13, 2011) (court determined that ILSA is not meant to supersede nor guarantee state law recording obligations in holding that failure to record declarations of condominium prior to sale of unit did not violate ILSA where state law did not require such recordation).

Regardless of whether the non-complying aspect of the contract was obvious to the purchaser, the result of the **Berkovich** decision shifts the entire risk and burden to the developer. By doing so, the **Berkovich** court allowed a mere technicality to trump the practicality of condominium project development and the limitations imposed by state law. The court did so irrespective of the fact that there was no showing of harm or prejudice to the purchasers or intent to mislead or defraud on the part of the developer.

The **Berkovich** decision challenges long-standing industry practice and marks a potentially significant shakeup of North Carolina condominium law. The North Carolina Condominium Act, N.C.G.S. § 47C-1-101 *et seq.*, requires extensive disclosures when offering condominiums for sale to the public, but clearly contemplates that there will be pre-construction contracting. *E.g.* N.C.G.S. § 47C-4-103 (requiring developers to disclose proposed declarations if they have not been recorded). Developers and lenders have long assumed that pre-construction sales contracts are binding, provided that developers comply with the North Carolina Condominium Act's various disclosure requirements. As a result, developers have often provided pre-construction buyers with thick pre-offering disclosures that include, among other things, the planned condominium's proposed declarations. **Berkovich** undermines this practice by holding that, even with detailed information and disclosure of the proposed declarations, no pre-construction contract can be made binding until the declarations are recorded—something that cannot occur under North Carolina law until construction is substantially complete.

If the **Berkovich** decision were to be widely followed, the decision would render pre-construction sales of condominiums an unreliable mechanism for developers and lenders to determine the viability of a contemplated condominium project. During the real estate boom of the previous decade, construction lending for condominium projects was often made contingent on a certain amount of pre-sales. Coming out of the downturn, lending practices have become more onerous. Ultimately, by creating uncertainty about whether pre-construction sales contracts are binding, the decision could drastically alter construction financing for condominium projects and stymie condominium development. Likewise, in light of the North Caro-

Continued page 8

Pre-Sale, *continued from page 9*

lina's recording requirements, the **Berkovich** court's rigid application of ILSA handicaps condominium construction in North Carolina by creating a nearly insurmountable obligation for developers. Such an interpretation places North Carolina at a significant disadvantage as compared to other states with differing recording requirements.

At the time this article was prepared, the **Berkovich** decision had not been appealed. When interviewed shortly after the Court's decision, the developer suggested it intended to appeal. Assuming that an appeal may still be feasible, it is unclear whether the decision will be upheld. Even if the **Berkovich** decision remains unchanged, it is one federal court's interpretation of this issue. Other federal and state courts in North Carolina are not required to follow this decision. However, absent Congressional action to amend ILSA to exclude condo unit sales from its ambit, or judicial action reinterpreting the act's applicability to such sales, the Berkovich decision will be relied upon by purchasers seeking to rescind their contracts and likely will be seen as instructive by other courts when addressing this issue. Accordingly, uncertainty and risk remains. While the lending environment may be improving, lenders do not like uncertainty. Therefore, developers and practitioners must consider carefully the implications of the **Berkovich** decision when trying to develop condominium projects. •

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Etiquette for Real Property ListManager

1. When sending a message, **use a meaningful subject line**. This is a time-saving mechanism for receivers. People will know if something can wait. Also, if they are not interested in the topic, they can delete the message. If you subscribe to a number of lists or one with a high volume of messages, you'll appreciate those messages that have clear, meaningful subject lines.

2. When responding to a message, **keep your messages brief**. Include a portion or a summary of the message you are responding to, but don't forward the entire message.

3. **Stick to the topics intended for discussion on the ListManager.** If you deviate from the intended discussion topics, someone may object, hopefully in a polite way, or people may unsubscribe if they consider the messages to be unhelpful.

4. **Identify yourself.** This could simply be your first and last name, or it could include your law firm and town. Many e-mail addresses do not clearly indicate the identity of an individual.

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6. **NCBA policy forbids sending attachments** through ListManager. The exception is if individuals or the ListManager manager gives prior permission. There is a lot of concern about computer viruses and attachments are a key way they invade computers.

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10. **Have an opening and closing to your message.** Not only is this considered polite in the ListManager world, it also assures the person that the entire message is included. It can be as simple as "Dear Group" or "Hi" for a greeting and "Bye for now" or "Thanks" for a conclusion.

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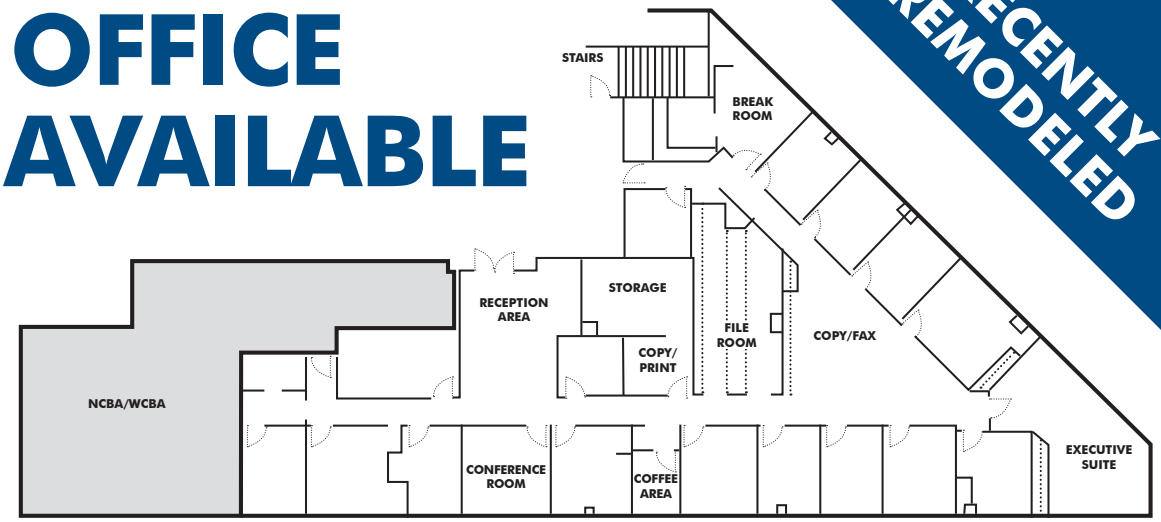

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A Summary of the Commercial Real Estate Broker Lien Act

By Garth K. Dunklin

On June 17, 2011, Governor Perdue signed into law House Bill 174, the Commercial Real Estate Broker Lien Act. Passage of the bill, sponsored primarily by Representative Darrell McCormick (a commercial real estate broker from Yadkin County), made North Carolina the 29th state to afford lien rights to real estate brokers. In addition to establishing a lien right for brokers providing services with respect to commercial real estate, the bill also made an important change to the North Carolina Real Estate License Law regarding enforcement of agreements for brokerage services.

The Commercial Real Estate Broker Lien Act establishes a right to file a lien upon commercial real estate, establishes the conditions prerequisite to filing a lien, sets forth the manner of filing and enforcement of a lien and establishes the means of terminating or cancelling a lien. Practitioners should be mindful of the fact that the **Commercial Real Estate Broker Lien Act was effective on Oct. 1, 2011 but applies only to written agreements signed on or after that date.** Accordingly, lien claims cannot be filed with respect to brokerage service agreements executed and dated prior to Oct. 1, 2011.

Prerequisites For Filing A Lien Pursuant To The Commercial Real Estate Broker Lien Act

The statute sets forth a number of requirements which must be met in order for a broker to have a right to file a lien.

First, only a "broker" which is defined in NCGS §44A-24.2(1) as "a real estate broker licensed pursuant to Chapter 93A of the General Statutes", may file a lien. An out of state broker who obtains a Limited Non-Resident Commercial License would qualify and be eligible to file a lien pursuant to the statute because they would be a "broker licensed pursuant to Chapter 93A". However, an out of state broker who may list a property and never enter the state or obtain a license here would not be eligible to file a lien because they would not be licensed pursuant to Chapter 93A (even though they may legally take the listing and conduct the sale if they are licensed in their state of residence and do not enter North Carolina). Clearly, an unlicensed person (even if acting pursuant to a valid exemption from the license requirement) will not be able to file a lien, because they are not a "broker".

Second, **the lien is only permitted to be filed upon and in connection with services rendered with respect to commercial real estate, as commercial real estate is defined in NCGS §44A-24.2(3)** (which is essentially the same definition of commercial real estate used in the Statute in connection with the Limited Non-Resident Commercial License). Commercial real estate is defined as property or an interest therein which is used "primarily for sales, office, research, institutional, warehouse, manufacturing, industrial or mining purposes or for multifamily purposes involving five or more dwelling units" or property which is zoned to permit such use, or which is subject to a petition for rezoning for such use or which is in good faith intended to be immediately used for such purposes. This last category of good faith intention is applicable only in areas of the state where there are no land use regulations controlling the use of property and should not be applied or relied upon otherwise to classify a property as commercial real estate.

NCGS §44A-24.3(a) requires a broker to have a "written agreement for broker services signed by the owner or signed by the owner's duly authorized agent". **This requirement means that typically only listing agents will be entitled to a lien.** The language "signed by the owner's duly authorized agent" contemplates circumstances where broker services agreements might be signed by officers acting on behalf of a business entity, where someone might act pursuant to a power of attorney or where someone might be specifically authorized to sign a brokerage services agreement on behalf of an owner. Even though a listing agent might be viewed as a "duly authorized agent" of an owner, this language **does not** contemplate split agreements as they are agreements to share compensation between brokers, not agreements for broker services "signed by the owner or the owner's duly authorized agent".

NCGS §44A-24.3(a) (1), (2) and (3) require, before a lien may be filed, that

- The broker must have performed pursuant to the terms of the written agreement referenced above;
- The duties which must be performed by the broker must be clearly set forth in the agreement; and
- The agreement must set forth: (i) the conditions to be met by the broker to be entitled to compensation, and, (ii) the amount of such compensation.

The essence of these requirements is that a broker must have earned the commission pursuant to the agreement, and the right to receive the commission and the amount thereof must be clear in the agreement. A broker cannot file a lien as soon as a listing agreement is signed, but must wait until the commission is actually earned pursuant to the terms of the agreement. Therefore, a close examination of the "when the commission is earned" provisions of a brokerage services agreement is necessary for counsel to assure that the stated requirements have been clearly established.

If a brokerage services agreement in a sales transaction provides that the broker earns the commission only upon closing, then there will be no ability for the broker to file a lien because NCGS §44A-24.4 provides that "a notice of lien is timely filed if it is filed **after the claimant's performance** under the written agreement for brokerage

services **and before the conveyance or transfer of the commercial real estate** which is the subject of the lien". Since the earning of the commission and the conveyance would be simultaneous, a broker cannot timely file a lien after having earned the commission but before conveyance, since conveyance itself is what earns the commission pursuant to such an agreement.

Even where a brokerage services agreement provides that the commission is earned prior to closing or possession transfer, a broker still may not be entitled to file a lien immediately upon earning the commission because NCGS §44A-24.4 provides:

> "When a notice of a lien is filed more than 30 days preceding the date for settlement or possession set out in an offer to purchase, sales contract, or lease which establishes the broker's claim of performance, the lien shall be available only upon grounds of the owner's breach of the written agreement for broker services."

What this provision means is that **a broker cannot file a lien until a point in time that is within 30 days of the closing date stated in a contract or the possession date stated in a lease.** Only if the owner has breached the broker services agreement, can a lien be filed at an earlier point in time than 30 days preceding the closing or possession date. In most instances this will occur by way of anticipatory breach, that is to say, for instance, the owner tells the broker s/he is not going to pay them.

In a lease transaction, the statute does permit filing of a lien after transfer of possession. NCGS §44A-24.4 also provides that "in the case of a lease or transfer of a nonfreehold interest, the notice of lien shall be filed no later than 90 days following the tenant's possession of the commercial real estate or no later than 60 days following any date or dates set out in the written agreement for broker services for subsequent payment or payments." Thus, in a lease transaction, a lien can be filed at any time within 30 days **before** transfer of possession until up to 90 days after transfer of possession or 60 days after the due date of a payment pursuant to the brokerage services agreement.

Where payment of a commission is due in installments that are due after conveyance or transfer, NCGS §44A-24.3(c) provides that a lien may be filed during the period from 30 days in advance of the conveyance or transfer of possession until the date that is 90 days after the due date of a payment due.

So, for example, where a sales commission payment may be due half at closing and half on the date that is 30 days after closing, a broker could file a lien as early as 30 days prior to closing or as late as 120 days after closing. However, the statute limits the effectiveness of the lien in this circumstance as against the owner's interest to any sum of funds due the owner.

Where a lease commission may be due half at lease execution and half 30 days after possession by the tenant, a broker could file a lien as early as 30 days prior to possession (which may or may not be prior to execution) and as late as 120 days after possession by the tenant.

The statute permits a single lien filing to cover all installments due if the lien is filed prior to the transfer or conveyance, provided that the broker is obligated to release the lien (essentially to amend it) to reflect the reduced amount due on account of any payments of installments.

Filing And Enforcement Of A Lien

NCGS §44A-24.3(b) provides that the statutory lien is available only to the broker named in the written brokerage services agreement. Since most firms name the firm in the brokerage services agreement (and the agreement typically belongs to the firm), it will likely be the firm (as opposed to the individual broker) who has the right to file a lien. This same section also makes it clear that the lien is available only against the commercial real estate which is the subject of the brokerage services agreement, so it is vitally important that the property covered by a brokerage services agreement be accurately and clearly described in the agreement.

NCGS §44A-24.5 requires that the lien notice include the name of the lien claimant, the name of the owner, a description of the commercial real estate upon which the lien is claimed, the amount claimed pursuant to the lien (and whether it is due in installments) and the basis for the lien (a reference to the brokerage services agreement that supports the claim of lien). The lien must also be signed by the claimant and attested by the lien claimant as "true and accurate to the best of the lien claimant's knowledge and belief." Once prepared and signed, the lien is to be filed in the office of the Clerk of Superior Court in the county where the affected property is located. NCGS §44A-24.7 requires the lien claimant to send a copy of the filed notice of lien to the owner of the affected property by certified mail, return receipt requested, or by serving a copy of the lien in accordance with the rules for service of process pursuant to the Rules of Civil Procedure. The lien claimant is required to file proof of service with the Clerk of Superior Court. **Failure to meet such notice and filing of proof of service requirements will render the lien void** pursuant to NCGS §44A-24.7. So, simply filing the lien alone is not sufficient. Notice must be given in the manner prescribed for the lien to be effective.

If a lien is not paid or otherwise satisfied, pursuant to NCGS §44A-24.8, a lien claimant has up to 18 months from the filing of the lien in which to file suit to enforce the lien. The suit must be filed in a court of competent jurisdiction in the county where the property subject to the claim of lien is located. NCGS §44A-24.9 sets forth the required elements of a complaint for foreclosure to enforce the lien. This section also requires that all parties who have an interest of record in the real property which is subject to the lien shall be made parties to the suit, provided that lenders are not required parties unless the lender "has willfully caused the nonpayment of the commission giving rise to the lien".

Lien claims filed pursuant to the statute are effective only from the time of filing (there is no "relation back" to the time the agreement was signed or the time the commission was earned), and only if they are timely filed (meaning during the time periods outlined above as permissible periods within which to file the lien). Being effective as of filing means that valid prior recorded liens or mortgages have priority over the lien and any foreclosure sale will be made subject to such liens. Further, NCGS §44A-24.14 expressly provides that mechanics and materialmen's liens are always superior to the broker lien claimant, no matter when they are filed, even if they are filed later or

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Broker Lien Act, *continued from page 13*

have an effective date after the filing of the broker lien. For example, if a broker seeks to enforce a lien against a property that has two prior mortgages, a prior IRS lien and two mechanics liens filed after the broker lien, at any foreclosure sale, the property will be sold subject to the two prior mortgages, the prior IRS lien and the two mechanics liens filed after the broker lien. Since this state of affairs means that any purchaser at the foreclosure of the broker lien will have to undertake the obligations of the two mortgages and will face possible foreclosure of the IRS lien and the two mechanics liens, it is highly likely there will be no bidders/purchasers other than the broker at the foreclosure sale. If the broker acquires the property at foreclosure, they acquire not only the property, but these same obligations as well. Accordingly, prior to pursuing enforcement of a lien via foreclosure, it is critically important that the broker understand what other interests affect the subject property and where the broker lien stands, priority wise, in relation to those interests.

Termination Or Cancellation Of A Lien

There are several provisions of the statute which can result in a termination or release of a properly filed lien:

• As noted above, a lien is rendered void for failure to give and file notice of the lien pursuant to NCGS §44A-24.7.

• Failure to file suit to enforce the lien within 18 months of the filing of the claim of lien will also extinguish the lien pursuant to NCGS §44A-24.8, NCGS §44A-24.11 and NCGS §44A-24.13(a)(3). NCGS §44A-24.11 requires a lien claimant to affirmatively satisfy/cancel a lien not more than 30 days after a written demand from an owner where a suit has not been timely filed.

• Pursuant to NCGS §44A-24.6 (and NCGS §44A-24.13(a)(7)), if a condition occurs that would preclude the lien claimant from receiving compensation pursuant to the brokerage services agreement, such as it being determined that the lien claimant was not properly licensed at the time the commission was earned, then the lien claimant is required to promptly record and serve upon the owner a release or satisfaction of the lien, which release or satisfaction must in any event be filed not later than 30 days after a demand for release or satisfaction based upon such condition.

• Pursuant to NCGS §44A-24.10 (and NCGS §44A-24.13(a)(7)), a failure to file an answer in a pending suit to enforce a lien within 30 days after written demand, which demand must be made by registered or certified mail or personal service (with proof of service to be filed with the Clerk of Court), will result in the lien being extinguished.

There are also affirmative actions which may be taken pursuant to the statute that result in discharge of the lien against commercial real estate:

• Pursuant to NCGS §44A-24.13(a)(1), the lien claimant or claimant's attorney can acknowledge satisfaction of the claim of lien in front of the Clerk of Superior Court, whereupon the Clerk is to mark the lien satisfied and the lien claimant or claimant's attorney shall sign the acknowledgement on the record.

• Pursuant to NCGS §44A-24.13(a)(2), the owner of the commercial real estate subject to the lien may exhibit to the Clerk an instrument of satisfaction signed by the lien claimant whereupon the Clerk is obligated to cancel the lien.

• Pursuant to NCGS §44A-24.11, where a claim pursuant to a lien has been paid in full, a lien claimant is obligated to cancel a lien not later than 30 days after demand by the owner.

• Pursuant to NCGS §44A-24.13(a)(4), a judgment dismissing an action to enforce a claim of lien, or adversely determining the lien claimant's claim, may be filed with the Clerk, whereupon the lien is deemed cancelled.

• Pursuant to NCGS §44A-24.13(a)(5), NCGS §44A-24.13(a)(6) and NCGS §44A-24.13(b), where a cash deposit or surety bond in an amount equal to 125 percent of the amount of the claim of lien is deposited with the Clerk, the Clerk shall release the claim of lien on real property and then the lien claimant has a lien on the funds deposited or the proceeds of the surety bond, as applicable. These provisions permit an owner who may believe a good faith dispute as to the commission obligation exists, to remove the lien from the property, thereby facilitating a transfer of the property, by transferring the lien obligation to a sum of money or a bond. The sum of money or bond provides "replacement" security for the payment obligation to the broker, in lieu of the security provided by the lien on real property. If the broker prevails in enforcing the claim of lien, the money or bond is available to satisfy the financial obligations of the owner.

Broker Beware

As one can see from the foregoing, among other considerations, there are detailed preconditions to the right to file a lien accruing, time frames within which the lien must be filed in order to be properly filed, requirements for notice and actions to maintain the lien, obligations to act in certain circumstances or in response to certain demands and a need to acquire knowledge about the holders of other interests in the commercial real estate- all in all, a fairly complex statutory framework for a mere five-page act.

Further, the statute contains a "pay-to-play" provision. NCGS §44A-24.12 provides that the costs of any proceeding to enforce a lien, including reasonable attorneys fees, shall be paid by the non-prevailing party. This provision will be beneficial in covering the attorneys fees of a broker who properly files and enforces a claim of lien. On the other side of the coin, a broker who wrongfully files a lien will not get paid and also will have to pay the court costs and attorneys fees incurred by the owner of commercial real estate to defend against the broker's lien claim. In addition, if it is determined that a lien was improperly filed, and there was a motive to interfere with a pending transaction simply to try to secure payment where

payment was not clearly entitled, a broker may also be subject to a slander of title lawsuit. If slander of title is established, the owner can recover treble damages, in addition to attorneys fees.

A Statute Of Frauds For Brokerage Services Agreements

For many years, Rule A.0104 of the North Carolina Real Estate Commission Rules has required that brokerage services agreements be in writing. Taking this rule at face value, one might believe that no matter the type of transaction, one could not get paid unless one had a written agreement since absent a written agreement, one has not complied with the requirements of the rules. Many people view compliance with the rules governing one's profession as a prerequisite to compensation. In sales transaction, the question seems to be clearly answered by Rule A.0109(c)(1) which provides that in a real estate sales transaction, a broker cannot be paid by their principal except pursuant to an agency agreement that complies with Rule A.0104.

Over the years, courts of various states have looked at rules similar to Rule A.0104 and their decisions have split roughly down the middle as to whether or not a regulation requiring a written agreement constituted a de facto Statute of Frauds (meaning an agreement was not valid and could not be enforced unless it was in writing). Some courts held that if the regulatory agency governing the profession requires a written agreement, a written agreement is required for any recovery to be had in court. Other courts held that if one did the work, they should get paid for it, even if there might be a technical violation of the rules.

North Carolina courts had not ruled squarely on this question until a recent Court of Appeals case where it was effectively held that, notwithstanding Rule A.0104 and Rule A.0109, a broker may recover a commission despite there being no written agency or services agreement.

Section 2 of the Commercial Real Estate Broker Lien Act expressly overrules this recent Court of Appeals case. The Section provides for a new section of the Real Estate License Law, NCGS §93A-13 which reads as follows:

"No action between a broker and the broker's client for recovery under an agreement for broker services is valid unless the contract is reduced to writing and signed by the party to be charged or by some other person lawfully authorized by the party to sign."

So now, by statute, the question is clearly answered in North Carolina. If a broker does not have a written agreement signed by the client, there is no action (legal, equitable or other) that can be maintained to recover any fee or commission. Put another way, if a broker files an action to recover a fee based upon an oral agreement, the client can have the case dismissed on summary judgment by simply pointing to this statute which says no such action is valid/can be filed. •

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