



# Carolina Update

*NCLTA's Exclusive Report to its Members*

## Contents

2

Title Insurance Industry Reacts to Recession

4

Sam Mann Memorial Award

5

Legislative Update

6

Real Estate – Investment, Development and Finance Practice

6

Convention Calendar

## President's Message

*By Carolyn Snipes*



It is hard to believe that the first quarter of 2010 has already come to a close! Thankfully spring is here and it is time to trade in the snow shovel for a beach towel and hiking boots. Despite the harsh winter, numerous

weather closures and a legislative recess, NCLTA has been hard at work on its agenda and is as active as ever. We continue to build momentum as our endeavors to bring more and more value to the membership are realized. The strength of our organization is our active membership, but we can be stronger. As you plan for the coming months, please make NCLTA a top priority. Our current initiatives are vitally important to our industry. Your participation is fundamental to achieving our goals.

The legislative committee continues to diligently work along with David Ferrell, our lobbyist, on the proposed mechanics lien bill, SB803. Please take a moment to read David's legislative update. He is doing a fantastic job on our behalf; however, his efforts are most effective with your participation. We must continue to solicit support from legislators by contacting your representatives and letting them know the mechanic lien problem is still an issue that needs to be addressed legislatively. Please contact me if you would like assistance in meeting with your representatives. The members of the legislative committee would be more than happy to help. Now is the time to educate those with the power to help abate this very significant crisis.

The loss prevention committee has also been very active over the last several months. The committee continues to work on setting parameters for audits to assist the process and make any audit program as orderly for the approved attorneys as possible. The committee finalized the audit authorization form and the assurances form, which can be accessed by clicking [here](#). Plans are also moving forward to host a continuing legal education seminar on trust accounting and audits to be offered in the Raleigh area. It will be videotaped and available for replay across the state.

More than a year has passed since the release and widespread implementation of NCLTA's lien forms. With the experiences of the last year in mind, the forms committee is revising the forms.

I leave you with these final thoughts. As individuals in business and as members of our communities we naturally support the people who support us. This should be no different with NCLTA. Our organization's very purpose is to educate, inform and advance our industry. I call on you to support this group that does so much to support you and your business. Make your plans to attend our annual convention in Kitty Hawk September 16 -18, 2010. You will benefit from educational programs that are relevant to lawyers and non-lawyers alike, but most importantly experience the camaraderie that is so fundamental to our industry and professional development. Join your fellow title industry professionals at the meeting to learn and connect with those people who are working hard for you.

**Carolina Update** is the official publication of the North Carolina Land Title Association. It is distributed quarterly to title insurance company members, attorney members, and other persons interested in the title insurance industry. Readers are encouraged to submit articles to the newsletter. The opinions and statements of guest writers do not necessarily reflect the policies or opinions of NCLTA.

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# Title Insurance Industry Reacts to Recession: Creditor's Rights Endorsements Decertified by ALTA and Generally Unavailable

By Terrence E. Budny, K&L Gates – Chicago and Brian P. Evans, K&L Gates - Charlotte

The current (2006) American Land Title Association ("ALTA") form of loan policy of title insurance, which is in general use by title insurers throughout the United States (California has its own forms that are prescribed by the California Land Title Association and which tend to mirror the ALTA forms), excludes from coverage the following (collectively, "Creditors' Rights"):

Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is:

- (i) a fraudulent conveyance or fraudulent transfer, or
- (ii) a preferential transfer for any reason not stated in Covered Risk 13(b) of this Policy.

(Covered Risk 13 (b) covers loss arising out of Creditors' Rights by reason of a failure to timely record the instrument creating the estate or lien, or a defect in that instrument resulting in failure to impart record notice.)

## There is a similar exclusion in the form of owner's policy of title insurance.

The purpose of this exclusion is to isolate the title insurer from liability under the title policy in the event that the acquisition of the subject property (as to an owner's policy) or the encumbering of the subject property by a mortgage, deed of trust or equivalent (as to a loan policy) by the insured is challenged by a creditor of the transferor or by a trustee in bankruptcy on the basis of the fraudulent conveyance provisions of Section 548 of the United States Bankruptcy Code (the "Code") or substantively equivalent state laws, or on the basis of the preferential transfer provisions of Section 547 of the Code.

In addition to transfers made with intent to defraud a creditor, fraudulent transfers under the Code include transfers for less than "reasonably equivalent value" and in which the party transferring the property is insolvent, illiquid, or undercapitalized. If a creditor successfully asserts that a transaction is a fraudulent transfer under the Code, that transfer can be voided and the property that was fraudulently transferred, or its value, can be recovered from the transferee for the benefit of the bankrupt's estate. Transferees are afforded protection if the property interest was acquired for value and in good faith, but the transferee would have to establish those facts in bankruptcy court.

Therefore, if a purchaser acquires fee simple to a shopping center for a price that is drastically under market, and is aware that the seller will be insolvent after the transfer, then other creditors of the shopping center seller could force the seller into bankruptcy, attack the sale as a fraudulent transfer, and seek to recover from the purchaser the difference between the price paid and the market value of the center.

A preference under Section 547 of the Code includes a transfer of an interest in property to secure an antecedent debt made while the debtor was insolvent and within 90 days before the date of the filing of the bankruptcy petition. Lenders in the current environment are scrambling to get better secured. Let's say a lender made a \$5,000,000.00 loan to an office building owner secured by a deed of trust on the building. Suspecting that the value of the property has declined, the lender obtains an appraisal, which shows that the property is now worth only \$1,500,000.00. This breaches a loan covenant, and the lender notifies the borrower of that fact. The borrower responds that she owns a beach house worth \$3,000,000.00 that is unencumbered. She offers to give a mortgage on that house to

*continued on page 3*

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## Title Insurance Industry Reacts to Recession

*continued from page 2*

secure the \$5,000,000.00 loan, and the lender accepts. Within 90 days she declares bankruptcy. The lender's mortgage on the beach house can likely be set aside as a preference.

Purchasers and lenders have been able to obtain coverage over Creditors' Rights (except in New York, Texas and New Mexico), either by obtaining title insurance in the form of the 1970 (revised 1984) ALTA policies (which do not exclude Creditors' Rights from coverage), deleting the Creditors' Rights exclusion by endorsement, or obtaining a "creditor's rights endorsement" (which ALTA adopted as ALTA Endorsements 21 and 21-06, and which CLTA adopted as CLTA 131 and 131-06) that results in insurance protection from the assertion of these Creditors' Rights. In order to obtain such coverage, title insurers have had to separately underwrite the risk that Creditors' Rights would be asserted and have customarily required the submission by the parties to the transaction of a "creditors' rights affidavit" and financial information regarding both the subject property and the transferor under the deed or mortgage to be insured. In many states, an additional premium has been charged for this coverage. Given the considerable benefits conferred by Creditors' Rights coverage, its issuance has become fairly standard for commercial real estate transactions, and the creditors' rights endorsement has long been a staple on the menu of endorsements required by lenders. If the shopping center owner in the first example above had an owner's policy with Creditors' Rights coverage, it could have made a claim on its owner's policy for the loss suffered. If the lender taking the beach house as additional collateral had a loan policy with Creditors' Rights coverage, she could likewise make a claim for loss arising out of the avoidance of the lien of the mortgage, subject to the other terms of the policy.

The recent turmoil in the commercial real estate markets has led to the challenge, particularly in the context of a bankruptcy, of sales and mortgages as either fraudulent conveyances or preferential transfers. Where the subject transaction has involved the issuance of a title insurance policy with Creditors' Rights coverage, the insured has

tendered the defense of these claims to the title insurer. This in turn has led to considerable exposure to the title insurance industry, both for the costs of litigation and ultimately for the full amount of insurance under the applicable title insurance policies.

The magnitude of this exposure has led to the recent announcement by ALTA that it has decertified ALTA Endorsements 21 and 21-06 as official ALTA forms effective March 8, 2010. ALTA has confirmed that title insurers may decide on their own whether to issue coverage over Creditors' Rights and what form of endorsement to use, but there is no current ALTA approved form.

Recently, the states of New Jersey, Pennsylvania, Delaware and Oregon (which are states that require the approval of endorsement forms issued by title insurers writing policies in their respective jurisdictions) have taken the same step. Pennsylvania's action took effect February 1, 2010; the effective date in the other states awaits final administrative action. Effective February 4, CLTA decertified CLTA 131 and 131-06. The result is that creditors' rights endorsements are no longer available in these states.

As might be expected, most of the major title insurance companies have announced that they will no longer provide Creditors' Rights coverage, based on the turmoil in the markets, recent Bankruptcy Court decisions, ratings bureau actions, and the unavailability of reinsurance. While some title insurers appear to be willing to consider issuance of coverage over Creditors' Rights, the reasonable expectation is that few, if any, title insurers will continue to issue this coverage, and that any company issuing coverage will do so only after comprehensive underwriting and submittal of detailed financial information. In other words, coverage will only be issued in cases where it's pretty obviously not needed.

Where does this leave purchasers and lenders who have become accustomed to Creditors' Rights coverage? The burden of underwriting the risk of a fraudulent transfer or preference has been shifted from the title insurers to their insureds. Lenders purchasing owner's policies

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Please submit your nominations for the Sam Mann Award to be given to a new member of our industry who demonstrates the following qualities: puts people at ease, is inclusive and caring; is willing to listen; approaches life with wisdom, dignity, courage, and a sense of humor; is dependable, honest, loyal, and trustworthy; and willingly seeks leadership opportunities.

The purpose of this award is to recognize a new generation of leaders in the title industry. It will be given at our 2010 Annual Convention on September 16-18.

Candidates will be considered annually by the Nominations Committee and those selected will be presented with a plaque at the annual meeting. Nominate a candidate using the nomination form on the NCLTA website or on page 4 of this newsletter.

*continued on page 6*

# Sam Mann Memorial Award

The purpose of this award is to recognize a new generation of leaders in the title industry. The award winner will demonstrate the special qualities of Sam Mann in terms of contributions, encouragement, and support of the title industry.

- Put people at ease, inclusive, and caring; willing to listen
- Approach life with wisdom, dignity, courage, and a sense of humor
- Dependable, honest, loyal, and trustworthy
- Willingly seek leadership opportunities

The award will honor a person new to the title industry. Candidates will be considered annually by the Nominations Committee and those selected presented with a plaque at the annual meeting. The postmark/email deadline for nominations is July 30, 2010. Please submit your nominations to the NCLTA Nominations Committee, c/o NCLTA, 1500 Sunday Drive., Suite 102, Raleigh, NC 27607-5151, fax 919-787-4916, email: [exec@nclta.org](mailto:exec@nclta.org) or [nshore@firstpointresources.com](mailto:nshore@firstpointresources.com), phone 919-861-5584.

I hereby submit a nomination for the SAM MANN MEMORIAL AWARD for:

Nominee's Name: \_\_\_\_\_

Company: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_

Zip: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

Number of Years Working in Title Industry: \_\_\_\_\_

Please attach a narrative of why you feel that individual demonstrates the qualities of Sam Mann, a biography or other summary of work history and contributions, reference letters, a photograph, and any other information you feel would be pertinent to the selection committee.

Signed by Nominator: \_\_\_\_\_

Date: \_\_\_\_\_

Company: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_

Zip: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

# Legislative Update

David P. Ferrell, Vandeventer Black, LLP, Raleigh, NC

It has been a busy “off season” at the North Carolina General Assembly. The legislature will convene the 2010 legislative session May 12, 2010. In the interim, numerous study committees have been meeting to examine diverse issues, from health care to education, from the state budget to taxes.

The Senate Appropriations Committee has been working on the state budget to be adopted during the 2010 legislative session. On Wednesday, April 7, 2010, Legislative leaders unveiled more details of an ambitious budget timeline that calls for the Senate to approve its proposed spending plan just eight days after the legislature reconvenes on May 12th. The details were rolled out as more joint budget-writing subcommittees met to go over the effects of Governor Beverly Perdue’s decision to hold back up to 5 percent of agency budgets to address a budget shortfall in the current fiscal year. That shortfall is projected to reach \$500 million by the end of June. Perdue is expected to release her proposed budget for the new fiscal year on April 20th. The timeline calls for Senate budget writers to go to work on May 5th, and the chamber to produce and pass a budget by May 20th. The House would then pass its budget plan by June 10th, with budget conferees starting to meet the next day. The timeline has conferees producing an agreement by June 29th in order to pass a final budget by the July 1st start of the fiscal year

The House and Senate Finance Committees have been meeting jointly to discuss the state’s tax system, expanding the tax base, reviewing exemptions, credits, and deductions, and otherwise looking for ways to raise revenue for the State. During the 2009 legislative session, legislative leaders raised the possibility of a special legislative session in the “offseason” to consider tax reform and tax structure changes that would broaden the tax base to include services, including a possible tax on legal services. Senator Dan Clodfelter (D-Mecklenburg) put together an extensive tax reform package in 2009 that included both service taxes and major changes to state income taxes. The proposals, though, were never put in bill form and did not pass last year. It appears that there will not be a special legislative session, and it is unclear whether the

legislature will tackle extensive changes to the State’s tax systems during the “short” session.

NCLTA has been working on two (2) primary issues this legislative “offseason.”

**“Hidden” Mechanic’s Liens:** NCLTA’s top legislative priority for 2009 was legislation to address the “hidden” or “secret” mechanic’s lien problem in North Carolina. At the request of NCLTA, **Senate Bill 803, Protect Third Party Purchasers for Value**, was introduced in the Senate by Senate Majority Leader Tony Rand (D-Cumberland). Although the bill was not enacted in 2009, the issue was included in the “studies bill”, which authorized the legislature to study issues related to mechanic’s liens on real property in North Carolina, including the State’s current laws regarding mechanic’s liens on real property, ways to address hidden liens to protect third party purchasers for value and lenders in real estate transactions, and any other issues the committee deems relevant to the study. Senator Rand retired from the legislature in December. However, we believe we have found legislators willing to run the bill in the short session, even without the study. We will have to seek the support of the various construction groups who have concerns with the bill. We continue to meet with legislators and construction groups to seek their support for the bill.

## **House Bill 116, Railroad Corridor**

**Management:** is a bill concerning management and protection of railroad corridors in North Carolina, as recommended by the House Select Committee on a Comprehensive Rail Service Plan for North Carolina. The provisions of interest to NCLTA in House Bill 116 include those dealing with abandoned railroad corridors and the recording and better accessibility of railroad corridor maps. House Bill 116 passed the House but was not enacted into law last session. The bill is eligible for consideration in the 2010 legislative session. The study committee has met during the interim and it seems from talking with various folks that some version of the bill will be considered in the Senate during the short session.

*continued on page 6*

## Real Estate – Investment, Development and Finance Practice

K&L Gates has one of the largest dedicated real estate practices of any global law firm. Within the group we deal with structuring and financing a wide range of real estate transactions, including investment/development, regeneration, leasing, and acquisitions transactions. We also advise on various financing and investment structures, tax planning and entity structuring, real estate services agreements, and real estate litigation. Many of our lawyers are also LEED (Leadership in Energy and Environmental Design) Accredited Professionals. LEED is an internationally recognized certification system that was developed by the U.S. Green Building Council to promote design and construction practices that will reduce the negative environmental impacts of buildings and improve occupant health and well-being.

Our global platform uniquely positions us to offer our clients a full range of real estate services. With 35 offices in key markets in the United States, Europe, Asia, and the Middle East, we are strongly positioned to serve as an effective, efficient, and comprehensive real estate legal services provider. We assist our diverse clients with on-the-ground local capabilities in all of our markets, ensuring that we can provide them with the right, timely solutions no matter the issue or location.

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## Legislative Update

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For more information, contact NCLTA Lobbyist David Ferrell at [dferrell@vanblk.com](mailto:dferrell@vanblk.com) or (919) 754-1171. Information is also available on the General Assembly's website: [www.ncga.state.nc.us](http://www.ncga.state.nc.us).

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## Title Insurance Industry Reacts

*continued from page 3*

for property purchased out of a foreclosure or by deed in lieu must be careful to calculate any bid or relief of indebtedness to approximate the fair market value of the property. Lenders will need to pay even closer attention to the value of their collateral and the financial strength of their borrowers. Borrowers must negotiate any requirement for creditors' rights coverage out of their loan commitments. Purchasers will likewise need to be alert to sales for less than value and sellers in financial distress. Doing so is particularly difficult in the current environment of declining values and general financial instability.

There is likely little comfort in knowing that purchasers and lenders nationwide will now be treated the same as their counterparts in New York, Texas and New Mexico. In any event, just as these counterparts, they will have to rely on their own analyses of the fraudulent conveyance and preference risks inherent in their transactions, price them accordingly and act at their own, and not the title insurers', risk.

## Convention Calendar

### NCLTA 2010 Annual Convention

September 16-18, 2010

Hilton Garden Inn

Kitty Hawk, NC

<http://hiltongardeninn.hilton.com/en/gi/hotels/index.jhtml?ctyhocn=ORFKHGI>

### 2010 ALTA Annual Convention

October 13-16, 2010

Manchester Grand Hyatt

San Diego, CA

[www.alta.org/meetings/meeting.cfm?meeting=SAM2010Ann](http://www.alta.org/meetings/meeting.cfm?meeting=SAM2010Ann)

### NCLTA 2011 Annual Convention

September 15-17, 2011

The Grove Park Inn Resort & Spa

Asheville, NC

[www.grovesparkinn.com](http://www.grovesparkinn.com)

### NCLTA 2012 Annual Convention

September 13-15, 2012

Wild Dunes Resort

Isle of Palms, SC

[www.wilddunes.com](http://www.wilddunes.com)

## New HUD-1 Check List:

- My software provider has all of the new HUD-1 changes in place that I need.
- I've updated all of my reports and documents that will be affected.
- My staff is trained on the new HUD-1 regulations and forms.
- I've notified my lenders that my firm is ready to accept the new GFE.
- My lenders have sent me their new closing instruction formats.
- I am confident that we are ahead of the competition in closing on the new HUD-1.



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and we've got the  
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