

NORTH CAROLINA LENDING LAW

**A Guide for Commercial Lenders
and Businesses**

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I.
INTRODUCTION

The commercial laws of North Carolina are generally well established and lend themselves well, from a lender's standpoint, to govern a commercial lending transaction. There are no usury or other type of interest rate limitations, liens are easily perfected and readily enforceable, and the only real disadvantage is that jury trial waivers are unenforceable as a matter of law.

This summary has been prepared as a summary of current North Carolina lending laws to provide guidance to banks, commercial lenders, businesses and their respective attorneys contemplating extensions of credit to North Carolina borrowers or perfection of liens in assets that are located in North Carolina or that are owned by residents of North Carolina. Since abbreviated, it does not purport to be a comprehensive review of the substantive laws of North Carolina on secured lending transactions.

II.
BASIC LEGAL STRUCTURE

- CONSTITUTION:** The North Carolina Constitution consists of 14 articles which, among others, includes provisions on finance, corporations, and exemptions from sale under judgments issued for collection of debts. Article V, Finance, provides for taxation, limitations upon state debt, capital projects for industry and agriculture, and higher education facilities. Article VIII, Corporations, provides for the chartering of corporations. Article X, Homesteads and Exemptions, though modified by statute, provides exemptions from sale for dwellings and certain personal property.
- STATUTORY LAW:** The General Statutes of North Carolina are comprised of some 368 separate chapters. Chapters impacting commercial lending include the following: Chapter 24, Interest; Chapter 25, Uniform Commercial Code; Chapter 42, Landlord and Tenant; Chapter 45, Mortgages and Deeds of Trust; Chapter 55, North Carolina Business Corporation Act; and Chapter 57C, North Carolina Limited Liability Company Act.
- PROCEDURAL LAWS:** The North Carolina Rules of Civil Procedure are found in Chapter 1A of the General Statutes of North Carolina. The North Carolina Rules of Civil Procedure mirror the Federal Rules of Civil Procedure with few exceptions. Each county has adopted local rules of procedure as has each federal district court.

ADMINISTRATIVE LAW:

The North Carolina Administrative Code consists of 28 titles and provides the framework for agency decision making in North Carolina. The Departments of Agriculture, State Auditor, Commerce, Environment and Natural Resources, Revenue and the North Carolina State Bar, to name a few, each have their own titles within the administrative code. Set out within each such title are chapters which provide guidance to these departments of the government in managing the day-to-day business of the State of North Carolina. Disagreements with agency decisions may be pursued through an appeal process set out in Title 26 which deals with the Office of Administrative Hearing.

LOCAL LAW:

There are 100 North Carolina counties. Each has its own governing body. Within each county, there are typically city governments as well. Each such body has the authority to promulgate ordinances and rules within the framework of the North Carolina General Statutes and the administrative code.

COURT SYSTEM:

Each North Carolina county has both district and superior courts. In civil matters, jurisdiction is divided between these courts depending on the amount in controversy. Where the amount in controversy is \$10,000 or less, the district court has jurisdiction while the superior court has jurisdiction of amounts greater than \$10,000 in controversy. Each county has a Clerk of Court and a Register of Deeds. UCC filings and deeds of trust are recorded in the Office of the Register of Deeds. Appeals from district and superior court are to the North Carolina Court of Appeals, except for appeals as a matter of right directly to the North Carolina Supreme Court. Appeals from the North Carolina Court of Appeals lie to the North Carolina Supreme Court.

North Carolina has 3 federal district courts: the United States District Court for the Eastern District of North Carolina located in Raleigh, the United States District Court for the Middle District of North Carolina located in Greensboro, and the United States District Court for the Western District of North Carolina located in Charlotte.

North Carolina is in the Fourth Circuit of the United States Court of Appeals which is headquartered in Richmond, Virginia.

III. AUTHORITY

QUALIFICATION TO DO BUSINESS IN NORTH CAROLINA:

A foreign corporation or foreign limited liability company (an "LLC") must obtain a certificate of authority from the North Carolina Secretary of State before transacting business in North Carolina. N.C.G.S. § 55-15-01(a). A certificate of authority is obtained from the North Carolina Secretary of State by filing an executed original of an application for a certificate of authority. N.C.G.S. §§ 55-15-03(a); N.C.G.S. § 57C-7-02(a). In addition, the application must be accompanied by a certificate of existence of the foreign corporation or LLC from its state of incorporation or organization and a filing fee of \$250. N.C.G.S. §§ 5-15-03 and 55-1-22(a)(19); 57C-7-04 and 57C-1-22(a)(19).

The determination of whether a foreign corporation or an LLC is transacting business in North Carolina is a question of the facts and circumstances of each individual case. As a safe harbor, a foreign corporation or LLC will not be considered to be transacting business in North Carolina by engaging in one or more of the following non-exclusive list of activities:

- Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;
- Holding meetings of its directors or shareholders (if a corporation), or managers or members (if an LLC), or carrying on other activities concerning its internal affairs;
- Maintaining bank accounts or borrowing money in North Carolina, with or without security, even if such borrowings are repeated and continuous transactions;

- Maintaining offices or agencies for the transfer, exchange, and registration of its securities (including LLC membership interests), or appointing and maintaining trustees or depositories with relation to its securities;
- Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance outside of North Carolina before becoming binding contracts;
- Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within North Carolina, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in North Carolina;
- Taking security for or collecting debts due to it or enforcing any rights in property securing the same;
- Transacting business in interstate commerce;
- Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature;
- Selling through independent contractors; and
- Owning, without more, real or personal property. N.C.G.S. §§ 55-15-01(b) and 57C-7-02(b).

Domestic and foreign corporations must submit an annual report, which may be delivered in paper form to the North Carolina Secretary of Revenue or in electronic form to the North Carolina Secretary of State. N.C.G.S. § 55-16-22(a). Domestic and foreign LLCs must submit annual reports to the Secretary of State. N.C.G.S. § 57C-2-23(a). The annual report for a corporation must be accompanied by a fee of \$25 if filed on paper or \$18 if filed electronically.

N.C.G.S. § 55-1-22(a)(23) and (23a). The annual report for an LLC must be accompanied by a fee of \$200. N.C.G.S. § 57C-1-22(a)(25).

LICENSING REQUIREMENTS: As a general rule, commercial lenders not based in the State of North Carolina are not required to obtain any licenses to make commercial loans in this State. However there are exceptions to the general rule, including the following major ones:

- Unless determined to be an exempt person pursuant to N.C.G.S. § 53-243.01(8), any person engaged directly or indirectly in the business of making residential mortgage loans as a mortgage banker or mortgage broker, or to act as a loan officer on behalf of a licensed mortgage banker or mortgage broker, must be registered with the Commissioner of Banks. N.C.G.S. § 53-243.01 *et seq.* The act defines a residential mortgage loan as one made primarily for personal, family or household use and primarily secured by a mortgage or deed of trust on residential real property located in North Carolina.
- A bank must obtain a license from the Commissioner of Banks before acting in any fiduciary capacity without a bond. N.C.G.S. § 53-160.
- A license is required to make loans under the North Carolina Consumer Finance Act. N.C.G.S. § 53-166(a). However, the Consumer Finance Act does not apply to a company doing business under the appropriate North Carolina statute as a bank, trust company, savings and loan association, cooperative credit unions or agriculture credit corporations. N.C.G.S. § 53-191.
- A license is required to sell or issue checks pursuant to the Money Transmitters Act. N.C.G.S. § 53-208.3(a). However, this requirement does not apply to banks, savings and loan associations, savings banks, or mutual banks organized under the laws of the United States or any state. N.C.G.S. § 53-208.4(a). A non-exempt person is subject to the

Money Transmitters Act if the person makes money transmissions available to North Carolina citizens through an Internet website. N.C.G.S. § 53-208.3(c).

- Any person engaged in the business of arranging loans to be repaid from anticipated tax refunds must register with the Commissioner of Banks. N.C.G.S. § 53-247(a). Loans to be repaid from refunds of North Carolina taxes are prohibited. N.C.G.S. §§ 53-245(b) and 143B-426.40A.
- A license is required to engage in the check-cashing business. N.C.G.S. § 53-276. Banks, savings institutions, credit unions and other kinds of financial institutions are exempt from this requirement. N.C.G.S. § 53-277.
- A license is required to act as a security broker or private banker. N.C.G.S. § 14-401.7. A "security broker" is "any person, bank or corporation that deals in foreign or domestic exchange certificates of debt, shares in any corporation or charter companies, bank or other notes, for the purpose of selling the same or any other thing for commission or other compensation, or who negotiates loans upon real estate securities." N.C.G.S. § 14-401.7. A "private banker" is "any person, bank, or corporation engaged in the business of negotiating loans on any class of security or in discounting, buying or selling negotiable or other papers or credits, whether in an office for the purpose or elsewhere. N.C.G.S. § 14-401.7.
- Although a national bank or a state bank chartered under the laws of another state is not required to obtain a license to engage in banking activity in North Carolina, it is under the supervision of the Commissioner of Banks of North Carolina to the extent that such bank is transacting the business of banking within North Carolina and to the extent the authority of the Commissioner of Banks is not preempted by federal law. N.C.G.S. § 53-104.

TAXATION:

Foreign corporations (and LLC's electing to be taxed as corporations) are generally subject to North Carolina income taxes to the extent they have property and/or employees located in North Carolina and/or generate revenue in North Carolina. N.C.G.S. § 105-130.3. The tax is generally imposed at a rate of 6.9%. Corporations taxed under subchapter S of the Internal Revenue Code are not subject to the tax.

In addition to income tax, a franchise tax is imposed on all corporations for the privilege of doing business in North Carolina. N.C.G.S. § 105-122(a). The tax is generally imposed upon the issued and outstanding capital stock of the corporation plus the corporation's surplus and undivided profits. N.C.G.S. § 150-122(b). Corporations generally must apportion capital stock, surplus and undivided profits using the fraction the corporation uses for apportioning income tax (or, in the case of an exempt corporation, that the corporation would use if it were subject to the income tax). N.C.G.S. § 105-122(c1). The amount apportioned to North Carolina cannot be less than 55% of the ad valorem tax value of the corporation's investments in tangible property in North Carolina. N.C.G.S. § 105-122(d). In addition, in the case of an international banking facility, the capital base is reduced by the excess of the amount as of the end of the taxable year of all assets which are employed outside the United States over liabilities owed to foreign persons. N.C.G.S. § 105-122(b). The tax is imposed at a rate of \$1.50 per \$1,000, with a minimum tax of \$35. N.C.G.S. § 105-122(d).

Although an LLC is not subject to North Carolina franchise tax, a corporation or affiliated group owning more than fifty percent (50%) of the capital interests in an LLC must include, for purposes of calculating the franchise tax liability of the corporation or affiliated group, a pro rata portion of the LLC's capital stock, surplus and profits, at least 55% of the ad valorem tax value of the LLC's property, and the LLC's actual investment in North Carolina tangible property. N.C.G.S. § 105-114.1. An LLC with a total book value of less than \$150,000 is exempt from this requirement. N.C.G.S. § 105-114.1(f).

An annual privilege tax is imposed on state and national banks or banking associations that operate in North

Carolina as commercial banks, industrial banks, savings banks, trust companies or any combination of such facilities or services. The tax is imposed at the rate of \$30 per \$1,000,000 of total assets. Total assets are determined by averaging the total assets shown in the four quarterly call reports of conditions (consolidating domestic subsidiaries) for the preceding calendar year. The total asset number is reduced by total assets employed outside of North Carolina. In addition, in the case of an international banking facility, total assets are reduced by the excess of the amount as of the end of the taxable year of all assets which are employed outside the United States over liabilities owed to foreign persons. Counties and cities are not permitted to levy a license or privilege tax on banks taxed under this section. N.C.G.S. § 105-102.3

An annual privilege tax of \$250 per business location is imposed on every person, firm or corporation involved in the business of making loans or lending money, accepting liens on, or contracts of assignment of, or other security or evidence of debt for repayment of such loans in installment or otherwise. This annual privilege tax does not apply to banks, industrial banks, trust companies, savings and loan associations, cooperative trust unions, the business of negotiating loans on real estate, or insurance premium finance companies. N.C.G.S. § 105-88(b).

IV. FUNDAMENTALS

BASIC CONTRACT LAW:

North Carolina contract law is not substantially different from contract law in other states. However, North Carolina is one of only a few states which continues to recognize a document executed "under seal" as having legal significance (see Signature Requirements below).). In North Carolina, a document executed "under seal" raises a presumption of consideration, *Honey Properties, Inc. v. City of Gastonia*, 252 N.C. 567, 571, 114 S.E.2d 344, 347 (1960), which must be rebutted by clear and convincing evidence, *Loman-Garrett Supply Co., Inc. v. Dudney*, 56 N.C.App. 622, 289 S.E.2d 600 (1982).

Additionally, the statute of limitations applicable to a sealed instrument is 10 years (N.C.G.S. § 1-47(2)), extending the statute of limitations from three years for

contracts in general (N.C.G.S. § 1-52) and four years for contracts for the sale of goods (N.C.G.S. § 25-2-725).

North Carolina has adopted the Uniform Commercial Code (including revised Article 9 which became effective July 1, 2001). The Uniform Commercial Code establishes the basic rules for contracts involving sales of goods, negotiable instruments, letters of credit, and secured transactions. Effective January 1, 2005, North Carolina repealed Article 6 of the Uniform Commercial Code which applied to certain bulk sales transactions. (N.C.G.S. § 25-6-101 *et seq.*)

PROMISSORY NOTES:

North Carolina law relating to promissory notes is not substantially different from relevant law in other states. An obligation to pay reasonable attorneys' fees contained in a promissory note or other evidence of indebtedness is valid and enforceable in North Carolina. If a note provides for the recovery of attorneys' fees based on a specified percentage of the outstanding balance of the obligation, then such provision is enforceable up to but not in excess of 15% of the outstanding balance. N.C.G.S. § 6-21.2(1). If a note provides for the recovery of a reasonable attorneys' fee without specifying a percentage, then the amount that the borrower must pay is 15% of the outstanding balance of the debt. N.C.G.S. § 6-21.2(2). On the other hand, if the note provides for the recovery of a reasonable attorneys' fee not exceeding a sum equal to 15% of the outstanding balance, then the court must determine a reasonable percentage within the specified range. *Jennings Communications Corp. v. PCG of Golden Strand, Inc.*, 126 N.C. App. 637, 486 S.E.2d 229 (1997).

GUARANTIES:

North Carolina law recognizes both guaranties of collection and guaranties of payment. Basic contract principles apply to guaranties and other types of suretyships, including the requirement of consideration (though the promise of the creditor to extend credit to the borrower may serve as consideration for the guarantor's promise to guaranty the debt), the availability of contribution against the primary obligor and other guarantors/sureties and defenses such as forgery. Unless a waiver of N.C.G.S. §§ 26-7 *et seq.* is obtained (see Other Laws of Interest below), the guarantor may effectively convert a guaranty of payment into a guaranty of collection. Absent a waiver, the guarantor may

give written notice to the holder of the guaranteed indebtedness requiring the holder to use reasonable diligence to recover against the primary obligor and any properties securing the indebtedness. Failure of the holder of the indebtedness to take appropriate action within 30 days of service or receipt of the notice will discharge the guarantor giving the notice on the indebtedness, to the extent the guarantor is prejudiced. N.C.G.S. § 26-9.

STATUTE OF FRAUDS:

North Carolina law requires that certain contracts be in writing to be enforceable. Contracts requiring a writing executed by the party to be bound include contracts creating personal liability of an executor or administrator of an estate and suretyship promises (N.C.G.S. § 22-1), contracts conveying an interest in land, including deeds of trust, sales and leases for more than three years (N.C.G.S. § 22-2), commercial loan commitments for loans in excess of \$50,000 (N.C.G.S. § 22-5) and certain sales of goods with a value in excess of \$500 (N.C.G.S. § 25-2-201).

**SIGNATURE
REQUIREMENTS:**

Documents executed under seal have special characteristics (see Basic Contract Law above). The affixing of a corporate seal is not itself conclusive of a corporation's intent to make a sealed instrument, *i.e.* to create a specialty. In order for a document or instrument to be a specialty executed "under seal", either the body of the writing must contain language indicating the party's intent to create a specialty or extrinsic evidence must demonstrate such an intention. Generally, the phrases "hereunto set my hand and seal" or "witness our hands and seals" or like phrases will suffice to show such intent. N.C.G.S. § 25-2-203; *Square D. Co. v. C.J. Kern Contractors, Inc.*, 314 NC 423, 334 S.E.2d 63 (1985). Documents for the transfer of an interest in land are presumed to be executed under seal.

North Carolina has adopted the Uniform Electronic Transactions Act (N.C.G.S. § 66-311 *et seq.*), which provides, among other things, that a contract will be enforceable if it either contains an original signature or a digital signature or is made expressly valid through another form of consent. The Act applies to transactions which the parties have agreed to conduct electronically; however, the Act is not applicable to transactions governed by Article 9 of the Uniform Commercial Code, and therefore it has no

usefulness in expediting and facilitating the execution of lending documents generally. N.C.G.S. § 66-313.

V.
INTEREST AND USURY

GENERALLY:

This section applies to commercial loans made to business entities. Special interest and consumer protection laws apply to most loans to individuals.

COMMERCIAL LENDING RATE; GENERALLY, NO USURY LIMITS:

N.C.G.S. § 24-9 defines an "exempt loan" as one where (1) the borrower is not a natural person, (2) the principal amount of the loan is \$300,000 or more, or (3) the borrower is a natural person and the loan is for a purpose other than a personal, family or household purpose. In an exempt loan transaction the borrower may agree to pay, and the lender may charge and collect from the borrower, interest at any rate and fees and other charges in any amount that the borrower agrees to pay. A claim or defense of usury is prohibited in an exempt loan transaction.

METHODS OF INTEREST ASSESSMENT:

North Carolina has no specific laws, cases or regulations in which any method for the calculation of interest is required.

WHEN INTEREST MAY BEGIN TO ACCRUE:

N.C.G.S. § 24-3 provides that interest is due and payable on instruments as follows:

- All bonds, bills, notes, bills of exchange, liquidated and settled accounts (provided such liquidated and settled accounts are signed by the debtor) bear interest from the time they become due, unless it is specially expressed that interest is not to accrue until a time mentioned in such writings or securities.
- All bills, bonds, or notes payable on demand are due when demandable by the creditor, and bear interest from the time they are demandable, unless otherwise expressed.

- All securities for the payment or delivery of specific articles bear interest as moneyed contracts; and the articles shall be rated by the jury at the time they become due.
- Bills of exchange drawn or indorsed in North Carolina, and which have been protested, shall carry interest, not from the date thereof, but from the time of payment therein mentioned.

**POINTS, FEES AND OTHER
LOAN CHARGES:**

As mentioned above, in an "exempt loan transaction" a lender may charge fees and other charges in any amount the borrower agrees to pay.

**ADDITIONAL FEES AND
CHARGES:**

No lender may impose a late payment charge for any payment unless past due for 15 days or more (or 30 days in the case of an installment obligation for which interest is paid in advance) and then only in an amount not in excess of 4% of the amount of the past due payment. N.C.G.S. § 24-10.1.

**VI.
CONFLICT OF LAW RULES**

GENERALLY:

In the absence of a contractual provision providing for the choice of law to govern a contract, interpretations of contracts generally will be determined by the doctrine of *lex loci celebrationis* (also sometimes referred to as *lex loci contractus*), which applies the law of the jurisdiction in which the last act occurs essential to the meeting of the minds necessary for the creation of the enforceable contract. A North Carolina court should enforce that state's laws, if different from North Carolina, unless:

- the contract is against North Carolina public policy or is contrary to good morals;
- North Carolina, or its citizens, would be injured by the enforcement of the contract;
- the contract violates the constitution or statutes of the State of North Carolina;

- the contract is entered into for the purpose of avoiding the usury laws of the State of North Carolina;
- the contract is for a loan secured by land located in the State of North Carolina, in which case the usury laws of the State of North Carolina will apply;
- the contract relates to the sale or conveyance of an interest in real estate located in the State of North Carolina; or
- the contract is for insurance on "property, lives, or interests" in the State of North Carolina or the application for the insurance contract was taken within the State of North Carolina. N.C.G.S. § 58-3-1.

CONTRACTUAL CHOICE OF LAW PROVISIONS:

Contractual choice of law provisions will be enforced in the State of North Carolina provided the transaction bears a reasonable relation to the state whose laws are chosen by the parties to govern the transaction. N.C.G.S. § 25-1-105(1) provides that when a transaction bears a reasonable relation to this State and also to another state, the parties may agree that the law either of this State or of such other state shall govern their rights and duties.

**VII.
TYPES OF BORROWERS**

CORPORATIONS:

Ordinary business corporations, which are subject to the North Carolina Business Corporation Act (N.C.G.S. § 55-1-01 *et seq.*), constitute the majority of private corporations operating in North Carolina.

The North Carolina Business Corporation Act generally does not apply to nonprofit corporations without capital stock, which are governed under Chapter 55A of the North Carolina General Statutes. There are also several other types of corporations that are treated under special statutory provisions, such as banking corporations, professional corporations, business development corporations, insurance companies, nonprofit hospital service corporations, railroads, and various types of cooperative organizations

such as savings and loan associations, credit unions, land and loan associations, and miscellaneous cooperative and marketing associations.

PARTNERSHIPS:

There are three types of partnerships recognized in North Carolina: (1) general partnerships; (2) limited partnerships; and (3) registered limited liability partnerships.

No written partnership agreement is required to form a North Carolina general partnership. There are also no requirements that a North Carolina general partnership register with the Secretary of State. However, a Certificate of Assumed Name must be filed with the local register of deeds if the business is conducted under an assumed name. (N.C.G.S. § 66-68). In general, the provisions of the North Carolina Uniform Partnership Act (N.C.G.S. § 59-31 *et seq.*) will apply to a North Carolina general partnership only if a particular issue is not addressed by a partnership agreement. However, in a few cases, including those involving a partner's fiduciary duties, the principles of the Uniform Partnership Act may not be changed by agreement. This Act also governs the procedures under which foreign limited liability partnerships may qualify to do business in North Carolina.

The provisions of the North Carolina Revised Limited Partnership Act (N.C.G.S. § 59-101 *et seq.*) apply to limited partnerships. A certificate of limited partnership must be filed with the North Carolina Secretary of State. North Carolina limited partnerships also are required to have both a registered office in North Carolina and a registered agent for service of process in North Carolina. The Revised Limited Partnership Act also governs the procedure under which foreign limited partnerships may qualify to do business in North Carolina.

As with general partnerships, the provisions of the North Carolina Uniform Partnership Act (N.C.G.S. § 59-31 *et seq.*) apply to registered limited liability partnerships. An application for registration must be filed with the North Carolina Secretary of State. Registered limited liability partnerships must also file an annual report with the Secretary of State.

Partners in a general partnership, as well as general partners in a limited partnership, are jointly and severally liable for the acts and obligations of the partnership. A partner in a registered limited liability partnership is not individually liable for the debts and obligations of the partnership solely by reason of being a partner or participating in the management or control of the partnership. A registered limited liability partner is also not individually liable for the errors or malpractice committed by another partner or employee of the partnership. However, a registered limited liability partner remains liable for his own errors or malpractice in the rendering of professional services. N.C.G.S. § 59-45. The liability of limited partners is limited to their investment in the limited partnership. Moreover, a limited partner will not become liable for partnership obligations by participating in the management or control of the limited partnership. N.C.G.S. § 59-303. Because limited partners are not personally liable for limited partnership debts, if the lender desires for the limited partners to have any personal liability, personal guarantees of individual limited partners are required when making a loan to a North Carolina limited partnership.

LIMITED LIABILITY COMPANIES:

In 1993 North Carolina enacted the North Carolina Limited Liability Company Act as Chapter 57C of the North Carolina General Statutes, permitting the creation of an LLC. An LLC is an entity designed to be taxed as a partnership while offering its members the limited liability that shareholders of a corporation enjoy.

LLC articles of organization must be filed with the North Carolina Secretary of State. A North Carolina LLC also is required to have both a registered office in North Carolina and a registered agent for service of process in North Carolina. An LLC must also file an annual report with the Secretary of State. N.C.G.S. § 57C-2-23.

Because individual owners of an LLC are not personally liable for company debts, it is advisable to obtain personal guarantees from LLC owners when making a loan to a North Carolina LLC.

PROPRIETORSHIPS AND

INDIVIDUALS:

Loans to an individual doing business as a proprietorship are treated the same way as loans to the individual. The owner must file a Certificate of Assumed Name with the local register of deeds if the business is conducted under an assumed name. N.C.G.S. § 66-68.

**LENDERS AND MARRIED
BORROWERS:**

North Carolina is a common law state, not a community property state. As such, each spouse generally has the full authority, acting alone, to enter into debt obligations binding and encumbering all personal property owned solely by the borrowing spouse. However, marital rights conferred by N.C.G.S. § 29-30 do not allow real property to be conveyed in the same manner as personal property. These marital rights allow a surviving spouse to elect to take a life estate in lieu of the share that the surviving spouse would take by the will of the deceased spouse or by intestate succession. By electing to take a life estate, a surviving spouse dissenting from the will or the intestate share is entitled to take a life estate in one third, in value, of all the real property of the deceased spouse. To waive this elective life estate, a spouse must join in the conveyance of the real property by the owning spouse. Therefore, it is important to determine the marital status of the grantor and to obtain the signature of the grantor and the grantor's spouse on all conveyances of real property, including deeds of trust, if the grantor is married. Additionally, with a few exceptions, the owner of an interest in real property acquired jointly by such owner and his spouse during marriage cannot be transferred or encumbered without the joinder of both the owner and his spouse in the conveyance. N.C.G.S. § 39-13.6.

**PROPERTY EXEMPT FROM
CLAIMS OF GENERAL
CREDITORS:**

Certain assets in North Carolina are exempt from seizure to satisfy the claims of general creditors. These include, by way of example, the first \$18,500 in value of real property or personal property the debtor or dependent of the debtor uses as a residence (\$37,000 if the owner is older than 65 and formerly owned the property with a deceased spouse or co-tenant); the first \$3,500 in value of one motor vehicle; the first \$5,000 in value plus \$1,000 for each dependent of the debtor in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or

musical instruments that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor; the first \$2,000 in value of any tools of trade; life insurance; professionally prescribed health aids; compensation for personal injury or compensation for the death of a person upon whom the debtor was dependent for support; individual retirement plans; and up to \$25,000 in Section 529 college savings plans. N.C.G.S. § 1C-1601.

Alternatively, the debtor may elect to take the personal property and homestead exemption provided in the Constitution of North Carolina instead of the exemptions provided by N.C.G.S. § 1C-1601. By electing to take his constitutional exemptions, the debtor is entitled to have \$1,000 in value in real property owned and occupied by him and \$500 in value in his personal property exempted from sale under execution. N.C.G.S. § 1C-1602.

VIII. REAL ESTATE LENDING

PROPERTY RIGHTS:

When two or more unmarried people acquire title to real property together, they are presumed to hold the property as tenants in common. In North Carolina, the mere designation of such owners as "joint tenants" does not create rights of survivorship among the owners. Rights of survivorship arise among joint tenants only when expressly created by a designation as "joint tenants with rights of survivorship". A joint tenancy with rights of survivorship among only two joint tenants is severed by the unilateral conveyance of the interest of either joint tenant. However, when the interest of one of three or more joint tenants with rights of survivorship is conveyed, the tenancy is severed only with respect to such interest such that the recipient of such interest becomes a tenant in common with the remaining owners who continue to hold their interests as joint tenants with rights of survivorship. N.C.G.S. § 41-21.

When a husband and wife acquire title to real property together, they are presumed to hold the property as tenants by the entirety. Even if a husband and wife acquire title to real property together with other people, the husband and wife are presumed to hold their portion as tenants by the entirety with the remaining owners holding as tenants in

common (or joint tenants with rights of survivorship, if such is specified in the instrument of conveyance). A tenancy by the entirety automatically contains rights of survivorship. Unlike a joint tenancy, a tenancy by the entirety cannot be severed by the attempted unilateral conveyance of the interest of either the husband or the wife in the real property. Furthermore, such property is not subject to the debts of either the husband or the wife and cannot be attached by a judgment against either the husband or the wife, so long as such judgment is not against them both. N.C.G.S. § 39-13.3 *et seq.* Pursuant to *United States v. Craft*, 122 S.Ct. 1414 (2002), however, a federal tax lien against either the husband or the wife does attach to real property held as tenants by the entirety.

If real property is owned by a married individual, the owner's spouse must sign any instrument of conveyance of an interest in such real property, including mortgages and deeds of trust, whether or not the owner's spouse signed the promissory note and whether or not the owner's spouse is a record owner of the real property. If a spouse does not sign the instrument of conveyance, the recipient of such conveyance holds title subject to certain statutorily prescribed inchoate marital rights of the non-signing spouse. N.C.G.S. § 29-30.

**LEASES; ASSIGNMENTS
OF LEASES AND RENTS:**

North Carolina leases are governed by Chapter 42 of the North Carolina General Statutes entitled "Landlord and Tenant".

Fixed term leases that can exceed three years from creation must be in writing, including a fixed term lease of exactly three years to commence in the future and, pursuant to *Wright v. Allred*, 226 NC 113, 37 S.E.2d 107 (1946), a fixed term lease that can exceed three years from creation due to a right in the lease to renew or extend the lease for an additional term. A tenant under a fixed term lease of more than three years must record the lease or a memorandum of the lease in order to protect its interest from subsequent lien creditors and purchasers for value. A sufficient memorandum of a lease must contain the names of the parties; a description of the premises; the term of the lease, including extensions and renewals; any options to

purchase; and sufficient reference to identify the complete agreement between the parties. N.C.G.S. § 47-118.

In the absence of a contractual prohibition on assignments or subleases, the tenant may freely assign or sublease its interest or a portion of its interest in real property, or encumber its leasehold interest in real property, without the consent of the landlord. Under both assignments and subleases, the original tenant remains liable to the landlord unless a novation occurs by which the landlord expressly releases the original tenant from liability. However, only assignees and not sublessees are liable directly to the landlord for the tenant's obligations under the lease, unless the sublessee expressly assumes the tenant's obligations under the lease.

North Carolina landlords may assign leases, rents, issues or profits. Such assignments may be included in a deed of trust or may be by separate instrument. In any event, such assignments must be recorded to protect the assignee from subsequent assignees, lien creditors and purchasers for value. N.C.G.S. § 47-20.

**MORTGAGES AND
DEEDS OF TRUST:**

While North Carolina recognizes mortgages, the prevailing practice is to use a deed of trust to encumber real property located in North Carolina. North Carolina is a title theory jurisdiction, by which a deed of trust passes title to a trustee for the benefit of the lender. Although North Carolina is a title theory jurisdiction, the grantor retains the right to possession at least until default. There are no mortgage or recordation taxes payable to any taxing jurisdiction in North Carolina in connection with the recordation of a deed of trust.

**FORMALITIES OF
NORTH CAROLINA
DEEDS OF TRUST:**

A deed of trust is both a contract and a conveyance of real property. Therefore, a North Carolina deed of trust must satisfy the following requirements:

- The satisfaction of all contractual formalities, including requirements that the parties have contractual capacity, that the underlying obligation be supported by consideration and that the

contracting process be free from fraud and duress;

- The deed of trust must be in writing and signed by the grantor. If an individual grantor is married, the grantor's spouse must sign the deed of trust, whether or not the spouse signed the promissory note and whether or not the spouse is a record owner of the real property collateral. N.C.G.S. § 29-30;
- The signatures of the grantor must be notarized to allow recordation of the deed of trust;
- The deed of trust must contain the names of the grantor, the trustee and the beneficiary; recite that the consideration is the underlying secured obligation; state the amount of the underlying secured obligation, if practicable; contain a granting clause conveying an interest in real property; contain a defeasance clause stating that the deed of trust is void upon repayment of the underlying secured obligation; and contain a legal description of the real property sufficiently certain to identify it; and
- The deed of trust should contain an acceleration clause enabling the lender to demand full payment of the entire outstanding obligation upon certain events of default; a power of sale provision enabling the trustee to conduct a non-judicial foreclosure under a power of sale; a provision enabling the lender unilaterally to substitute the trustee; and other customary representations, warranties, covenants, terms, conditions and provisions.

FUTURE ADVANCES:

A North Carolina deed of trust may secure future advances. N.C.G.S. § 45-70. Lenders must use a statutorily-prescribed future advances clause to insure that the priority of future advances will relate back to the time of the original recordation of the deed of trust. The applicable statute requires that the deed of trust state that it is given, in whole or in part, to secure future obligations; the amount of present obligations secured; the maximum principal amount of the obligations secured, including present and future obligations; and the period, not to exceed 15 years, in

which such obligations may be incurred. N.C.G.S §§ 45-67 *et seq.* It is also customary to explicitly state that the future advance provision is intended to comply with N.C.G.S. §§ 45-67 *et seq.* and to state that future advances need not be evidenced by a writing referring to the deed of trust in order to be secured thereby.

FIXTURE FILINGS:

N.C.G.S. § 25-9-502 allows for a duly recorded deed of trust to serve as a fixture filing so long as: it describes the goods covered; the goods are or are to become fixtures related to the encumbered real property; it provides the names of the debtor and the secured party; it indicates the collateral covered; it indicates the type of collateral covered; it indicates that it is to be recorded in the real property records; it provides a description of the real property to which the collateral is related; and it identifies the owner of the real property if the debtor does not have a recorded interest in the real property. A deed of trust that is effective as a fixture filing eliminates the need for the filing of continuation statements for such fixture filing. N.C.G.S. § 25-9-515(g).

CONSTRUCTION MORTGAGES:

In order to insure the best priority of their liens in fixtures, construction lenders should label each of their deeds of trust “construction deed of trust” and state that such deed of trust constitutes a “construction mortgage” as defined in N.C.G.S. § 25-9-334(h). That statute provides that, except in special cases set forth in N.C.G.S. § 25-9-334(e) and (f), to the extent a deed of trust secures an obligation to construct improvements on land, including the acquisition of the land, security interests in fixtures will be subordinate to such deed of trust if the deed of trust is labeled as stated above, the deed of trust is recorded before the goods become fixtures, and the goods become fixtures before the completion of construction. The statute also provides that a deed of trust has this priority to the extent that it refinances a “construction mortgage.”

RECORDATION:

In order to be effective against third parties, a deed of trust must be recorded in the Office of the Register of Deeds of the county in which the real property is located. N.C.G.S. § 47-20.

CANCELLATION:

Payment of the underlying debt extinguishes the deed of trust even though the deed of trust may not be canceled of record. N.C.G.S. § 45-36.3 requires lenders, within 60 days after satisfaction of the indebtedness, to discharge and release the lien of record and forward the canceled documents to the grantor or the trustee, or send to the grantor or the trustee the documents necessary to enable the grantor or trustee to have the deed of trust canceled of record.

ASSIGNMENT OF THE DEED OF TRUST:

An effective assignment of the underlying obligation is an effective assignment of the deed of trust, with or without the recordation of a written assignment of the deed of trust. If the lender effectively transfers the promissory note, all of the lender's rights in the deed of trust, including the right to substitute the trustee and exercise any power of sale, are automatically transferred to the assignee. N.C.G.S. § 47-17.2.

DEFAULT AND FORECLOSURE REMEDIES:

Upon default, the lender may initiate a judicial foreclosure proceeding or cause the trustee to initiate a power of sale foreclosure. The power of sale foreclosure is the most common method of foreclosure in North Carolina because it is quicker, easier and cheaper than a judicial foreclosure. The lender generally has 10 years from the date of default in which to bring a foreclosure action. The interests of necessary parties omitted from the foreclosure proceedings remain unaffected by a foreclosure sale. Therefore, notice to all appropriate persons is imperative for a successful foreclosure.

In order to have the option of causing the trustee to initiate a power of sale foreclosure, the lender must specifically reserve the power of sale in the deed of trust. A power of sale foreclosure is initiated by the filing of a special proceeding before the Clerk of Superior Court in the county where the encumbered property is located and service of process upon all parties. A hearing is then held before the Clerk to establish: (a) whether a valid debt exists; (b) whether there has been a default; (c) whether the deed of trust provides for foreclosure by power of sale; and (d) whether proper notice has been given to those so entitled. N.C.G.S. § 45-21.16. Upon establishment of such facts

through affidavits or testimony, the Clerk enters an order authorizing the trustee to proceed with selling the property at public auction.

North Carolina recognizes and protects the grantor's equity of redemption. If, at any time after default but before the end of the upset bid period for a foreclosure sale, the grantor or anyone with an interest in the real property tenders the balance of the obligation, the lender must accept the tender and stop the foreclosure proceedings. N.C.G.S. § 45-21.20. Attempts to contract away the grantor's equity of redemption prior to the occurrence of an event of default under the deed of trust are void.

After the required statutory notice (by mail, posting and publication), the trustee holds a public auction at which the property is sold to the highest bidder. A deposit may be required by the trustee at the sale. The bid remains subject to upset (by at least 5% but not less than \$750) until 10 days pass in which no upset bid is filed. Each time an upset bid is filed, the 10-day period starts over. N.C.G.S. § 45.21.27. Once 10 days pass with no upset bid being filed, the trustee can convey the property to the high bidder in exchange for payment of the successful bid amount.

DEFICIENCY RIGHTS:

Lenders are generally allowed to seek deficiency judgments against borrowers when the collateral does not bring a sufficient price at the foreclosure sale to satisfy the entire indebtedness, subject to the following exceptions:

- Freedom of contract allows the parties to a loan transaction to agree that the loan will be "non-recourse" to the borrower and, in such cases (except as otherwise provided in the loan documents), the lender's only remedy is against the collateral itself;
- When the seller of real property also finances the purchase price of the real property and secures the purchase price by a purchase money deed of trust on the real property, the seller/lender is precluded from suing the buyer/borrower to recover a deficiency judgment. N.C.G.S. § 45-21.38. The North Carolina courts have construed this anti-deficiency broadly, even precluding liability of guarantors on such purchase money debts and

precluding realization on other collateral for such purchase money debts;

- When a lender purchases real property collateral at its own non-judicial (power of sale) foreclosure, the borrower has a right of offset against any deficiency claim by an amount equal to the excess of the fair market value of the real property over the purchase price paid by the lender at the foreclosure sale. N.C.G.S. § 45.21.36;
- A foreclosing lender must make a "reasonable and diligent" attempt to notify interested parties of the foreclosure. N.C.G.S. § 41-21.16. A borrower who does not receive such notice and who does not have actual knowledge of the foreclosure is not liable for a deficiency. N.C.G.S. § 41-21.16(b)(2); and
- A deficiency action is barred if not brought within one year after the completion of the foreclosure sale. A deficiency action will also be barred even if brought within one year after the foreclosure if the statute of limitations on the underlying note has run. The general statute of limitations for contracts in North Carolina is 3 years. Contracts signed under seal have a 10 year statute of limitations. N.C.G.S. §§ 1-54(6), 1-52(1), 1-47(2).

DEED IN LIEU OF FORECLOSURE:

After default, if the lender pays fair value for the borrower's equity in real property, an agreement between the borrower and the lender in which the borrower transfers the real property, including its equity, to the lender is enforceable. With regard to such transfers, the lender bears the burden of overcoming a presumption of fraud and proving that the transaction was fair and free of undue influence. Such an arrangement is referred to as a deed in lieu of foreclosure. Deeds in lieu of foreclosure are advantageous for the lender because the lender will save the time and expense of foreclosure. However, when accepting a deed in lieu of foreclosure, the lender takes the real property subject to all liens on the real property, including those inferior to the lender's lien.

**TITLE SEARCHES/TITLE
INSURANCE:**

When making a North Carolina real property loan, it is customary to obtain a title and lien search with respect to the real property and its current and past owners, confirming the current ownership of the real property and the liens, claims and encumbrances of record against the property. A mortgagee policy of title insurance insuring the lender's lien and its priority is also customary in a North Carolina real property transaction, and is issued in reliance upon an opinion of title rendered by a North Carolina licensed attorney who is not an agent or employee of the title insurance company and who has performed or directly supervised the title search in the real property records of the county in which the property is located.

**EXECUTION
REQUIREMENTS FOR
RECORDED DOCUMENTS:**

A document which is to be recorded in the public land records (commonly referred to as the Office of the Register of Deeds in each county) of North Carolina must be executed as follows:

- A document signed on behalf of a business trust must be signed by at least one of its trustees, its president, a vice-president or other duly authorized officer, and attested or countersigned by its secretary, assistant secretary or such other officer as is the custodian of its common seal, not acting in dual capacity. N.C.G.S. § 39-46;
- A document signed on behalf of a corporation must be executed by an official of the corporation which includes the corporation's chairman, president, chief executive officer, vice-president, assistant vice-president, treasurer, or chief financial officer. N.C.G.S. § 47-18.3. An authorized agent, other than an official of the corporation, may execute a document which is to be recorded only if there is a resolution of the board of directors of such corporation which authorizes such agent to execute, sign, seal, and attest deeds, conveyances or other instruments and which resolution has been duly recorded in the register of deeds of the county in which the land lies. N.C.G.S. § 47-18.3;

- A document signed on behalf of a limited liability company must be executed by a duly authorized member manager in a member managed limited liability company or a duly authorized manager in a manager managed limited liability company. N.C.G.S. § 57C-3-23; and
- A document signed on behalf of general or limited partnership must be executed by a duly authorized general partner. N.C.G.S. § 59-40; N.C.G.S. § 59-403.

**IX.
PERSONAL PROPERTY LENDING**

**NORTH CAROLINA
UCC ARTICLE 9:**

North Carolina adopted the Uniform Commercial Code, and Article 9 along with it, in 1965, with an effective date of July 1, 1967. It applies to all secured transactions occurring on or after that date. Article 9 replaced the old Chattel Securities Law (N.C.G.S. §§ 45-1 through 45-3.1), the Uniform Trust Receipts Act (N.C.G.S. §§ 45-46 through 45-66), the law governing agricultural liens for advances (N.C.G.S. §§ 44-52 through 44-64), the factor's lien acts (N.C.G.S. §§ 44-70 through 44-76), and the laws governing assignment of accounts receivable (N.C.G.S. §§ 44-77 through 44-85), each of which was repealed in 1967, as well as the deed of trust on personal property and fixtures, the conditional sale and the pledge. If there are any secured transactions in North Carolina pre-dating July 1, 1967, those transactions are still governed by the old pre-Code laws.

Article 9 was substantially revised in North Carolina in 1975 (the 1972 revision of Uniform Article 9), with an effective date of July 1, 1976. The Article underwent a number of limited amendments over the course of the next quarter century, and then in August 2000 North Carolina adopted Revised Article 9, using the uniform effective date of July 1, 2001.

With regard to the transition from old Article 9 to Revised Article 9, the general rule is that Revised Article 9 applies to all transactions within its scope, even if the transaction or lien was entered into or created before the effective date

of Revised Article 9. N.C.G.S. § 25-9-702(a). An exception applies to valid pre-effective date transactions and liens that were not governed by old Article 9 but would have been covered by Revised Article 9 if entered into after July 1, 2001. Such security interests or liens remain valid after July 1, 2001 either (i) pursuant to the old law under which the interest was created or (ii) Revised Article 9. N.C.G.S. § 25-9-702(b)(1),(2). The result of the foregoing legislative history is that there are three significant dates to remember in determining the law applicable to a secured transaction in North Carolina: July 1, 1967, July 1, 1976, and July 1, 2001.

- Any secured transaction that predates July 1, 1967 is governed by pre-Code law.
- Any secured transaction that was created between July 1, 1967 and July 1, 1976 is governed by Article 9 as it existed at that time.
- Any secured transaction that was created between July 1, 1976 and July 1, 2001 and was not governed by old Article 9 is either (i) still governed by the law that created it, even if it would otherwise be within the scope of Revised Article 9, or (ii) governed by Revised Article 9.
- Any secured transaction that was created between July 1, 1976 and July 1, 2001 and was within the scope of old Article 9 is governed by Revised Article 9.
- Any secured transaction that was created after July 1, 2001 is governed by Revised Article 9 unless excluded by N.C.G.S. § 25-9-109.

**MODIFICATIONS
TO UNIFORM PROVISIONS
OF REVISED ARTICLE 9:**

North Carolina's enacted Revised Article 9 differs from the uniform Revised Article 9 in the following material respects:

- North Carolina has adopted certain non-uniform provisions that restrict free assignability of

accounts, chattel paper, promissory notes, health-care-insurance receivables, and certain general intangibles. Non-uniform N.C.G.S. §§ 25-9-406(i) and 408(f) specifically exclude several North Carolina statutes from the "free assignability" provisions of N.C.G.S. §§ 25-9-406 and 408, including North Carolina Structured Settlement Act (Article 44B of Chapter 1 of the General Statutes); North Carolina Crime Victims Compensation Act (Chapter 15B of the General Statutes); North Carolina Consumer Finance Act (Article 15 of Chapter 53 of the General Statutes); North Carolina Firemen's and Rescue Squad Workers' Pension Fund (Article 86 of Chapter 58 of the General Statutes); Employment Security Law (Chapter 96 of the General Statutes); North Carolina Workers' Compensation Act (Article 1 of Chapter 97 of the General Statutes); and Programs of Public Assistance (Article 2 of Chapter 108A of the General Statutes). N.C.G.S. §§ 25-9-406(j) and 408(e) also raise the possibility of additional restrictions on assignability by stating that "this section prevails over any inconsistent provision of an existing or future statute, rule, or regulation of this State unless the provision is contained in a statute of this State, refers expressly to this section, and states that the provision prevails over this section."

- N.C.G.S. § 25-9-310(b) previously contained a non-uniform subdivision (11), which provided that the filing of a financing statement is not necessary to perfect a security interest "created in connection with the issuance of any bond, note, or other evidence of indebtedness for borrowed money by this State or any political subdivision or agency thereof, except as provided in N.C.G.S. §§ 63A-11(e), 143B-456.1(f), 159C-28, and 159D-23. A similar provision existed under North Carolina's version of old Article 9. This subsection was repealed effective July 1, 2001.
- Subpart 2 of Part 5 of Revised Article 9 sets forth certain rules for the operation of UCC filing offices. Many of those rules have been made

subject to some non-uniform amendments in North Carolina. The general tendency of the amendments is to relax the requirements imposed on the filing offices. For example, in most instances in which the uniform version of Revised Article 9 requires a response by the filing office within 2 business days, the North Carolina version allows 3 business days. E.g., N.C.G.S. § 25-9-520(b) (communication concerning refusal to accept a record), N.C.G.S. § 25-9-523(e) (response to request for information from filing office). N.C.G.S. § 25-9-523(c) provides that the filing office shall not be liable for its provision of a record to a party requesting information under that subsection. Revised § 9-527, which creates an obligation on behalf of the appropriate governmental official to report annually concerning the operation of the filing office, was not adopted in North Carolina. Finally, North Carolina adopted a non-uniform N.C.G.S. § 25-9-710, which is designed to guide the transition from the former dual-filing system to the current system. It provides, among other things, that a local-filing office shall not accept for filing a record presented after June 30, 2001, whether or not the record relates to a financing statement filed in the local-filing office before July 1, 2001. This provision means that UCC financing statements filed in a local office under old Article 9 cannot be terminated by filing a termination statement with the local office after July 1, 2001, because the local office is forbidden from accepting filings on or after that date. It also provides that the local filing offices must maintain all old filing records until July 1, 2008, and must respond to requests for information about those records until that date. After July 1, 2008, the local filing offices are authorized to destroy all records relating to filing under Former Article 9. N.C.G.S. § 25-9-710(e).

- Except as discussed below with respect to crop liens, North Carolina has adopted the uniform provisions of Revised Article 9 with respect to priority of security interests. Therefore, a security interest is subordinate to a possessory lien on goods unless the statute creating the possessory lien expressly provides otherwise. N.C.G.S. § 25-9-333(b). Similarly, a security interest is subordinate to the rights of a lien creditor to the extent that the security interest secured an advance made more than 45 days after the person becomes a lien creditor unless the advance is made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien. N.C.G.S. § 25-9-323(b).

STATUTORY LIENS:

The most significant liens created by statute in North Carolina include a lien for two months' wages in favor of an employee of an insolvent employer (N.C.G.S. § 44-5.1), a lien for overdue child support (N.C.G.S. § 44-86); a repairman's lien (N.C.G.S. § 44A-2(a)); an innkeeper's lien (N.C.G.S. § 44A-2(b)); a lien in favor of a person engaged in the business of boarding animals (N.C.G.S. § 44A-2(c)); a mechanic's lien (N.C.G.S. § 44A-2(d)); a landlord's lien (N.C.G.S. § 44A-2(e)); a lien in favor of a lessor of space for a manufactured home (N.C.G.S. § 44A-2(e2)); a textile processor's lien (N.C.G.S. § 44A-2(f)); a lien in favor of any person who fabricates or uses a mold, die, form or pattern against its owner (N.C.G.S. § 44A-2(g)); a lien in favor of a city or county of the State of North Carolina for unpaid real and personal property taxes (N.C.G.S. § 160A-207, 153A-146, 105-355); and a lien to recover costs of environmental action (N.C.G.S. § 130A-19 *et. seq.*).

LIENS FOR WAGE CLAIMS:

N.C.G.S. § 44-5.1 establishes a lien in favor of employees of an insolvent corporation, partnership, or individual. The lien attaches against all assets of the insolvent employer, and secures the payment of up to two months' unpaid wages. The statute provides that the lien is "prior to all other liens that can be acquired against such assets," but there is conflicting jurisprudence regarding whether the lienholder has priority over a previously perfected security interest. No action must be taken by the employee to perfect the lien, but the lien does not arise until the property of the insolvent employer is sequestered for liquidation.

The lien does not arise if the property is still in the hands of the employer.

**LIEN FOR REPAIRMEN,
MECHANICS AND
TEXTILE PROCESSORS:**

The liens for repairmen, mechanics, and textile processors are created by N.C.G.S. §§ 44A-2(a), (d) and (f), respectively. In each case the lien arises only while the items being repaired or processed are in the possession of the lienholder, and terminates when the lienholder voluntarily relinquishes possession. Such liens do not terminate when the lienholder involuntarily relinquishes possession. The mechanic's lien secures the payment of the reasonable charges of the mechanic's services. The textile processor's lien secures the contract price for the processor's services. The repairman's lien secures the lesser of the contract price or the reasonable charges for services performed, with a cap of \$100 if the lien is asserted against a lawful possessor of the property other than the owner. In every case, the lien is explicitly stated to "have priority over perfected and unperfected security interests."

LANDLORD'S LIEN:

N.C.G.S. § 44A-2(e) establishes a lien in favor of any lessor of nonresidential real property that attaches to all personal property of the tenant which remains on the premises if (i) the tenant has vacated the premises for 21 days after the expiration of the paid rental period and (ii) the lessor has a lawful claim for damages against the tenant. The lien secures the payment of all unpaid rent due when the tenant vacated the premises and up to 60 days thereafter, any sums necessary to repair the premises, and reasonable costs and expenses of sale. Disposition of any property pursuant to this statute must be by public sale. The lien is expressly made subject to the rights of the holder of a prior perfected security interest.

**PERSONAL PROPERTY
TAX LIENS:**

A tax lien unpaid ad valorem taxes on personal property arises after levy or attachment and garnishment of the personal property levied upon or attached. It secures the payment of all unpaid personal property taxes, and if the property attached is the property upon which the taxes were imposed, the tax lien is superior to any competing interest in the property to which the lien attaches, whether those

rights arise before or after the tax lien attaches. N.C.G.S. § 105-356(b). If the property attached is not the property upon which the taxes were imposed, the tax lien is superior only to those competing interests arising after the attachment.

UCC FILING RULES:

Before the effective date of Revised Article 9, North Carolina had a dual filing system, which required the filing of a financing statement with the Secretary of State, and an additional financing statement with the Register of Deeds of a county if: (a) the financing statement covered equipment used in farming operations, farm products, accounts or general intangibles arising from or related to the sale of farm products, or consumer goods, and the debtor's residence was in that county or, if the debtor was not a resident of North Carolina, the goods were located in that county; (b) the financing statement covered fixtures, minerals or the like, or timber to be cut, and the related real property was located in that county; or (c) the debtor had only one place of business in the state or the debtor had no place of business in the state but resided in that county. Revised Article 9 provides for the filing of all financing statements with the Secretary of State of North Carolina, unless the financing statement covers fixtures, as extracted collateral, or timber to be cut, in which case the proper filing office is the Register of Deeds for the county in which the related real property is located. The contents of the financing statement are governed by Subpart 1 of Part 5 of Revised Article 9, which was adopted without substantive change in North Carolina.

CROPS AND FARM PRODUCTS:

Revised Article 9 as enacted in North Carolina contains two significant non-uniformities intended to protect farm lenders. The first is the continuation of the concept of the "production-money security interest," and the second is the protection of the landlord's lien on crops. Other than these non-uniformities, Revised Article 9 as enacted in North Carolina follows the uniform version..

PRODUCTION-MONEY SECURITY INTEREST:

Revised Article 9 as enacted in North Carolina contains two significant non-uniformities intended to protect farm lenders. The first is the continuation of the concept of the "production-money security interest". Old § 9-312(2)

contained a concept known in North Carolina as a "production-money security interest," an agricultural parallel to a purchase-money security interest. While the concept has not been retained in the uniform version of Revised Article 9, it was retained in North Carolina, and codified at N.C.G.S. §§ 25-9-103.1(a) and 25-9-324.1. Non-uniform definitions have been added for "production-money crops" (N.C.G.S. § 25-9-102(65)), "production-money obligation" (N.C.G.S. § 25-9-102(66)), and "production of crops" (N.C.G.S. § 25-9-102(67)).

A security interest in crops is a production-money security interest to the extent that the crops are production-money crops. N.C.G.S. § 25-9-103.1(a). "Production-money crops" are crops that secure a production-money obligation incurred with respect to the production of those crops. N.C.G.S. § 25-9-102(65). A "production-money obligation" is an obligation of an obligor incurred for new value given to enable the debtor to produce crops if the value is in fact used for the production of the crops. N.C.G.S. § 25-9-102(66). With certain limited exceptions, a properly perfected production-money security interest in crops will have priority over all competing security interests in the same crops. N.C.G.S. § 25-9-324.1(a).

**PRIORITY OF
SECURITY INTERESTS
IN CROPS:**

The uniform version of Revised § 9-334 provides in subsection (i) that a security interest in crops has priority over a conflicting interest in the real property on which the crops are grown if the debtor has an interest or is in possession of the real property. North Carolina's version, N.C.G.S. § 25-9-334(i), makes this rule of priority subject to N.C.G.S. § 42-15, which creates a landlord's lien on crops and states that "this lien shall be preferred to all other liens." Uniform Revised § 9-334(j), which provides that Revised § 9-334(i) shall have priority over certain inconsistent statutes set forth therein, was not enacted in North Carolina, since the legislature chose to give priority to the inconsistent statute.

FIXTURE FILINGS:

The place to file a financing statement covering fixtures in North Carolina is the office of the Register of Deeds of the county in which the real property to which the fixtures are or will be attached is located. However, if the debtor is a

transmitting utility (as defined in N.C.G.S. § 25-9-102(83)), all financing statements, including those covering fixtures, should be filed with the Office of the Secretary of State. Under Revised Article 9 in North Carolina, a deed of trust is effective as a fixture filing from the date of its recordation if it indicates the goods that it covers, the goods are or are to become fixtures related to the real property described therein, the deed of trust satisfies the requirements for a financing statement covering fixtures other than an indication that it is to be filed in the real property records; and the deed of trust is duly recorded. N.C.G.S. § 25-9-502(c). One advantage to using the deed of trust as a fixture filing, when possible, is that the deed of trust remains effective as a financing statement covering fixtures as long as the deed of trust remains of record and is effective against the related real property, without the need to file continuation statements. N.C.G.S. § 25-9-515(g).

UCC LIEN SEARCHES:

Search requests for financing statements naming a particular debtor require a fee in the amount of (a) \$38 if the request is communicated in writing; and \$30 if the request is communicated by another medium authorized by filing-office rule. There is also fee of \$2 per page for each copy requested of any filed financing statement or statement of assignment. N.C.G.S. § 25-9-525(d). This subsection does not require that a fee be charged for remote access searching of the filing office database.

North Carolina has enacted a non-uniform § 9-523(e), which gives the Office of the Secretary of State 3 business days, rather than 2, to comply with any request for information. The subsection places no response time requirements at all upon local filing offices.

North Carolina has converted its filing system from a dual-filing system to a central filing system effective July 1, 2001. A non-uniform section, N.C.G.S. § 25-9-710, was enacted to provide guidelines for the offices of the Registers of Deeds in the 100 counties of North Carolina during the transition period. Local filing offices are required to maintain all records relating to filings made under former Article 9 through June 30, 2008, and are required to respond to any requests for information concerning those records which are received before June

30, 2008. The fee for such a search is \$30. N.C.G.S. § 25-9-710(d).

**UCC FILING AND
OTHER FEES:**

The filing fee for a financing statement or other record is (a) \$38 if the record is communicated in writing and consists of one or two pages; (b) \$45 if the record is communicated in writing and consists of more than two pages, plus \$2 for each page over 10 pages; and (c) \$30 if the record is communicated by another medium authorized by filing-office rule. N.C.G.S. § 25-9-525(a).

UCC REMEDIES:

Part 6 of Revised Article 9 was adopted in North Carolina without substantive change. The standard for a disposition of collateral is commercial reasonableness, subject to certain non-waivable requirements set forth in N.C.G.S. § 25-9-602.

X.

EQUIPMENT LEASING

**NORTH CAROLINA
ARTICLE 2A:**

Article 2A of the Uniform Commercial Code was adopted in North Carolina in 1993. Article 2A is based on Article 2 of the Uniform Commercial Code, governing sales, and courts in North Carolina have looked to analogous provisions of Article 2 when interpreting Article 2A.

**MODIFICATIONS
TO UNIFORM
PROVISIONS
OF ARTICLE 2A:**

Article 2A as enacted in North Carolina contains only a handful of deviations from the official text:

- In order to be considered a consumer lease in North Carolina, a lease must require total payments of less than \$25,000. N.C.G.S. § 25-2A-103(1)(e).
- A "lease" is defined to include a "motor vehicle operating agreement that is considered a lease under § 7701(h) of the Internal Revenue Code."
- For purposes of the enforcement of a lease which does not comply with the statute of frauds set forth

in N.C.G.S. § 25-2A-201, if there is no evidence of the parties' intent regarding the term of the lease, North Carolina law provides that there shall be "a reasonable lease term." N.C.G.S. § 25-2A-201(5).

- If a lessee has rightfully rejected or revoked acceptance of leased goods, Uniform Commercial Code § 2A-508(5) gives the lessee a security interest in the goods to secure repayment of any rent and security that has been paid and any reasonable expenses incurred in the inspection, receipt, transportation, and care and custody of the goods. The lessee is entitled to dispose of the goods in good faith and in a commercially reasonable manner. North Carolina has added a non-uniform sentence to the end of this subsection which requires the lessee to "account to the lessor for any excess over the amount of the lessee's security interest." N.C.G.S. § 25-2A-508(5).
- Uniform Commercial Code § 25-2A-311 is omitted from the North Carolina enactment. Uniform Commercial Code § 25-2A-311 clarifies that any person entitled to a priority security interest pursuant to a lease may agree to subordinate that interest.

DEFAULT REMEDIES:

Except as set forth above, North Carolina has enacted the uniform version of Part 5 of Article 2A dealing with default remedies without substantive modification.

OTHER LAWS:

Criminal penalties are established for malicious or willful injury to leased property, subletting of leased property without permission, failure to return leased property, leasing with intent to defraud, and conversion of property by a lessee. N.C.G.S. §§ 14-165 through 14-169. Generally, the crimes are misdemeanors, but conversion of property with a value in excess of \$400 is a felony.

**XI.
OTHER LAWS OF INTEREST**

**WAIVER OF JURY TRIALS
ILLEGAL:**

N.C.G.S. § 22B-10 provides that "any provision in a contract requiring a party to the contract to waive his right

to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable." This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.

**NORTH CAROLINA
SURETYSHIP LAW:**

North Carolina law applicable to loan guarantees is found in the "Suretyship" articles of Chapter 26 of the North Carolina General Statutes. As a general rule, it is not necessary to modify standardized multi-state loan guaranty forms for use in North Carolina except in one instance. N.C.G.S. § 26-7 permits a surety or guarantor, after the obligation becomes due and payable, to give written notice to the holder or owner of the obligation to "use all reasonable diligence to recover against the principal" and "to proceed to realize upon" any security for the obligations. N.C.G.S. § 26-9 in turn provides that if, within 30 days after receipt of such notice, the holder or owner of the obligation refuses or fails to take appropriate action, the surety or guarantor giving such notice shall be discharged to the extent he is prejudiced thereby. Consequently, it is common practice to have the surety or guarantor acknowledge in the contract of guaranty or suretyship that his liability is absolute and unconditional, and to waive any defense which may otherwise arise as a result of the provisions of N.C.G.S. § 26-7.

**NORTH CAROLINA
BULK SALES LAW:**

North Carolina has repealed the bulk transfer provisions of Article 6 of the Uniform Commercial Code effective January 1, 2005.

**NORTH CAROLINA
FRAUDULENT
CONVEYANCE LAWS:**

North Carolina in 1997 adopted the Uniform Fraudulent Transfer Act. It is codified at N.C.G.S. §§ 39-23.1 *et seq.* The maximum time period (statute of limitations) for the filing of a North Carolina fraudulent conveyance is within 4 years from the time that the transfer was made or the obligation was incurred, except for certain preferential transfers to insiders for which the maximum time period is 1 year.

**NORTH CAROLINA
ENVIRONMENTAL**

LAWS AND REGULATIONS:

The statutes governing environmental matters in North Carolina are found primarily in Chapter 143, Article 21, Water and Air Resources, of the North Carolina General Statutes. Regulations implementing those statutes are found in Title 15A, Department of Environment and Natural Resources, of the North Carolina Administrative Code. As the title indicates, these laws and regulations are enforced by the North Carolina Department of Environment and Natural Resources ("NCDENR").

North Carolina has not passed a super-priority lien statute for environmental expenditures made by the state as have some states. Neither has North Carolina passed legislation creating a non-priority lien for such expenditures. However, it is the position of NCDENR and the North Carolina Department of Justice that North Carolina's nuisance law provides an avenue for imposition of a lien on real estate in such situations. N.C.G.S. § 130A-19 provides that a local health department shall have a lien on such property for the costs of the abatement of a nuisance in the nature of a mechanic's and materialmen's lien as provided in Chapter 44A of the General Statutes.

CARRUTHERS & ROTH, P.A.

Carruthers & Roth, P.A., with its principal headquarters in Greensboro, North Carolina, is a law firm whose growth and direction have resulted from the changing and expanding needs of its clients over many years. Founded in 1937, the firm has evolved into a full service law firm representing businesses and individuals in most aspects of their legal needs and objectives. During the last 30 years, the firm has grown more than sixfold, as it has broadened and diversified its legal specialties. Today, its practice is conducted by attorneys with specialized skills and experience in such diverse fields as employment law, tax law, pension and employee benefits, estate planning and administration, corporate law, real estate, environmental law, intellectual property, factoring, asset based lending, commercial finance and banking, creditors' rights, insolvency and bankruptcy, and general litigation.

The firm is recognized locally and nationally for its expertise and responsiveness in handling complex loan and other commercial transactions. It represents numerous clients in commercial matters, including national and state banks, insurance companies, and institutional lenders. It handles a variety of secured transactions requiring a broad knowledge of real and personal property security devices, and has extensive experience in negotiating, structuring, and financing leveraged buy-outs, loan workouts, and other loan transactions. The firm also has substantial experience in the areas of factoring and finance leasing.

In its lending practice, the firm continually addresses regulatory issues under state and federal laws, including usury limitations, lien perfection and priority requirements, and environmental matters and issues, including regulatory compliance, governmental clean up actions, environmental assessment analysis, enforcement litigation, worker safety, toxic tort litigation, informational reporting requirements, municipal water and sewer projects, waste disposal practices, permit applications, insurance coverage disputes, asbestos removal, and lender environmental liability generally. The firm also regularly advises its clients on potential lender liability claims when pursuing their remedies in collecting loans and realizing upon collateral.

The firm also has considerable expertise in all areas of bankruptcy and insolvency law, including debtor and creditor rights, state court receiverships, and out-of-court workouts. The firm regularly represents banks, lending institutions, and other creditors in bankruptcy and insolvency proceedings. The firm makes regular appearances before the United States Bankruptcy Courts and handles all forms of bankruptcy litigation involving such complex issues as preferences, fraudulent conveyances, equitable subordination, relief from automatic stay, and cash collateral and cram down issues. The firm also regularly consults with clients on bankruptcy avoidance and financial restructuring.