

Lenders: A Judgment on a Note Does Not Extinguish Your Right to Foreclose on a Mortgage

By: Tommy Lydon, Weston Adams, and Jill Benson, MG&C

MG&C appellate attorneys, Weston Adams and Jill Benson, recently prevailed in a case before the South Carolina Supreme Court that will protect lenders who choose to sue borrowers or guarantors for judgments, rather than foreclosing on real estate or other collateral that secures the indebtedness. This situation typically arises when collateral is contaminated, has little value, or is jointly owned by the borrower with others, which could make it difficult to liquidate.

In *Lever v. Lighting Galleries*, a promissory note in the amount of \$36,256.97 was secured by a fourth mortgage on real estate owned by the borrower. When the borrower defaulted, the lender chose not to bring a foreclosure action against the real estate because the property was worthless at that time due to an oil spill and the borrower only owned a 1/3 interest in the property. Instead, the lender brought suit on the note which resulted in a judgment against the borrower. Despite attempts to collect the debt, the lender was unable to recover any money via its judgment.

A number of years later, the contamination on the real estate was cleaned up and the value of the property exceeded the balances due on the prior mortgages. The borrower sought to avoid paying our client's mortgage arguing the mortgage was extinguished because the lender had elected its remedy by suing on the note and because the judgment expired after its ten year statutory effective period. The trial court agreed with the borrower, finding the expiration of the judgment obtained by the lender on the promissory note rendered the note and mortgage inoperative, such that the mortgage should be marked satisfied.

The South Carolina Supreme Court reversed the trial judge. The Supreme Court ruled a lender who holds a mortgage to secure a debt has the option to either bring an action on the note or pursue a foreclosure action and may pursue a foreclosure even after its note judgment expires. Until the mortgage debt is actually satisfied, the recovery of a judgment on the underlying promissory note has no effect upon the mortgage or its lien. As a result, lenders can now rest assured that pursuing legal action against borrowers and guarantors without simultaneously foreclosing against their collateral will not prejudice their right to pursue the collateral at a later date if they so desire.

Myths Surrounding Life Insurance Policies, Individual Retirement Accounts, and 401(k)s

By: Angela Kirby and Richele Taylor, MG&C

1. My will controls who receives these assets when I pass: Many people assume their Will may control who will receive proceeds from their life insurance policy and who will receive the money in their 401(k) and IRA. Actually, the person named as a beneficiary remains the beneficiary regardless of what your Will states and regardless of your marital status. Your beneficiary forms act as a contract outside of your Will, meaning if you have not changed your beneficiary designation forms, whomever you last named as a beneficiary receives these assets. When you re-do your Will, always update the beneficiary designation forms for these non-probate assets.

2. When I get a divorce, my ex-spouse is automatically prevented from receiving proceeds from my life insurance policy, IRA and 401(k): Don't fall for this trap! Divorce does not alter your beneficiary designations for these assets. Only changing your beneficiary designation can change who receives these assets. Whether you have been divorced for one week or 10 years, if your beneficiary designation for any of these items states your ex-spouse is your beneficiary, your ex-spouse receives the proceeds from that asset.

3. Life insurance proceeds pass outside of my estate and are not subject to estate taxes when I die: Right and wrong. Any insurance policies in which you have an "incident of ownership" are included as part of your taxable estate. This includes policies you can borrow against, assign or cancel, or for which you can revoke an assignment, or can name or change the beneficiary. The proceeds from your life insurance do pass outside of your will as a non-probate asset unless you have named your estate as your beneficiary or your named beneficiary has predeceased you and the proceeds default to your estate. A non-probate asset simply means that your beneficiary does not have to wait for the probate of your estate to be completed to receive the proceeds. The fact life insurance proceeds pass outside of your estate only means it is a non-probate asset, and the Court does not assess probate fees based on this asset. The proceeds from the policy are included in the value of your gross estate and, if the total value of your gross estate reaches the threshold of a taxable estate, your estate pays taxes on the total amount, which will include the value of the life insurance proceeds.

- Continued on PAGE 2

MG&C Events Near You!

Fourth Annual Legislative Bowl-A-Rama
Columbia, SC
May 8, 2007



MG&C Consulting hosted the South Carolina House Ways & Means and LCI Committees at the Fourth Annual Legislative Bowl-A-Rama. The sponsors this year were SC Economic Developers Association, The SC Medical Association, and The SC Petroleum Council.

Myths Surrounding Life Insurance Policies, Individual Retirement Accounts, and 401(k)s

-Continued from PAGE 1

The beneficiary may or may not owe estate taxes depending on how your will specifies the source of payment for estate taxes and debts. If you have no will then the recipient will pay a pro-rata share of the estate taxes. A taxable estate in the year 2007 is an estate worth \$2 million dollars.

4. I outwitted the system: My wife purchased a policy on my life and I purchased a policy on her life: Oops! Now you cannot change your mind as to who will benefit from the policy on your life. If you and your spouse divorce, there is no way to make sure your children or new spouse receive the benefits of the proceeds of your policy. Your ex-spouse owns the policy on your life and can change the beneficiary, cash out the policy and take the cash value, or even cancel the policy.

5. There is no way to provide life insurance proceeds to a beneficiary without paying estate taxes: You can pass life insurance proceeds without paying estate taxes if you create an irrevocable trust while you are alive, and make your irrevocable trust the owner and beneficiary of your life insurance policy. Since you no longer have any ownership of the policy, the amount of the proceeds of your policy are not considered part of your estate and do not add to the value of your estate. Typically, you would make an annual gift of the premiums to the trust. The premiums you give to the trust may be subject to the gift tax rules but, depending on the value of your estate, this may be the right move! The IRS places other restrictions on such plans, so make sure you talk to an estate planning attorney before attempting to create an irrevocable trust that owns life insurance.

6. IRAs and 401(k)s pass outside of my estate, and are not subject to estate taxes when I die: Right and wrong again. As in number three, these are non-probate assets but they are taxed as part of your estate if your estate reaches the value of a taxable estate. What's more, the beneficiary receiving the 401(k) or IRA account may be subject to paying estate taxes and income taxes on the asset if income taxes were deferred during the decedent's lifetime. If your spouse receives your IRA or 401(k) they will receive preferential tax treatment and may roll the account over and stretch out the distributions, paying no estate taxes and reducing lump sum payment of income taxes. Your spouse will have to roll the 401(k) into an IRA at this time.

If the person receiving the 401(k) or IRA account is not your spouse, they pay income taxes on the distributions they receive as this money has not yet been taxed to the Decedent. A 401(k) and an IRA allow a person to save money pre-taxes but, when a new person receives the account, the money must be taxed upon distribution of the asset. There are now favorable options for non-spousal beneficiaries and you should seek the advice of a professional investment advisor to take advantage of these new stretch IRAs available to beneficiaries.

7. I have minor children and have named my children's guardian as the beneficiary of life insurance to take care of my children:

Make sure you have not named minor children or their guardian as the beneficiaries of any of these assets! Minors lack the legal capacity to own property, which means they cannot receive these items until they reach eighteen (18) years of age. The Court will require the appointment of a conservator, not just a guardian, to hold these assets for the benefit of your minor child. If you merely name the Guardian outright as the beneficiary there will be no legal obligation to use the funds for the benefit of your children. A better alternative is creating a Trust for the benefit of the minor children and naming the Trust as the beneficiary of these assets. Talk to your estate planning attorney about options that exist if you have minor children.

The 2007 Legislative Year in Review

By: Hope Lanier, MG&C Consulting

The South Carolina General Assembly adjourned its session Sine Die on June 29, 2007, wrapping up the first year of a two-year legislative session. The 2007 session was very busy and often contentious but, at the end of the day, Legislators made some significant accomplishments, many of which were of particular interest to the business community.

From among the high profile issues undertaken by the General Assembly, the following "Top Five" list is our pick of issues defining the 2007 Legislative Session:

(1) *The Budget & Tax Cuts*

Passage of the Budget hinged on a Legislative "trifecta" of sorts – ending a political show-down between the House, Senate, and Governor's office. Prior to consideration of the Budget, House leadership insisted on passage of reform of both the Workers' Compensation System and the Department of Transportation. When all the pieces fell into place, South Carolinians were the beneficiaries

of \$220 Million in tax cuts – including the elimination of the 3% tax on non-prepared foods and the elimination of the state's lowest tax bracket, reducing income taxes by \$86 Million. The tax cuts were included as part of the state's \$7.3 Billion budget package for 2007-2008.

Law makers took two days to reject all but 15 of the Governor's record 243 Budget vetoes, finalizing a plan that includes: expansion of the Children's Health Insurance Plan (CHIPS) to include an additional 71,000 children, new funding for Economic Development and Job Recruitment, a pay increase for state employees, additional funding for LIFE and Palmetto Scholarships for students studying math, science or engineering, and funding for the second year of the 4-K pilot program for at-risk children in the I-95 corridor districts.

(2) *Workers' Compensation Reform*

After two years of hearings, debates and studies, the General Assembly passed Workers' Compensation Reform legislation (S.332) during the final week of the 2007 session. The reform legislation includes the orderly dissolution of the Second Injury Fund, strong language defining repetitive trauma injuries, and the correction of some court cases that have significantly expanded the scope of workers' compensation law in recent years. The legislation also provides a rebuttable presumption against the "50 percent back rule" and stronger fraud provisions for both employers and employees. A new appellate procedure was established, where appeals from the Commission now will be sent to the Court of Appeals instead of the Circuit Courts. The compromise legislation also releases trucking companies from liability in accidents involving independent contractors

(3) *Department of Transportation Reform*

The third piece of the legislative "trifecta" was passage of a bill to reform the state's beleaguered Department of Transportation. After the release of a scathing report from the Legislative Audit Council, tough hearings before the House and Senate, and the departure of the Executive Director, the State Department of Transportation will now be led by a Secretary serving at the pleasure of the Governor, commissioners selected by the General Assembly and the Governor, a detailed internal audit process, and requirements that the commission prioritize road building projects to eliminate the practice and appearance of political favoritism in awarding DOT projects and funds.

(4) *Energy: Hydrogen, Nuclear and Natural Gas*

As the nation buzzes over claims of global warming and increasing energy prices, there has been significant focus in South Carolina on sustainable domestic energy production. The State's electric utilities achieved passage of legislation to stabilize electricity rates while helping to finance the permitting and construction of new nuclear and coal fired power plants (S. 431). The General Assembly adopted a joint resolution creating a committee to study the feasibility of deep water natural gas production in the Outer Continental Shelf in South Carolina's coastal waters (H. 3828). Lawmakers created a Hydrogen Infrastructure Development fund to encourage research and development on Hydrogen Fuel Cell technologies (S. 243). They also provided funding for the 2008 National Hydrogen Association Conference. The forum will be hosted by the University of South Carolina, which is home to the nation's only National Science Foundation Industry/University Cooperative for Fuel Cells.

(5) *School Choice: Public, Private, Both or Neither*

Among the most polarizing issues to come before the General Assembly in recent years, the School Choice and School Voucher debate was extremely heated once again this year. Proponents of the so-called "Put Parents in Charge" initiative put forth a modified plan and inched ever closer to success in their efforts to provide private school vouchers for students in failing public schools but still came up short of passage in the House. Opponents of the private school vouchers, led by new State Superintendent of Education, Dr. Jim Rex, pushed an alternative choice plan allowing open enrollment in public schools.

While the Open Enrollment bill was adopted by both the House and the Senate, in the end it did not have the requisite support necessary to overcome a veto by Governor Sanford – in large part due to fear that it would all but end the debate over private school vouchers.

With strong opinions among proponents on both sides – and the state's abysmal 53% high school graduation rate that begs for fresh solutions – this debate is certain to continue into the next session, perhaps with some of the compromise that was floated during Senate consideration of the Open Enrollment bill. In any case, both sides are in agreement that options need to be made available to parents of students in failing schools – how that is achieved remains a question for next year.

Looking Ahead – The 2008 Legislative Session

The second year of the two-year Legislative session is likely to be as contentious as the first. With a laundry list of priority items on the agenda and the entire membership of both the House and Senate up for election next November, the tenor of debate is likely to be highly politicized. Battles between the General Assembly and the Governor are not likely to wane, increasing the likelihood of a "Showdown" over the budget or other key initiatives.

Because legislators can take up unfinished business where they left it at the end of the 2007 Session, several issues will automatically be at the forefront of the debate starting in January. Our picks for the "Top Five" issues before the 2008 General Assembly are:

(1) *Immigration Reform*: With national attention focused on illegal immigration, 17 proposals were introduced in South Carolina during the 2007 Session. At the end of the Session, one bill had been vetted through both the House and the Senate Committee process and was set for special debate in the Senate. Look for this proposal to be among the first bills out of the box in 2008.

(2) *Cigarette Tax Increase*: The House passed a 30 cent per-pack increase in cigarette taxes this year – a number that increased to 45 cents in the Senate before the proposal ran out of time. With South Carolina's cigarette tax being the lowest in the nation and a push to provide funding for smoking cessation and children's health initiatives, this bill is likely to be back at the top of the priority list early next year.

(3) *School Choice*: With the 2007 veto of the public school open enrollment bill and a close vote in the House on private school vouchers, this issue is sure to be a hot topic again next year. Both sides are entrenched but still shy of the requisite support needed to achieve success. This could ultimately lead to a compromise – or another year of heated election battles leading up to November 2008.

(4) *Statewide 4-year-old Kindergarten*: The state's two-year 4-K Pilot program for at-risk students will have been completed at the end of the next legislative session, leaving many Legislators hopeful they can expand the program for at-risk children statewide. Both House and Senate proposals are already on the table and should be a priority in the coming session.

(5) *Judicial Elections*: While the election of judges has been a contentious issue in years past, it has been common practice for those races to remain largely an issue for the electing legislators and not for the interests represented in the State House Lobby. All of that changed in 2007 when a handful of independent entities expended an unprecedented amount political capital reportedly promoting the unsuccessful candidacy of an Appeals Court Judge seeking election to the State Supreme Court. With elections to fill two likely vacancies on the Supreme Court, in addition to a vacant seat on the Court of Appeals, onlookers are curious to see whether the involvement of outside interests was a one-time "trial balloon" or the first step toward setting a precedent of third party activity on the part of future judicial candidates. The vacancy on the Court of Appeals was created when Justice Don Beatty was elected by the General Assembly as the newest member of the South Carolina Supreme Court.

Estate Planning Tips

- 1) Special estate planning should be done for beneficiaries of your estate with special needs to prevent disqualification of government benefits.
- 2) Your original will should also name guardians for minor children.
- 3) In South Carolina, your Personal Representative does not automatically have the power to sell real estate without a court order unless the will has a specific powers clause that addresses the power to sell assets.
- 4) There is no obligation to leave an inheritance to your children so do not leave them \$1.00 to acknowledge them in the will.
- 5) In South Carolina, a surviving spouse has a right to file an elective share to inherit one-third of his/her spouse's probate estate. To properly address this issue, have your spouse waive their right to an elective share. This is most important for individuals with children from a first marriage who are interested in taking care of children.

NEWS

Births

Douglass and **Mary Margaret Hyatt** welcomed Hughes Shingler Hyatt into their family on May 2nd.

DeAndrea and **Steve Benjamin** welcomed Jordan Grace Benjamin into their family on May 16th.

Professional Appointments/Awards/Recognitions

Jay Courie was named Chair of the EdVenture Children's Museum and Vice Chair of the Hammond School Board of Trustees.

Mary Margaret Hyatt was elected Secretary of the South Carolina Bar Health Care Law Section for 2007-2008.

Angela Kirby was elected to the Board of Directors of the Township Auditorium.

Steve Benjamin delivered the Midlands Tech Commencement Address on May 10, 2007. He also spoke at The Electric Cooperatives of South Carolina Summer Conference in Savannah, Georgia on June 5th.

DID YOU KNOW?



Mike LeFever, a member of MG&C Consulting, serves as an assistant coach on the Dreher High School softball team and is head coach of the Capital City Shockers, a 16U girls fastpitch softball travel team.

Websites of Interest

CHECK THESE OUT!

www.mgclaw.com

Come visit our new website! MG&C recently redesigned the site to improve client service. Clients can now register for events and seminars online, find attorneys more quickly, and navigate the site more easily.

www.dol.gov/opa/aboutdol/laborday.htm

Check out this website to learn more about the history of Labor Day. This year, Labor Day is celebrated on September 3rd.

www.401k.org/index.html

Visit the Profit Sharing / 401k Council of America's website to learn more about retirement plans and reaching your retirement goals by using their useful tools and calculators.

mgclaw.com or mgcconsulting.com

Check out our newsletter online

mgclaw.com

919-719-8200
RALEIGH, NC 27622
PO Box 30516
Suite G-02
5400 GLENWOOD AVE.

RALEIGH

864-239-4000
GREENVILLE, SC 29602
PO Box 2980
Suite 300
75 BEATTIE PLACE
GREENVILLE

843-576-2900
CHARLESTON, SC 29402
PO Box 877
Suite 200
78 WENTWORTH STREET
CHARLESTON

704-643-6303
CHARLOTTE, NC 28230
PO Box 30307
Suite 700
6302 FAIRVIEW ROAD
CHARLOTTE

803-779-2300
COLUMBIA, SC 29211
PO Box 12519
Suite 300
700 GERVAIS STREET
COLUMBIA