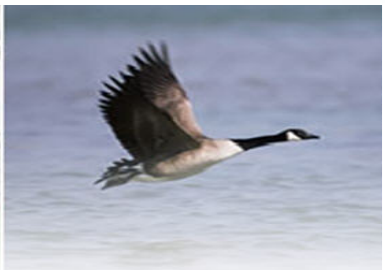
THE NC CONNECTION

AN INVESTORS TITLE COMPANY PUBLICATION

Title Insurance Coverage for Interest Rate Swap Agreements

by Tonya Mason, Esq., VP-Commercial Services

Click here for Tonya's Bio

INNOVATIVE BY INSTINCT

In the new economy, creativity in commercial real estate financing may be the spark needed to generate transactional activity. Interest rate swap agreements can be a borrower's way to leverage risk involved with a variable rate transaction. Generally, interest rate swap agreements are used when interest rates may unexpectedly rise due to volatility and uncertainty in the market.

> **"Interest rate swap agreements can be a borrower's way to leverage risk..."**

In order to address issues posed by insuring deeds of trust or mortgages involving interest rate swap agreements, the American Land Title Association promulgated two (2) new endorsements in 2010: the ALTA 29-06 Endorsement (Interest Rate Swap Endorsement – Direct Obligations) and the ALTA 29.1-06 Endorsement (Interest Rate Swap Endorsement – Additional Interest). The endorsements are designed to be used either on or after the date of the lender's title insurance policy. If the endorsement is dated after the title insurance policy, the title must be updated accordingly, and any new exceptions must be listed on the endorsement.

In the ALTA 29-06 Endorsement, the title insurance company gives affirmative coverage to the insured lender if the insured deed of trust or mortgage is invalid, unenforceable, or lacks priority because of the repayment of the swap obligation at the date of the endorsement. The date of the endorsement must be noted on the ALTA 29-06 Endorsement; in addition, the parties to the interest rate swap agreement must be identified on the endorsement.

The ALTA 29-06 Endorsement does not provide coverage for the following:

- Any rights or obligations created after the date of the endorsement under the interest rate exchange agreement;
- The avoidance of the insured deed of trust or mortgage due to creditors' rights laws;
- The calculation of the amount of the swap obligation as determined by a court of competent jurisdiction;
- The invalidity, unenforceability or lack of priority of the insured deed of trust or mortgage due to any mortgage or intangible tax issues; or
- Any exceptions to title if the date of the endorsement is after the date of the title insurance policy.

In order to give the ALTA 29-06 Endorsement, the title insurance company typically requires receipt and review of the written interest rate exchange agreement between the lender and the swap entity.

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In addition, the deed of trust or mortgage should disclose that it secures an obligatory advance for the swap obligation. Because of North Carolina's future advance statute applying to future obligations, the requisite future advance language should be included in any deed of trust securing a swap obligation for North Carolina property. Due to the complexities involved with interest rate swap transactions, a title attorney should also be consulted as to any other potential requirements before the title insurance company will agree to provide title insurance coverage.

"a title attorney should be consulted as to any other potential requirements..."

The ALTA 29.1-06 Endorsement provides similar coverage to the insured lender as the ALTA 29-06 Endorsement; however, rather than giving coverage as to the swap obligation, the endorsement provides affirmative coverage to the insured lender if the insured deed of trust or mortgage is invalid, unenforceable, or lacks priority because of the repayment of the "Additional Interest" at the date of the endorsement. "Additional Interest" is defined in the endorsement as "the additional interest calculated pursuant to the formula provided in the loan documents secured by the Insured Mortgage at Date of Endorsement for repayment of the Swap Obligation."

In order to give the ALTA 29.1-06 Endorsement, the title insurance company shall make the same requirement that it uses for issuance of the ALTA 29-06 Endorsement with one caveat: the title company shall also require that the loan documents contain an additional interest formula.

If your transaction involves an interest rate swap agreement, it is advisable to obtain the additional affirmative coverage for the insured lender through the ALTA 29-06 endorsements. Be prepared to discuss the specifics of your transaction along with any information concerning the swap obligation with a title attorney. Remember that the ALTA 29-06 endorsements may also be utilized for any post-policy interest rate swap agreements as long as an update of title is performed through the date of the endorsement. If you have any questions or concerns about the applicability of this coverage to your transaction, do not hesitate to contact a title attorney for further direction.

NC FUN FACTS

The World War II battleship 'North Carolina' is permanently berthed on the Cape Fear River at Wilmington. She was saved from the scrap heap in the 1960's by public subscription, including donations of dimes by schoolchildren.

For Want of a Digit, a House Was Lost

By Peter Walther, Claims Administrator

In 2008, John Smith bought a house in a subdivision and gave a $70,000 Deed of Trust to a lender. In 2009, the HOA foreclosed a $4,350 assessment lien and the property was bought by Flip That House, LLC on a bid for that amount. About thirty days later, We Buy Houses, LLC bought the house from Flip for $25,000 and was insured for $90,000, based on the purchase price and the assumed unpaid balance on the DOT.

"...the mailing address...had the wrong zip code..."

Wanting to let the lender know it now owned the house and would like to bring the loan current, We Buy mailed a letter to John asking for the loan number and contact information for the lender. John's response was to file a lawsuit to set the sale aside because he claimed he was not properly served in the foreclosure.

In the foreclosure, the mailing address from the HOA, which was different from the property address, was used by the foreclosure attorney to mail John a Notice of Foreclosure Hearing by registered mail. When it was returned unclaimed, notice was posted on the property and the sale was held and confirmed. In his suit, John claimed, and it was later confirmed, the mailing address that was used had the wrong zip code (off by one digit), and, because of that error, a proper attempt to serve him by registered mail was never made so posting notice to the property was not effective to perfect service on him. John also claimed the property was vacant and he had not been there in months so had not seen the posted notice.

It turned out that even with the incorrect zip code, the letter found its way to the right post office and it was returned from there as unclaimed. It is interesting how John hadn't claimed that he didn't received notice from the post office of the registered letter, (he couldn't remember if he had received the pick up notice from them) only that he hadn't been served because of the incorrect zip code. He also admitted he knew he owed a monthly assessment to the HOA since he had made earlier payments and that if he didn't pay the assessments, the HOA had the right to foreclose. In his deposition John also testified he didn't make the payments because he had lost his job, his tenant had moved out, he hadn't been able to find another and was generally broke.

Mediation was ordered and, after going back and forth, John offered to pay We Buy $34,000 in return for a deed. We Buy had already spoken with Flip who agreed to return the $16,000 profit it made on the sale to We Buy which left We Buy $10,000 short of the $60,000 difference between what it thought its equity in the property was worth and what it was collecting from the others. Since there was no guarantee the Court would find in the insured's favor, and the cost of litigating the issue would probably cost more than the $10,000, Investors paid the insured.

The moral of the story is because of one wrong digit, the insured didn't get the property it wanted, the owner paid $34,000, Flip lost its profit and Investors paid $10,000 and attorney's fees to defend the Insured.

All names have been changed to protect the privacy of all parties involved.

Click here or visit www.invtitle.com/contact us/ for information regarding the claims process.

MEET OUR TITLE ATTORNEYS

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Charity was born and raised in Marion, North Carolina. She attended the University of North Carolina at Chapel Hill as a Morehead Scholar, where she received a Bachelor of Arts degree in History with highest distinction in 2001 and was a member of Phi Beta Kappa. She returned to the University of North Carolina at Chapel Hill and earned her Juris Doctor in 2004. Prior to joining Investors Title, Charity was an attorney with a real estate firm in Asheville, North Carolina, where she focused on residential real estate closings and real property issues. She is a member of the North Carolina State Bar and the Real Property Section. Charity joined the ITIC Legal Department in 2007 and supports the North Carolina approved attorneys and the ITIC North Carolina branch offices. She is also a contributing author to Investors Title newsletters and works with the organization of many of the Investors Title seminars, including the annual ITIC Fall Gathering.

ALTA ENDORSEMENT 23-06

ALTA ENDORSEMENT FORM 23-06
(CO-INSURANCE ENDORSEMENT) (10/16/08)

Attached to and made a part of Issuing Co-Insurer's Policy No. _____ ("Co-Insurance Policy"). Each title insurance company executing this Co-Insurance Endorsement, other than the Issuing Co-Insurer, shall be referred to as a "Co-Insurer." Issuing Co-Insurer and each Co-Insurer are collectively referred to as "Co-Insuring Companies."

1. By issuing this endorsement to the Co-Insurance Policy, each of the Co-Insuring Companies adopts the Co-Insurance Policy's Covered Risks, Exclusions, Conditions, Schedules and endorsements, subject to the limitations of this endorsement.

Co-Insuring Companies	Name and Address	Policy Number [File Number]	Amount of Insurance	Percentage of Liability
Issuing Co-Insurer			$	
Co-Insurer			$	
Co-Insurer			$	
Co-Insurer			$	
Aggregate Amount of Insurance			$	

2. Each of the Co-Insuring Companies shall be liable to the Insured only for its Percentage of Liability of: (a) the total of the loss or damage under the Co-Insurance Policy, but in no event greater than its respective Amount of Insurance set forth in this endorsement; and (b) costs, attorneys' fees and expenses provided for in the Conditions.

3. Any notice of claim and any other notice or statement in writing required to be given under the Co-Insurance Policy must be given to each of the Co-Insuring Companies at its address set forth above.

4. Any endorsement to the Co-Insurance Policy issued after the date of this Co-Insurance Endorsement must be signed by each of the Co-Insuring Companies by its authorized officer or agent.

5. This Co-Insurance Endorsement is effective as of the Date of Policy of the Co-Insurance Policy. This Co-Insurance Endorsement may be executed in counterparts.

The ALTA 23-06 Endorsement is designed to be used when two (2) or more title insurance policies are issued at the client's request for a single transaction. All co-insuring title insurance companies must be listed on the endorsement along with their respective issued policy numbers, amount of insurance provided, and the percentage of overall liability for the transaction. In order to be effective, each co-insuring title insurance company must execute the endorsement.

Seagraves v. Seagraves

To determine whether a testator was subjected to undue influence, courts look to several factors that, taken together, must "'satisfy a rational mind of its existence.'" The North Carolina Court of Appeals made that observation in a case that developed after Pauline Seagraves died in August 2006. Before her death, she executed a number of deeds that conveyed various amounts of her real estate to one of her sons (Donald) and his wife. She also executed a Will in September 2004 that significantly changed the distribution of her property after her death. When Seagraves died, her other three children filed suit, arguing that she made many of her decisions because of Donald's undue influence. Although there were a number of procedural issues that were also addressed in this case, the primary question was whether Seagraves had testamentary capacity. To resolve that issue, the appellate court looked to several factors—among them, her age, her availability to see other individuals, and whether her bequests named unrelated beneficiaries. When taking all of those factors into consideration, the Court said in its 31-page opinion, "Caveators have not forecast any relevant, admissible evidence [that]...Pauline was not acting of her own free will...."

--*Seagraves v. Seagraves,* No. COA09- 302, 402, N.C. Ct. App. 8/17/10

The above information is for information purposes only and does not constitute legal advice.