



LEGAL COMPASS

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NATIONAL BANKS CANNOT FORUM SHOP NC COURTS



Jimmy R. Summerlin, Jr.

The North Carolina Supreme Court recently dismissed and denied the Notice of Appeal and Petition for Discretionary review of TD Bank, NA, seeking review of the Court of Appeals decision holding that national banks are “foreign corporations” for purposes of venue in North Carolina courts. In so doing, the Court effectively held that national banks may not forum shop for courts convenient to the bank or its counsel.

In October, 2012, TD Bank, NA filed suit in Buncombe County against a limited liability company and its two guarantors, all of whom resided in Catawba County. TD Bank, a National Association organized and existing under the National Bank Act and supervised by the Office of the Comptroller of Currency, sued the borrower and its guarantors in the Buncombe County Superior Court for sums claimed due on a promissory note it held as successor by merger with Carolina First Bank, a South Carolina corporation. The defendants timely moved to change venue of the action as a matter of right to Catawba County. Despite finding that TD Bank was a National Association with principal offices in the States of Maine and New Jersey and that the defendants resided in Catawba County, North Carolina, the trial court found that venue was proper in Buncombe County and denied defendants’ motion to change venue.

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Young, Morphis, Bach & Taylor, LLP

Young, Morphis, Bach & Taylor, LLP is a full-service law firm located in the First Lawyers Building in downtown Hickory, North Carolina. Established in 1949, our firm serves clients throughout North Carolina and offers expertise in a broad range of practice areas including bankruptcy, business and corporate law, civil litigation, collections, estate planning and probate, real estate, tax, traffic matters, wills and trusts, homeowners’ associations, guardianship and special needs law, local governments, and non-profit organizations.

Legal Compass is published by Young, Morphis, Bach & Taylor, LLP. We hope that it will give you useful information and alert you to changes in the law; however, *Legal Compass* is not intended as legal advice, as every situation is different. If you have a colleague or client who would benefit from receiving a copy of *Legal Compass*, please let us know.

“FARM TO FORK”

Must Know Legal Tips for Farm & Food Business Operations

Our firm has been advising many clients on legal issues that arise from being involved in the “Farm to Fork” business and we also have received questions from clients about the challenges regarding organic farming, insurance claims for crop and livestock as well as business succession planning for the family farm. Many participants who are actively engaged in food and farming issues have looked to the Center for Environmental Farming Systems (“CEFS”), which is a partnership between N.C. State University, N.C. Agricultural and Technical State University and N.C. Department of Agricultural and Consumer Services. The mission for the CEFS is to develop and promote food and farming systems that protect the environment, strengthen local communities and provide economic opportunities in North Carolina and beyond.

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YMB&T Lawyers

Wayne M. Bach	Jimmy Summerlin, Jr.
Terry M. Taylor	Timothy D. Swanson
Paul E. Culpepper	Henry S. Morphis
Kevin C. McIntosh	Jordan L. Faulkner

We have been here for generations, and will continue to be here in the future to help counsel you and plan for all of your legal needs.



Henry S. Morphis

If you do not use a computer stop reading now—this article does not apply to you. If you do use a computer, then ask yourself just how many things you currently use a computer for. Do you have family pictures on a memory card or on a photo web site like Flickr or Snapfish? Do you pay your bills electronically or manage your bank account on-line? Do you shop at Amazon, E-Bay or any other on-line retailer? Do you use social media or on-line dating sites or have a blog? How do you get your news or check the weather? More and more we are doing these things with the use of a computer. The average person today has twenty-six on-line accounts and ten different passwords.

What happens to this information if you die? What happens to this information if you are alive but not able to manage your affairs? What happens if you are the only one who knows the workings of your personal affairs? When we help a client administer an estate (whether for a deceased individual or for an incapacitated/incompetent individual) we recommend to our clients that they go through the person's desk and mail in order to determine where the person was doing business. If a person keeps all their important information in a desk or filing cabinet this usually works. Recently, however, we had a client whose loved one did most of their work on a computer. The loved one lived alone, ran a small business and none of their family knew the status of the person's affairs. When the loved one was killed in an accident, the family (after qualifying to open the

person's estate) had to pay a third-party to break into the person's computer.

Even after obtaining access to the computer, the family is still working to obtain access to all of the person's electronic information, such as e-mails, that would disclose information important to the estate. To give you an example of what a family might face, Yahoo's *Terms of Use* states under a heading titled *No Right of Survivorship and Non-Transferability* that upon accepting the terms of use, "[y]ou agree that your !Yahoo account is non-transferable and any rights to your !Yahoo ID or contents within your account terminate upon your death." Google takes a different approach, stating in its *Terms of Service* that "[s]ome of our Services allow you to submit content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours." Neither of these policies may be very helpful if, for example, an estate wants to sell a business e-mail address.

Currently, only three states have laws that provide default answers to the above questions. In our most recent General Assembly session, a bill was introduced in an attempt to address some of these issues, but the bill was not passed. Until a default statutory scheme is adopted, people have to plan to allow others to have access on their own. The key to minimizing disruptions and losing information is taking the time to read what you are agreeing to with various internet companies and then planning what to do if something does happen. Powers of attorney and wills can be modified to specifically address digital assets. If this is something that you may need help with, give us a call and we will be happy to assist you.

NATIONAL BANKS CANNOT FORUM SHOP *(Continued from Page 1)*

The defendants disagreed and appealed to the Court of Appeals asserting that TD Bank was a "foreign corporation" in that it was neither formed under the laws of the State of North Carolina, nor an entity formed in another jurisdiction that maintained a registered office pursuant to a certificate of authority granted from the NC Secretary of State. Accordingly, the defendants argued, venue was required to be moved to Catawba County, where the defendants resided.

The Court of Appeals agreed, finding that TD Bank was "a corporation created by the National Bank Act" and, thus, was a "foreign corporation" for venue purposes. As a foreign corporation, TD Bank was a "non-resident" for venue purposes. Accordingly, venue was proper in Catawba County and the trial court was reversed and the case transferred to Catawba County.

The Court's decision is an important victory for North Carolina residents in that it provides a level of protection from forum shopping by non-local national banks and associations such as TD Bank and requires these banks to bring actions where the defendants live, not in other counties that may be many miles and hours away from the defendants' homes. The decision, however, would not impair the ability of national banks with registered offices in North Carolina (such as Bank of America and CommunityOne Bank) to bring suits in other counties. The Court's opinion is reported at *TD Bank, NA v. Crown Leasing Partners, LLC*, ___ N.C. App. ___, 737 S.E.2d 738 (N.C. App. 2012), review denied and appeal dismissed by *TD Bank, N.A. v. Crown Leasing Partners, LLC*, 2013 N.C. LEXIS 554 (N.C., June 12, 2013). Young, Morphis, Bach & Taylor partner, Jimmy R. Summerlin, Jr. was counsel for the defendants.

One question we often get asked about is: "Do North Carolina laws require either Condominium Associations or other Owners' Associations to establish a Reserve and/or conduct a Reserve/Capital Improvements study?" Currently, North Carolina laws do not require this, but many lenders and appraisers are now asking Associations for a copy of their current year's budget and a verification of the amounts held in a reserve account for major replacements.

Another issue we are frequently asked about is: "What should be included in the Minutes of an HOA Board Meeting? Does every item on the Agenda have to be addressed in the Minutes?" Adopted Minutes are the official record of actions taken at a meeting. For that reason, well written Minutes can be invaluable. In the event of a dispute, Minutes are the best proof of the precise wording of a Motion, or whether a proposal was adopted by the Board.

The governing documents for HOAs and Condominiums generally don't address what must be in the Minutes. The laws that govern Community Associations, the North Carolina Condominium Act and the North Carolina Non-Profit Corporation Act, give little guidance as well.

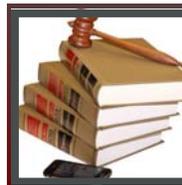
State law does require that Membership and Board Meetings of HOAs and Condominium Associations must be conducted in "accordance with the most recent edition of *Robert's Rules of Order*." The eleventh edition of *Robert's* was published in 2011 and gives excellent advice on Minutes. The short version of the answer to the question is that Minutes are a record of what was done at a meeting, and not verbatim what was discussed. There is no need to summarize debate—once a meeting ends, it

does not matter what Members said. It does not even matter how each Member felt about a specific Motion. What is needed, however, is the exact wording of each Proposal and whether it was adopted or rejected.

Generally, Minutes should include:

1. A first paragraph stating the type of meeting, the name of the organization, the date, time and location of the meeting, whether the President and Secretary were present, and whether the prior Minutes were read and approved;
2. A separate paragraph for each motion/proposal including final wording and disposition; and
3. A final paragraph that states the time of adjournment.

Finally, another question that we are often asked is: "After a property has been foreclosed on, when does the purchaser at the foreclosure sale become obligated to start paying the dues assessed by the Association and the Restrictive Covenants?" The most recent changes to the Planned Community Act, that went into effect on October 1, 2013, states that the buyer of a piece of property at a foreclosure, often the lender, becomes responsible for the dues after ten days, whether the deed to the purchaser has been transferred or not. The law, however, is not retroactive so it will not apply to past foreclosures.



To receive our Newsletter via e-mail, please send your request to Newsletter@hickorylaw.com

UPCOMING 2014 LLC STATUTORY CHANGES

For our Business Clients, be on the look out for an Article in our next newsletter, which will provide an overview of the new North Carolina Limited Liability Company Act that takes effect on January 1, 2014.

The New LLC Act, to be set out in Chapter 57D of the General Statutes, will replace the existing Chapter 57C of the General Statutes. The New Act provides certain transition rules designed to minimize the impact on existing limited liability companies. The core principles of the New Act make it clear that the Statute intends for an LLC's Operating Agreement to control the rights and duties of the LLC's owners, and any other party to the Agreement. The purpose of the New Act is to provide a flexible framework under which one or more persons may organize and manage one or more businesses as they determine to be appropriate with minimum prescribed formalities or constraints. It is the policy of the New Statute to give the maximum effect to the principle of freedom of contract and the enforceability of operating agreements.

You are encouraged to forward copies of your existing Operating Agreements to one of our business attorneys to have them review whether or not it may be necessary for you to make changes to your Operating Agreement to take advantage of the flexible principles now allowed under the New Act.

“FARM TO FORK” (Continued from Page 1)

In April of this year, Catawba County released its Farm and Food Sustainability Plan with the main objective to focus on agricultural economic development to recruit younger farmers and provide tools for farm transitioning in the County. The Plan also includes efforts to ensure local food sustainability by developing a robust “Farm to Fork” initiative where local food producers line up with local food distributors and restaurants to ensure the availability of fresh, locally produced food within Catawba County. For our farming and agricultural business clients, we usually offer a series of tips to help them get started assessing their needs in making sure their plans are properly in place to promote this initiative. Those tips are as follows:

1. Review your agricultural production contracts including farm leases, farm machinery leases and animal leases to make sure they are in conformance with North Carolina law.
2. Make sure your leases, deeds and timber contracts have correct legal descriptions from an up-to-date survey and proper Memorandums of Lease recorded to ensure the current boundaries are listed on these important documents.
3. Have a succession plan in place and review the terms at least bi-annually with your attorney to make sure any gifting and/or charitable easement considerations have been taken into account.
4. If organic farming is important to your business operation, make sure you have the proper certifications and labels as well as develop appropriate business strategies and risk management contract clauses.
5. Review your Buy/Sell Agreements and make sure you have adequately accounted for all of the “Ds” (Death, Disability, Divorce, Disaster, Disagreement and Disengagement). Many folks do not realize that there are currently over 130 farmers in Catawba County and the impact of farming and food production is very important on our local economy.



Terry M. Taylor

**If you are interested in this article, please contact
Terry M. Taylor at (828) 322-4663.**

AROUND THE OFFICE: Partner Inducted into NC General Practice Hall of Fame#



Charles R. Young, Sr. with his family
Left to Right: Heather Hancock, Bert Young, Elaine
Young, Charles R. Young, Sr., and Roger Young

Earlier this year, Charles R. Young, Sr., a retired partner of Young, Morphis, Bach & Taylor, LLP, was inducted into the General Practice Hall of Fame by the North Carolina Bar Association. On Thursday, June 20, 2013, a ceremony at the Grove Park Inn honored this year’s Hall of Fame Inductees.

Young has resided in Hickory, North Carolina since the age of nine and has over forty years of legal experience. Although he practiced in many areas, Young made his mark on the legal profession primarily in the field of real estate. Young’s accomplishments rank him among the State’s legal elite, although his most

endearing professional characteristic is that he has a deep commitment to not only the betterment of the practice of law in North Carolina, but also to increasing the congeniality and camaraderie among fellow attorneys.

Young gives much of the credit for his accomplishments to the loving support of his wife, Elaine, and his children, the Rev. Bert Young of Bladenboro, North Carolina, Heather Young Hancock of Hickory, North Carolina and Roger Young of Hickory, North Carolina. Young also loves spending time with his nine grandchildren.

Young is deeply committed to helping others, helping his profession, and helping those in his community.



Celebrating at the June 20th Reception; Left to Right:
Kevin C. McIntosh, Terry M. Taylor, Charles R. Young,
Sr., Jordan L. Faulkner, and Jimmy R. Summerlin.