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My Note and Deed of Trust Have Different Dates. Do I Have a Problem?

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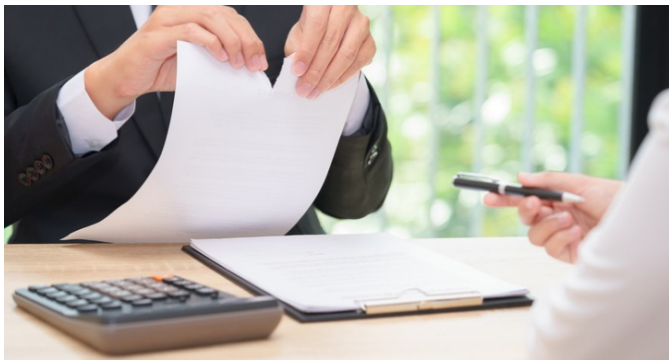

Consider this scenario: You loan money to a borrower.

You intend to secure the loan with a deed of trust encumbering real property. Your borrower signs a promissory note dated November 7, 2006. But your deed of trust is dated October 7, 2006. You don't re-date the promissory note. Worse still, the deed of trust secures a "promissory note of even date herewith." But there is no promissory note of "even date herewith" – October 7, 2006. Do you have a valid deed of trust you can foreclose if your borrower defaults on the loan?

In In re: SDS Investments, LLC, a recent unpublished decision with these facts, the North Carolina Court of Appeals held that the deed of trust was valid and the lender had the right to foreclose it. The general rule in North Carolina is that a deed of trust is invalid if it does not properly identify the secured obligation. But the Court held that a discrepancy between the date of the Note and the Deed of Trust does not, *per se*, invalidate the Deed of Trust. The Court can consider all identifying information in the deed of trust, and other competent evidence, to determine if the obligation is properly identified.

In SDS Investments, the Court noted that the deed of trust and promissory note were both acknowledged by the notary public on the same date. Although not discussed in SDS Investments, if the dollar amount secured by the deed of trust matched the loan amount reflected on the note, this would be strong evidence linking the two documents. Beyond the note and deed of trust, a signed loan commitment letter showing an intention to secure the loan with the property in the deed of trust would be additional evidence.

The decision protects lenders from minor mistakes or sloppiness in their loan documents, so long as they can provide competent evidence that the deed of trust was meant to secure the note. It suggests that Court will focus more on the intent of the parties than perfectly-prepared loan documents. But lenders should take note this matter was heard by the Catawba County Clerk of Court, a Superior Court judge, and the North Carolina Court of Appeals. The second and third levels of review – and the time and expense associated with them -- could have been avoided had the lenders double-checked the dates on their loan documents at closing.

In other words, this decision should not encourage poor closing hygiene. Loan closings routinely are scheduled, delayed, and re-scheduled – often multiple times. It is not uncommon for lenders – through inadvertence, fatigue, or even indifference – to fail to update all their loan documents before closing. To make matters worse, many form loan documents contain the phrase "of even date herewith," an awful bit of legalese that invites ambiguity. If a loan goes into default, you want to have a "clean" set of loan documents all properly executed and all bearing the same date. Lenders should require their loan officers and closing

counsel double-check the dates of their documents as part of their loan closing checklist. Otherwise, you invite the arguments (and litigation expense) that the lenders in SDS Investments had to overcome before they could enforce their deed of trust.

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