SECURITIES OFFERINGS—N.C. App.: TICs are securities under North Carolina law, NASAA argues**,** (Oct. 17, 2017)

By John M. Jascob, J.D., LL.M.

NASAA has urged the North Carolina Court of Appeals to uphold a trial court's ruling that tenancy in common (TIC) interests were securities under North Carolina law. Although disclaiming any interest in the outcome of the claims underlying the dispute, NASAA filed a joint amicus brief with the North Carolina Secretary of State, arguing that the case's foundational jurisdiction issues directly implicate the Secretary of State's ability to enforce the North Carolina Securities Act (*NNN Durham Office Portfolio 1, LLC v. Grubb & Ellis Co.*, October 16, 2017).

TICs are securities. The trial court had held that the exercise of control over the enterprise by the tenants-in-common after the collapse of the defendants' business plan did not prevent the investment from qualifying as a securities transaction. Although agreeing with this conclusion, the amici urged the North Carolina Court of Appeals to go further and reach the ultimate question left open by the trial court, namely, whether the TICs at issue fell within the definition of a security under North Carolina law.

The amici observed that the Secretary of State has adopted by rule a definition of the term "investment contract" that closely parallels the U.S. Supreme Court's widely-followed *Howey* test. The TICs offered by the defendants were securities, the amici argued, because they constituted an investment in a common real estate enterprise with an expectation of profit to be derived from the defendants' management of that enterprise. Other courts considering this question have also agreed that TICs are securities, and construing the North Carolina Securities Act in a similar fashion would promote uniformity with other jurisdictions and advance the legislature's policy goals of protecting investors and the state's capital markets, the amici stated.

Standing under the North Carolina Securities Act. The amici also urged the appeals court to reverse the trial court's ruling that only those plaintiffs who actually received or accepted an offer in North Carolina could bring claims under the North Carolina Securities Act. The amici noted that North Carolina is one of 33 states that have adopted language from the Uniform Securities Act of 1956 providing for territorial jurisdiction when an offer to sell securities "originates from" the state. Although few courts have construed the "originates from" language, three precedents have been established:

1. *Newsome* test, which holds that an out-of-state offer "originates from" the state if "any tion of the selling process" occurred in-state (*Newsome v. Diamond Oil Producers*, Okla. t. 1983);
2. *Lintz* test, which holds that an out-of-state offer originates from a state if there is a ritorial nexus" between the extraterritorial offer or sale and the originating state (*Lintz v. rey Manor Ltd.*, W.D. Va. 1985); and
3. *Lundberg* test recently adopted by the Kansas Court of Appeals, which unifies these two roaches (*State v. Lundberg*, Kan. App. 2017).

The amici contend that the trial court erred by failing to consider any of these relevant precedents. The amici posited that the hybrid *Lundberg* test provides the appropriate test to apply when assessing territorial jurisdiction because this standard will keep North Carolina law uniform with the law of all other jurisdictions that have considered this question. If the trial court's ruling were to stand on this point, the amici fear, the legislature's intent of safeguarding the integrity of North Carolina's securities markets would be subverted and the enforcement efforts of the Secretary of State and other state securities regulators could be impeded.

The case is No. COA17-607.

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Companies: NNN Durham Office Portfolio 1, LLC; NNN Durham Office Portfolio 2, LLC; Grubb & Ellis Co.; Grubb & Ellis Realty Investors, LLC; Grubb & Ellis Securities, Inc.

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