

Primer - FAQs by Out of State Clients Relating to Florida Real Estate

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Nuances for the Out-of-State Client Relating to Legal Opinions, Title Insurance, Mortgage Loan Related Taxes, Deed Taxes, Sales Taxes on Rent, Closing Costs, and Foreclosure Time Periods

This brief summary addresses some of the most common questions we receive regarding Florida law or practice in complex commercial Florida real estate and financing transactions. The information presented provides a snapshot as of the date specified, and is somewhat abbreviated. As such, it runs the risk of being misleading, incomplete, or outdated when applied to the facts of any particular transaction. For these reasons, it is recommended that you consult with Florida counsel before relying on, or applying, the information contained herein.

1. Legal Opinion Practice. Florida legal opinion practice is much like many other states' legal opinion practice. One nuance is that the Florida Bar adopted its own "Report on Opinion Standards" which is sometimes incorporated by reference by law firms rendering an opinion on Florida real estate or financing transactions. There is nothing inherently problematic with the "Florida Report" but as a matter of principle, non-Florida lenders are often unwilling to accept the incorporation of this Report into opinions being issued to them. Unfortunately, since many Florida lawyers are also unwilling to deviate from this practice of incorporating the "Florida Report" into their opinions, this can be a real point of contention and often arises at the "eleventh hour". To avoid last minute headaches, opinion requirements ought to be clarified as early as possible in the transaction.

2. Title Insurance. The title insurance industry in Florida is heavily regulated by statute. Attorneys in a Florida real estate or finance transaction often act as "issuing agent" for the title insurance issued in connection with such transactions. While the title insurance product actually issued and the cost of the same should be no different whether issued by an attorney agent or directly by the title company, non-Florida parties are often skeptical of this practice, especially since there are apparent conflicts of interest when a Florida attorney is acting in dual capacities in a transaction. Despite these conflicts, the practice in Florida is not likely to change any time soon since the issuance of title insurance is such a lucrative practice for attorney agents. At a minimum, any transaction party paying for title insurance should inquire about the "Butler rebate", whether the Policy is being issued by an agent or the underwriter itself. The Butler

rebate will result in a significant savings (i.e. as much as close to 70 percent) on the title premium. While in the past this type of rebate had only been available to title agents, it is now available to any purchaser of title insurance as a result of the Florida Supreme Court decision (*Chicago Title Insurance Co. v. Butler*, 2000 WL 1535354 (Fla. 2000)). It has been my experience that a Butler rebate is frequently not offered by title companies unless specifically requested.

3. Title Insurance Endorsements Available in Florida. The title insurance industry is strictly regulated in Florida. As a result, endorsements or affirmative coverages which are commonplace in other states are not generally available in Florida. More specifically, unless permitted by the Florida title insurance rules, endorsements and affirmative coverages are generally not available without approval from the Florida Department of Insurance. A partial list of the permitted endorsements in Florida includes the ALTA 4 Condominium Endorsement, ALTA 5 Planned Unit Development Endorsement, ALTA 6.1 and 6.2 Variable Rate Endorsements, ALTA 7.0 Manufactured Housing Endorsement, ALTA 8.0/8.1 Environmental Protection Lien Endorsements, Revolving Credit Endorsement, Florida Form 9 Endorsement, Navigational Servitude Endorsement, Shared Appreciation Endorsement, Additional Interest Endorsement, Option Endorsement, Foreign Currency Endorsement, Assignment of Mortgage Endorsement and Balloon Mortgage Endorsement. Most endorsements are available in a commercial transaction for a nominal fee but the cost of the Florida Form 9 Endorsement and Navigational Serviceable Endorsement are 10 percent of the promulgated premium. Specifically prohibited endorsements in Florida include the Doing Business Endorsement, Non-Imputation Endorsement, Access Endorsement, Location Endorsement, Expanded Insured Endorsement, Zoning Endorsement, and Usury Endorsement.

4. Mortgage Related Taxes. There are two taxes which are commonly potentially payable in connection with the closing of a loan secured by a Florida mortgage. They are the Florida documentary stamp (“promise to pay”) tax and the Florida non-recurring intangible personal property tax. The Florida documentary stamp (“promise to pay”) tax is due in the amount of \$.35 on every \$100 (or fraction thereof) of indebtedness secured by a mortgage on Florida real property. The Florida non-recurring intangible personal property tax is due in the amount of \$.002 times the amount of such indebtedness, subject to the limitation that the intangible tax base cannot exceed the value of the Florida real property encumbered by the mortgage. However, there are methods for limiting the amount of the aforesaid taxes, based on the current interpretation of the relevant statutes by the Florida Department of Revenue. One method for limiting taxes, available in a transaction in which the indebtedness secured by the Florida mortgage is also secured by real property located outside the State of Florida, is by means of allocation formulas for both the documentary stamp tax and the non-recurring intangible personal property tax. If the allocation method does not work effectively to reduce the tax liability given the relative values of the properties inside and outside of Florida, it is possible to limit the taxes due on the Florida mortgage by limiting the recovery available under the Florida mortgage to an amount that approximates the amount the lender can reasonably expect to recover upon enforcement of the Florida mortgage. For purposes of the above discussion: (i) We have assumed that the promissory note and any other written obligations for the payment of money secured by the Florida mortgage will be executed and delivered outside the State of Florida (if not, documentary stamp taxes will be

due on the total amount of the obligations evidenced thereby without reduction under the methods described above). (ii) We have assumed that the property encumbered by the Florida mortgage comprises fee estates. In the event that the property encumbered by the mortgage comprises a leasehold estate, the nonrecurring intangible personal property tax is generally not due in connection with the Florida mortgage, unless and except to the extent that the lease in question vests ownership of improvements in the name of the borrower/tenant, in which case the maximum nonrecurring personal property tax base will be the value of such improvements. (iii) We have assumed that the indebtedness secured by the Florida mortgage is a direct and absolute obligation, such as pursuant to a promissory note, rather than an obligation of a contingent nature, such as a guarantee or letter of credit reimbursement obligation. In the event that the secured indebtedness arises pursuant to a guarantee or other contingent instrument, pursuant to West Flagler Associates, et al v. Florida Department of Revenue, decided on March 15, 1994 by the Third District Court of Appeals of Florida, a Florida mortgage will not be subject to the nonrecurring intangible personal property tax unless and until the guarantee or other contingent obligation secured by the Florida mortgage becomes due. Finally, this summary does not address all of the structuring permutations available in connection with these issues. It also does not address issues related to insurance loans. It is once again suggested that you consult with Florida counsel to assure that the approach actually taken in any transaction is reflected properly in your mortgage and related documents.

5. Deed or Transfer Taxes. In addition to the Florida documentary stamp taxes which are due with respect to notes and other promises to pay, a documentary stamp tax is imposed on “deeds, instruments, or writings whereby any [interest in Florida] . . . real property [is] granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser.” In all Florida counties other than Miami-Dade County, the tax currently is at the rate of 70 cents per \$100 or part thereof of consideration. Therefore, a real property sale for \$100 would result in a tax of 70 cents, but a sale for \$101 would result in a tax of \$1.40. The Miami-Dade County rate is 60 cents per \$100 or part thereof on all deeds plus a 45 cents surtax on all deeds conveying anything other than a single-family residence. In general, the Department considers taxable any transfer of real property in which a deed is recorded. It does not apply to a transfer of equity interests in the entity which owns real property (although it may be necessary to complete and file certain disclosure forms if there is a change in control of such entity). The deed tax, if applicable, is normally imposed on the fair market value of the real property conveyed (not the value of the personal property included in the sales price), and includes the amount agreed to be paid, the amount of any debt discharged, and the amount of any mortgage on the property, whether or not assumed. Again, the tax is due upon recording of an instrument of conveyance.

6. Sales Taxes on Rent. The Florida sales tax applies to rents collected on all Florida commercial leases and residential leases less than seven months in term. The rate of sale tax varies by county. The landlord collecting the rent is the party which is statutorily liable to pay the tax and faces penalties/charges if the sales taxes are not paid. Florida landlords typically pass through this sales tax liability to tenants in the lease. One nuance often overlooked is that Florida sales taxes are due with respect to termination payments if they are deemed to be rent. They are also due on improvements installed at Tenant’s expense but which because the property of Landlord.

7. Time

Period to Complete an Uncontested Foreclosure. Although not a transactional issue, this question has been asked perhaps more than any other in the current economic climate. The answer varies by county but is estimated to be anywhere from a few months to one year. **8. Which Party Pays for What Closing Costs.** Although all closing costs are negotiable, it has been my experience that in a sale/purchase of Florida real property, the seller more commonly pays the Florida deed (documentary stamp) tax and the cost of the owners' title insurance policy. The buyer generally pays for any costs related to any financing.

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