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Client Alert

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Preventing "Southern Discomfort" – Be on the Lookout for These Issues When Deal-Making in the South.

Thinking of doing a deal in Florida, Georgia or The Carolinas? Here are a few state-specific real estate issues to keep on your transactional radar.

Florida: When It Comes to Taxes, It's Not All Sunshine in the Sunshine State.

While Florida may have a reputation as a safe-haven from the burn of high taxes, the revenues that keep the government running must come from somewhere. Though your paycheck may not get dinged by a state income tax in the Sunshine State, you'll feel the Florida heat elsewhere.

Planning a development in Florida? You'd better make tap/impact fees a hefty budget line item. Florida was one of the first states to implement these sizable utility use taxes as a means of offsetting the costs of increased infrastructure demand. The state leads the nation in assessing tap/impact fees as additional taxes. Though these fees are typically picked up by the original developer as an initial project cost, all costs inevitably flow downstream, resulting in higher rents and occupancy costs. If you're a tenant upgrading second-generation space to a use which increases utility demand, be prepared for the owner/landlord to argue that these new costs should be borne by you.

A tax on paying rent? Once again, Florida gets creative. It's one of the few states to assess a tax on the rents generated by real property. But for a few exclusions, you'll pay an additional 6% into the government coffers when you write your monthly rent check in Florida. Pursuant to statute, landlords are to collect these taxes from their tenants and pay them over to the state. If you're a tenant moving into the Florida market, be certain to budget this additional cost. If you're a landlord, you'll want to confirm that your lease contains language requiring your tenants to shoulder the burden of the Florida rent tax.

Georgia: Where Things Aren't Always as Peachy as They May Seem.

"Good faith and fair dealing" should be the norm, right? That's not always the case in landlord-friendly Georgia. It's one of a handful of states that does not require landlords to use good faith efforts mitigate their damages following a default by a tenant. The majority of states require that landlords make some minimal effort to find a replacement tenant, but, in Georgia, in order to impose such a duty on landlords, it must be expressly set forth in the agreement between the parties.

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For leases utilized in Georgia, landlords should always insist that the form contains a clause whereby the parties stipulate that the tenant has only a "usufruct", and not an "estate for years". A usufruct is, essentially, a right to use certain premises, rather than a much stronger "estate for years" interest in the underlying real property. In Georgia, a lease of less than five years is deemed to be a usufruct, whereas a lease in excess of five years is automatically regarded as an "estate for years". A variety of important legal issues turn on whether a tenant possesses a usufruct or an estate for years, so be certain that your landlord form leases contain a clause whereby it is stipulated between the parties that the tenant has only a usufruct.

South Carolina: Local Counsel Final Blessing is a Required "Home Cookin'" Ingredient.

Few states can rival Palmetto pride, and the South Carolina Bar is extremely protective of its South Carolina members. If you're acquiring property in South Carolina, expect your title company to require that a South Carolina licensed attorney sign a "belt and suspenders" affidavit affirming that all transaction documents have been reviewed and approved. In a recent South Carolina court case, it was held that a lender could not foreclose on its note because the transaction documents were not reviewed and blessed by a licensed South Carolina attorney. What does that mean for a buyer? It means that your title company is going to look to cover itself on that issue by requiring a South Carolina attorney to sign an affidavit affirming his or her review of the transaction documents. Don't let this surprise affidavit hold up your closing. Be sure to involve local counsel willing to sign off on the review of all transaction documents prior to closing.

North Carolina: Keeping Your Lease from Going South.

Unless you're a sizable tenant with plenty of leverage, landlords will typically respond to a tenant's request to place its lease of record with a categorical "no". Landlords prefer that tenants not meddle in their matters of title. Tenants request to record their leases, or a memorandum of lease containing material deal points, to put the world on constructive notice of the lease's existence. If title for the property is pulled, evidence of the lease will show. For landlords, this creates more hoops to jump through in the event of a sale or refinancing of a property. Though tenants will often move off this aggressive request to place the lease "of record" in most states, it's "lessee beware" in North Carolina.

In North Carolina, any lease of three years of longer will not be recognized as a property interest unless recorded in the Office of the Register of Deeds in the county where the land lies. Thinking of pouring $100,000.00 into improving restaurant space for a 5 year Lease? It sure sounds typical. But in North Carolina, absent evidence of the existence of the Lease of record, the tenant's interest in the property can be extinguished by the landlord on a whim. To protect your investment on North Carolina deals, be certain that you've recorded a Memorandum of Lease to ensure that you get the full benefit of the expected term. When the landlord rejects this request, be sure to push back, and push back hard.