

# Representing National Real Estate Lenders

A Practical Guidance® Practice Note by  
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This practice note is for attorneys representing lenders that provide real estate secured financing to borrowers located in multiple jurisdictions within the United States. These lenders might include national, state, and foreign banks and other financial institutions; non-bank finance companies; investment banks; debt funds; and mortgage real estate investment trusts. This practice note summarizes common threads in all national real estate lending practices and discusses issues to be addressed in new jurisdictions, including legal opinions, licensing requirements, taxes, local lending requirements, real property laws, real estate lending laws, default and foreclosure remedies, lien priority, land use and planning, and litigation. A detailed discussion of all of the laws and regulations to which a national real estate lender may be subject is beyond the scope of this note.

For further guidance on commercial real estate acquisition transactions, see [Commercial Real Estate Acquisition Loan Resource Kit](#). For an overview of multi-jurisdictional real

estate financing, see [Multistate Real Estate Financing Transactions](#). For state-specific guidance on real property tax assessments and payments, mortgage recording tax, and transfer tax, see [Real Property Tax State Law Survey](#), [Mortgage Recording Tax State Law Survey](#), and [Deed Transfer Tax State Law Survey](#), respectively. For guidance on the encumbrance forms customarily used in commercial real estate financing transactions in each of the 50 states and the District of Columbia, see [Customary Encumbrance Forms State Law Survey](#). For more information on mortgages and deeds of trust generally, see [Mortgages and Deeds of Trust in Acquisition Loan Transactions](#). For guidance on recording real property documents, see [Recording Real Property Documents](#) and [Uniform Real Property Electronic Recording Act State Law Survey](#).

## Scope of a National Real Estate Practice

It is virtually impossible for a single lender or its counsel to be an expert in real estate practice in all national jurisdictions. Not only do states have differing constitutions, statutory law, administrative law, and judicial precedents, many also have reservations and other Indian tribal lands within the states subject to separate laws and court systems. This practice note identifies some of the areas where these laws differ from state to state, so that a practitioner will know where to make additional inquiries.

Unless counsel to a national real estate lender is admitted to practice in all jurisdictions where the lender is doing business, counsel needs to be careful not to engage in the

unlawful practice of law in a jurisdiction where it is not authorized to practice. According to an important California Supreme Court case, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119 (1998), counsel can be engaged in the unlawful practice of law if it engages in telephonic and electronic communication with a foreign jurisdiction even if counsel does not physically enter that jurisdiction. The American Bar Association has adopted Model Rule 5.5(c) (which has been adopted in most, but not all, states) permitting temporary practice in a foreign jurisdiction in limited circumstances, including when counsel associates with local counsel actively participating in the relevant matter. From our experience, most counsel to national real estate lenders expect national real estate lenders to engage local real estate counsel to assist on matters involving a foreign jurisdiction's law.

## Legal Opinions

Most real estate lenders require opinions of legal counsel in loan transactions of any significant size. Many aspects of such opinions are unique to the jurisdiction where the property is located. Among other issues addressed by such opinions are:

- The enforceability of the loan documents
- The forms of the mortgage and other security documents being sufficient for recordation and creation of a lien
- Usury
- The need for the qualify to do business in the jurisdiction
- Taxation of the mortgage in the jurisdiction
- Conformity of the lender's standard real estate lending forms with local laws and practice –and–
- Other legal issues particularly raised by the borrower's national or special local counsel

It is common for national real estate lenders (and/or their counsel) to maintain standard forms of legal opinions requested from local counsel to the lenders and from local counsel to their borrowers. To prepare those forms, counsel would want to have a general understanding of the multiple issues that can arise for lenders in other jurisdictions. Given the variability of potentially applicable laws in foreign jurisdictions, the forms of opinions requested from borrowers' counsel vary by jurisdiction.

For further guidance on legal opinions in commercial real estate acquisition financing transactions, see [Legal Opinions in an Acquisition Loan](#).

## Lender's Business and Licensing Qualification

There are a number of matters to be considered by a real estate lender doing business in a new jurisdiction (and covered by a standard legal opinion from local counsel to the lender and/or borrowers, as applicable). One matter involves the requirements for the qualification of lenders to do business and licensing in the new jurisdiction.

In each jurisdiction where a lender makes real estate loans, the lender will, of course, want to make sure that, to the extent required by local law, the lender is qualified to do business (in its own name and in its trade names). For example, a lender may have to comply with local lending laws generally such as the California Finance Lenders Law in California. Cal. Fin Code Section 221000. In addition, depending on the nature of the lender, it may have to comply with local banking law requirements or specific mortgage broker requirements prior to making a real estate loan in a new jurisdiction. Further, in order to engage in lending, a national real estate lender should not be surprised if it is required to comply with local licensing and other qualification requirements. Failure to appropriately qualify may result in transactions being void or voidable and may cause the defaulting lender to be unable to maintain an action to collect amounts due to it in the local courts.

## Taxation

### General

In addition to complying with local laws regarding doing business in a state, a lender will not want to be surprised when its multi-state activities become subject to new local taxes, such as those imposed by jurisdictions on income, property taxes, and sales and use taxes. Without appropriate planning, taxes can, of course, make doing business in a jurisdiction less appealing than it first seems.

### Ad Valorem Real Property Taxes

As real estate property tax liens are most always "super liens," with priority over all other liens regardless of the time of recording, it is of significant concern to real estate lenders that property taxes be paid current at the time of the loan closing. Because the lender's loan policy of title insurance assures the lender that taxes are paid current, this is also a requirement of the title insurance company.

For guidance on the relevant dates for real property tax assessments and tax payments in all 50 states and the District of Columbia, see [Real Property Tax State Law Survey](#).

## Mortgage Taxes

Common taxes of particular interest to national real estate lenders will be mortgage and intangibles taxes and, in the event of a foreclosure or transfer in lieu of foreclosure, transfer taxes. In some states with mortgage and intangibles taxes, the tax can be significant. Although as between the lender and borrower, the borrower is almost always responsible for paying such taxes, the lender may be asked to accept assignments of prior mortgage instruments in order to help minimize the tax burden. As the failure of the borrower to pay such taxes may impair the lender's ability to exercise remedies under its mortgage instrument, the lender will want clear evidence that such taxes are paid at the time the mortgage instrument is recorded. In some states, endorsements to the lender's loan policy of title insurance are available that insure against the invalidity or loss of priority of the lien of the mortgage resulting from the failure to pay the mortgage tax at the time the mortgage is recorded.

See [Mortgage Recording Tax State Law Survey](#) for guidance on which jurisdictions impose a mortgage recording tax.

## Transfer Taxes

Many states and local jurisdictions have transfer taxes that apply to the transfer of real property. Although these taxes typically do not apply to the recording of a mortgage instrument, they may apply upon the foreclosure of a mortgage or a transfer-in-lieu of foreclosure. As these taxes may be significant, it is important for the lender to understand their application and amount when preparing to exercise remedies.

For state-specific information on transfer taxes (including the state rate and links to the applicable state statute, if applicable), see [Deed Transfer Tax State Law Survey](#).

## Local Lending Requirements

Naturally, each jurisdiction's general lending laws apply to a national real estate lender, and it will want to comply with those laws by vetting its forms with local counsel. Applicable local laws may include:

- Consumer laws
- Interest rate laws, including usury laws, and limitations on points, prepaid interest, compound interest, and fees

- Rules governing applications of payments and rights to prepay principal
- Laws governing the use of demand and other facilities that are uncommon in the local jurisdiction
- Laws governing the exercise of remedies against real estate and other collateral
- Laws dealing with "dragnet" clauses –and–
- Other lending laws (and related exceptions)

Since these laws can vary greatly among jurisdictions and will directly impact the business of how a multi-jurisdictional lender conducts its business, legal opinion requests on these issues should be broadly stated.

## Property Laws Generally

Property laws (such as community property laws, marital property laws, registered domestic partnerships, rights accruing to holders of joint tenancy rights, laws exempting assets from claims of creditors, trusts and estates rights, and interests in condominiums, cooperatives, and planned communities) can directly impact how lenders conduct business in various jurisdictions and can vary depending on the underlying property and the nature of the borrower (e.g., municipal, corporation, limited liability company, limited partnership, etc.). For example, agricultural property can be subject to specific laws governing how it is encumbered, and the rights and powers of a municipality to encumber property can be limited by jurisdiction.

## Real Estate Lending Laws

Of course, jurisdictions have varying laws regarding rights in real property, whether held by an individual, an entity, or multiple people or entities. These laws address, among other things, rights of survivorship, the rights of married parties, enforceable terms in transfer document and leases, and specific real property interests (such as condominiums and tenancies in common). As a result, there are enormous variations among the types of real property security instruments utilized within the United States. While a number of states will recognize both mortgages and deeds of trust and are accustomed to "purchase and sale agreements" or "installment land contracts" relating to real property, the actual forms commonly used vary greatly by jurisdiction reflecting both local laws and customs and practices.

For example, while mortgages or deeds of trust can incorporate assignments of rents and leases, in some jurisdictions it is more common to document such

assignments separately from the lien on underlying real property (sometimes with a license back to the borrower). For more information on assignments of leases and rents, see [Assignment of Leases and Rents in a Commercial Real Estate Loan Transaction](#). For guidance on the encumbrance forms customarily used in commercial real estate financing transactions in each of the 50 states and the District of Columbia, see [Customary Encumbrance Forms State Law Survey](#). For more on mortgages and deeds of trust generally, see [Mortgages and Deeds of Trust in Acquisition Loan Transactions](#).

In addition to the basic documentation encumbering real property, many jurisdictions commonly use separate environmental indemnities in connection with real property financings rather than incorporating them into other related loan documents. For a form of environmental indemnification agreement to use in an acquisition loan transaction, see [Environmental Indemnification Agreement \(Acquisition Loan\)](#).

Formal requirements for recording of real property related documents also require consideration by a multi-jurisdictional lender. For example, electronic recording of documents may be recognized in some jurisdictions (but certainly not in all). For guidance on which states have adopted the Uniform Real Property Electronic Recording Act, see [Uniform Real Property Electronic Recording Act State Law Survey](#). For more information on recording procedures generally, see [Recording Real Property Documents](#).

Naturally, the specific contents of any document to be recorded in a jurisdiction's real property documents may be the subject of many specific legal requirements, including notarization, recitals of necessary recording data, payment of various fees, and sometimes specific reference to local laws and regulations. Formalities required to be contained in mortgages, deeds of trust, and/or installment land contracts vary from form requirements (such as specification of specific margin requirements) to specific factual requirements, such as inclusion of the legal address for the lender and street addresses of the underlying property.

## Default and Foreclosure Remedies

A lender's ability to accelerate obligations, make demand for payment, and foreclose on collateral varies according to jurisdiction and, in some cases, can be varied by contract

and general legal concepts. For example, local law may (i) permit foreclosure by exercise of a private power of sale (non-judicial) or by judicial foreclosure, with the types of sale varying by type of property and loan documentation content or (ii) limit exercise of foreclosure rights "in bad faith" or the enforcement of "due-on sale" or "due on encumbrance" clauses. "Deeds in lieu of foreclosure" may also be used in many jurisdictions, but their effect on title may vary. For guidance on default and remedies in commercial real estate loan transactions, see [Commercial Real Estate Loan Defaults and Remedies](#). For further guidance on foreclosure, see [Foreclosure of Real Property](#). For guidance on requirements for judicial foreclosure, including minimum default period, notification standards, deficiency judgments, and borrower's right to cure, see [Judicial Foreclosure State Law Survey](#). For guidance on nonjudicial foreclosure, specifically including notice requirements and timelines, see [Nonjudicial Foreclosure State Law Survey](#).

In California and other jurisdictions, there are "one action" laws and "security first" rules that limit a lender to a single action to recover on real property secured debt. Among other things, these rules can limit the ability of a real property lienor to voluntarily release its lien on real property and can force a lender into taking unwanted actions to preserve its deficiency rights. For more on the one action rule in California, see [Commercial Real Estate Loan Defaults and Remedies \(CA\)](#). Counsel to a national real estate lender will want to engage experienced local counsel to assist the lender in avoiding these unpleasant situations to the extent possible.

## Priority of Interests in Real Property

Generally speaking, the priority of liens on real property generally can be expected to be based on "first in time, first in right," but that rule can be disrupted by legal issues, such as equitable subordination (where a lien holder assumes the priority position of a prior lienholder), mechanic's and material supplier's liens, and matters such as mandatory future advances and modifications of existing liens. Secured parties and owners rely on title insurance to confirm the priority of their interests in many (but not all) jurisdictions. For guidance on mechanic's liens, see [Mechanic's Lien Resource Kit](#). For guidance on title insurance, see [Title Insurance](#).

## Property and Insurance Impounds

Local laws can vary on the ability of a lender to collect impounds for taxes, insurance premiums, and other real estate related costs. Laws also vary in their limitations on the amount that a lender can require be impounded. For example, the amount of insurance required to be maintained may be limited by law to the value of the insured property.

## Land Use and Planning

Both state and local laws and regulations can govern land use in states, sometimes with complex regulatory overlays. These laws can touch on matters such as zoning issues, subdivisions of property and municipal land use, environmental status of properties, and other real property planning issues and can be embellished by laws governing how these regulations are implemented. For further guidance, see [Planning and Zoning](#).

## Litigation Generally

National real estate lenders know that pursuing litigation, arbitration, or similar rights will vary by jurisdiction. For example, a pre-dispute waiver of jury trial may not be enforced in California although it may be in other jurisdictions. Similarly, statutes of limitations, enforceability of arbitration agreements, choice of law rules, forum selection provisions, and available prejudgment remedies vary by jurisdiction. Moreover, even in the absence of a specific law on an issue, local laws (such as an Unfair Trade Practices Act) can be brought to bear to enforce local legal preferences to the surprise of an unsuspecting national real estate lender.

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### **Pauline Stevens, Partner, Allen Matkins Leck Gamble Mallory & Natsis LLP**

Pauline Stevens is a partner in the Los Angeles office and heads the firm's Commercial Finance Practice Group.

She represents lenders, administrative agents and borrowers in connection with domestic and cross-border financial transactions ranging from leveraged financings to Chapter 11 exit financings and workouts, trade financings, credit enhancement, private banking and asset-backed financings. Financial products with which she works include acceptances, foreign exchange products and letters of credits. These transactions frequently are secured by intellectual property, real property, restricted stock and other non-traditional (and sometimes exotic) collateral.

Among the assets comprising collateral in the transactions on which Pauline works are commodities, designer label apparel, manufacturing equipment, fine art, fresh and processed food products, gas stations, investment quality wines, land development projects, rights to payment from various sources (including commercial mortgage notes, equipment leasing and entertainment residuals), restaurants and vineyards. It is common for these transactions to involve intercreditor and subordination arrangements with other lenders, factors, franchisors, take-out sources of re-financing and trade creditors.

By bringing to bear experience in a broad array of transactions and wide-ranging substantive knowledge built on a background as an insolvency and bankruptcy practitioner, Pauline helps clients solve problems creatively. Her in-depth knowledge of commercial and creditor laws provides Pauline the ability to negotiate and close complex financing transactions on compressed timelines. Clients depend on her to work with them to achieve results that work for all parties.

In addition to lecturing on commercial finance topics, Pauline's writing has won her a Burton Award for Legal Achievement, and she has been elected a fellow of the American College of Commercial Finance Lawyers. Prior to joining Allen Matkins, Pauline was a partner at Morrison & Foerster LLP and, before that, an assistant general counsel with Bank of America.

### **Marc Young, Partner, Allen Matkins Leck Gamble Mallory & Natsis LLP**

Marc Young is a partner in the Los Angeles office of Allen Matkins. His practice covers a broad range of real estate transactions, with a particular emphasis on real estate lending and loan workouts and restructurings.

Marc has represented borrowers and lenders in connection with the origination, servicing and restructuring of all types of real estate-related financings, including loans secured by multiple properties, hotel financings, syndicated loans, subordinate and mezzanine financings, unsecured credit facilities, securitized debt, construction loans, and preferred equity transactions. He also is experienced with preferred equity investments.

Marc has substantial expertise in dealing with distressed loans and preferred equity investments, including workout and restructuring options, intercreditor issues, sales and remedies. His finance clients include commercial banks, investment banks and REITs.

Marc has represented buyers and sellers in numerous purchase and sale and joint venture transactions involving commercial office buildings, industrial properties, hotels, large residential properties, and unimproved land. He has advised clients in a number of portfolio sales and acquisitions.

Marc has developed special expertise in the purchase, sale, financing, and operation of energy projects. He has represented both buyers and sellers of electric generating facilities and other energy facilities, and has participated in significant domestic and international energy-related project finance transactions.

Marc is a member of the California Lawyers Association, the Los Angeles County Bar Association, and the American Bar Association. He is recommended by *Legal 500 United States*, *Best Lawyers*, and *Chambers & Partners USA*, where clients say that he "is an experienced, thoughtful attorney that we rely on for not only legal advice, but also business advice."

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