Closing Real Estate and Other Transactions Amid Covid-19

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Categories:

Coronavirus Response Team

Local and state government emergency declarations have disrupted society and the economy in countless ways including real estate and other transactions. For instance, if closing requires the recording or filing of documents in public real estate or other records, be aware that recording and filing offices may either be closed to the public or open with limited access. Title insurance underwriters have developed COVID-19 specific gap indemnity agreements that permit closings to occur but indemnify the underwriter for gaps from closing to recording caused by COVID-19 office closures.

State Mandated Closures Affecting Transactions

Legal Services

Governors across the country have issued emergency declarations that require all "non-essential" businesses to close. What is considered non-essential, unfortunately, varies from state to state. Below is a summary of how legal services are treated by various states for purposes of emergency declarations.

Pennsylvania: Legal services are considered non-essential services shuttering law offices and law firms across the Commonwealth, except as required to allow lawyers to participate in court functions deemed essential by the county president judge.

Michigan: Legal services are considered non-essential functions and offices must close.

New York: Lawyers and law firms may access and use their offices to perform what the state deems to be in support of essential functions such as health care providers, governmental entities and utilities.

Ohio: Legal services are deemed essential by the governor's emergency declaration order and may remain open.

Office closures do not, of course, mean that lawyers and law firms are not working. Along with millions of other Americans, lawyers are working remotely in states in which legal services are deemed non-essential.

Settlement and Title Insurance Services.

Whether settlement and title insurance services are essential and may remain open is an open question because state emergency declarations conflict with guidance from the Treasury Department and the Cybersecurity and Infrastructure Security Agency (CISA) as to what is considered essential critical infrastructure and, in many cases, must remain open and operational. Federal guidance is advisory only and not directives.

According to Treasury guidance and CISA, the financial services sector is identified as critical infrastructure by the Department of Homeland Security. If you work in a critical infrastructure sector, you have a special responsibility to maintain your normal work schedule. The critical infrastructure workforce for the financial services sector includes those who are needed to process financial transactions and services, clearing and settlement services and provide consumers access to banking and lending services.

Based on federal guidance, title and settlement insurance services should be deemed critical infrastructure to provide consumers access to lending services by providing settlement services. Some states disagree. Pennsylvania, for instance, has shuttered most of its private sector using the North American Industry Classification System (NAICS) definition of a life-sustaining business to determine what business may or may not remain open. In Pennsylvania, title and settlement companies are required to be closed. In-person, title, settlement and notary services are prohibited, but accommodations are available for closing to occur that do not require the parties to meet in person, including remote online notarization legislation that is now in process and promoted by the Pennsylvania Land Title Association.

Financial Institutions

Banks are essential critical infrastructure and should remain open.

Access to Government Offices and Records

Check the county and state in which you plan to close a transaction to determine if public offices and records are available for recordings and filings. Some offices are open for recording and title searches, but others necessary to satisfy title or other requirements are not. For instance, in Allegheny County, Pennsylvania, the recording office is open, but the department of court records for judgment liens, inheritance tax liens, necessary to conduct full title searches, is closed. If all records are not available online, then the ability to close new deals will be impaired until all offices that house records necessary to clear title are open and available to the public.

Deal Diligence

Diligence required to close a finance transaction varies by credit facility. Amid COVID-19, all are reliant on what governmental offices and records are open and available and limited by whether other vendors are open for business and available to perform property condition inspections and reports, surveys, environmental site assessments and other diligence.

Corporate and industrial (C&I) credits that do not involve real estate collateral will still require access to public UCC, lien, pending litigation, judgment and bankruptcy searches (lien searches), which may be limited by the availability of public records that are not accessible online.

Real estate transactions, in addition to lien searches required in C&I transactions, require and closing will depend upon the availability of title, survey, environmental and property condition diligence.

For more information, please contact Steven Regan or any attorney in Frost Brown Todd's Real Estate practice group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Resource Page. We have also convened a dedicated Coronavirus Response Team, with attorneys

on hand to field questions concerning labor and employment matters, commercial contracts, litigation risks, as well as business succession, continuity and crisis response planning.