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To Give or Not to Give a Partition Opinion?

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It was April 2018 and my office was lead counsel to three (3) tenant in common ("TIC"), borrowers/ owners. My client was entering into a $30,000,000.00 non-recourse loan intended to be secured by a commercial retail shopping center. Closing was supposed to have occurred by first quarter end but due to some delays (estoppels and SNDAs, and KYC), closing had slipped so we were all pushing for an early April close. The loan itself was fairly routine. All three of our TIC borrowers were single asset, Delaware limited liability companies. And while all three were recycled entities, they were all able to make the requisite backward representations. Other than having TICs as the co-borrowers, the transaction was relatively straightforward and consistent with other non-recourse loans our client and our office had closed with the lender and its counsel in the past. Loan document negotiation had gone smoothly, title and survey were approved, the tenant documents had been received and were in satisfactory form and the signature pages were signed and in escrow. The Tenant in Common Agreement ("TIC Agreement") needed to be amended and restated to incorporate some negotiated edits requested by lender's counsel, including a requirement that the waiver of partition be memorialized in a recorded memorandum, but even this process-- required as a result of the TIC co-borrower structure, did not, in my view, overly complicate what was, at its core, a fairly routine, non-recourse loan closing.

Other than a few minor odds and ends, the only remaining open items were opinions. For the weeks leading up to closing all parties had dutifully participated in weekly checklist calls, during which we cursorily discussed checklist items 77 through 80. The checklist opinion requirement read as follows:

I.		**OPINION LETTERS**
77.	BC	Property Jurisdiction enforceability of the loan documents and other matters
78.	BC	New York Counsel for Borrower with respect to enforceability of loan documents
79.	BC	Non-Consolidation Opinion
80.	BC	Authority to File; DE Springing Member; [Other Opinions TBD]

With respect to items 77, 79 and 80, our office, as counsel to borrower, was the opinion giver. When we discussed the opinions during weekly checklist calls, we indicated that our firm would render the opinions in forms that had been previously delivered and accepted by the lender and its counsel. Everyone involved in the transaction knew our firm, so no issues were expected.

But none of the prior deals included TIC borrowers. A few days before closing, we delivered item 77: the property jurisdiction enforceability of loan documents opinion draft. The opinion covered (i) enforceability of the loan documents to the extent governed by the property jurisdiction law, (ii) no violation, (iii) form for filing and (iv) perfection. When comments were received we realized we had an opinion issue. Lender's counsel wanted our opinion to also provide that the waiver of the right of partition contained in the TIC Agreement was enforceable in accordance with the property jurisdiction law (the "Partition Opinion"), which, in this case, was Delaware law. Upon receiving the Partition Opinion request we immediately contacted lender's counsel and indicated that we were not in a position to provide an enforceability opinion on the waiver of the right of partition contained in the TIC agreement. We explained that generally, waivers of such rights are enforceable in concept, unless public policy, statute or constitutional principles make those rights incapable of being waived. We explained that Delaware courts had upheld waiver of the right to bring a partition action noting applicable case law, but that a Partition Opinion would be a reasoned opinion and thus time consuming and expensive for our client. We also noted that it was our view that it was not a customary transactional opinion request, hoping that the "Golden Rule" would save us from having to render the opinion. Being on the one-yard line of closing, we hoped our explanation would end the issue. It did not.

I share this story because as a member of ACREL and other professional organizations, I have been on listserv email chains that have questioned the "customary" nature of a Partition Opinion. Typically, the email goes like this:

> My Firm has been asked to render an opinion to the effect that "a state or federal court sitting in [property jurisdiction] would honor each Borrower's waiver of its right to partition set forth in the TIC Agreement and hold that such waiver is a valid and binding obligation of each Borrower under [property jurisdiction] law, enforceable against each Borrower in accordance with its terms.
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> Has anyone ever seen this before? Is it customary?

Since my April 2018 TIC closing, I read the ensuing email chains with great interest. The general view is that the Partition Opinion request does come up from time to time when dealing with TIC borrowers. Anecdotally, it appears that such opinions are reasoned opinions, provided the waiver sunsets on some basis. The maturity of a loan has been cited as a factor supporting the sunset of such a waiver helping to support the view that such a waiver would be enforceable. Overall, the determination of the enforceability of the waiver of the right of partition is based on the applicable jurisdiction's case law and statutes. In some states, such as Louisiana, there is a statutory framework that limits the time period for waivers and implicitly makes them enforceable. (See La. R.S. §9:1702). Further, the laws of other states provide a more express limitation on partition, but still likely warrant a reasoned opinion due to latent ambiguities in the applicable statute that require caselaw upon which an opinion giver can rely. For example, California law provides that the right to partition is an absolute right, unless a "valid" waiver is in place. (Cal. Code Civ. Proc., § 872.710). The California statute stops short of defining if the waiver must sunset in order to be "valid"; but California courts have found that tenants-in-common can *implicitly* enter into a valid waiver of the right to partition by entering into a right of first refusal among the co-

tenants. (See Harrison v. Domergue 274 Cal.App.2d 19 (Cal. Ct. App. 1969) (emphasis added)). Similarly, the Delaware Supreme Court upheld the ability of parties to enter into an implicit waiver of partition, but engaged in a factual analysis considering whether the waiver of partition was an unreasonable restraint on alienation. (See Libeau v. Fox, 892 A.2d 1068, 1072 (Del. Supr. 2006) (reviewing the lower court's analysis of the issue of unreasonable alienation)).

On the other hand, a South Carolina statute on partition more clearly outlines that a waiver of partition among tenants in common is valid, but only in very specific factual circumstances. For example, the effectiveness of the waiver requires that (i) an electric power plant sits upon, or will sit upon, the subject land, and (ii) the duration of the waiver does not extend beyond the operating life of the plant. (S.C. Code § 15-61-10.) Notwithstanding the factual assumptions that an opinion giver would need to make even under these more "clear cut" statutes, opinion givers may still hesitate to opine upon how a court *would* interpret such waiver, rather than relying on case law to provide how the court *should* interpret the waiver.

Going back to my April 2018 closing, we were under immense pressure to close. Our client did not like the idea of paying for yet another opinion, especially one that was reasoned (e.g., expensive). As a firm, we were confident we could render the opinion but we had not done it before and the rush to close and perform the requisite analysis was not ideal. In response to our request that lender proceed without the Partition Opinion we were advised that it was a market opinion. Since it was anticipated that the lender would securitize the loan shortly after closing, I decided to consult with a friend who regularly represented lenders in securitized loans since it was not customary to provide a Partition Opinion in Delaware. It was her view that a Partition Opinion was indeed market in securitizations and other secondary market transactions. Before I gave up and put pen to paper to draft the opinion, I contacted another friend who had formerly been in-house counsel to a lender. This friend specialized in securitizations. She gave me a trick that I use to this day. Agree to provide the opinion, but only if it is required in connection with a securitization or other secondary market transaction. I thought this was worth a try so I called lender's counsel. After some discussions about the time pressure and costs to our client we had a deal. Thirty days later, I verified that our client's loan was successfully bundled and securitized without needing the opinion. The client was happy that we found a practical solution. We have since closed other loans with TIC borrowers, and it is our experience that the Partition Opinion is only required when loans are expected to be securitized.