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USA Regional Real Estate

Arkansas

Quattlebaum, Grooms & Tull PLLC

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ARKANSAS

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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Quattlebaum, Grooms & Tull PLLC has real estate team members in both of its offices, in Little Rock and Springdale. Its primary practice areas related to real estate work include banking, environmental and regulatory, land use and zoning, real estate litigation, secured transactions, tax increment financing and agricultural law. The firm has extensive experience representing world-class developers in a variety of transactions, including commercial leasing, acquisitions and development. It represents national and regional real estate

developers, investors, landlords, tenants and lenders in numerous development projects throughout the United States – including shopping centres, distribution centres, office buildings, hotels and luxury condominiums – and has represented developers on Low Income Housing Tax Credit and New Market Tax Credit projects. The firm is counsel to the Arkansas REALTORS® Association and has substantial experience in timber land acquisition, sale and related matters, including oil, gas and other mineral interests.

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1. General

1.1 Main Substantive Skills

Arkansas requires all attorneys to graduate from an American Bar Association (ABA) accredited law school and pass the bar examination. Arkansas does not recognize a legal specialization for real estate law. However, a qualified attorney has experience and education focusing on conveyancing issues (purchase agreements and leases), title review skills and a knowledge of real estate financing law. Until recently, it was common for attorneys practicing real estate law to also maintain a general practice of law. The current trend is toward attorneys focusing their practice more exclusively on real estate law issues given the growing complexity of regulatory and business issues.

1.2 Most Significant Trends

Commercial real estate lending has slowed, in part due to regulatory and interest rate concerns. The impact of online retailing on traditional “brick and mortar” retailers, with repercussions on retail developments, has negatively impacted development. Multi-family housing construction, refinances and sales remain very strong as traditional housing models remain in flux.

1.3 Impact of the New US Tax Law Changes

Businesses and individuals are bearing the consequences in a multitude of ways as a result of the enactment of the Tax Cuts and Jobs Act. Generally, the following provisions are some of the more impactful provisions of the Tax Cuts and Jobs Act:

- Corporate tax rate structure;
- Qualified business income deduction;
- Business interest expense;
- Depreciation and amortization;
- Deduction of “qualified real property” under Code § 179;
- Opportunity zones;
- Carried interests; and
- Technical terminations of partnerships.

2. Sale and Purchase

2.1 Ownership Structures

Most commercial real estate is owned by an entity. The most common entity is a limited liability company, though corporations and, more rarely, limited partnerships are also used.

Some transactions are structured as tenants-in-common agreements where multiple parties each own an undivided interest in a property, but these arrangements are usually only done in the context of tax-deferred transactions.

2.2 Important Jurisdictional Requirements

There are no special requirements for transferring specific types of real estate. The same instruments are used to transfer all types of real estate.

2.3 Effecting Lawful and Proper Transfer of Title

A title is transferred with a deed. There are three forms of deeds: general warranty deeds, special warranty deeds and quitclaim deeds. Quitclaim deeds provide no promises that a seller has good title to a property. General warranty deeds and special warranty deeds both promise that the seller has title to the property, though they vary in the breadth of the warranties with special warranty deeds containing fewer assurances than general warranty deeds. Commercial transactions are almost always effectuated with a warranty deed.

A deed must be executed and acknowledged by a notary. The deed must then be recorded in the county clerk’s office where the property is located.

2.4 Real Estate Due Diligence

Typical due diligence includes:

- Review of a title commitment and special exception documents;
- Review of a survey;
- Review of an environmental site assessment (ie, Phase I);
- A building inspection; and
- A zoning verification.

Lawyers usually review and provide comments to all of these except a building inspection.

2.5 Typical Representations and Warranties for Purchase and Sale Agreements

Representations and warranties can vary widely in purchase and sale agreements, and many have no representations and warranties. However, the most common are:

- The environmental condition of a property;
- The existence of any pending lawsuits or government actions concerning a property;
- The authority of the parties to enter into an agreement;
- The availability of utilities;
- The zoning designation of a property; and
- A seller’s ability to provide marketable title at closing, free of any liens.

The law does not automatically provide for any representations or warranties. However, federal law requires sellers of residences built before 1978 to disclose that the property could have lead-based paint.

A buyer has two typical remedies for misrepresentation: a suit for breach of contract; or a suit for fraud if the misrepresentation was intentional. Some purchase and sale agreements may provide for alternative remedies, such as termination of the agreement or liquidated damages.

Sellers often want to limit the representations and warranties to the “best knowledge” of the seller, which effectively means that the seller will only be held liable if the seller gives an intentional misrepresentation. A seller cannot limit its liability for fraud.

2.6 Important Areas of Laws for Foreign Investors

There are no special issues in Arkansas for foreign investors. While the law does not prohibit direct foreign investment, most foreign investors choose to establish an American company to take title to a property.

2.7 Soil Pollution and Environmental Contamination

Under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), any landowner can be held liable for the environmental contamination of a property even if the buyer did not cause the contamination. Buyers typically hire an environmental consultant to perform a Phase I environmental site assessment to determine the risk of contamination prior to purchasing a property. The allocation of liability is negotiable between a buyer and a seller, but, most often, the buyer agrees to assume the liability after closing unless the seller intentionally concealed a known problem.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

A buyer usually ascertains zoning by reviewing the online records of the municipality where a property is located. It may be necessary to call the planning office in smaller cities that do not have zoning maps online. It is usually prudent to request a zoning verification letter from the municipal planning office, even though these letters are not generally enforceable in court if the letter contains an error. Most title companies will sell an endorsement to the title policy insuring the zoning designation of the property.

Contract zoning is not permitted in Arkansas, so it is not possible to enter into specific development agreements with municipalities. However, most municipalities offer some derivation of “planned zoning” where the landowner and the municipality can negotiate a zoning designation unique to the property.

2.9 Condemnation, Expropriation or Compulsory Purchase

The government has the right to condemn land for a public purpose. The government must pay just compensation for

the land. The government can take land immediately then litigate over the actual value of the land though, in practice, the government will usually negotiate for several months prior to taking land. There is no certain way to gauge the risk of a taking, though property near roads that might be expanded in the future is at greatest risk.

2.10 Taxes Applicable to a Transaction

Arkansas assesses a transfer tax of USD3.30 per USD1,000 of the purchase price for the sale of real property. The tax is typically shared equally between a buyer and seller, though this is negotiable. The transfer tax does not apply in certain exempt transactions. For example, Arkansas exempts transfers to subsidiaries and transfers for consideration of less than USD100.

2.11 Rules and Regulations Applicable to Foreign Investors

There are no Arkansas-specific rules or regulations that apply to foreign investors.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Most commercial real estate transactions in Arkansas are financed through banks. Alternative lenders, such as insurance companies and retirement systems, are less frequent. The state will occasionally provide some or all of the financing, though this is generally reserved for industrial development projects.

3.2 Typical Security Created by Commercial Investors

The standard security instrument for real property is a mortgage, though a deed of trust can be used as well. The mortgage usually includes a fixture filing.

3.3 Regulations or Requirements Affecting Foreign Lenders

There are no Arkansas-specific rules or regulations that apply to foreign investors.

3.4 Taxes or Fees Relating to the Granting or Enforcement of Security

There are no mortgage taxes in Arkansas. The transfer tax only applies to a sale of real property and is not triggered by a foreclosure or deed in lieu of foreclosure.

3.5 Legal Requirements Before an Entity Can Give Valid Security

An entity must have the legal authority to sign a financing instrument. This is sometimes verified through an attorney's

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opinion letter where the borrower's attorney will opine as to the entity's authority.

3.6 Formalities When a Borrower is in Default

Arkansas offers both judicial and non-judicial foreclosure for when a borrower is in default. Judicial foreclosure is the most common method used for foreclosing commercial properties.

3.7 Subordinating Existing Debt to Newly Created Debt

Secured debt can become subordinate to newly created debt when the creditors agree and record appropriate subordination agreements. Tax liens can trump secured debt.

3.8 Lenders' Liability Under Environmental Laws

Arkansas law does not impose additional liability on lenders for environmental liability over and above that imposed by federal law. Lenders who hold foreclosed property are generally immune from environmental liability. Lenders, however, can forfeit this immunity by operating the foreclosed property.

3.9 Effects of Borrower Becoming Insolvent

Arkansas follows federal bankruptcy laws if a borrower becomes insolvent and files for bankruptcy.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

The amount of controls that apply to various aspects of new buildings or refurbishments can vary significantly depending on the municipality, with larger municipalities tending toward applying more controls. Outside of a few special districts established for aesthetic controls, most municipalities do not directly dictate design or appearance standards as long as the building conforms to the height and size requirements established for a particular zoning district. Practically, some municipalities may want to review design plans before granting zoning changes. Those districts with aesthetic controls typically have more detailed standards for construction and design and occasionally have review boards.

4.2 Regulatory Authorities

In most cases, a municipality is responsible for regulating the development and designated use of individual parcels of real estate. Larger municipalities use a combination of zoning restrictions and large-scale development plan approval to regulate the development.

4.3 Obtaining Entitlements to Develop a New Project

The usual process for obtaining entitlements for a new project or refurbishment is to make an application with the applicable municipality. The typical application seeks: i) rezoning; ii) replatting; and iii) a site plan review. If all three are sought, then an application must be filed. The application is reviewed by municipal staff then forwarded to the planning commission for review. The planning commission then makes a recommendation that is forwarded to the city council for final approval or denial. Any member of the public may comment at any stage during the process. In situations where rezoning is not necessary, the planning commission typically has the authority to grant the final approval instead of just a recommendation.

4.4 Right of Appeal Against an Authority's Decision

The process to appeal a decision falls into one of two categories. If the municipality denies a re-zoning, then the appeal must be taken to circuit court. Appeals are rarely successful because a municipality is held to an "arbitrary and capricious" standard, which essentially means that the courts will defer to the municipality's decision absent some overwhelming reason. If the municipality denies other types of requests, such as a site plan review, then the appeal must also go to circuit court. However, the courts will review the case on a de novo basis, which means that the courts will substitute its judgment for that of the municipality.

4.5 Agreements with Local or Governmental Authorities

Arkansas does not recognize transferable development rights. Typically, the re-zoning process requires a developer to donate right-of-way and utilities to a municipality as part of the approval process.

4.6 Enforcement of Restrictions on Development and Designated Use

Municipalities have the authority to deny municipal services to a rogue developer. A municipality can also sue for an injunction to stop a development.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Arkansas recognizes all typical entities available to investors:

- s-corporations;
- c-corporations;
- limited liability companies;
- general partnerships;
- limited partnerships;

- limited liability partnerships; and
- limited liability limited partnerships.

Most real estate transactions use limited liability companies, though a significant number use s-corporations.

5.2 Main Features of the Constitution of Each Type of Entity

Limited liability companies are the most commonly used entity used to invest in real estate because they are the most flexible entity structure in existence. They have minimal corporate formalities and a great deal of flexibility.

Corporations are sometimes used to claim different tax treatment that might be beneficial to particular situations.

Partnerships are older entities that are rarely used except in legacy situations where an entity predates the more efficient limited liability company structure, which only became common in the 1990s.

5.3 Tax Benefits and Costs

Generally, entities classified for federal income tax purposes as partnerships are preferred for multi-party real estate investment from a tax perspective. For investors, some of the federal income tax benefits of such a classification may include the ability to deduct their distributive share of losses against their share of partnership liabilities, and to generally receive a distribution in-kind of their pro rata share of the real estate owned by the partnership in a non-recognition, or deferral, transaction. Entities classified as a partnership for federal income tax purposes may also afford more flexibility – for example, the partnership agreement (or operating agreement in the case of a limited liability company classified for federal income tax purposes as a partnership) may generally provide for special allocations of tax items and/or the grant of a carried interest to the real estate fund manager (or general partner) or person who renders services to the entity.

Entities that are classified for federal income tax purposes as disregarded generally have the same tax benefits and costs as the investor owning the property in his/her/its individually.

It is generally disadvantageous to use entities classified for federal income tax purposes as electing small business corporation (or s-corporations) or c-corporations to invest in real estate as a transfer of the real estate out of the entity will be characterized as a deemed sale, resulting in entity level gain to the extent the fair market value of the property exceeds the entity's adjusted basis.

In addition to the above benefits and costs, Arkansas imposes franchise taxes on entities domiciled, or foreign entities registered to transact business, within the state.

5.4 Applicable Governance Requirements

Limited liability companies have minimal corporate formalities and extensive abilities to establish custom governance requirements. Partnerships, on the other hand, have flexibility in the governance structure but are subject to more formalities. Corporations, particularly c-corporations, are the most rigid in terms of formality.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

The most common method the law recognizes for the use of real property is a lease agreement. Other less common methods include a life estate or a license. A life estate automatically terminates at the death of a party. A license is typically terminable at will and is usually only used for very short-term arrangements.

6.2 Types of Commercial Leases

The two most common types of commercial leases are traditional leases and ground leases. The principal differences are the length and the amount of control that a tenant has. Traditional leases are typically shorter and a landlord retains control over uses and maintenance. Ground leases are sometimes referred to as “synthetic ownership” where the tenant has almost the same control and responsibilities of the owner, but for a limited duration. Ground leases are typically very long, with 30 years usually being the minimum duration.

6.3 Regulation of Rents or Lease Terms

Arkansas does not control rents or lease terms for commercial leases.

6.4 Typical Terms of a Lease

The length of a lease term is highly variable. For commercial leases, though, a common duration is ten years with the option to renew for an additional ten years.

In regard to the maintenance and repair of a real estate, this is highly negotiable. Most commonly, a landlord will maintain the common areas, the building envelope and the structural systems. A tenant will maintain everything else. If the lease is silent, the default is that the tenant is responsible for maintenance.

The frequency of rent payments is also negotiable, though monthly is the most common.

6.5 Rent Variation

Whether a rent amount will stay the same for the duration of a lease is negotiable, but the amount usually increases peri-

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odically throughout the lease. The amount usually increases by a fixed percentage or is tied to the inflation rate.

6.6 Determination of New Rent

If rent is to be changed, how it is done is negotiable. Most commonly, rent goes up by a fixed amount, a fixed percentage or the rate of inflation.

6.7 Payment of VAT

Arkansas does not have a value-added tax (VAT) or other levy on rent. However, a landlord is subject to ordinary income taxes.

6.8 Costs Payable by Tenant at Start of Lease

At the start of a lease, tenants usually pay a deposit equal to the first month's rent, plus the first month's rent and common area maintenance charges.

6.9 Payment of Maintenance and Repair

Who pays for the maintenance and repair of common areas is negotiable, but most leases require a tenant to reimburse the landlord for the tenant's pro rata share of the cost.

6.10 Payment of Services, Utilities and Telecommunications

Utilities and telecommunications services are usually paid for directly by a tenant.

6.11 Insuring the Real Estate That Is Subject to the Lease

Typically, a landlord carries insurance on a building and its common areas while a tenant insures the interior of the premises and the tenant's personal property. The tenant usually reimburses the landlord for its pro rata share of the landlord's insurance. The policy usually covers damage from fires, storms and other casualties.

6.12 Restrictions on Use of Real Estate

A landlord can impose restrictions on a tenant's use of a real estate. Typically, the landlord will restrict the use to one particular activity, such as running a restaurant. The law does not impose further restrictions as long as the use complies with applicable zoning restrictions.

6.13 Tenant's Ability to Alter and Improve Real Estate

Typically, a tenant is only permitted to modify the interior of a premises. Most landlords also want the right to review and approve the plans in advance.

6.14 Specific Regulations

Generally, Arkansas does not distinguish between different categories of real estate.

6.15 Effect of Tenant's Insolvency

Standard federal bankruptcy laws apply in the event of a tenant's insolvency. The bankruptcy court may permit the tenant to terminate the lease.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

The most common types of security are security deposits, usually in the amount of one month's rent, and/or personal guaranties from the individual owners of the entity leasing the real property.

6.17 Right to Occupy After Termination or Expiry of a Lease

A tenant does not have the right to continue to occupy real estate after the expiry of a lease. A tenant may be evicted through one of several means, but the most common method is to file an unlawful detainer suit against the tenant, which is described in more detail below.

6.18 Right to Terminate Lease

Any failure of a tenant to abide by the terms of a lease agreement can trigger the right to terminate the lease. The most common event is the tenant's failure to pay rent.

6.19 Forced Eviction

A tenant who is in default can be forced to vacate. The most common method used is a suit for unlawful detainer. In an unlawful detainer suit, the tenant must be given a warning letter three days before filing suit. After the suit is filed and the tenant is served, the tenant has five days to answer the lawsuit. The landlord is entitled to a writ of possession if the tenant does not appropriately answer the lawsuit within the five-day period. The sheriff will assist with the eviction after the courts issue a writ of possession. From a timing perspective, usually the hardest part is serving the tenant with the lawsuit. If the landlord can promptly serve the tenant, and the tenant does not contest the eviction, the tenant can usually be removed within two weeks.

6.20 Termination by Third Party

There are two circumstances where the government may terminate a lease:

- If the government takes the leased premises for a public purpose; or
- If the government enjoins the use of the leased premises because of a violation of the law, such as failure to pay taxes or operating an illegal business.

In the case of taking a leased premises for a public purpose, the government must pay just compensation for the taking. The government will offer an amount that it considers fair, but the tenant and landlord may challenge the amount in court and allow a jury to decide what is fair. The landlord

usually receives the entire amount for the value of the premises. The tenant usually just receives the cost of relocating.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Construction contracts allocate price in a number of ways but generally follow one of three pricing schemes:

- Fixed amount (or lump sum price);
- Cost-plus a fee (general cost plus a percentage of the cost of the work); or
- Cost-plus with a guaranteed maximum price (GMP).

These pricing concepts are project-dependent and address the applicable risk allocation and considerations related to compensable costs; whether additional work is subject to compensation; who obtains the benefit of cost savings; any rights to audit the other parties' records; and situations that call for increases to the compensable costs of the work.

7.2 Assigning Responsibility for the Design and Construction of a Project

Depending on the project, construction projects allocate responsibilities in a variety of manners and depending on the type and complexity of the project. Generally the contract terms should specify any responsibilities of any contractual obligations between the owner, architect, contractor and any subcontractors. Of note, design-bid-build contracts, where an owner has already commissioned the design of a project prior to a contractor providing a price and executing the contract, has become more common in recent years, allocating the responsibility to design the project to the design-build contractor, whereby the project is substantially more undefined at the time the initial contract is entered.

7.3 Management of Construction Risk

Common devices used to manage risk on a construction project are warranties and indemnifications. With respect to residential projects, as a general rule, an express warranty excludes any implied warranty on that subject but only if the contractual provision expressly covers the standards of workmanship. However, in order for an express warranty to exclude the implied warranties of habitability, sound workmanship and proper construction the express warranty must expressly warrant the same.

Express indemnity arises by virtue of a contract and holds one liable for the acts or omissions of another over whom he has no control. Arkansas courts have held that the language imposing indemnity must be clear, unequivocal and certain. While no particular words are required, given that the liability of an indemnitor for the negligence of an in-

demnitee is an extraordinary obligation to assume, a court will not impose it unless the purpose to do so is spelled out in unmistakable terms.

An implied indemnity agreement will only arise when there is a special relationship carrying with it a duty to indemnify, such as an employment versus independent contractor relationship. A party can be a third-party beneficiary to an indemnity agreement. However, a contract, including an indemnification agreement, will not be construed as having been made for the benefit of third parties unless it clearly appears that such was the intention of the parties.

Ultimately, these risk-management options should be specifically noted in the contract so as to ensure enforceability if any future issues arise. And, both contractors and owners should be sure to obtain any liability insurance to protect against risk as well.

7.4 Management of Schedule-Related Risk

Delays on a project can occur for a variety of reasons. Depending on the cause, and if the delay is excusable or non-excusable, owners can seek compensation for any non-excusable delay on the part of a contractor. Missed deadlines can delay the start of revenues generated by a completed project and can result in losses such as lost profits, extended oversight costs, and the extended cost of professional time and services arising from the delay. Generally, compensable delay is based on the implied contractual obligation not to unreasonably hinder the performance of another party.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Depending on the cost of a project and an owner's relationship with a contractor, owners often do seek other forms of security to guarantee a performance under a construction project, particularly with larger commercial projects. Letters of credit and personal guarantees are common on larger commercial projects or costly residential ones.

In order to protect against liens, owners often require that the contractor pay a bond. Payment bonds can substitute for any materialmen's lien filed. While a payment bond does not preclude the filing of a lien, it lessens the effects.

7.6 Liens or Encumbrances in the Event of Non-Payment

Under Arkansas's construction lien laws, contractors, subcontractors, material suppliers, architects, engineers, surveyors, appraisers, landscapers and title insurance agents are entitled to materialmen's liens on a project. A construction lien cannot exist in Arkansas without a valid contract with the property owner, whether express or implied through the conduct of the parties. In Arkansas, there are distinct notice requirements that must be satisfied before a lien claimant

can assert a lien which vary, depending on whether the project is commercial or residential. These requirements must be strictly followed in order to obtain a valid materialmen's lien.

Actions to enforce the lien must be commenced within 15 months after filing the lien with the circuit clerk. If no action is taken on the lien by that time, it ceases to exist. In suits to foreclose construction liens, the contractor is a necessary party and must be made a party within the period provided in the act for enforcement of such liens. Failure to do so results in dismissal of the lien action.

All construction liens have equal priority toward each other without regard to the date of filing of the account or lien or the date when the labour or material was performed or furnished. With respect to priority against other encumbrances, construction liens date from the time the construction or repair first commenced.

In order to have a construction lien discharged prior to the entry of a final judgment, the owner of the property, any mortgagee or other person having an interest in the property, or any contractor, subcontractor or other person liable for the payment of the construction lien may file a bond with surety, in the amount of the lien claimed, with the circuit clerk or other officer with whom the lien is filed as required by law. Alternatively, a person desiring to contest a lien may bring an action pursuant to the statute, but the issues in the action will be limited to whether the lien was filed in the form required and whether all applicable notice requirements were satisfied. The lien may also be contested by declaratory judgment proceedings.

7.7 Requirements Before Use or Inhabitation

Generally, prior to occupancy or use, local law requires certain obligations be met, such as the issuance of a certificate of occupancy or the equivalent, and other inspection certificates. Insurance may also require certain requirements be met prior to obtaining full coverage. The contractor can and often does make these local government requirements part of a construction agreement to protect against potential defective construction claims prior to completion of the project.

8. Tax

8.1 Sale or Purchase of Corporate Real Estate

Federal

The sale of corporate real estate is generally subject to federal income taxation. The federal income tax is payable by a seller (or in certain situations the owners of the seller) of the corporate real estate. The applicable rate will vary, generally depending on the federal tax classification of the seller, how

long the seller has held the real estate, and the seller's use of the real estate (ie, stock in trade, use in a trade or business, held for investment, allowable depreciation, etc).

Depending on the circumstances, if a seller of corporate real estate is classified for federal income tax purposes as a disregarded entity or a partnership, the applicable marginal rates will, for the taxable year 2018, generally range between 10.00% and 39.60% (please note, the net investment income tax, which is imposed at a rate of 3.80%, may also apply). Similarly, if a seller of corporate real estate is classified as an electing small business corporation (or an s-corporation), the applicable marginal rates will, for the taxable year 2018, generally range between 10.00% and 39.60% (please note, i) the net investment income tax, which is imposed at a rate of 3.80%, may also apply; and ii) certain rules applicable to s-corporations that were formerly classified as c-corporations for federal tax purposes can affect the level at which the tax is paid – the shareholder level or the entity level – and thus the applicable rate). The applicable rate with respect to a seller of corporate real estate classified for federal income tax purposes as a c-corporation is, for the taxable year 2018, a flat 21.00%.

There are no exemptions to the federal income taxation resulting from the sale of corporate real estate. There are, however, certain non-recognition, or deferral, provisions which may be applicable (ie, IRC §§ 1031; 1033).

Arkansas

Arkansas imposes a state income tax which generally adheres to the federal income tax law. Accordingly, the sale of corporate real estate by an Arkansas resident is generally subject to Arkansas income taxation as is the sale of corporate real estate when the seller's business is carried on in Arkansas or the corporate real estate is located in Arkansas. Arkansas income tax is payable by a seller (or in certain situations the owners of the seller) of the corporate real estate. The applicable tax rate will vary, generally depending on the tax classification of the seller, how long the seller has held the real estate, and the seller's use of the real estate.

Circumstances depending, if a seller of corporate real estate is classified for Arkansas income tax purposes as a disregarded entity or partnership, the applicable marginal rate is estimated for the taxable year 2018 to range between 0.9% and 6.9% (please note, to the extent gain from the disposition of the corporate real estate constitutes a net capital gain, as defined by the Code, 50.00% of that net capital gain is excluded in applying the applicable rate, and if the net capital gain exceeds USD10 million then the amount of such excess is also excluded). Arkansas has adopted Subchapter S of the Code. Accordingly, the rates applicable to a seller of corporate real estate that has elected to be an electing small business corporation for Arkansas income tax purposes

are generally the same as set forth in the previous sentence (please note, certain rules applicable to s-corporations that were formerly classified as c-corporations for Arkansas income tax purposes can affect the level at which the tax is paid and thus the applicable rate). The applicable marginal rate with respect to a seller of corporate real estate classified as a corporation, but that has not elected to be classified as an electing small business corporation for Arkansas income tax purposes, is estimated to range, for the taxable year 2018, between 1.00% and 6.50%.

Similar to the federal tax law, Arkansas provides that taxpayers are not required to recognise gain from the sale of corporate real estate in certain situations. For example, Arkansas has adopted Code § 1033, relating to gain resulting from involuntary conversions, and although Arkansas has not adopted Code § 1031, it follows the general principle that gain from the sale or exchange of property for like-kind property of a similar value is not recognised.

In addition to the Arkansas income tax, which is the responsibility of the seller of corporate real estate, Arkansas imposes a real property transfer tax on the seller and purchaser of corporate real estate on the basis of the full consideration for the transferred real estate. By statute, the real property transfer tax is borne half by the seller and half by the purchaser. However, a seller and purchaser can agree to allocate the tax burden differently. Further, certain real property transfers are exempt from the transfer tax. (For a list of exempt real property transfers, see Ark. Code Ann. § 26-60-102.)

Local

There are no local taxes imposed on the sale or purchase of corporate real estate.

8.2 Mitigation of Tax Liability

Structuring an acquisition transaction as a transfer exempt from real property transfer tax is the general method by which the Arkansas real property transfer tax is mitigated.

8.3 Municipal Taxes

Persons operating a trade, business, profession, vocation or calling within a city in Arkansas are generally required to obtain a business license from that city and pay an annual license fee. To the extent exemptions exist, such exemptions would be on a city-by-city basis.

8.4 Income Tax Withholding for Foreign Investors

Subject to certain exceptions, upon a foreign seller's disposition of a US real property interest, the purchaser or recipient of the real estate is treated as a withholding agent and generally required to withhold a tax equal to 15.00% of the amount realised by the foreign seller upon the disposition. The purchaser or recipient of the real estate is responsible for determining whether the seller is a foreign person, and if the seller is a foreign person and the purchaser or recipient of the real estate fails to withhold, the purchaser or recipient may be held liable for the tax.

8.5 Tax Benefits

Depreciation deductions are generally viewed as a tax benefit of owning real estate and, in some instances, the depreciation deductions may be accelerated by obtaining a cost segregation study with respect to the real estate. Further, in certain cases all, or a portion of, the gain resulting from the disposition of the real estate will be subject to federal income taxation at the preferred capital gain rates. Additionally, recognition of the gain from the sale or exchange of real estate may, under certain circumstances, be deferred under Code § 1031. In some instances the ownership of real estate may result in the owner of the real estate (or the owners of the entity holding the real estate if the entity is classified for federal income tax purposes as a disregarded entity, partnership or s-corporation) receiving a federal (and possibly state) tax credit, which will reduce the overall tax liability of the owner (or, if applicable, the owners of the entity holding the real estate).

8.6 Key Changes in Federal Tax Reform

See 1.3 **Impact of the New US Tax Law Changes.**

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