

An Out-of-State Lender's Obligation to Obtain a Certificate of Authority in Wisconsin May Depend Upon the Type of Entity Serving as the Lender

In commercial loan transactions involving out-of-state lenders, local real estate counsel is frequently called upon to issue an opinion that the lender for the transaction is not required to qualify to do business in the state in which the borrower's real property is located if the lender's contact with such state is limited to lending money to the borrower and acquiring a mortgage. Below is an example of such an opinion that our firm was recently asked to provide:

Lender is not required to qualify to do business solely by virtue of making the Loans, taking a lien on property in the State of _____, enforcing its rights under the Mortgage(s) and/or the taking of title to the Mortgaged Property through purchase at a foreclosure sale, pursuant to a power of sale or by taking a deed in lieu of foreclosure.

As in other states, the ability of Wisconsin local counsel to provide such an opinion is necessarily dependent on the requirements set forth in the applicable statutes. Unfortunately, the situation in Wisconsin is somewhat complicated due to the inconsistent treatment the Wisconsin Statutes give to various forms of out-of-state entities. The Wisconsin Statutes generally require out-of-state entities to obtain a certificate of authority from the Wisconsin Department of Financial Institutions before transacting business in Wisconsin. However, the Wisconsin Statutes governing corporations and limited liability companies (but not the Wisconsin Statutes governing limited partnerships and limited liability partnerships) explicitly state that the requirement to obtain a certificate of authority is not triggered by any of the following activities as such activities do not constitute transacting business:

1. lending money or creating or acquiring indebtedness, mortgages and security interests in property;
2. securing or collecting debts or enforcing mortgages and security interests in property securing the debts; and
3. owning, without more, property.

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As a result, Wisconsin attorneys serving as local counsel should be able to provide some form of the requested opinion found above regarding the duty of out-of-state lenders to qualify to do business in Wisconsin. As an example, below is the form of this opinion that our firm has been willing to give in the past for out-of-state lenders that are corporations or limited liability companies (but not limited partnerships or limited liability partnerships):

Pursuant to Wisconsin Statutes section _____, the Lender is not required to obtain a Certificate of Authority from the Wisconsin Department of Financial Institutions to do business in Wisconsin so long as the Lender's activities in Wisconsin are limited to the following: lending money or creating or acquiring indebtedness, mortgages and security interests in property; securing or collecting debt or enforcing mortgages and security interests in property securing the debts; and owning, without more, property.

If you have questions about this update, please contact your Reinhart attorney or any member of the Reinhart Real Estate Opinion Team.

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