Some Foreign Real Estate Investors are Circumventing State Foreign Ownership Laws

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On February 22, 2024, Thompson Hine published an article, "Georgia Takes a Stand: Buyers From Bad Actor Countries May Be Blocked From Buying Land." In that publication, we reported on two parallel bills introduced by Georgia lawmakers that would prohibit foreign business entities whose government designated as a "foreign adversary" from owning land near military bases and installations. Both bills have now passed the respective chambers of the Georgia legislature, and on March 26, 2023, the Georgia Senate voted 41 to 11 to adopt the House version. The Georgia Senate has sent the reconciled Senate Bill 420 to Georgia Governor Brian Kemp for signature.

As a recap, Senate Bill 420 makes it illegal for any nonresident alien to own any agricultural land in the state of Georgia. It also probits the ownership by a nonresident alien of any land within a 25-mile radius of a military base, installation, or airport in Georgia. Under Senate Bill 420, a nonresident alien includes a U.S. company with 25% or more ownership by a business entity that is domiciled in a country designated as a foreign adversary by the United States Secretary of Commerce, currently China, Cuba, Iran, North Korea, Russia and the Maduro Regime of Venezuela. Senate Bill 420 further provides that any nonresident alien with any possessory interest in agricultural land prior to the proposed effective date of the law must dispose of such possessory interest no later than June 30, 2027. Intentional legal violations may yield fines of up to $15,000 or jail time.

If the governor signs the bill, Georgia will join an increasing number of states that have passed similar regulations that have garnered significant controversy. A recent federal appellate court ruling, however, signals obstacles to enforcement of such foreign ownership restrictions enacted by state legislatures.

On February 1, 2024, the U.S. Court of Appeals for the 11th Circuit granted a preliminary injunction in favor of two plaintiff-appellants enjoining the application of a Florida law analogous to the Georgia bills. Florida Senate Bill 264 (codified at Fla. Stat. Ann. §§ 692.201 to 692.205) limits selected persons from foreign countries of concern from owning or having a controlling interest in certain Florida real estate near military installments or infrastructure facilities. The law also forbids governmental entities from contracting with these persons if the interaction would enable access to personal identifying information or involve economic incentives. There are several exceptions, such as *de minimis* direct interests, leases and ownership approved by the federal government. Failure to comply with the disclosure requirements and prohibitions can result in fines, liens and potential forfeiture.

In May 2023, a group of Chinese citizens living in Florida and a real estate brokerage firm filed a lawsuit (*Shen v. Simpson*, No. 4:23-cv-208 (N.D. Fla. 2023)) against the state of Florida alleging that the state's newly enacted foreign ownership law violates the Equal Protection and Due Process clauses of the U.S. Constitution. After the district court denied the plaintiff's motion to prevent the state from implementing and enforcing its foreign ownership law, the plaintiffs appealed to the

Eleventh Circuit, which granted a partial preliminary injunction. As a result, the state of Florida currently cannot enforce its restriction against two individual plaintiffs only.

Although the Shen plaintiffs claim that the Florida law is unconstitutional for several reasons, the court's order granting the partial injunction rests solely on the plaintiffs' preemption argument. According to the Eleventh Circuit's order, two of the Shen plaintiffs have shown a substantial likelihood that the federal government's role in monitoring certain foreign acquisitions of real property located within the U.S. preempts Florida's foreign ownership law.

In their motion, the Shen plaintiffs assert Florida's foreign ownership law violates the Supremacy Clause of the U.S. Constitution by conflicting with the federal government's system of regulating land purchases by foreign investors. The federal law at issue is the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (50 U.S.C. § 4565) described in our prior article. Through FIRRMA, Congress authorized the federal government to review certain transactions involving foreign investments and acquisitions of American businesses and real property. The review is conducted by the Committee on Foreign Investment in the United States (CFIUS) and determines whether a transaction presents a threat to U.S. national security. If a transaction is determined to pose a threat, CFIUS has mitigation options to minimize risk. The plaintiffs argue that by passing FIRRMA, Congress reserved for the federal government exclusive power to regulate foreign real estate investment in the U.S.

The court of appeals unanimously held that the plaintiffs showed a substantial likelihood of prevailing in their arguments that SB 264 is preempted by federal law because Congress has already established a system of national security review of real estate purchases by foreign nationals.

The Eleventh Circuit's order granting a partial preliminary injunction means that Florida's new law cannot be enforced against these two particular individual plaintiffs. The court's injunction, however, is not binding on other appellate courts. Further, since it is limited to two individuals, the state of Florida may continue to enforce its restriction against all other investors and/or owners subject to its foreign ownership law, including other plaintiffs in the case. Oral arguments on the merits are set for April 19, 2024.

Currently, approximately 20 states have passed or introduced legislation restricting foreign private investment in real property, which includes agricultural land, residential and commercial property. The decision from the Eleventh Circuit may ultimately impact the trend of state legislation governing foreign private ownership in real property. The results could potentially trigger the overturn of the Florida law, challenges to similar laws in other states, such as Senate Bill 420 in Georgia, and eventually a review by the U.S. Supreme Court. Conversely, if the 11th Circuit upholds the Florida law, it might prompt similar bills from states that have not yet initiated regulation activity in this area.

This poses the question of whether a reversal in the recent trend of foreign real property ownership regulations is on the horizon. Considering the varying and fast-changing landscape of these regulations, some of which require divestiture of existing properties, Thompson Hine can assist in understanding the requirements in your state and planning for future transactions.

For More Information

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