

Resources

Cherryland and Chesterfield Decisions Elicit Legislative Response

March 5, 2012

In late January 2012, we **reported** to you on possible "springing recourse" liability for borrowers and guarantors arising out of *Wells Fargo Bank, NA v. Cherryland Mall Ltd. P'ship (Cherryland)*. For lenders, borrowers or guarantors of non-recourse loans in Michigan, this decision certainly caused a stir.

In the wake of the decisions rendered in *Cherryland* and *51382 Gratiot Avenue Holdings, LLC v. Chesterfield Development Company, LLC, et al., (Chesterfield)* by the U.S. District Court for the Eastern District of Michigan, bipartisan legislation was introduced this week in the Michigan Legislature that might just overturn these results.

Senate Bill 992 (the "Bill"), is co-sponsored by the four top Republican and Democratic leaders of the Michigan Senate and is reported to be on a fast track for passage. The Bill was introduced on February 29, 2012, and already reported favorably out of committee to the full Senate with immediate effect recommended. An identical bill, House Bill 5446, was introduced on the same day in the Michigan House of Representatives. The Bill would create a new law known as the Nonrecourse Mortgage Loan Act (the "Act"). As proposed, the Act would effectively overturn the *Cherryland* and *Chesterfield* decisions and make the deficiency judgments rendered in those cases unenforceable. The stated purpose of the Act is to:

- Prohibit a post-closing solvency covenant from being used, directly or indirectly, as a nonrecourse carve out or as a basis for any claim against a borrower (such as a developer), guarantor or other surety on a nonrecourse loan;
- Invalidate noncompliant provisions in loan documents; and
- Clarify that if loan documents did not include nonrecourse provisions, the Act would not prohibit a loan secured by a mortgage from being fully recourse to a borrower or guarantor.

Perhaps the most unusual content of the Bill is its enacting section, which appears to seek to overturn the *Cherryland* and *Chesterfield* decisions currently pending at the appellate level. The enacting section of the Bill provides the Act will apply:

- Prospectively to any claim made or action taken to enforce a post closing solvency covenant on or after the effective date of the Act;
- To pending claims to enforce a post closing solvency covenant; and
- Retroactively to any pending claim where a judgment or order has been entered but rights to appeal the judgment or final action have not been exhausted.

The Bill also includes the following significant policy justifications likely intended to buttress any legal challenges to this change/clarification of Michigan law:

"The legislature recognizes that it is inherent in a nonrecourse loan that the lender takes the risk of a borrower's insolvency, inability to pay, or lack of adequate capital after the loan is made and that the parties do not intend that the borrower is personally liable for payment of a nonrecourse loan if the borrower is insolvent, unable to pay, or lacks adequate capital after the loan is made;" and

"The legislature recognizes that the use of a post closing solvency covenant as a nonrecourse carve out, or an interpretation of any provision in a loan document that results in a determination that a post closing solvency covenant is a nonrecourse carve out, is inconsistent with this act and the nature of a nonrecourse loan; is an unfair and deceptive business practice and against public policy; and should not be enforced."

Dykema will continue to monitor the status of the Bill and provide further updates and analysis. If you are interested in the potential impact of the Bill on your specific loan or circumstances, you may contact **Adam Fishkind** at 248- 203-0749,

Cherryland and Chesterfield Decisions Elicit Legislative Response (Cont.)

Brian Page at 616-776-7509 or your regular Dykema contact. Questions regarding the legislative process may be directed to **Steven Liedel** at 517-374-9184.

As part of our service to you, we regularly compile short reports on new and interesting developments and the issues the developments raise. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments are always welcome. © 2012 Dykema Gossett PLLC.

Attorneys

Adam M. Fishkind

Steven C. Liedel

Brian J. Page

Practice Areas

Real Estate

Real Estate Finance

As part of our service to you, we regularly compile short reports on new and interesting developments and the issues the developments raise. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments are always welcome. © 2019 Dykema Gossett PLLC.