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Nonrecourse Mortgage Loan Act Provides Relief to CMBS Borrowers in Michigan

In a swift response to the rulings in *51382 Gratiot Avenue Holdings v. Chesterfield Dev. Co.* and *Wells Fargo Bank NA v. Cherryland Mall* last December, and to the great relief of the CMBS industry, the Michigan legislature passed, by an overwhelming majority in both houses, Senate Bill 992, the Nonrecourse Mortgage Loan Act, which was signed by Governor Snyder yesterday, March 29, 2012, and will take immediate effect as PA 67 (Act).

The Act was supported by many industry groups with the Building Owners and Managers Association of Metropolitan Detroit (BOMA) taking the lead. Honigman Miller Schwartz and Cohn LLP was special counsel to BOMA in this effort.

In summary, the Act prohibits a post-closing solvency covenant from being used, directly or indirectly, as a nonrecourse carveout or as a basis for a personal judgment against a borrower, guarantor, or other surety on a nonrecourse loan and declares such provisions to be against public policy and invalid. The Act applies to the interpretation and enforcement of all nonrecourse loans in existence as of March 29, as well as those entered into after that date.

Many nonrecourse loan documents, particularly those used in CMBS loans, include provisions designed to minimize the risk that a borrower would seek bankruptcy protection in the event of a default, including requirements that the borrower be a so-called "single purpose entity." The opinions in the cases noted above construed some of these provisions based on a strict, literal reading of the documents and out of the context in which they were always understood by everyone in the CMBS industry, borrowers and lenders alike, and held that a borrower's simple insolvency resulted in a nonrecourse loan becoming fully recourse to the borrower and carveout guarantor. The Act restores the fundamental business understanding of the parties to these CMBS loans by making such an incongruous interpretation unenforceable.

If you have any questions about this Act, please feel free to contact any of our real estate attorneys [listed here](#).

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