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Michigan Supreme Court Remands Cherryland After Enactment of Legislation Deeming Solvency Covenants of Non-Recourse Loans Unenforceable

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It is believed that the Act was, in large part, a reaction to a decision of the Michigan Court of Appeals finding a guarantor liable for a deficiency claim notwithstanding the non-recourse nature of the loan. See *Wells Fargo Bank, NA v. Cherryland Bldg Ltd. P'ship*, 205 Mich.App. 95, 812 N.W.2d 750 (Mich. Ct. App. 2011).

Loan Act (the "Act"), which would regulate the use and enforceability of certain loan covenants in non-recourse commercial transactions. See <https://www.legislature.mi.gov/doc.aspx/mcl-act-2012-0001>.

On March 28, 2012, the Act, MCL 445.1591, et seq., became effective. The Act retroactively prohibits a post-dating solvency covenant from being used as a non-recourse covenant or as a basis for any claim against a borrower, guarantor or other surety on a non-recourse loan.

On Sept. 26, 2012, the Michigan Supreme Court remanded Cherryland in lieu of granting leave to appeal. The Michigan Supreme Court directed the Court of Appeals to reconsider its decision in light of the Act. When the Court of Appeals reviews its previous decision in the next few months, it will undoubtedly be confronted with, among other things, an argument that the Act is unconstitutional due to the contracts clause under both the Michigan Constitution and the United States Constitution.

We will provide a further update upon issuance of any decision by the Court of Appeals.

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