

Maryland Legislature Fixes Problems Left Over From 2012 Indemnity Deed of Trust (IDOT) Legislation

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Prior to 2012, the Indemnity Deed of Trust ("IDOT") had long been the preferred structure for borrowers in Maryland looking to finance their property because it would allow deferment of recordation taxes that would otherwise be required at the time of the loan. In 2012, the Maryland Legislature passed a law that imposed the recordation tax on *any* instrument securing a guaranty for a loan of more than \$1 million where the guarantor was not primarily liable, meaning that IDOTs and conventional deeds of trust securing loans over \$1 million were treated the same. This created serious problems for commercial borrowers and lenders. In an effort to fix these problems, the Maryland Legislature revised the existing law in 2013 in order to:

- Remove the bar on refinancing commercial loans;
- Raise the exemption threshold for qualifying loans;
- Clarify the rules for guarantees below the threshold; and
- Impose the recordation tax on "new money" only.

An IDOT, unlike a conventional deed of trust, is granted not by the borrower, but by a third party who acts as the guarantor for the loan and who grants the IDOT as security for the guaranty. Md. Tax-Property Code Ann. § 12-105 (LexisNexis 2013). The recordation taxes would only be due when the liability of the guarantor was triggered, usually as a result of a default by the borrower or guarantor under the loan documents. *Id.* This meant that, in most cases, such recordation taxes would never actually be paid.

This all changed in 2012, however, when the Maryland Legislature passed a law that imposed the recordation tax on *any* instrument securing a guaranty for a loan of more than \$1 million where the guarantor was not primarily liable. See Md. Tax-Property Code Ann. § 12-105 (LexisNexis 2012). This meant that IDOTs securing loans for over \$1 million were treated exactly the same as a conventional deed of trust for purposes of the recordation tax. The only exemption under the law dealt with the use of IDOTs to refinance the primary residence of the borrower. Md. Tax-Property Code Ann. § 12-108 (LexisNexis 2012). This not only put an end to the IDOT structure for

commercial borrowers, it also put those who utilized the structure prior to the law's passage in a strange purgatory as, theoretically, the law could be used to impose the recordation tax on the entire amount of the loan if the IDOT were ever amended for a refinancing or otherwise.

Less than a year after the 2012 law was made effective, the outcry from borrowers and lenders was too loud to ignore, and the Maryland Legislature passed what are now Chapters 267 and 268 of the Laws of Maryland of 2013 to address their concerns. The new legislation went into effect on July 1, 2013, and it mitigates the impact of the 2012 law as it:

1. **Removes the Bar on Commercial Loans.** The 2013 law permits the use of an IDOT exemption for commercial borrowers looking to refinance a loan, which, under the 2012 law, was only permitted for private borrowers refinancing their primary residence (See Md. Tax-Property Code Ann. § 12-108 (LexisNexis 2013));
2. **Raises the Threshold for Qualifying Loans.** The 2013 law raises the threshold for the IDOT exemption from \$1 million to \$3 million (but note that this requirement cannot be circumvented by utilizing multiple IDOTs as part of one transaction because for the purposes of the threshold, the multiple IDOTs would simply be aggregated) (Md. Tax-Property Code Ann. § 12-105 (LexisNexis 2013));
3. **Clarifies the Rule for Guarantees Below the Threshold.** The 2013 law further indicates that an IDOT can be used for loans over the \$3 million threshold without triggering recordation taxes so long as the IDOT itself only guarantees a maximum amount not more than \$3 million *Id.*; and
4. **Imposes Taxes on the “New Money” Only.** The 2013 law permits amendments to IDOTs *over* the \$3 million threshold without incurring the recordation tax on the entirety of the outstanding loan. The tax is only incurred on the “new money” used for refinancing. That is to say, if the amendment does not raise the amount of the loan above the then-outstanding principal balance, no recordation taxes are triggered, even for borrowers that never paid any because they utilized an IDOT prior to the 2012 law coming into effect (Md. Tax-Property Code Ann. § 12-108 (LexisNexis 2013)).

Ultimately this is good news for commercial borrowers and lenders dealing with financing under \$3 million or looking to refinance an IDOT above that threshold without triggering recordation tax on the entire amount of the loan.

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