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Senate Bill 992 (as introduced 2-29-12)
Sponsor: Senator Arlan Meekhof
Committee: Economic Development

Date Completed: 2-29-12

CONTENT

The bill would create the "Nonrecourse Mortgage Loan Act" to do the following:

- Prohibit a post closing solvency covenant from being used as a nonrecourse carveout or as a basis for any claim against a borrower, guarantor, or other surety on a nonrecourse loan.**
- Specify that a noncompliant provision in loan documents would be invalid.**
- Specify that the Act would not prohibit a loan secured by a mortgage from being fully recourse to the borrower or guarantor, if the loan documents did not contain nonrecourse provisions.**
- Include statements of legislative recognition and intent.**

The Act would apply to the interpretation and enforcement of all nonrecourse loans in existence on its effective date or entered into on or after that date.

Nonrecourse Loans

The proposed Act would prohibit a post closing solvency covenant from being used, directly or indirectly, as a nonrecourse carveout or as the basis for any claim or action against a borrower or any guarantor or other surety on a nonrecourse loan. A provision in the documents for a nonrecourse loan that did not comply with that prohibition would be invalid and unenforceable.

The Act would not prohibit a loan secured by a mortgage on real property located in Michigan from being fully recourse to the borrower or the guarantor, including as a result of a post closing solvency covenant, if the loan documents did not contain nonrecourse loan provisions.

"Nonrecourse loan" would mean a commercial loan secured by a mortgage on real property located in Michigan and evidenced by loan documents that provide any of the following:

- That the lender will not enforce the liability or obligation of the borrower by an action or proceeding in which a money judgment is sought against the borrower.
- That any judgment in any action or proceeding on the loan is enforceable against the borrower only to the extent of the borrower's interest in the mortgaged property and other collateral security given for the loan.
- That the lender will not seek a deficiency judgment against the borrower.
- That there is no recourse against the borrower personally for the loan.

"Nonrecourse loan" also would include a commercial loan secured by a mortgage on real property in Michigan evidenced by loan documents that include any combination of the provisions described above or any other provisions to the effect that the loan is without personal liability to the borrower beyond the borrower's interest in the mortgaged property and other collateral security given for the loan.

"Nonrecourse carveout" would mean a specific exception, if any, to the nonrecourse provisions set forth in the loan documents for a nonrecourse loan that has the effect of creating personal liability of the borrower or a guarantor or other surety of the loan for all or some amounts owed to the lender, if specified events occur.

"Post closing solvency covenant" would mean any provision of the loan documents for a nonrecourse loan, whether expressed as a covenant, representation, warranty, or default, that relates to the solvency of the borrower, including a provision requiring the borrower to maintain adequate capital or have the ability to pay its debts, with respect to any period of time after the date the loan is initially funded. The term would not include a covenant not to file a voluntary bankruptcy or other voluntary insolvency proceeding or not to collude in an involuntary proceeding.

Legislative Recognition & Intent

An enacting section of the bill states: "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. The legislature recognizes that the use of a post closing solvency covenant as a nonrecourse carveout, or an interpretation of any provision in a loan document that results in a determination that a post closing solvency covenant is a nonrecourse carveout, 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."

The bill also states: "It is the intent of the legislature that this act applies to any claim made or action taken to enforce a post closing solvency covenant on or after the effective date of this act; to any claim made to enforce a post closing solvency covenant that is pending on the effective date of this act; and to any action to enforce a post closing solvency covenant that is pending on the effective date of this act, unless a judgment or final order has been entered in that action and all rights to appeal that judgment or final order have been exhausted or have expired."

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.