

SENATE BILL No. 992

February 29, 2012, Introduced by Senators MEEKHOF, RICHARDVILLE, HUNTER and WHITMER and referred to the Committee on Economic Development.

A bill to regulate the use and enforceability of certain loan covenants in nonrecourse commercial loan transactions in this state.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

- Sec. 1. This act shall be known and may be cited as the
 "nonrecourse mortgage loan act".
- 3 Sec. 2. As used in this act:
 - (a) "Nonrecourse carveout" means 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, if specified events occur, personal liability of the borrower or a guarantor or other surety of the loan for all or some amounts owed to the

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- 1 lender.
- 2 (b) "Nonrecourse loan" means a commercial loan secured by a
- 3 mortgage on real property located in this state and evidenced by
- 4 loan documents that meet any of the following:
- 5 (i) Provide that the lender will not enforce the liability or
- 6 obligation of the borrower by an action or proceeding in which a
- 7 money judgment is sought against the borrower.
- 8 (ii) Provide that any judgment in any action or proceeding on
- 9 the loan is enforceable against the borrower only to the extent of
- 10 the borrower's interest in the mortgaged property and other
- 11 collateral security given for the loan.
- 12 (iii) Provide that the lender will not seek a deficiency
- 13 judgment against the borrower.
- 14 (iv) Provide that there is no recourse against the borrower
- 15 personally for the loan.
- 16 (v) Include any combination of subparagraphs (i) to (iv) or any
- 17 other provisions to the effect that the loan is without personal
- 18 liability to the borrower beyond the borrower's interest in the
- 19 mortgaged property and other collateral security given for the
- 20 loan.
- 21 (c) "Nonrecourse provisions" means 1 or more of the provisions
- 22 described in subdivision (b) (i) to (v), whether or not the loan is
- 23 subject to a nonrecourse carveout or carveouts.
- 24 (d) "Post closing solvency covenant" means any provision of
- 25 the loan documents for a nonrecourse loan, whether expressed as a
- 26 covenant, representation, warranty, or default, that relates <<solely>>
 to the
- 27 solvency of the borrower, including, without limitation, a

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- 1 provision requiring that the borrower maintain adequate capital or
- 2 have the ability to pay its debts, with respect to any period of
- 3 time after the date the loan is initially funded. The term does not
- 4 include a covenant not to file a voluntary bankruptcy or other
- 5 voluntary insolvency proceeding or not to collude in an involuntary
- 6 proceeding.
- 7 Sec. 3. (1) A post closing solvency covenant shall not be
- 8 used, directly or indirectly, as a nonrecourse carveout or as the
- 9 basis for any claim or action against a borrower or any quarantor
- 10 or other surety on a nonrecourse loan.
- 11 (2) A provision in the documents for a nonrecourse loan that
- 12 does not comply with subsection (1) is invalid and unenforceable.
- Sec. 4. This act does not prohibit a loan secured by a
- 14 mortgage on real property located in this state from being fully
- 15 recourse to the borrower or the guarantor, including, but not
- 16 limited to, as a result of a post closing solvency covenant, if the
- 17 loan documents for that loan do not contain nonrecourse loan
- 18 provisions.

<<Sec. 5. This act applies to the enforcement and interpretation of
all nonrecourse loan documents in existence on, or entered into on or
after, the effective date of this act.>>

19 Enacting section 1. <<

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21
>>The legislature

22 recognizes that it is inherent in a nonrecourse loan that the

- 23 lender takes the risk of a borrower's insolvency, inability to pay,
- 24 or lack of adequate capital after the loan is made and that the
- 25 parties do not intend that the borrower is personally liable for
- 26 payment of a nonrecourse loan if the borrower is insolvent, unable
- 27 to pay, or lacks adequate capital after the loan is made. The

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- 1 legislature recognizes that the use of a post closing solvency
- 2 covenant as a nonrecourse carveout, or an interpretation of any
- 3 provision in a loan document that results in a determination that a
- 4 post closing solvency covenant is a nonrecourse carveout, is
- 5 inconsistent with this act and the nature of a nonrecourse loan; is
- 6 an unfair and deceptive business practice and against public
- 7 policy; and should not be enforced. It is the intent of the
- 8 legislature that this act applies to any claim made or action taken
- 9 to enforce a post closing solvency covenant on or after the
- 10 effective date of this act; to any claim made to enforce a post
- 11 closing solvency covenant that is pending on the effective date of
- 12 this act; and to any action to enforce a post closing solvency
- 13 covenant that is pending on the effective date of this act, unless
- 14 a judgment or final order has been entered in that action and all
- 15 rights to appeal that judgment or final order have been exhausted
- 16 or have expired.