

Michigan Court of Appeals Upholds Non-Recourse Mortgage Loan Act



Robert J. Hahn

In what has been called a big victory for borrowers of commercial loans, the Michigan Court of Appeals has upheld the Michigan legislature's recent passage of the Non-Recourse Mortgage Loan Act (NMLA). In the case of *Wells Fargo Bank v Cherryland Mall Ltd Ptnsp*, the Court addressed the issue of whether developer David Schostak is personally liable for a guarantee on an original \$8.7 million non-recourse loan obtained for the purpose of renovations to the Cherryland Center Mall near Traverse City, Michigan.

Generally, a "non-recourse loan" means a commercial loan secured by a mortgage on real property. In a non-recourse loan, the lender takes the risk of a borrower's insolvency, inability to pay, or lack of adequate capital. In the event of default, the lender is limited to recovery of the loan by the sale of the asset. The asset used as collateral, as well as the money that flows from the asset, are isolated by covenants referred to as recourse triggers or carveouts, which are generally related to bad acts.

In the case of the Cherryland Center Mall, the foreclosure sale resulted in a \$2.1 million deficiency. Wells Fargo Bank sued David Schostak who had signed a guarantee making him liable for any deficiency if a violation of the loan covenants was found. The Trial Court found that Schostak was liable "as guarantor" for the entire loan deficiency because insolvency was a violation of the loan covenants.

While the case was on appeal, the Michigan legislature passed the NMLA, which provides, in part, that a post-closing solvency covenant may not be used as a non-recourse carve-out or as a basis for a claim against a borrower or guarantor on a non-recourse loan. The legislation was effective retroactively. The Court made a review of the legislative hearings leading up to the passage of the NMLA. These discussions included the argument that allowing non-recourse loans to become recourse due to insolvency would "irreparably harm the current environment for investment in Michigan." Furthermore, the failure to pass the proposed Act would "basically eliminate" non-recourse loans in Michigan leading to a collapse of non-recourse lending, a decrease in tax revenues, and a wave of foreclosures.

After considering the bank's arguments that the retroactive modification of private contracts violated the Constitution of both the State of Michigan and the United States of America, and possible economic consequences of a failure to uphold the law, the Michigan Court of Appeals rejected the bank's Constitutional challenge to the NMLA and held that it barred the bank's claims against Schostak.

Robert J. Hahn

Robert J. Hahn is a partner in our Livonia office where he concentrates his practice on corporate and commercial litigation, securities and real estate. He can be reached at (734) 261-2400 or rhahn@cmda-law.com.

in this issue

Court of Appeals Upholds NMLA	1	Northern Michigan Municipal Seminar	3
Michigan Legislation Update	2-3	Office Locations	4
Attorney Joins Livonia Office	3		

Michigan Legislation Update

RECENTLY ENACTED MICHIGAN LAWS



Karen M. Daley

[Michigan Schools Avoid Makeup Days](#)

Under the State School Aid Act, schools must meet a minimum number of days and hours of instruction to qualify for State aid. A school district that fails to meet either the minimum hours or days will incur a reduction in State aid. However, a school district may cancel up to six school days, but still count

them toward the minimum number of days of instruction, if the closing is due to weather, fires, epidemics, power failure, water or sewer failure, or health conditions.

Legislation was recently enacted that will allow schools with too many snow days to avoid having to schedule extra days in June. Under the bill, school districts that have more than six snow days this year can have longer days for the rest of the school year instead of adding days at the end of the year. Schools will still have to meet the minimum hours of instruction.

[No Cell Phone Use for Commercial and Bus Drivers](#)

The Michigan Vehicle Code currently prescribes civil infraction fines for individuals who read, type, or send text messages while operating a motor vehicle or a commercial motor vehicle. Beginning October 28, 2013, the fines will also apply to a person who uses a hand-held mobile telephone to talk while operating a commercial motor vehicle or a school bus, including while temporarily stationary due to traffic, a traffic control device, or other momentary delays.

The new law defines “use a hand-held mobile telephone” as one or more of the following: 1) using at least one hand to hold a mobile telephone to conduct a voice communication, 2) dialing or answering a mobile phone by pressing more than a single button, and 3) reaching for a mobile phone in a way that requires a driver to move out of a seated driving position.

The legislation does contain exceptions for individuals using a mobile phone to: report a traffic accident, medical emergency, or serious road hazard; report a situation in which the person believes his or her personal safety is in jeopardy; report or avert a crime; carry out official duties as a police officer, law enforcement official, member of a paid or volunteer fire department, or operator of an emergency vehicle.

[Universal Form for Meds Authorization](#)

In an effort to contain costs, some health insurance companies require prior authorization before they will cover certain prescriptions, such as a brand name drug for which a generic is available, or a drug that is particularly expensive. Generally, the prior authorization process requires a physician to fill out a separate form documenting that the drug is medically necessary and submit it to the insurer. This process can be very burdensome and time consuming for health care providers, however, because there are currently about 150 different versions of these forms that are being used by insurers in Michigan.

A bill recently signed into law requires the creation of a single prior authorization form for use by health providers when an insurance company requires prior authorization. The new law requires the state insurance commissioner to develop a standard form for physicians, and requires insurers to start using the universal form by July 2016.

LEGISLATION TO WATCH

[Teacher Merit Pay](#)

The House Education Committee recently considered a bill that would make teacher job performance the primary factor in determining pay. The bill would amend the Revised School Code to modify the criteria school districts, intermediate school districts, and charter schools must use to set compensation for teachers and administrators. The bill would require that job performance and job accomplishments be the primary factor used to determine compensation, and that the evaluation of job performance be based primarily upon student growth data. The bill further specifies that school officials would be prohibited from using “length of service” or “achievement of advanced degrees” as a factor in compensation levels or adjustments in compensation, with a few exceptions. The bill would only apply to teachers and administrators hired after the bill’s effective date.

[Erasing Felony Records](#)

Currently there is a law in Michigan that provides a process by which a person who has only one criminal conviction can apply to the court for an order setting aside the conviction.

A recently introduced bill would revise this law to instead allow, with some exceptions, a person to file an application

continued on page 3

Michigan Legislation Update (cont.)

with the convicting court for an order setting aside one or more convictions as follows: (1) a person convicted of one felony offense and not more than two misdemeanor offenses could petition to set aside the felony offense; and (2) a person convicted of not more than two misdemeanor offenses and no other felony or misdemeanor offenses could apply to have either or both of the misdemeanor convictions set aside. A "minor offense" is defined to mean a misdemeanor or ordinance violation for which the maximum term of imprisonment is 90 days and that was committed when the person was 21 years of age or younger.

However, not all felony or misdemeanor convictions are eligible to be expunged. A conviction cannot be set aside for a felony that is punishable by life imprisonment; for a

conviction for or attempted violation of the criminal sexual conduct (CSC) statutes; for offenses involving child sexually abusive materials; for offenses involving the use of a computer to commit numerous crimes, or for a traffic offense. The bill would not change this, and would actually add another offense to the list of convictions that could not be set aside: a conviction that is a felony involving domestic violence if the person had a prior misdemeanor conviction for domestic violence.

Karen M. Daley

Karen M. Daley is an attorney in our Livonia office where she concentrates her practice on appellate law and municipal law. She can be reached at (734) 261-2400 or kdaley@cmda-law.com.

Attorney Joins Livonia Office

We are pleased to announce that Nathan I. Stull has joined our Firm as an attorney in our Livonia office.

He focuses his practice on estate planning, business succession planning and real estate law. When planning something as important as a will or trust, the administration of a family member's estate, the purchase or sale of real estate, or the formation of a business succession plan, clients rely on his

knowledge, experience and support.

Mr. Stull received a Juris Doctor degree from the University of Michigan Law School and a Bachelor of Arts degree from Hillsdale College.

He can be reached at (734) 261-2400 or nstull@cmda-law.com.

Northern Michigan Municipal Law Seminar

Please join CMDA attorneys as we share our knowledge on emerging issues in municipal law.

Thursday, June 27, 2013

8:30 a.m. - 4 p.m.

Treetops Resort
Gaylord, Michigan

Space is filling quickly.
Register today!

A panel of CMDA attorneys will present on the following topics:

Open Meetings Act
Freedom of Information Act (FOIA)
EEOC and Employment Discrimination
Document Retention

There is no fee to attend, but registration is required. Please register by June 20, 2013.

A seminar schedule and registration form can be found on the homepage of our website at www.cmda-law.com.

This is a joint seminar between CMDA and the Michigan Municipal Risk Management Authority (MMRMA).

33900 Schoolcraft Road
 Livonia, Michigan 48150

PRSR STD
 US POSTAGE
 PAID
 PERMIT NO. 63
 SOUTHFIELD, MI

On Law is a monthly publication from Cummings, McClorey, Davis & Acho, P.L.C.

Comments and questions regarding specific articles should be addressed to the attention of the contributing writer. Remarks concerning miscellaneous features should be addressed to the attention of Jennifer Sherman.

CMDA - On Law
 33900 Schoolcraft Road
 Livonia, Michigan 48150
 (734) 261-2400
 www.cmda-law.com
 E-Mail: jsherman@cmda-law.com

On Law is intended for informational purposes only and should not be used as a substitute for individual legal advice. Please consult an attorney regarding your particular situation.

Would you like to reference previous issues of On Law? View them at www.cmda-law.com.

Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.



Accra, Ghana
 P.O. Box 12556
 Accra, Ghana
 Telephone: +223-21-224260
 Facsimile: +233-21-232262

GHANA

Riverside
 3801 University Avenue
 Suite 560
 Riverside, CA 92501
 Telephone: 951.276.4420
 Facsimile: 951.276.4405

Grand Rapids
 2851 Charlevoix Drive, S.E.
 Suite 327
 Grand Rapids, MI 49546
 Telephone: 616.975.7470
 Facsimile: 616.975.7471

Sterling Heights
 43409 Schoenherr Road
 Sterling Heights, MI 48313
 Telephone: 586.731.5000
 Facsimile: 586.803.1034

Traverse City
 125 Park Street
 Suite 415
 Traverse City, MI 49684
 Telephone: 231.922.1888
 Facsimile: 231.922.9888

MISSOURI

CALIFORNIA

MICHIGAN

Cummings, McClorey, Davis & Acho, P.L.C.
Office Locations