

HOUSE BILL No. 5446

February 29, 2012, Introduced by Reps. Hobbs, Hammel, Wayne Schmidt, Haveman, O'Brien, Foster, Ananich, Townsend, Ouimet and Walsh and referred to the Committee on Commerce.

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:

1 Sec. 1. This act shall be known and may be cited as the
2 "nonrecourse mortgage loan act".

3 Sec. 2. As used in this act:

4 (a) "Nonrecourse carveout" means a specific exception, if any,
5 to the nonrecourse provisions set forth in the loan documents for a
6 nonrecourse loan that has the effect of creating, if specified
7 events occur, personal liability of the borrower or a guarantor or
8 other surety of the loan for all or some amounts owed to the

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 to the
27 solvency of the borrower, including, without limitation, a

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 guarantor
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.

13 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.

19 Enacting section 1. This act applies to the enforcement and
20 interpretation of all nonrecourse loans in existence on, or entered
21 into on or after, the effective date of this act. 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

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.