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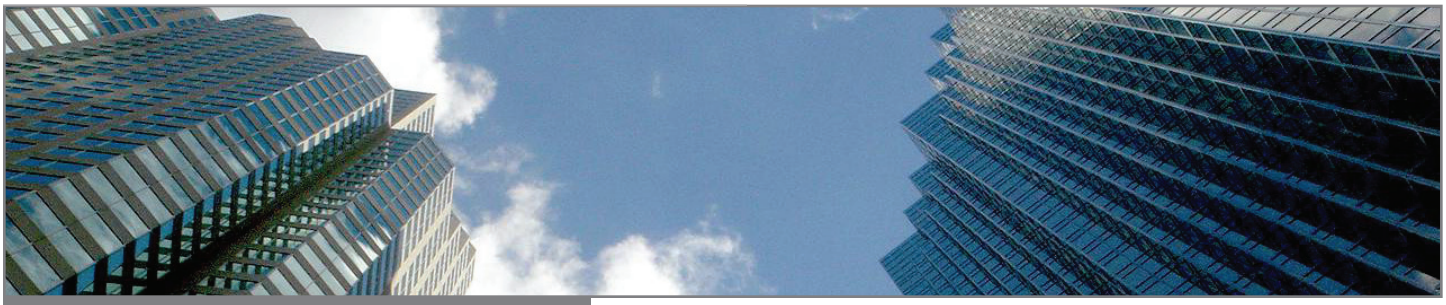

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MICHIGAN LEGISLATURE REACTS QUICKLY TO DRAMATIC NONRECOURSE LIABILITY DECISIONS

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Michigan became the focus of national attention in the world of commercial real estate finance in December, when the Michigan Court of Appeals and the federal district court for the Eastern District of Michigan each determined that lenders could pursue remedies against borrowers and guarantors of loans when the borrower-property owners became insolvent and failed to make required loan payments, notwithstanding the fact that the loans were styled as nonrecourse obligations. The decisions, *Wells Fargo Bank NA v. Cherryland Mall Limited Partnership*, (Case No. 304682, Michigan Court of Appeals, currently on appeal to the Supreme Court of Michigan) ("Cherryland Mall") and *51382 Gratiot Avenue Holdings, LLC v. Chesterfield Development Co., LLC* (Case No. 2:11-CV-12047, E.D. Mich) ("Chesterfield") caused consternation both in lending circles and among borrowers because the courts' interpretations of the loan documents would have created potential liability for borrowers and guarantors of virtually all commercial mortgage-backed securitization ("CMBS") loans, when those loans had been marketed as "nonrecourse" obligations that would not result in personal liability for borrowers and guarantors except for certain limited "bad boy acts" such as fraud, misappropriation of rents, waste on the property, or similar issues.

The decisions had been characterized as "disastrous" and "terrifying" by industry observers, as more than an estimated $1 billion of loans in Michigan could have been affected by the decisions, with many more dollars at stake if courts across the country adopted the Michigan courts' rationale. At the same time, many market commentators noted, as each of the court's opinions did, that the language in the loan documents, which was largely standardized for loans of this kind, clearly indicated that insolvency of the borrower violated "single purpose entity" covenants contained in the loan documents, and that such violations were a trigger for recourse against the borrower and guarantors of the loans.

The legislative solution, the Nonrecourse Mortgage Loan Act, signed into law by Governor Snyder on March 29, 2012, specifically prohibits lenders from using insolvency of the borrower as a basis for any claim against such borrower or guarantor in the context of nonrecourse commercial real estate loans. The legislation recognizes that "it is inherent in a nonrecourse loan that the lender takes the risk of a borrower's insolvency" and "the parties do not intend that the borrower is personally liable for payment of a nonrecourse loan." The law states in its enacting language that using insolvency as a nonrecourse carveout "is inconsistent with … the nature of a nonrecourse loan; is an unfair and deceptive business practice and against public policy; and should not be enforced."

The Act applies to the enforcement and interpretation of all nonrecourse loan documents in existence now or which will be entered into in the future under Michigan law. Challenges to the statute on constitutional grounds are expected, so it may be some time before the controversy is fully resolved.

Even with the passage of this new law, lenders and borrowers alike should carefully negotiate the carve-out provisions in loan documents. As the *Cherryland Mall* court noted, "it is not the job of this Court to save litigants from their bad bargains or their failure to read and understand the terms of a contract."

The *Cherryland Mall* and *Chesterfield* decisions represented a substantial departure from the perceived structure and meaning of non-recourse debt, and therefore drew a dramatic legislative response - a response that itself may be subject to further challenges. Rigorous enforcement of other nonrecourse carveouts is a certainty in today's market, and it is in the best interest of both borrower and lenders to assure that the allocation of risk between the parties is clearly understood and negotiated when necessary.

SUPREME COURT DECISION ALLOWS LANDOWNERS TO APPEAL EPA ADMINISTRATIVE COMPLIANCE ORDERS

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In a unanimous decision released on March 20, 2012, the United States Supreme Court held that administrative compliance orders issued by the United States Environmental Protection Agency ("EPA") pursuant to the Clean Water Act ("CWA") are subject to pre-enforcement judicial review. This decision is likely to have a considerable impact on the EPA's future enforcement of environmental laws, providing new avenues for landowners to challenge the EPA and possibly delaying certain enforcement actions by the EPA.

Michael and Chantell Sackett, the plaintiffs in *Sackett v. Environmental Protection Agency*, 566 U.S. ____ (2012), purchased a residential lot that was separated from an inland lake by several developed lots. The Sacketts received an administrative compliance order from the EPA after filling a portion of their lot with dirt and rock in order to construct a home. The compliance order stated that the Sacketts' property was a federally-regulated wetland under the CWA and that filling the property violated the CWA. It ordered the Sacketts to restore the lot to its prior condition pursuant to an EPA-established Administrative Work Plan and to allow the EPA access to the lot and all records concerning the lot. If the Sacketts did not comply, they faced fines of up to $75,000 per day.

An administrative compliance order, such as that issued to the Sacketts, is a tool used frequently by the EPA to compel compliance with a number of environmental laws, including the CWA, Clean Air Act ("CAA"), Resource Conservation and Recovery Act ("RCRA"), and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), without first commencing a lawsuit. If a party fails to comply with the administrative compliance order, then the EPA may bring an enforcement action in court, seeking daily penalties for both the alleged violation of the law and the subsequent violation of the order. However, the prospect of incurring hefty fines usually prompts the receiving party to comply with the terms of the compliance order without judicial enforcement.

The Sacketts, believing that their property was not a federally-regulated wetland, wished to appeal the compliance order immediately. However, they soon discovered that the EPA did not have a formal appeal process for compliance orders. Instead, the Sacketts filed a lawsuit, seeking judicial review pursuant to the Administrative Procedures Act ("APA"), and alleging that due process requires the EPA to have a system for pre-enforcement appeals of compliance orders. The district court ruled that it lacked jurisdiction over pre-enforcement review of the EPA's compliance orders, and the Ninth Circuit Court of Appeals affirmed.

The Supreme Court unanimously overruled the lower courts, holding that an administrative compliance order issued by the EPA under the CWA is "final" for purposes of judicial review under the APA, and that the CWA contained no "express" language barring pre-enforcement judicial review of the compliance order. Thus, the Sacketts could challenge the administrative compliance order before the EPA brought an action in court to enforce it.

While the decision in *Sackett* dealt with the CWA, it is likely to affect enforcement with respect to many federal environmental laws. Neither RCRA nor the CAA currently contain an express bar on pre-enforcement judicial review of compliance orders, and thus it is likely that landowners will be able to challenge any future orders issued pursuant to those acts in court prior to the commencement of an EPA enforcement action. By contrast, CERCLA does contain a direct statutory bar on pre-enforcement judicial review. Since the Court did not reach the constitutional due process issue brought by the Sacketts, at least for now it appears that there will continue to be no pre-enforcement review available for administrative compliance orders issued under CERCLA.

The EPA has already indicated that the Supreme Court's decision means that the EPA will issue fewer administrative compliance orders, opting instead to immediately commence administrative hearings or federal

litigation. Formal litigation may be more costly and resource-intensive for both landowners and the EPA. Nonetheless, the Supreme Court's decision is a positive development for commercial real estate developers and landowners. Landowners will feel less pressure to simply comply with a questionable administrative order to avoid incurring hefty fines when an immediate legal challenge is available. Further, by controlling the timing of judicial review of the order, a landowner can decrease any lost time on a particular project that would have occurred by waiting for the EPA to bring an enforcement action.

DICKINSON WRIGHT OFFERS UNIQUE CROSS-BORDER REAL ESTATE EXPERTISE

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Dickinson Wright is one of the very few law firms in the United States and Canada with substantial real estate practice groups and expertise within its firm walls on both sides of the US and Canadian border. To reach this distinction, on January 1, 2011, Dickinson Wright combined practices with Aylesworth LLP, creating the newly formed Canadian entity Dickinson Wright LLP.

The Aylesworth firm was founded in 1861 and was a nationally recognized firm in Toronto, Ontario with an enviable client base and the well earned-respect of the legal community and the business community alike. It was a full service business law firm enjoying an excellent reputation. The firm featured a strong real estate group with a broad range of experience including acquisitions and dispositions, condominium development and conversions, commercial lending transactions, real estate realizations (enforcement/foreclosure) and workouts, leasing and other real estate related matters. Aylesworth LLP built its reputation on providing first rate responsive service at a reasonable cost with excellent results for its clients.

The strong real estate, corporate commercial and litigation groups within the newly formed Dickinson Wright LLP can facilitate fast, effective and exceptional advice in all aspects of business law in the Canada. The considerable interaction between attorneys and lawyers in all of our offices leads to the obvious benefits and efficiencies of a team approach.

We strongly believe that we have achieved a pre-eminent presence in North America with our innovative and collective commitment to rapid integration, and with a shared vision and shared values on each side of the border. Working together creates a certain familiarity of the law by all of our attorneys and lawyers on both sides of the border. The result is that we have a better understanding of the needs of our cross border clients and their respective geographic areas which makes us an even better law firm.

If you have any questions with respect to our cross border capabilities, please let us know. If you wish to contact any of our lawyers in the Toronto office directly, please refer to our website at www.dickinsonwright.com. If you have any questions with regard to the services that we can provide, please contact Leslee Lewis at 616.336.1042 or llewis@dickinsonwright.com.

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