maddin hauser
Maddin Hauser Wartell Roth & Heller PC
attorneys and counselors

Real e-State

Winter 2012
Vol. 9 Issue 1

An electronic newsletter for real estate professionals

From the Desk of

The Real e-ditor
Steven D. Sallen

2012 Tax Assessment Notices Coming Soon to a Mailbox Near You!

I hear from many sources that the economy is, generally, improving, and that deals are getting done. Yes, deals are getting done, especially for buyers with cash! Interest rates are low, but equity requirements are high; and personal guarantees are a must. Building users can make a great deal, but investors need to be more cautious. Sellers seem, almost always, to be lenders and special servicers administering lender-owned property or overseeing short sales. Certainly, 2008 is in the rearview mirror, but lenders, as sellers, are a near daily reminder that the crash of 2008 is hardly out of sight, and definitely not out of mind.

Building owners are still struggling with the need to reduce operating costs. In the next few weeks, municipalities will be sending 2012 Notices of Tax Assessment. For owners who find that the taxable value in their Notice of Assessment exceeds 50% of true cash value, now is the time to take action. Owners of commercial, industrial and multi-family residential properties can skip the Board of Review process, and go straight to appeal, provided that their appeals are timely filed. At Maddin Hauser we have had great success in saving property owners money on their real property taxes. Our approach to handling such cases is a little different. First of all, we will handle cases on a contingency *or* on an hourly fee basis. For higher value properties, an hourly fee based property tax appeal might save the client several multiples below what a contingent fee case might cost. Also, the Michigan Tax Tribunal is buried in a backlog of cases. Property tax appeal cases can take several years to wind their way through the system and ultimate resolution. In the meantime, property owners will have paid several more years of taxes without relief. And relief is what we find our clients need *now*, not years from now. So we work hard to position cases for quick settlement. Where the property owner shows a willingness to work with the municipality to a mutually satisfactory resolution, then most municipalities are willing to work towards a settlement, which will provide the tax relief that our clients are looking for much sooner.

So when your (or your clients') Notices of Tax Assessment arrive in the coming days and weeks, consider whether now might be a good time to consider a property tax appeal. Then, let Maddin Hauser's property tax appeal team develop a strategy that will save you money and time.

Steve Sallen

Registers of Deeds Continue to Examine Transfer Tax Exemptions

By: Kasturi Bagchi

In a prior issue, *Real e-State* readers were warned that several counties have taken the position that interim conveyances, pending expiration of the redemption period, were not transfer tax exempt even where the conveyance instrument claimed recitation of consideration of $100.00 or less. Registers of deeds are now scrutinizing and sometimes rejecting other claimed transfer tax exemptions. Based on a letter dated October 4, 2011 from the Michigan Department of Treasury (the "Department"), Wexford County and Antrim County have advised The Detroit Legal News that conveyances to Fannie Mae and Freddie Mac are not exempt from transfer taxes and, therefore, a check for transfer taxes must be submitted with the instrument to be recorded. MCL 207.505[1] and MCL 207.526[2]. Exempt "written instruments which this state is prohibited from taxing under the constitution or statutes of the United States." The Department asserts:

> *… it is probably only a matter of time before all registers of deeds adopt the same position …*

"[Fannie Mae and Freddie Mac] are government sponsored entities. Federal law generally prohibits the taxation of these entities by state and local governments except for a direct tax on real property … [The Department] has concluded that real estate transfer tax is not a tax on real property, but rather is an excise tax on the instrument being recorded. The Federal general exemption from taxes is not an explicit prohibition on excise taxes. Therefore, government sponsored entities are not exempt from real estate transfer tax."

Continued On Page 3

Recent Michigan Case Puts CMBS Loan Guarantors at Risk

By: Danielle M. Spehar And Kasturi Bagchi

Two days after Christmas, 2011, under the title Wells Fargo Bank, N.A., vs. Cherryland Mall Limited Partnership and David Schostak, the Michigan Court of Appeals rendered a decision which could have a dramatic impact on real estate developers in our state.

First, a short course in CMBS (commercial mortgage-backed securities) loans. The key features of such loans are (a) non-recourse to the borrowing entity and to the principals of the borrower, except for a guaranty of the so-called nonrecourse carveouts, (b) favorable interest rates, (c) typical loan terms and amortization periods of approximately 10 and 25 years, respectively, and (d) the resulting loans are bundled into "pools" with similar loans and sold as securities to Wall Street investors. The terms and conditions of these loans are rigidly watch-dogged by the investment rating agencies (like Standard & Poor's), to assure that the loans, once produced, can be pooled and sold on Wall Street to investors. Consequently, the documentation on these loans is quite rigid, often limiting negotiations to select business points.

One of the most important features of these loans to developers is their nonrecourse nature; meaning that in the event of a default, the lender's primary remedy is generally limited to mortgage foreclosure. The right to a deficiency judgment on the debt is specifically waived by the lender. Therefore, if realization on the collateral is the lender's only remedy, then a borrower's bankruptcy could hinder or significantly delay foreclosure, thereby impeding the lender from realizing its primary remedy.

Continued On Page 2

Recent Michigan Case Puts CMBS Loan Guarantors at Risk

By: Danielle M. Spehar And Kasturi Bagchi

Continued From Page 1

Consequently, CMBS borrowers are required, pursuant to the terms of the standard loan documents, to agree to maintain their status as a "single purpose entity" or SPE. Typical CMBS loan documents, therefore, contain a list of covenants that borrowers would or would not do certain things that the rating agencies theorize could cause a borrower not to be a single purpose entity. Why? Because an entity that is not single-purpose may be more likely to be consolidated into bankruptcy proceedings involving one or more persons affiliated with the Borrower or its principals.

It is also interesting to note that the *Cherryland* case does not discuss whether, in fact, the borrower was actually "insolvent". So there was no analysis made by the Court of such questions as: Whether the borrower's inability to pay a nonrecourse debt rendered it insolvent? Or, when is insolvency to be measured?

SPE's, therefore, are often also referred to as "bankruptcy remote" entities. In fact, CMBS lenders are so concerned that their borrower not become bankrupt, that one or more principals of borrower are required to guaranty the entire principal amount of the loan upon occurrence of certain catastrophic (from the lender's point of view) events, including if the borrower declares bankruptcy, or fails to maintain its bankruptcy remote (*i.e.*, SPE) status. Bankruptcy and failure to maintain SPE status are referred to, colloquially, as "springing recourse" events; meaning that, upon occurrence of such an event, a guarantor's guaranty springs to full effect and covers the entire principal amount of the loan.[1]

In the *Cherryland* case, the borrower obtained an $8.7 million CMBS loan, and later defaulted. The plaintiff foreclosed on its mortgage and was the successful bidder at foreclosure sale, at $6,000,000, leaving a deficiency on the note of approximately $2.1 million. At this point, presumably, the borrower and guarantor would have thought the matter concluded.

After foreclosure was completed, however, the lender amended its complaint to add the guarantor to the proceedings and demanding that he pay the $2.1 million deficiency amount. The plaintiff argued that the borrower had become *insolvent*, and the Mortgage provided that failure of the borrower to "remain solvent" was a violation of the SPE covenants. The lender argued that borrower's failure to maintain its "status" as a single purpose entity was a breach of the springing recourse covenants of the note and, therefore, the guarantor should repay the $2.1 million deficiency.

The Court of Appeals, relying on cases from other jurisdictions, found that a breach of just one SPE provision constituted a "failure to maintain SPE status," and that upon failure to maintain SPE status, full recourse to the borrower and to the guarantor was triggered. One noteworthy irony is that, in the event a creditor of an entity related to the borrower had tried to consolidate assets of the borrower in such a bankruptcy, the lender would have tried to block bankruptcy consolidation by arguing that although a single covenant of the SPE provisions may have been breached, borrower's "status" as an SPE was otherwise intact and, therefore, consolidation of the borrower into such a related party bankruptcy case would be inappropriate. We do not know if that irony was pointed out to the Court of Appeals in the course of the proceedings; if it was, however, the argument was obviously not persuasive to the Court.

The *Cherryland* decision has been appealed to the Michigan Supreme Court. Until the Michigan Supreme Court rules on this matter, however, *Cherryland* stands as the law of the land in Michigan, and defaulting CMBS loan borrowers can expect to see more enforcement of springing recourse actions against their guarantors in the coming months.

---

[1] More often, the non-recourse carveout guaranty is thought of as guarantying repayment of damages suffered by a lender on account of more obvious "bad" conduct by the borrower, such as absconding with the proceeds of insurance or condemnation, converting tenant security deposits, committing waste of the collateral, and similar "bad boy" acts.

Registers of Deeds Continue to Examine Transfer Tax Exemptions

By:
Kasturi Bagchi

Continued From Page 1

Since the letter of October 4, 2011 issued by the Department was circulated to all counties, it is probably only a matter of time before all other registers of deeds adopt the same position as Wexford and Antrim counties.

Not only are conveyances to Freddie Mac and Fannie Mae (and perhaps any other "government sponsored entities") now subject to real estate transfer taxes according to various registers of deeds, Corporation Counsel for Macomb County has taken the position that an instrument which assigns a land contract vendee's interest is also subject to real estate transfer tax. Both MCL 207.505 and MCL 207.526 contain exemptions for "a land contract in which legal title does not pass until the total consideration specified in the contract has been paid." Macomb County Register of Deeds claims that the statutory exemptions specifically do not include an *assignment* of land contract and, therefore, an assignment of the land contract is subject to real estate transfer taxes. The legality of this position is dubious because on what consideration is the transfer tax assessed? Also, when the land contract vendee ultimately obtains the deed, do they have to pay a transfer tax again?

The trend is clear: registers of deeds are reviewing and challenging claimed transfer tax exemptions with or without merit. This leads to uncertainty in whether certain instruments will be recorded. We will be curious to see how this uncertainty will be handled by title insurers of such transactions. In the interim, real estate practitioners must be prepared to vigorously back-up their basis for an exemption from transfer tax.

1This statute sets forth exemptions for county transfer taxes.

2This statute sets forth exemptions for state transfer taxes.

maddin hauser
Maddin Hauser Wartell Roth & Heller PC
attorneys and counselors

www.maddinhauser.com
28400 Northwestern Highway
Third Floor, Essex Centre
Phone: 248-827-1861
Fax: 248-359-6161

The Real e-State Staff:

EDITOR-IN-CHIEF:
Steven D. Sallen
ssallen@maddinhauser.com

CONTRIBUTING EDITOR:
Danielle M. Spehar
dspehar@maddinhauser.com

CONTRIBUTING EDITOR :
Kasturi Bagchi
kbagchi@maddinhauser.com

LAYOUT EDITOR:
Tracy L. Farley
tfarley@maddinhauser.com