

**From:** Paul S. Magy  
**Sent:** February 22, 2013  
**To:** Karen Penafiel  
**CC:** Janet Langlois; Jim jonas; Greg McDuffee; John Sier  
**Subject:** Amicus Brief Supporting Constituionality of Michigan Nonrecourse Mortgage Loan Act In Wells Fargo Bank vs. Cherryland Mall Limited Partnership Case in Michigan Court of Appeals (on Remand)

Karen-

We very much appreciate the help and support of BOMA International in this effort to protect the interests of commercial real estate in the face of the threat posed by the Cherryland decision in Michigan. Today we filed the attached Motion for Leave to File and the actual Amicus Brief supporting the constitutionality of Michigan's Nonrecourse Mortgage Loan Act that is under attack in the case Wells Fargo Bank vs. Cherryland Mall Limited Partnership et al currently pending before the Michigan Court of Appeals on Remand from the Michigan Supreme Court.

The Michigan Supreme Court remanded the Cherryland case back to the Michigan Court of Appeals to specifically reconsider its December 27, 2011 decision that mere insolvency triggered full recourse liability in light of the Nonrecourse Mortgage Loan Act (the Act). If the Cherryland loan is considered a "nonrecourse mortgage loan" and is found to contain a "post-closing solvency covenant" as each of those terms is defined in the Act, then the Court of Appeals should vacate the December 27, 2011 Opinion and dismiss the case. However, Wells Fargo (the Lenders assignee) is challenging the applicability of the Act to the Cherryland loan as well as the constitutionality of the Michigan legislature applying the law retroactively to existing cases in a way that could void the Cherryland judgement.

However, the Act has importance and impact well beyond the parties in the Cherryland case. It means a lot to BOMA, commercial real estate interests, and all of their related industries. That was the very reason that BOMA made a significant investment in time and effort and human and financial resources in leading the way to the Act's passage, espically in record time. It is largely because of its passage that the threat of deficiency collection litigation against borrowers and guarantors in otherwise nonrecourse loans was virtually eliminated. The most helpful aspect of this legislation was its retroactive effect – that is applies to all such loans already in existence on the date of the Act.

The commercial real estate industry is at risk that what BOMA fought so hard to obtain and did obtain at substantial expense could still be lost in the courts. Unless the constitutionality of the Act is upheld at this stage (and perhaps the next if the decision of the Court of Appeals is again appealed to the Michigan Supreme Court), a great portion of the value of the legislation to the industry is at risk.

The submission of legal briefs by the parties and amicus curiae is now complete, and the matter is now before the Michigan Court of Appeals. We will keep you informed of any additional developments and certainly of the Court's decision when rendered.

We very much appreciate the help and support of BOMA International in this effort. Do not hesitate to contact me should you have any questions in connection with the Cherryland case, the Nonrecourse Mortgage Loan Act, or the Amicus Brief.

Paul S. Magy  
Clark Hill, PLC  
151 S. Old Woodward / Suite 200 / Birmingham, Michigan 48009  
248.988.5844 (direct) / 248.988.2332 (fax) / 248.417.5048 (cell)  
[pmagy@clarkhill.com](mailto:pmagy@clarkhill.com) / [www.clarkhill.com](http://www.clarkhill.com)