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FACING THE ISSUES[®]

LEGAL BRIEFS FROM THE ATTORNEYS OF MACKALL, CROUNSE & MOORE, PLC

Creditors' Corner

"Non-Recourse" Does Not Mean "Without Recourse"

In the recent case of *Blue Hills Office Park v. J.P.Morgan Chase Bank*, 477 F. Supp. 2d 366 (D.Mass. 2007), the U.S. District Court in Massachusetts found that the terms of the non-recourse mortgage loan were stated broadly enough to allow the lender to declare an immediate default, without notice, without opportunity to cure, and with the right to a deficiency against the borrowers. When the loan terms contain very broad carve-out language for liability in the event of certain behavior and "springing guarantees" for material and intentional acts, the lender has wide latitude in pursuing remedies. These "non-recourse" carve outs (also known as "bad boy carve outs") gave the lender in this case a wider scope of recovery if the borrower failed to have an independent director, if the borrower commingled certain assets or acted in bad faith. *Practice Pointer*: In the event a lender negotiates a non-recourse loan, make sure that certain acts or behavior on the part of the borrower give the lender recourse in those specific instances.

Bankruptcy Court Declares Exemption Statute Unconstitutional

In *In re Reiland*, 2007 WL 3239756 (Bankr.D.Minn. Nov. 1, 2007), the bankruptcy court held a certain Minnesota statute exempting disability insurance benefits was unconstitutional on its face for failing to set forth a dollar limit of any kind. Article I, Section 12 of the Minnesota Constitution states "A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law." The Minnesota Supreme Court has interpreted this provision to require an exemption statute to set forth a limit, in some form or another. The statute at issue in this case, section 550.39, did not impose any limit. For this reason, the bankruptcy trustee objected to the debtor's claimed exemption and reliance on section 550.39 of the Minnesota Statutes. The bankruptcy court sustained the objection and declared the statute unconstitutional.

Foreclosures still on the rise in October 2007

A report issued by RealtyTrac's October 2007 U.S. Foreclosure Market Report indicates that foreclosures continue to increase nationwide. The report showed that foreclosures increased 2% in October 2007 from the previous month. In the past 12 months, foreclosures increased 94%. Nationally, the current rate is one foreclosure for every 555 households.

Nevada, California and Florida continue to lead the nation in their respective foreclosure rates, with Nevada averaging one foreclosure per 154 households. By metro area, six of the top ten concentrations of foreclosures are California metro areas.

Minnesota is below the national average with a rate of one foreclosure per 1,365 households, but that number increased 9% from the previous month and 164.84 % from the previous 12 months. Both increases are well-above the national average. South Dakota and North Dakota rank 2nd and 4th for the least foreclosures per household. South Dakota averages



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