

HOUSE BILL 1864

By McManus

AN ACT to amend Tennessee Code Annotated, Title 45;
Title 47 and Title 66, relative to the nonrecourse
mortgage loan act.

WHEREAS, the legislature recognizes that it is inherent in a non-recourse loan that the lender takes the risk of a borrower's insolvency, inability to pay, or lack of adequate capital after the loan is made and that the parties do not intend that the borrower is personally liable for payment of a nonrecourse loan if the borrower is insolvent, unable to pay, or lacks adequate capital after the loan is made; and

WHEREAS, the legislature recognizes that the use of a post-closing solvency covenant as a nonrecourse carveout, or an interpretation of any provision in a loan document that results in a determination that a post closing solvency covenant is 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; now, therefore:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 47, is amended by adding the following language as a new, appropriately designated chapter:

47-16-101. This chapter shall be known and may be cited as the "Nonrecourse Mortgage Loan Act".

47-16-102. As used in this chapter:

(1) "Nonrecourse carveout" means a specific exception, if any, to the nonrecourse provisions set forth in the loan documents for a nonrecourse loan that has the effect of creating, if specified events occur, personal liability of the

borrower, guarantor, or other surety of the loan for all or some amounts owed to the lender;

(2) "Nonrecourse loan" means a commercial loan secured by a mortgage on real property located in this state and evidenced by loan documents that:

(A) Provide that the lender will not enforce the liability or obligation of the borrower by an action or proceeding in which a money judgment is sought against the borrower;

(B) Provide that any judgment in any action or proceeding on the loan is enforceable against the borrower only to the extent of the borrower's interest in the mortgaged property and other collateral security given for the loan;

(C) Provide that the lender will not seek a deficiency judgment against the borrower;

(D) Provide that there is no recourse against the borrower personally for the loan; or

(E) Include any combination of subdivisions (2)(A)-(D) or any other provisions to the effect that the loan is without personal liability to the borrower beyond the borrower's interest in the mortgaged property and other collateral security given for the loan;

(3) "Nonrecourse provisions" mean one (1) or more of the provisions described in subdivisions (2)(A)-(E), whether or not the loan is subject to a nonrecourse carveout; and

(4) "Post-closing solvency covenant":

(A) Means any provision of the loan documents for a nonrecourse loan, whether expressed as a covenant, representation, warranty, or default, that related solely to the solvency of the borrower, including, without limitation, a provision requiring that the borrower maintain

adequate capital or have the ability to pay its debts, with respect to any period of time after the date the loan is initially funded; and

(B) Does not include a covenant not to file a voluntary bankruptcy or other voluntary insolvency proceeding or not to collude in an involuntary proceeding.

47-16-103.

(a) No post-closing solvency covenant shall be used, directly or indirectly, as a nonrecourse carveout or as the basis for the claim or action against a borrower, guarantor, or other surety on a nonrecourse loan.

(b) A provision in the loan documents for a nonrecourse loan that does not comply with subsection (a) is invalid and unenforceable.

47-16-104. This chapter does not prohibit a loan secured by a mortgage on real property located in this state from being fully recourse to the borrower or the guarantor, including, but not limited to, as a result of a post-closing solvency covenant, if the loan documents for the loan do not contain nonrecourse loan provisions.

47-16-105. This chapter applies:

(1) To the enforcement and interpretation of all nonrecourse loan documents in existence, or entered into, on or after the effective date of this act;

(2) To any claim made or action taken to enforce a post-closing solvency covenant on or after the effective of this act; and

(3) To any action to enforce a post-closing solvency covenant that is pending on the effective date of this act, unless a judgment or final order has been entered in that action and all rights to appeal that judgment or final order have been exhausted or have expired.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.