

PUBLICATION

Maryland Court Affirms that Unpaid Recordation Tax on Indemnity Deed of Trust is not an Obligation of Beneficiary [Ober|Kaler]

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In good news for foreclosing lenders in Maryland, the Circuit Court for Howard County has affirmed a Maryland Tax Court Memorandum and Order concluding that the recordation tax payable on an indemnity deed of trust ("IDOT") pursuant to Title 12 of the Tax – Property Article is not the obligation of the beneficiary under the IDOT and does not become a lien on the property described in the IDOT.

Many real estate secured loans in Maryland involve an IDOT structure in which a loan is made to a borrower and guaranteed by a guarantor/owner that secures its guaranteed obligations with a deed of trust on its real property. The guarantor's deed of trust is an *indemnity* deed of trust because it secures the guarantor's *contingent* liability. Prior to July 1, 2012,¹ Maryland did not require payment of recordation tax on IDOTs at the time of recording because of the contingent nature of the secured obligations under IDOTs. Instead, collection of recordation tax was deferred until a default on the loan by the borrower, at which time the guarantor's contingent obligation becomes a current, direct (i.e., non-contingent) liability.

Several Maryland counties, including Howard County, adopted the practice of demanding payment by the beneficiary under an IDOT of deferred recordation tax upon default by the borrower and enforcement of the beneficiary's rights and remedies. In some instances, counties refused to certify payment of all taxes in connection with the conveyance of property at foreclosure of the IDOT, unless the foreclosing lender or purchaser at foreclosure paid the recordation tax owing with respect to the IDOT. Such certification of payment of all taxes is a prerequisite to transferring real property, so a county's refusal to provide such certification can negatively impact a foreclosure or out-of-court workout. Howard County's refusal to certify payment of taxes in some transactions triggered challenges.

In the challenge at hand, Atapco Howard Square I Business Trust and four other claimants ("Atapco Claimants") requested refunds from the Howard County Director of Finance for IDOT recordation tax paid under protest by the Atapco Claimants in connection with certain foreclosure proceedings or workouts. When the Director denied their requests, the Atapco Claimants appealed to the Maryland Tax Court. By Memorandum and Order dated August 28, 2012, the Maryland Tax Court reversed the Director's decision and granted the Atapco Claimants' refund requests on the basis that IDOT recordation tax is not the obligation of a foreclosing lender and does not become a lien on property encumbered by an IDOT. The County appealed the Tax Court's reversal.

By Order entered on June 13, 2013 in the matter of *Howard County Dept. of Finance v. Atapco Howard Square I Business Trust*, Case No. 13-C-12-092323, the Circuit Court for Howard County affirmed the decision of the Tax Court relying on prior opinions of the Attorney General's Office in concluding that the guarantor executing an IDOT is the party responsible for paying recordation tax. According to the Circuit Court's Memorandum Opinion, the Legislature included no provision in the Tax – Property Article imposing a lien on property for unpaid IDOT recordation taxes. The Circuit Court thus held that such taxes are not charges that must be paid as a prerequisite to the transfer of real property.

The Circuit Court opinion benefits lenders and purchasers of real property by restoring certainty with respect to who bears the responsibility for payment of, and the proper means of collecting, IDOT recordation taxes. This decision is of particular relevance to pre-July 1, 2012 IDOTs on which recordation taxes generally were not paid at the time of recording.

For more information about this topic or assistance with real estate financing issues, please contact one of the authors or any member of the Ober|Kaler Finance Group or Creditors' Rights, Workouts and Bankruptcy Group.

¹ On July 1, 2012, legislation took effect that limited the recordation tax deferral for IDOTs to transactions where the IDOT secured a guarantee of repayment of a loan of less than \$1,000,000. The Maryland General Assembly subsequently increased the threshold for IDOT recordation tax deferral from \$1,000,000 to \$3,000,000, effective July 1, 2013. See [Maryland Again Changes Rules on Taxation of Indemnity Deeds of Trust - Effective July 1, 2013](#).