



TUCKER ELLIS LLP

CLIENT ALERT – APPELLATE UPDATE

DECEMBER 2012

OHIO SUPREME COURT RULES 365/360 COMMERCIAL MORTGAGE CLAUSE UNAMBIGUOUS AND ENFORCEABLE *TUCKER ELLIS APPELLATE TEAM SCORES ANOTHER WIN*

On November 21, 2012, the Supreme Court of Ohio weighed in on the wave of class action lawsuits across the country challenging the 365/360 method for computing interest. The Court ruled in *JNT Properties v. KeyBank*, Slip Opinion No. 2012-Ohio-5369, that a clause in a commercial mortgage note expressly referencing the 365/360 method is unambiguous and enforceable. Exactly the same contract language has been used by hundreds of lenders nationwide in tens of thousands of commercial loans involving hundreds of millions of dollars.

The lending industry uses three separate methods to compute annual interest: the 365/365 method; the 360/360 method; and the 365/360 method. These methods were devised because it is impossible to calculate both equal daily and monthly interest charges under the Gregorian calendar (with months ranging from 28 to 31 days). As a result, lenders usually compute interest using a daily interest factor that assumes 30 days per month and 360 days per year. Of the three methods, only the 365/365 method computes a daily interest factor based on a 365-day year. For commercial loans, the 365/360 method is the most common and results in slightly higher interest charges.

The plaintiff in *JNT Properties* secured a loan from KeyBank memorialized by a promissory note, which included a provision explaining that “[t]he annual interest rate for this Note is computed on a 365/360 basis; that is, by applying the ratio of the annual interest rate over

a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.” The plaintiff claimed this language was “unintelligible” and that KeyBank’s use of the 365/360 method breached the note by charging interest in excess of the stated per annum interest rate. The trial court granted summary judgment in KeyBank’s favor, reasoning that the note clearly established the parties’ intent that interest would accrue on a 365/360 basis. The court of appeals reversed, concluding the note was ambiguous and an issue of fact remained for trial as to the intended method for computing interest under the note.

The Court’s decision ... encourages commercial lending in Ohio by eliminating legal risks associated with this commonly used method for computing annual interest.

The Supreme Court of Ohio accepted KeyBank’s appeal to address the meaning of the note’s 365/360 clause, which is the subject of many other pending class action lawsuits in Ohio and across the country. Some state trial courts in Illinois had certified 365/360 class actions against lending institutions using the same contractual language in commercial notes, while other intermediate state and federal courts in Illinois, Missouri, and New Mexico had ruled in favor of lenders.

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The Ohio Supreme Court adopted the argument of KeyBank presented by Tucker Ellis attorneys that although the 365/360 clause could have been written more clearly, there was “no doubt about what the clause was meant to do: define the method to be used to calculate interest.” The provision’s “grammatical structure and precise explanation of the interest calculation” did not support the plaintiff’s argument, the Court explained, and the 365/360 clause is neither “uncertain nor indefinite and can be enforced.”

The Court’s decision in *JNT Properties* is the first opinion issued by a state supreme court to address the meaning of a clause in a commercial note requiring payment of interest on a 365/360 basis. The Court’s confirmation that this clause is enforceable encourages commercial lending in Ohio by eliminating legal risks associated with this commonly used method for computing annual interest.

ADDITIONAL INFORMATION

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