

PUBLICATION

Recordation Tax to be Charged Upon Recordation of Indemnity Deeds of Trust Securing Repayment of \$1,000,000 or More [Ober|Kaler]

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Awaiting only Governor Martin O'Malley's signature is legislation that will fundamentally change lending practices in Maryland. Overlooked among the measures passed by the General Assembly in its Special Session this month is a significant limitation on the use of Indemnity Deeds of Trust (IDOTs) to avoid paying recordation taxes when recording a deed of trust.

Today, many loans in Maryland involve an IDOT structure. A loan made to a borrower, secured by a deed of trust on the borrower's real property, would require payment of recordation tax when the deed of trust is recorded. Using an IDOT structure, the loan is made to a borrower and guaranteed by a third party. The third party guarantor secures its guaranty obligations with a deed of trust on its real property. The guarantor's deed of trust is an IDOT because it secures the guarantor's *contingent* liability under its guaranty. That is, the guarantor's obligation to pay the lender is only triggered if the borrower defaults under the loan.

Pursuant to Maryland law, the contingent nature of IDOT obligations means that recordation taxes are not due at the time the IDOT is recorded. Rather, the payment of recordation tax is deferred until the contingent obligation becomes a current, direct liability of the guarantor.

The budget package passed in this month's Special Session—by the Senate on Tuesday and the House of Delegates on Wednesday—means that the benefits of the IDOT structure survive only for transactions where the guaranty secured by the IDOT guarantees repayment of a loan of less than \$1,000,000.

Given the significant increased cost involved for loan transactions that contemplate using an IDOT structure, lenders should review the loans in their pipelines. It may be worth it for the lenders' customers to accelerate the closing timetable for these loans in order to close them prior to July 1, 2012.

For more information about this topic or assistance with financing issues, please contact one of the authors or any member of the Ober|Kaler Finance Group.