

## Gross Negligence in Wisconsin Loan Documents

In addition to providing real estate opinions, members of Reinhart's Real Estate Opinion Team are also fortunate to be called upon regularly to tailor loan documents prepared by out-of-state clients and their principal attorneys to fit with the peculiarities of Wisconsin law. In providing that service, one of the issues that crops up fairly regularly involves the use of the term "gross negligence." In contrast to other states, Wisconsin courts have not recognized a distinction between simple and gross negligence since 1962, when the Wisconsin Supreme Court effectively abolished the concept of "gross negligence" in *Bielski v. Schulze*, 16 Wis. 2d 1, 14-19 (1962).

As a result, in our capacity as local counsel, we frequently suggest replacing the term "gross negligence" with something more appropriate, such as "recklessness." For example, we recently modified an exception to the borrower's indemnity provision in an out-of-state client's draft loan agreement to swap "gross negligence" with "recklessness" in an effort to achieve an appropriate standard for the applicability of that exception. As originally drafted, the provision limited the applicability of the indemnity exception to situations of "gross negligence" by the lender or its affiliates. Under Wisconsin law, however, that indemnity exception would have likely applied in the event of any negligence by the lender or its affiliates as the Wisconsin courts do not recognize the concept of "gross negligence." By simply replacing "gross negligence" with "recklessness," though, we were able to maintain the intent of the parties to limit the applicability of the indemnity exception to situations in which the borrower could show that the recklessness of the lender or its affiliates was actually to blame for the claim or loss.

If you have questions about this update, please contact your Reinhart attorney or any member of the Reinhart Real Estate Opinion Team.

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