

Commercial Real Estate Loan Documentation: Best Practices and Lessons (Hopefully) Learned During the Financial Crisis

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Texas Bankers Association
38th Annual Legal Conference
March 29 - 30, 2012
San Antonio, Texas

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REPRESENTATIVE LOAN TRANSACTIONS

- Represented lender in \$18 million loan for construction of student housing facility on ground-leased property in McLennan County, Texas.
- Represented lender in \$15 million revolving credit facility secured by timeshare-related assets.
- Represented lender in \$13 million refinance of hotel property in Tarrant County, Texas.
- Represented lender in \$13.5 million refinance of marina property in Harris County, Texas.
- Represented lender in third party's assumption of original borrower's obligations under \$9.1 million loan secured by real property located in Harris County, Texas.
- Represented lender in \$10 million loan for acquisition of real estate and development of residential subdivision in Houston, Texas.
- Represented lender in restructure of \$7.3 million real estate loan to tenants-in-common.
- Represented lender in \$8.7 million loan for construction of office building in Harris County, Texas.
- Represented lender in \$6.1 million loan for construction of business condominium complex in Harris County, Texas.
- Represented lender in establishment of \$3.8 million credit facility for acquisition of distressed assets.
- Represented transportation company in connection with the negotiation and closing of a \$75 million term equipment loan secured by maritime assets.
- Representation of lender in \$7.2 million loan for conversion of Houston warehouse facility into single-family residential and commercial use lofts.
- Representation of lender in connection with the negotiation, documentation and closing of a \$13 million loan for the construction of a multi-family apartment project.
- Represented lender in \$19.4 million Freddie Mac capital markets execution (CME) loan for purchase of multi-family project in Colorado.

REPRESENTATIVE WORKOUT TRANSACTIONS

- Represented a financial institution in the successful workout and restructure of five loans to a developer totaling over \$15,000,000 and secured by multiple commercial and residential tracts.
- Represented a financial institution in workouts of eight loans to a large homebuilder totaling over \$7,000,000 and secured by troubled assets, which culminated in structured foreclosures on all eight loans.
- Represented a financial institution with respect to the workout of three acquisition and development loans totaling over \$16,000,000 and secured by troubled assets, which ultimately concluded with partial foreclosure of the financial institution's liens, followed by the sale of two of the three loans.
- Represented a financial institution with respect to the workout of four loans totaling over \$3,000,000 and secured by apartment properties, which ultimately concluded with the sale of one property and the foreclosures of the remaining three loans.
- Represented a financial institution in workouts of thirty-six loans to four affiliate homebuilders totaling over \$5,200,000 and secured by troubled assets, initially resulting in a forbearance agreement and finally culminating in foreclosures on all thirty-six loans.
- Represented a transportation company in connection with major debt restructuring, workout and consolidation involving over \$350,000,000 in secured loans to more than 30 lenders.

EDUCATION

- Bachelor of Science – Economics, University of Texas at Arlington, 1984
- Juris Doctorate, University of Houston Law Center, 1987

PROFESSIONAL MEMBERSHIPS

- Houston Bar Association
- State Bar of Texas – Real Estate, Probate and Trust Law Sections
- Texas Association of Bank Counsel

CERTIFICATIONS

- Board Certified, Commercial Real Estate Law, Texas Board of Legal Specialization, 2004-present

RECENT PUBLICATIONS AND SPEECHES

- "Real Estate Workouts in a "No" Environment: Just Pay Me and Let's Get this Over With," 37th Annual Texas Bankers Association Legal Conference, March 31, 2011.

Commercial Real Estate Loan Documentation: Best Practices and Lessons (Hopefully) Learned During the Financial Crisis

Gary S. Gunn and Glenn P. Valentine ¹

I. Introduction

The ongoing financial crisis has presented us with a myriad of painful lessons regarding the origination and documentation of commercial real estate loans. What lessons have we learned during this difficult period? How can we integrate those lessons into our loan documentation and negotiation processes? And what best practices can banks and their attorneys adopt in response to these lessons?

This paper will cover several important issues that should be considered throughout the loan origination and documentation process, including issues associated with the preparation and usage of commitment letters, issues relating to the selection and preparation of loan documents, specific provisions with which lenders should be particularly familiar, and common problematic transactions and issues of which lenders should be aware.

II. The Commitment Letter

The preparation and execution of a commitment letter (or term sheet) is often the first step in the real estate loan process. Commitment letters come in various shapes and sizes; however, most, at the very minimum, identify the primary substantive terms of the loan transaction – (1) the parties (the lender, the borrower, any guarantors), (2) the loan amount, the interest rate and payment terms, and the nature of the loan (e.g., term, advancing, revolving, etc.), (3) the collateral to be pledged as security for the loan, (4) the conditions precedent to the closing of the loan, and (5) the primary representations and covenants to be included in the definitive loan documentation. While commitment letters are a useful tool for helping to ensure the lender and the borrower are on the same page before proceeding with the preparation of definitive loan documents, there can be hidden dangers in using a commitment letter, and care should be taken in their preparation.

The commitment letter should express the intention of the parties to enter into an agreement, but it should be drafted so that it does not commit the lender to obligations it thought were contingent on the borrower's performance. In addition, the commitment letter should afford the lender sufficient flexibility to address matters to be determined and evaluated during the due diligence phase (e.g., receipt of an appraisal which supports the contemplated loan amount). Moreover, the commitment letter creates a good opportunity to obtain a cash deposit from the borrower to be applied towards legal expenses and costs associated with appraisals, environmental surveys, title searches and other closing items. The following are issues of which lenders should be particularly cognizant when using a commitment letter for a transaction:

¹ The authors gratefully acknowledge the assistance of David Wechsler, a law clerk at Hughes Watters Askana, LLP, in the preparation of this article and the related Power Point presentation.

- Do I want this commitment letter to be binding on the bank? If so, how binding should it be?
- Does the commitment letter allow the bank to terminate its loan commitment if issues arise during the due diligence process, such as:
 - Title, valuation or environmental issues with the collateral.
 - Issues with the borrower's or guarantor's entity structure.
 - Issues with the borrower's or guarantor's financial condition.
- Does the letter commit the bank to close the loan before a particular deadline? If so, is that deadline feasible?
- Does the letter set forth terms and conditions which have yet to be approved by the bank's credit committee?
- The lender should avoid making the loan contingent upon (i.e. "tying" the loan to) the borrower's obtaining other loans, services or property from the lender.
- Is the bank's loan approval contingent upon obtaining participants? If so, the commitment letter should include that contingency.

When using a commitment letter for a transaction, perhaps one of the best rules of thumb is to begin with a form of commitment letter that has been reviewed and approved by competent legal counsel, rather than simply starting from scratch or adopting a form of which you don't know the origin. A well-drafted form will likely address many of the issues outlined above and prevent the bank from being locked into funding the loan in the event problems surface pre-closing. A sample form of commitment letter for a term real estate loan has been included with this paper as Exhibit "A".

III. Loan Documents: Selecting the Right Tool for the Job

One central component to all loan transactions is the loan documentation to be signed by the parties in connection with the closing and funding of the loan. The loan documents are likely the most critical aspect of the transaction as they establish the rights, duties, and obligations of the lender and the borrower at closing and going forward throughout the life of the loan. For instance, how many times have you contacted your attorney with a quick question about an existing loan transaction only to be met with some variation of, "It's going to depend on what the loan documents say."

Like commitment letters, loan documents can take on a variety of forms. A few of those varying forms, and the potential issues relating to each, are described in the following paragraphs.

A. In-House or "Canned" Loan Documents

When originating a loan, the first instinct for many lenders is to prepare the loan documentation internally using "canned" or form documents that are readily available inside the bank. The driving force in proceeding with internally generated documents is often the bank's desire (read: the *borrower's* desire) to minimize or altogether avoid incurring legal expenses as part of the transaction. Other reasons include the apparent "simple" nature of the transaction at hand, and the common perception that using an attorney to prepare the loan

documents will “slow things down” or “overcomplicate” matters. As the financial crisis demonstrated, however, significant issues can arise when a dispute between the bank and the borrower surfaces or the borrower faces financial hardship and it turns out the “canned” documents have either been used incorrectly, filled out wrong, or were inadequate for the task at hand.

1. Improper Usage of Documents (One Size Does Not Fit All)

Most sets of canned documents were created and are intended for use in documenting fairly straightforward transactions. For example, your basic set of real estate loan documents (i.e. Promissory Note; Deed of Trust; and perhaps a Guaranty Agreement) contemplates that – (1) the bank will extend a loan to a particular person or entity, (2) the borrowing person or entity will pledge certain real estate as collateral for the loan, and (3) a person or entity will guaranty the repayment of the loan. However, as we all know, not every real estate loan transaction falls into this basic format. And more to the point, canned loan documents are often insufficient for any transaction that does not fit this basic mold. In these instances, there can be a temptation to use an existing document and try and “fit” it to the circumstances. More often than not though, this strategy results in improper documentation of a loan, and may subject the lender to unintended risks and liabilities.

For instance, as mentioned above, the basic real estate transaction contemplates that the same person or entity is both obtaining the loan AND pledging the collateral. However, what if the borrower is not the party pledging the property, but instead an affiliate or other 3rd party is pledging the collateral? The typical canned Deed of Trust likely does not contemplate such a structure. Trying to use a plain vanilla form Deed of Trust in such a context can, at the very best lead to ambiguities, and at the very worst lead to enforceability issues with the bank’s lien.

Moreover, not all documentation issues are quite as glaring or obvious. For example, in my practice I have come across a number of loan transactions which are secured by private stock (in many cases stock in a bank or other financial institution). In many of those transactions, the loan documents were prepared in-house using a basic set of personal property loan documents, including a generic form Commercial Security Agreement, under the following misguided line of reasoning:

- (1) stock is personal property;
- (2) our bank’s form Commercial Security Agreement is to be used for taking a security interest in personal property;
- (3) therefore our Commercial Security Agreement will do the trick for taking a security interest in stock.

The problem, however, is that unlike a Pledge Agreement or other security instrument which might be specially intended for use in a stock-secured loan, most form Commercial Security Agreements contain provisions that contemplate more “traditional” types of collateral, such as accounts receivable, inventory, and equipment, and do not adequately address more “non-traditional” types of collateral like stock or other equity interests. The unfortunate result is

that the lender might not have at its disposal some of the rights and remedies it would be otherwise entitled to exercise and pursue had the proper security instrument been used at the outset of the transaction.

2. Inadequate Documents

In addition to being used improperly, canned documents can simply be inadequate to serve the intended purpose. Such inadequacies can stem from a host of facts and scenarios. For example, perhaps a particular area of the law has evolved or otherwise changed (e.g., for instance, in 2011, the Texas legislature passed the Texas Assignment of Rents Acts which impacts a lender's rights with respect to lease rents), and the canned documents have not been updated and revised to address that change. Alternatively, it may be merely an issue of complexity – you are trying to prepare documents for a construction loan that has some nuances; however the bank's form Construction Loan Agreement does not set forth all the conditions and requirements that your transaction warrants.

3. User Error

The final potential pitfall of using canned or form documents is more straightforward than simply reaching for an improper document or incorporating a document into your transaction which contains inadequate provisions. Sometimes a stock document will be appropriate for the situation, but as with the preparation of any document, the human element of error still exists, and the consequences of *incorrectly* preparing the *correct* document can be just as grave as using the incorrect document altogether.

Common errors in internally generated loan documents include the following:

- Identification of Parties
 - Spelling errors in party names
 - Party names are not included in the introductory paragraph of a document, or the name in the introductory paragraph does not match the signature block
 - The wrong party executes the document (e.g., the real-estate holding entity executes the Security Agreement, while the operating entity executes the Deed of Trust)
- Identification of Collateral
 - Errors in the legal description of the real estate
 - Failure to mark boxes for certain collateral types
- Loan Terms
 - Payment dates or other terms contain errors or are simply left blank
 - Failure to mark boxes to identify the indebtedness (e.g., a specific loan vs. all loans owed to lender)

B. Attorney-prepared Documents

During the financial crisis of the past several years, as borrowers defaulted on loans and lenders underwent the process of evaluating their rights and remedies, the consequences associated with improperly or inadequately documented loans became evident. In many cases, rather than being able to move forward with the exercise of remedies or even declare an “event of default,” lenders faced scenarios where they had to grant extensions or other concessions to borrowers in order to allow the lender the opportunity to shore up its loan document defects and shortcomings.

The primary way to help ensure loans (especially complex loans) are properly documented and will protect a lender’s interest is to have a competent attorney prepare (or at the very least review) the documents to be executed in connection with the loan. In addition to handling the preparation of the legal paperwork, a skilled attorney can confirm that the documents themselves will create a binding enforceable agreement between the parties. For instance, if the borrower is an entity and that entity contains a number of principals and officers (or even has multiple layers of entities). Furthermore, after reviewing the organizational documents for the borrowing entity, your attorney can verify that the loan was duly and validly approved by the appropriate persons, and that the person executing the loan documents on behalf of the borrower in fact has the authority to do so. After all, the last place any lender wants to find itself is in court having to argue over the enforceability of its loan documents.

Finally, a competent counsel can also add value to a transaction by providing insight regarding ways to potentially simplify the loan structure, strengthen the bank’s collateral position and streamline the loan closing process. In some cases, the attorney can provide alternative loan structures to create cost savings for the borrower (e.g., lower title policy premiums).

IV. Loan Document Terms

It is likely that every commercial banker at some point during the last few years has said to his or herself, “I really wish we had not agreed to delete that provision,” or “we should not have agreed to insert this provision.” In addition to leaving many with lessons concerning the usage of proper loan documentation, the financial crisis also raised the awareness of many in the commercial lending community regarding the practical and legal implications of specific terms and provisions in loan documents. The following sections will serve to summarize several types of provisions that banks should strongly consider including (or in some cases NOT including) in their real estate loan documents.

A. The Good: The Inclusion of “Right-Sizing” Provisions

As collateral values plummeted during the financial crisis, lenders often found themselves with loans which significantly exceeded the value of the collateral and with no contractual ability under their loan documents to address such a scenario. The inclusion of a “right-size” or “balancing” provision in loan documentation gives the lender a means to re-

establish the loan-to-value ratio that existed when the loan closed. Generally speaking, such a provision requires the borrower to, upon devaluation of the collateral, immediately make a principal reduction on the loan in an amount sufficient to bring the loan back in line with a pre-established loan-to-value limitation. Of course, many borrowers will resist the inclusion of such a provision in the loan documents.

B. The Bad: Deletion of the Deficiency Rights Waiver

In recent years, dramatic increases in foreclosure activity combined with declining property values have naturally resulted in a concurrent increase in post-foreclosure deficiencies (which arise when the price at which collateral property is sold at a foreclosure sale is less than the unpaid balance of the indebtedness secured by that property). In most commercial loans, the defaulting borrowers and guarantors are legally responsible for payment of that deficiency.

However, Sections 51.003 and 51.005 of the Texas Property Code have long provided defaulting borrowers and guarantors the statutory avenue to contest the amount of the deficiency, arguing that the price received for the collateral property at the foreclosure sale was less than the fair market value of such property. Those Sections provide that, in the event a lender sues a borrower or guarantor to recover a post-foreclosure deficiency, the borrower/guarantor may request that the court determine the fair market value of the property at the time of the foreclosure sale. This fair market value will be determined by the court based on expert testimony and other extrinsic evidence as to the fair market value of the property on the date of the foreclosure sale. In the event the court finds the fair market value of the property exceeded the price paid at the foreclosure sale, the amount of deficiency will be *reduced* by the difference between the fair market value and the foreclosure price. These statutes also give a borrower or guarantor the right to unilaterally challenge the foreclosure sale price for a period of 90 days after the sale, even when no deficiency action has been initiated by the lender.

Despite the apparent power that these statutes would seem to vest in borrowers and guarantors, Texas courts have determined that these challenge rights may be waived by the borrower and the guarantor in writing, and for years waivers to that effect were commonly included as boilerplate in commercial loan documents. A sample deficiency waiver provision is included in the attached Exhibit “B”.

In the years leading up to the financial crisis, there was a tendency for lenders to agree to delete these waiver provisions at the request of the borrower in the interest of closing deals. Deleting these provisions, however, can give rise to a number of complications and issues should the lender ever pursue a deficiency against the borrower or a guarantor:

- Delay in acquiring a deficiency judgment: If these challenge rights are not effectively waived in the loan documents, then the deficiency judgment cannot be considered final - (1) until the 90-day window to contest the sale price has passed, or (2) if the sale price is contested (either unilaterally by the borrower or guarantor,

or in response to a deficiency suit brought by the lender), until a court determination of the fair market value.

- Uncertainty as to the deficiency amount: If these challenge rights are waived in the loan documents, then the lender is able to determine as of the date of the foreclosure sale the precise deficiency amount on the loan. Absent the waiver, the deficiency amount will be subject to judicial determination if the foreclosure price is later contested by the borrower or guarantor.
- Significantly increased costs of deficiency collections: Generally speaking, the costs and expenses associated with non-judicial foreclosure proceedings and a subsequent deficiency action are relatively inexpensive, particularly when compared to judicial foreclosure, receivership and other remedies. However, if the loan documents do not contain a waiver by the borrower and guarantor of their respective challenge rights, then seeking and obtaining a post-foreclosure deficiency can prove to be very expensive and exhausting due to the borrower's/guarantor's ability to put on expert testimony as to the value of the property on the date of the foreclosure sale. As such, the lender may still have to bear the cost of hiring attorneys and expert witnesses to justify the foreclosure sale price, even though that price may have been "fair" and supported by an appraisal or other evidence of value.

C. The Ugly: Unintended Consequences of "Notice and Cure"

In the context of negotiating commercial loan documents, perhaps the most common request from borrowers is the addition of a notice and cure provision. Under such a provision the lender agrees to provide the borrower (and sometimes all guarantors) with written notice of, and a period of time to cure, a default under the loan documents before the lender will attempt to foreclosure on the property or exercise any other remedies.

In practice it is important to recognize that inclusion of notice and cure provisions, by their very nature, create timing issues. For instance, if the borrower is entitled to written notice upon every payment default, then the lender can find itself in a scenario in which it is periodically having to prepare and send the borrower a default letter. This can not only be frustrating (particularly in a default scenario where the bank is anxious to initiate foreclosure proceedings), but can also be a resource drain on the bank's operations. These timing issues can be further compounded if the borrower is entitled to a lengthy period of time during which to cure non-monetary defaults. For example, I have seen cure periods in loan documents which allow upwards of 60 days or more to cure covenant breaches. While an extended period of time may be appropriate in the context of breaches which can take a long period of time to remedy (e.g., construction delays due to force majeure events, M&M lien disputes, etc.), extreme care should be taken to ensure that extended cure periods only apply to a limited number of scenarios. ***The following is an example of a non-specific, global notice and cure provision which should be avoided at all cost:***

“Any provision in this note and any document securing or executed in connection therewith to the contrary notwithstanding, Borrower shall not be in default under this note or under such other loan documents unless:

- (a) in the case of a breach of a monetary covenant, Lender shall have given Borrower written notice of such default and Borrower shall not have cured such default within ten (10) days after delivery of said notice; and**
- (b) in the case of a breach of a non-monetary covenant, Lender shall have given Borrower written notice of such non-monetary breach setting forth in reasonable detail the nature and extent of such failure and Borrower shall not have cured the breach of the non-monetary covenant within thirty (30) days after delivery of said notice, or if such non-monetary covenant cannot be reasonably cured within such thirty (30) day period, as determined in the reasonable discretion of Payee, if Borrower shall prior to the cure of said non-monetary breach cease using Borrower’s best and continuous efforts to cure said non-monetary breach as determined in the reasonable discretion of Borrower.”**

In addition, care should also be taken to ensure that notice and cure provisions do not apply to bankruptcy and similar defaults. To the contrary, loan documents should specifically provide that upon the occurrence of a bankruptcy or similar default, the entire loan balance shall immediately and automatically accelerate without notice or demand of any kind. Absent the inclusion of such an acceleration clause in the loan documents, if the borrower were to ever file for bankruptcy, the bank would effectively be barred from accelerating the loan and initiating litigation against a guarantor for the full loan balance unless and until the borrower’s bankruptcy has been dismissed or otherwise completed. The attached Exhibit “C” contains a more narrowly-tailored notice and cure provision, as well as a provision that provides for automatic acceleration of the loan upon the occurrence of a bankruptcy event involving the borrower.

V. Common Problematic Transactions

In addition to the issues discussed above relating to loan documents and terms, the financial crisis revealed that there are certain transactions which tend to be problematic by nature. The following sections describe some of these transactions and why they should be of particular concern.

A. Complex Ownership Structure and Multiple Parties

Multiple entity layers, numerous limited partners or principals, a series of guarantors – these transaction characteristics frequently give rise to significant heart burn and anguish both pre- and post-closing. Prior to closing, these structures often times make it difficult to obtain the requisite legal authorization for the loan and the execution of the loan documents, since each entity may require consent from one or more individuals and/or other entities. Timing

and logistical issues also arise – there’s always the one partner who is still reviewing the loan documents or is unavailable for the “all hands” conference call or the proposed closing time. Even after closing, the same issues surface in the context of loan modifications, pledges of additional collateral, forbearance arrangements, and default scenarios. One’s roll changes quickly from banker/lawyer to cat herder, and the transaction costs and level of frustration steadily rise.

B. Loans Secured by Contracts for Deeds

Under a contract for deed transaction, a property owner agrees to sell his property to an interested buyer in exchange for the buyer’s agreement to make payments to the seller over a specified period of time. Once the buyer makes all of the requisite payments, then the seller conveys the property to the buyer pursuant to a warranty deed. While the stream of payments under a contract for deed may seem like an enticing piece of collateral to a lender, contract for deed transactions are fraught with issues.

For one, contract for deed transactions are often entered into between an experienced (and sometimes opportunistic) seller and a very unsophisticated buyer where the buyer is unable to procure traditional financing to acquire the property. Accordingly, the buyer is rarely fully aware of the implications of entering into a contract for deed transaction, and when the transaction goes awry and the seller terminates the contract for deed and seeks to re-take possession of the property, the buyer sometimes files suit or takes other defensive action, which can have negative effects for any lender who holds the contract for deed as collateral.

In addition, if the lender’s borrower (i.e. the seller under the contract for deed) ever defaults on the loan and the lender wishes to enforce the contract for deed, the lender can be stepping into a very precarious legal situation where it might be subjecting itself to exposure to the buyer for acts or omissions of the borrower/seller, including exposure arising from any lump sum payment made by the buyer to the seller at the outset of the contract for deed transaction. Also, by stepping into the shoes of the borrower/seller, the bank would be taking on a number of obligations and legal responsibilities (including significant disclosure and ongoing reporting requirements) which, by statute, are imposed upon the seller under a contract for deed.

C. Loans Secured by Private Stock or Equity Interests

Another type of transaction that is often marred with complications is the loan secured by private stock. Some of these complications arise from the fact that many stock-secured loans are prepared using inadequate loan documentation which, in a default scenario, leaves the bank without many of the contractual rights afforded a lender under attorney-prepared documents (see Section III(B) above). In addition, securities law issues can make foreclosing on and disposing of private stock relatively expensive, since the bank will likely need to engage outside legal counsel who is familiar with securities matters. Finally, unlike publicly-traded stock, private stock and other equity interests cannot be readily valued or easily liquidated.

D. Poorly Documented or Undocumented Renewal/Reinstatement Transactions

Generally speaking, the limitations period in Texas to foreclose a lien on real property is four (4) years from the date the loan matures, whether such maturity occurs by the terms of the loan documents or by the lender's earlier acceleration of the promissory note. This 4-year period can be extended; however to do so, the lender and the borrower must execute and acknowledge a written agreement which extends the maturity date, and that agreement must be filed in the county clerk's records where the real property is located.

While most banks are aware that this process must be followed when a loan matures by its terms, many lenders are unaware that other scenarios may warrant the execution of a renewal/reinstatement document by the parties. One such scenario is where a lender, upon the occurrence of a default, accelerates the loan balance and then initiates nonjudicial foreclosure with respect to the property. Subsequently, for whatever reason (perhaps the borrower tenders the missed payment(s) or otherwise remedies the defaults), the lender ceases the foreclosure proceedings. Under this scenario, the acceleration of the loan triggered the commencement of the 4-year limitations period for foreclosing on the property, and absent the execution and filing of a reinstatement agreement by the parties, the limitation period will continue to run. As such, after the expiration of that 4-year period, the lender could find itself without an enforceable lien on the property.

E. Constructing Lending

While I could probably dedicate this entire paper to discussing the various issues that can arise in the context of a commercial construction loan, I would like to address two specific issues that have plagued some of my lender clients over the past several years.

It has been my experience that when faced with M&M lien claims from contractors and subcontractors, lenders are rarely able to provide evidence that their deed of trust has priority over the liens of the M&M lien claimants. Under Texas law, an M&M lien claim attaches the property upon the earlier of: (1) the commencement of construction of improvements OR delivery of materials to the land where the improvements are to be located and on which the materials are to be used; or (2) the recording of a written agreement or affidavit evidencing an agreement between the owner and contractor. A title commitment issued at closing should reveal any recorded agreement, so (2) does not typically create problems for lenders. However, a lender is often without proof that, at the time of recordation of the lender's deed of trust, no construction had commenced and no materials had been delivered to the work site. To compound the problem, all M&M lien claimants (including the subcontractor who adds the finishing touches to the project) have the same priority, such that if M&M lien inception occurs prior to the recordation of the bank's deed of trust, then all M&M liens arguably have priority over the lender's security instrument. Therefore, in order to best assure their lien position, lenders should personally (or engage representatives to) visit and inspect the construction site prior to closing to confirm and to document (by way of photographs or video) that no construction activity exists. In addition, the person who conducts that inspection should sign an affidavit in support of the same. Taking a small

amount of time to perform such steps can prove to be an invaluable and minimal investment should ever the property be subject to M&M liens and the bank's lien priority be challenged.

Another situation in which many of my banking clients have found themselves is defending against claims by borrowers, guarantors, contractors, subcontractors and other third parties that the bank failed to insist on the fulfillment of all advance conditions in the construction loan agreement prior to disbursing funds (and thereby "mismanaged" the construction project). In other words, the bank waived (or simply ignored) an advance condition, and the borrower or contractor therefore contend that loan proceeds were "improperly" released by the lender. One way to undercut such an argument is to be sure your construction loan agreement includes a provision such as the following:

"Section [____] Conditions Precedent for the Benefit of Lender. All conditions precedent to the obligation of Lender to make any Advance are imposed hereby solely for the benefit of Lender, and no other party may require satisfaction of any such condition precedent or be entitled to assume that Lender will refuse to make any Advance in the absence of strict compliance with such conditions precedent. Any requirement of this Agreement may be waived by Lender, in whole or in part, at any time. Any requirement herein of submission of evidence of the existence or nonexistence of a fact means that the fact shall exist or not exist, as the case may be, and without waiving any condition or any obligation of Borrower, Lender may at all times independently establish to its satisfaction such existence or nonexistence."

While proper documentation is rarely a substitute for diligent and careful construction loan management, the inclusion of such a provision in the loan documentation at least gives the lender a foothold for defending against claims brought by the borrower or others with respect to administration of the loan.

F. Accidental Home Equity Loans

Lenders have been allowed to make home equity loans in Texas since 1998. However in keeping with Texas's strong public policy interest in protecting homesteads, these loans are subject to extensive rules and regulations aimed at protecting consumers. Failure to strictly adhere to Texas home equity lending requirements can have catastrophic consequences for lenders, including forfeiture of the lien securing the loan. Some basic restrictions on home equity loans are as follows:

- The lender must receive the credit application from the borrower and provide a required home equity notice to the borrower at least 12 days prior to closing.
- The loan documents must (1) be prepared by a licensed Texas attorney, (2) contain certain disclosures, and (3) include certain prescribed documents.
- A lender must obtain court approval before non-judicially foreclosing on property securing a home equity loan.
- Home equity loans are non-recourse.

- The loan must not be secured by any additional real or personal property other than the homestead.

(Note that a number of the restrictions listed above would not apply to a typical commercial real estate loan transaction. For instance, a lender would never provide a borrower a home equity loan notice in connection with a commercial real estate loan.)

In most cases, borrowers and lenders understand that they are engaging in a home equity lending transaction and, more importantly, lenders are fully aware of the home equity rules and regulations with which they must comply. However, under certain circumstances, borrowers and lenders can enter into commercial real estate loan transactions which also constitute home equity loans under Texas law and are therefore subject to all Texas home equity lending requirements. The following facts, in the aggregate, could begin to create a home equity loan scenario:

- (1) The borrower(s) is an individual, rather than a legal entity;
- (2) The borrower(s) will be cashing out a portion of his/hers/their equity in the property; and
- (3) The borrower(s) will be using and/or claiming the property (typically a small hotel or apartment property) as his/hers/their primary residence.

While these circumstances are not common to most commercial real estate loan transactions, I see them arise from time to time in my practice. For example, consider an application from an individual borrower who wants to cash-out his equity in his hotel property. What if that individual borrower also happens to reside in the hotel and has no other homestead property? Were that borrower to eventually default on their loan, they would have a legal basis to argue that the lender's lien on the hotel is invalid due to the lender's failure to adhere to Texas home equity lending rules and regulations. (Note that this situation may be avoided completely if the borrower simply conveys the property to a legal entity prior to the closing of the loan. Legal entities cannot maintain homesteads under Texas law.)

In sum, when making a cash-out loan to an individual who might possibly be living on the collateral property, you should have an attorney evaluate the nature of the transaction to ensure it does not inadvertently constitute a home equity loan.

VI. Conclusion

If there was one benefit of the financial crisis, it is that it highlighted both the strengths and weaknesses that had become an everyday part of the loan origination process. The issues and strategies described above obviously do not cover all of the potential scenarios which may arise in connection with the origination and documentation of commercial loans, but rather are a representation of some of the most common and/or problematic issues which were revealed by the crisis. Armed with this information, and some of the best practices described above, we should be able to take the lessons learned during the financial crisis and apply them to the loan documentation and origination process moving forward.

Exhibit "A"

Sample Commitment Letter with Term Sheet

[See attached]

March ____, 2012

Re: Proposed \$ _____ Loan

Dear _____:

You have informed _____ Bank, a _____ banking association (“us” or the “Bank”), that _____, a _____ (“Borrower”), desires to obtain a term loan from the Bank in the maximum principal amount of \$ _____ to [_____ *describe purpose of loan* _____].

The Bank is pleased to advise you of its commitment to extend the Loan upon the terms and subject to the conditions set forth or referred to in this commitment letter (together with the Summary of Proposed Terms and Conditions (“Term Sheet”) attached hereto as Addendum A this “Commitment” or “Commitment Letter”). Capitalized terms used but not defined in this Commitment Letter shall have the meanings assigned to such terms in the Term Sheet.

The Bank’s obligations under this Commitment Letter are conditioned on the fulfillment to the Bank’s sole satisfaction of each term and condition set forth or referred to in the Commitment Letter, including, without limitation, the following conditions precedent:

- (i) each of the terms and conditions set forth or referred to in the Commitment Letter;
- (ii) the absence of a material change in the accuracy of the information, representations, exhibits or other written materials submitted by Borrower or any Guarantor in connection with its/his/her request for the Loan;
- (iii) no change, occurrence or development that could reasonably be expected to have a material adverse effect on the business, assets, liabilities (actual or contingent), operations, condition (financial or otherwise) or prospects of Borrower or Guarantor taken as a whole shall have occurred or become known to us;
- (iv) compliance with all applicable laws and regulations by Borrower and each Guarantor (including compliance of this Commitment Letter and the transactions described herein with all applicable federal banking laws, rules and regulations);
- (v) neither Borrower nor Guarantor shall file or make or have filed or made against it/him/her a petition in bankruptcy, an assignment for the benefit of creditors or an action for the appointment of a receiver, or shall become insolvent, however evidenced;
- (vi) the negotiation, execution and delivery of definitive documentation with respect to the Loan satisfactory to the Bank and its counsel; and

(vii) the absence of a material change in the structure or ownership of Borrower or any Guarantor.

The commitment of the Bank to extend the Loan is subject to the negotiation, execution and delivery of definitive documentation with respect to the Loan satisfactory to the Bank and its counsel reflecting, among other things, the terms and conditions set forth in the Term Sheet. These terms and conditions are not exhaustive, and this Commitment Letter is subject to certain other terms and closing conditions customarily required by the Bank for similar transactions and may be supplemented prior to closing based upon the Bank's investigation and/or as disclosure of Borrower's circumstances so dictate.

You agree promptly to prepare and provide to the Bank all information reasonably available to you with respect to any Borrower, any Guarantor and the Loan, as the Bank may reasonably request. You hereby represent that (i) all written information, taken as a whole (the "Information"), that has been or will be made available to the Bank by you or any of your representatives was or will be (as the case may be), as of the date furnished, true, complete and correct in all material respects and did not or will not (as the case may be), as of the date furnished, contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements contained therein not materially misleading in light of the circumstances under which such statements were or are (as the case may be) made and (ii) any financial information and projections that have been or will be made available to the Bank by you or any of your representatives have been or will be (as the case may be) prepared in good faith based upon generally accepted accounting principles and reasonable assumptions. If, at any time from the date hereof until the closing of the Loan, any of the representations and warranties in the preceding sentence would be incorrect in any material respect if the Information were being furnished, and such representations and warranties were being made, at such time, then you will promptly supplement the Information so that such representations and warranties will be correct in all material respects under those circumstances.

The terms and substance of this Commitment Letter are confidential and may not be disclosed by you in whole or in part to any other person without the prior consent of the Bank, except (a) to your attorneys, financial advisors and accountants, in each case in connection with your evaluation hereof and to the extent necessary or (b) as may be compelled in a judicial or administrative proceeding or as otherwise required by law (in which case you agree to inform us promptly thereof).

The provisions of the immediately preceding paragraph shall remain in full force and effect regardless of whether definitive financing documentation shall be executed and delivered and notwithstanding the termination of this Commitment Letter or the Commitment of the Bank hereunder.

This Commitment Letter may not be assigned by the Borrower without the prior written consent of the Bank (and any purported assignment without such consent shall be null and void).

This Commitment Letter is intended to be solely for the benefit of the Bank and the Borrower, and is not intended to confer any benefits upon, or create any rights in favor of, any person other than the parties hereto.

This Commitment Letter may be executed in any number of counterparts, each of which shall be an original, and all of which, when taken together, shall constitute one agreement. Delivery of an executed signature page of this Commitment Letter by facsimile transmission shall be effective as delivery of a manually executed counterpart hereof.

This Commitment Letter, together with the Term Sheet, embodies the entire agreement understanding between the Bank and Borrower with respect to the specific matters set forth above and supercedes all prior agreements and understandings relating to the subject matter hereof.

This Commitment Letter shall be governed by, and construed in accordance with, the laws of the State of Texas.

This Commitment Letter may not be amended or any provision hereof waived or modified except by an instrument in writing signed by the Bank and the Borrower.

By acceptance of this Commitment Letter, you and Borrower acknowledges that further investigation and analysis by the Bank's counsel and us may reveal information that we are not aware of or certain other impediments to closing may come to our attention which may require that the Loan be restructured or otherwise modified. The Bank shall be the sole judge of what is an impediment and whether said impediment is so serious as to preclude closing the Loan.

The Bank's Commitment with respect to the Loan set forth above will expire at 5:00 p.m., Houston time, on _____, 2012, unless this Commitment Letter is accepted by the Borrower in writing and delivered to the Bank prior to such time, together with the sum of \$_____ as a good faith deposit (the "Deposit"). Following acceptance by you, this Commitment Letter shall expire at 5:00 p.m., Houston time, on _____, 2012, unless the Loan is closed by such time.

The Deposit shall not impose any obligation on the Bank, except that the Deposit (less any expenses incurred by the Bank in connection with making credit and legal evaluations, evaluating collateral and the like, including travel expenses, fees and costs of appraisers, engineers and attorneys, and other out-of-pocket expenses incurred by the Bank in connection with the origination of the Loan, whether or not the Loan actually closes) shall be returned to the Borrower, without interest, upon closing or if the closing of the Loan fails to occur.

Please indicate your acceptance of this Commitment Letter by signing in the space provided and returning the original copy to us. The Bank is pleased to have been given the opportunity to assist you in connection with this proposed financing, and we look forward to working with you.

Should you have any questions regarding the conditions of this approval or any terms of this letter, please do not hesitate to call our offices. Thank you.

THIS COMMITMENT LETTER, AND ANY LOAN AGREEMENT, NOTE OR OTHER DOCUMENTATION RELATING TO THIS COMMITMENT, REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES, AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

Yours very truly,

[INSERT NAME OF BANK]

By: _____
Name: _____
Title: _____

The above Commitment Letter is agreed to and accepted on the terms and conditions provided in this letter on this ____ day _____, 2012.

[INSERT NAME OF BORROWER]

By: _____
Name: _____
Title: _____

Attachment:
Addendum "A" – Summary of Proposed Terms and Conditions

ADDENDUM A
SUMMARY OF PROPOSED TERMS AND CONDITIONS

Capitalized terms used but not defined herein shall have the meanings give to such terms in the Commitment Letter.

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| Borrower(s): | _____ |
| Lender: | The Bank <i>[if applicable -- or one of its affiliates.]</i> |
| Loan Amount: | The lesser of (a) \$_____, or (b) ___% of the appraisal value of the Collateral (as hereinafter defined), as determined by an appraisal obtained by and acceptable to the Bank. |
| Property/Collateral: | <i>[Insert description of real property and improvements]</i> |
| Guarantor(s): | Payment and performance guaranty of _____ The guaranty of each Guarantor shall be continuous, unlimited, unconditional and irrevocable. <i>[If the guaranty will be limited or capped, insert language to that effect.]</i> |
| Documents: | This Commitment Letter does not set forth all the terms and conditions of the Loan offered herein. As a condition of closing, the Bank will require the execution of definitive loan documentation, prepared by the Bank's legal counsel, which will contain terms and conditions not set forth herein, including such representations, warranties, affirmative and negative covenants, indemnities, closing conditions, defaults and remedies as are typically required by the Bank and/or deemed appropriate for the Loan. The failure of Borrower and the Bank to reach agreement on the loan documents shall not be deemed a breach by the Bank of this Commitment Letter. Unless the Bank agrees otherwise in writing, completion of all documents is a condition of closing. |
| Maturity Date: | The Loan will mature _____ years from the closing date. |
| Interest Rate of Loan: | <i>[If applicable – A fixed rate of ___% per annum.]</i> <i>[If applicable -- A variable rate equal to the Wall Street Prime Rate [plus ___%] [; provided, however, the interest rate shall under no circumstances be less than ___% per annum.]]</i> All past due principal and interest shall bear interest at the maximum rate allowed by applicable law, and the Bank may impose a late charge of 5.00% of any past due installments. |

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| Repayment: | <p><i>[If interest only --</i> The Loan shall be repayable in monthly payments of accrued interest only until the maturity date when all remaining principal and interest shall be due.]</p> <p><i>[If principal including interest –</i> The Loan shall be repayable in monthly payments of principal and accrued interest until the maturity date when all remaining principal and interest shall be due. Payments shall be calculated based upon an amortization period of ___ years.]</p> |
| Origination Fee: | <p>% _____ of the Loan Amount</p> <p><i>[or \$ _____]</i></p> |
| Security: | <p>(a) A first lien Deed of Trust on the Property</p> <p>(b) A collateral assignment of all rents and incomes derived from the Property.</p> |
| Prepayments: | <p>Permitted in whole or in part, with prior notice but without premium or penalty and including accrued and unpaid interest.</p> <p><i>[Or insert alternative prepayment terms.]</i></p> |
| Closing Deadline: | <p>The Bank’s Commitment with respect to the Loan will expire at _____ p.m., Houston time, on _____, 20__, unless the Loan is closed by such time.</p> |
| Conditions to Closing: | <p>Those described or referenced in this Commitment Letter, in addition to those typically required by the Bank and/or deemed appropriate for the Loan. Without limiting the generality of the foregoing, the closings of the Loan shall be subject to the following additional conditions:</p> <p><i>[insert any specific closing conditions]</i></p> |
| Special Covenants, Conditions and Requirements: | <p>Without limiting the generality of anything contained in this Commitment Letter, the Loan shall be upon and subject to the following conditions, covenants, limitations and/or requirements:</p> <p><i>[insert any specific covenants, conditions and requirements]</i></p> |
| Financial Reporting: | <p>Those typically required by the Bank and/or deemed appropriate for the Loan, including, without limitation, the following:</p> <p>(a) <u>Annual Reports of Borrower</u> – Within _____ days after the last day of each fiscal year of Borrower, the [<i>company-prepared; CPA-reviewed; audited</i>] financial statements of the Borrower as of the end of such year prepared in conformity with generally accepted accounting principles consistently applied.</p> |

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| | <p>(b) <u>Quarterly Reports of Borrower</u> – Within _____ days after the close of each fiscal quarter of Borrower, the [<i>company-prepared; CPA-reviewed; audited</i>] financial statements of the Borrower as of the end of such fiscal quarter prepared in conformity with generally accepted accounting principles consistently applied.</p> <p>(c) <u>Annual Reports of Guarantors</u> – Within _____ days after the last day of each calendar year, the personal financial statements of Guarantor as of the end of such year prepared in conformity with generally accepted accounting principles consistently applied.</p> <p>(d) <u>Tax Returns</u> – Within _____ days of the filing thereof, a copy of the Borrower’s and Guarantor’s federal income tax returns on an annual basis.</p> <p><i>[(e) <u>Compliance Certificate</u> – Within _____ days after the close of each fiscal quarter of Borrower, a compliance certificate in form and substance satisfactory to the Bank which shall, without limitation, be certified as true and correct by an appropriate officer of the Borrower and state that the Borrower has not become aware of any Default or Event of Default that has occurred and is continuing or, if there is any such Default or Event of Default describing it and the steps, if any, being taken to cure it.]</i></p> <p><i>[insert any additional specific reporting requirements]</i></p> |
| Representations and Warranties: | Those typically required by the Bank and/or deemed appropriate for the Loan. |
| Affirmative Covenants: | Those typically required by the Bank and/or deemed appropriate for the Loan. |
| Negative Covenants: | Those typically required by the Bank and/or deemed appropriate for the Loan. |
| Events of Default: | Those typically required by the Bank and/or deemed appropriate for the Loan, including, without limitation, the following: the following: non-payment of obligations; breach of representation or warranty; non-performance of covenants and obligations; default on other material debt (including any other indebtedness to the Bank); change of control; bankruptcy or insolvency; material judgments; and termination or default under material contracts or licenses; death of a Guarantor who is a natural person. |
| Organizational Documents and Matters: | The Bank must receive executed copies of all organizational documents of Borrower and each Guarantor, as applicable, and their respective constituent entity members, if any, all in form and content satisfactory to Bank including, without limitation, Borrower's and each Guarantor’s resolutions authorizing the Loan and designating appropriate persons to execute and deliver the Loan Documents. |

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| Appraisal: | The Borrower must furnish, at its expense, an appraisal (or evaluation) of each property securing the Loan, in a form and by an appraiser acceptable to the Bank. |
| Title Insurance: | The Borrower must furnish a Mortgagee's (Loan) Title Insurance Policy(s) in the amount of each loan issued by a company acceptable to the Bank insuring the liens on the subject real property(s), and containing only those exceptions, which are satisfactory to the Bank. |
| Insurance/Taxes: | <p>The Borrower must furnish the Bank with insurance policy(s) covering all collateral securing the Loan, public liability and other matters required by the Bank, which policy(s) shall be approved by the Bank and name the Bank as the Mortgagee Loss Payee. During the term of the Loan, Borrower shall provide the Bank with proof of payment of all insurance policy premiums and taxes due against the property securing the Loan. Should Borrower default on its obligation to pay insurance or taxes, Bank shall have the right to require monthly escrow payments for the payment of such taxes and insurance, subject to periodic review and adjustment.</p> <p><i>[If escrow for taxes, insurance and/or other reasons will be required, include language to that effect.]</i></p> |
| Flood Insurance: | The Borrower must furnish an original duplicate policy or policies of flood insurance issued pursuant to the National Flood Insurance Act of 1968 by a company acceptable to the Bank in an amount equal to that requested by the Bank or a letter from said company or a qualified engineer certifying that the properties securing the Loan are not located in an area identified by the Secretary of Housing and Development as an area having special flood hazards. |
| Surveys: | The Borrower may be required to furnish to the Bank, a TSPS Category 1A, Condition II survey of the real property, by a surveyor acceptable to the Bank, reflecting a metes and bounds description of the subject real property and no encroachments on the subject real property; that there are no restrictions, easements or other matters objectionable to the Bank, and that the improvements located on the subject real property will not encroach upon any easements or other property or breach or violate any covenant, conditions, or restrictions of record or any applicable building or zoning ordinance, said survey to be sufficient to remove the boundaries exception from any title policy requirements hereby. |
| Environmental: | The Bank must receive an Environmental Phase I Site Assessment, in a form acceptable to Bank and its legal counsel, prepared by an environmental engineer acceptable to Bank, stating that the properties securing the Loan are free of any environmental conditions unacceptable to Bank and its legal counsel, and evidencing the condition of such property and its compliance with applicable law to Bank's satisfaction. In the event Bank is not satisfied with an Environmental Phase I Site Assessment for any reason or for no reason whatsoever, Bank reserves the right to require additional environmental studies of such property, including, but not limited to, a Baseline Environmental Assessment and/or a Phase II Environmental Site Assessment, all at Borrower's sole cost and expense. |

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| Costs: | The Borrower shall pay all costs, expenses and fees (including, without limitation, any reasonable attorneys' fees and expenses) associated with the Loan, regardless of whether the Loan actually closes. The Bank has engaged outside legal counsel to represent the Bank in the preparation of loan documentation and closing of the transactions contemplated in this Commitment Letter. |
| Arbitration: | <i>[If applicable -- The parties will agree to arbitrate all disputes.]</i> |
| Governing Law: | State of Texas |
| Opinion Letter: | <i>[If applicable – The Bank will require an opinion letter from Borrower's counsel with respect to such matters as the Bank deems desirable or appropriate.]</i> |
| Cross-Collateralization: | <i>[If applicable – The Collateral shall also secure all other indebtedness and obligations of the Borrower to the Bank.]</i> |

Exhibit "B"

Sample Deficiency Rights Waiver

[Note: The following provisions contain defined terms which might not be used in your loan documents.]

“Section [] **Waiver of Deficiency Statute.** (a) Waiver. In the event an interest in any of the Mortgaged Property is foreclosed upon pursuant to a judicial or nonjudicial foreclosure sale, Grantor agrees as follows: notwithstanding the provisions of Sections 51.003, 51.004, and 51.005 of the Texas Property Code (as the same may be amended from time to time), and to the extent permitted by law, Grantor agrees that Beneficiary shall be entitled to seek a deficiency judgment from Grantor and any other party obligated on the Note equal to the difference between the amount owing on the Note and the amount for which the Mortgaged Property was sold pursuant to judicial or nonjudicial foreclosure sale. Grantor expressly recognizes that this section constitutes a waiver of the above-cited provisions of the Texas Property Code which would otherwise permit Grantor and other persons against whom recovery of deficiencies is sought or Guarantor independently (even absent the initiation of deficiency proceedings against them) to present competent evidence of the fair market value of the Mortgaged Property as of the date of the foreclosure sale and offset against any deficiency the amount by which the foreclosure sale price is determined to be less than such fair market value. Grantor further recognizes and agrees that this waiver creates an irrebuttable presumption that the foreclosure sale price is equal to the fair market value of the Mortgaged Property for purposes of calculating deficiencies owed by Grantor, Guarantor, and others against whom recovery of a deficiency is sought.

(b) Alternative to Waiver. Alternatively, in the event the waiver provided for in subsection (a) above is determined by a court of competent jurisdiction to be unenforceable, the following shall be the basis for the finder of fact's determination of the fair market value of the Mortgaged Property as of the date of the foreclosure sale in proceedings governed by Sections 51.003, 51.004 and 51.005 of the Texas Property Code (as amended from time to time): (i) the Mortgaged Property shall be valued in an “*as is*” condition as of the date of the foreclosure sale, without any assumption or expectation that the Mortgaged Property will be repaired or improved in any manner before a resale of the Mortgaged Property after foreclosure; (ii) the valuation shall be based upon an assumption that the foreclosure purchaser desires a resale of the Mortgaged Property for cash promptly (but no later than twelve (12) months) following the foreclosure sale; (iii) all reasonable closing costs customarily borne by the seller in commercial real estate transactions should be deducted from the gross fair market value of the Mortgaged Property, including, without limitation, brokerage commissions, title insurance, a survey of the Mortgaged Property, tax prorations, attorneys' fees, and marketing costs; (iv) the gross fair market value of the Mortgaged Property shall be further discounted to account for any estimated holding costs associated with maintaining the Mortgaged Property pending sale, including, without limitation, utilities expenses, property management fees, taxes and assessments (to the extent not accounted for in (iii) above), and other maintenance, operational and ownership expenses; and (v) any expert opinion testimony given or considered in connection with a determination of the fair market value of the Mortgaged Property must be given by persons having at least five (5) years experience in appraising property similar to the Mortgaged Property and who have conducted and prepared a complete written appraisal of the Mortgaged Property taking into consideration the factors set forth above.”

Exhibit "C"

Narrowly Tailored Cure Language and Automatic Acceleration Upon Bankruptcy
[Note: The following provisions contain defined terms which might not be used in your loan documents.]

"Section [_____] **Events of Default**. The term "Event of Default," as used herein, shall include the occurrence of any one or more of the following events:

(a) The failure of Borrower to pay when due any installment of principal or interest on the Note, any taxes, assessments or other charges imposed, levied or assessed against any real or personal property constituting a part of Mortgaged Property, or any other amount due under this Agreement or any of the other Loan Documents ***and any such failure is not remedied within ten (10) days after notice of such failure from Lender; provided, however, that Lender shall not be obligated to provide such notice more than once during the term of this Agreement; and provided further, that Lender shall not be obligated to provide any such notice in connection with any payment of principal due at maturity (due to scheduled maturity or acceleration) under the Loan Documents.***

(b) The failure of Borrower to perform, observe or comply, ***within thirty (30) days from the date Lender gives Borrower notice of such failure***, with any covenant, agreement, undertaking or condition contained in any of the Loan Documents, ***which covenant, agreement, undertaking or condition is not otherwise specifically addressed in this Section.***

(c) Borrower shall (i) execute an assignment for the benefit of creditors or take any action in furtherance thereof; (ii) admit in writing its inability to pay, or fail to pay, its debts generally as they become due; (iii) as a debtor, file a petition, case, proceeding or other action pursuant to, or voluntarily seek the benefit or benefits of, any Debtor Relief Law or take any action in furtherance thereof; (iv) seek, acquiesce in or suffer the appointment of a receiver, trustee, custodian or liquidator of Borrower or of the Property or any part thereof or of any significant portion of Borrower's other property; or (v) voluntarily become a party to any proceeding seeking to effect a suspension or having the effect of suspending any of the Rights of Lender granted or referred to in the Loan Documents or of the Trustee under the Deed of Trust or take any action in furtherance thereof.

(d) The filing of a petition, case, proceeding or other action against Borrower as a debtor under any Debtor Relief Law or seeking appointment of a receiver, trustee, custodian or liquidator of Borrower or of the Property or any part thereof or of any significant portion of Borrower's other property or seeking to effect a suspension or having the effect of suspending any of the Rights of Lender granted or referred to in the Loan Documents or of the Trustee under the Deed of Trust and (i) Borrower admits, acquiesces in or fails to contest diligently the material allegations thereof; or (ii) the petition, case, proceeding or other action results in entry of an order for relief or order granting the relief sought against Borrower; or (iii) the petition, case, proceeding or other action is not permanently dismissed or discharged on or before the earlier of trial thereon or sixty (60) days next following the date of its filing.

..... *[More Events of Default typically follow]*.....

Section [] Certain Remedies. If any Event of Default shall occur and be continuing, Lender may declare the Indebtedness or any part thereof to be immediately due and payable, and the same shall thereupon become immediately due and payable, without notice, demand, presentment, notice of dishonor, notice of acceleration, notice of intent to accelerate, notice of intent to demand, protest, or other formalities of any kind, all of which are hereby expressly waived by Borrower and each other Loan Party; ***provided, however, that upon the occurrence of an Event of Default under Section 7.01(c) or Section 7.01(d), the Indebtedness shall become immediately due and payable without notice, demand, presentment, notice of dishonor, notice of acceleration, notice of intent to accelerate, notice of intent to demand, protest, or other formalities of any kind, all of which are hereby expressly waived by Borrower and each other Loan Party.*** If any Event of Default shall occur and be continuing, Lender may exercise all Rights available to Lender in law or in equity, under the Loan Documents, or otherwise.”