

**Strafford**

*presents*

# **Commercial Real Estate Loan Workouts**

## **Strategies for Developers, Owners and Lenders to Negotiate an Effective Workout Agreement**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

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**Tuesday, October 5, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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Please refer to the dial in/ log in instructions emailed to registrants.

**COMMERCIAL REAL ESTATE LOAN WORKOUTS  
New Restructuring Opportunities**

**Teleconference Sponsored by  
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**The Threat of Bankruptcy  
Forbearance Agreements  
&  
Bankruptcy Mitigation Techniques**

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## **I. DEVELOP A STRATEGY**

### **C. The Threat of Bankruptcy**

The likelihood and possible shape of a bankruptcy filing by the Borrower should be considered in any delinquent mortgage loan. In workout discussions, a Lender should generally measure settlement proposals against the likely outcome if a bankruptcy were filed. Workouts which leave the Lender in a worse position than the likely bankruptcy outcome should be declined since the Lender can do better by enforcing its rights. On the other hand, workouts which leave the Lender in a better position than the likely bankruptcy outcome often should be accepted even if the workout is otherwise not appealing to the Lender. Lenders sometimes have trouble accepting a workout they don't like even if it is better than the best they could do in litigation.

Generally speaking, the primary factor in evaluating bankruptcy risk is equity in the property. Without equity, a bankruptcy is unlikely to be successful since the demise of the new value exception, but with equity, the Borrower has a chance of presenting a feasible plan of reorganization. A bankruptcy filing itself can obviously have a negative effect on value and adversely affect sale or refinance efforts. Since erosion of equity affects the Borrower before the Lender, the Borrower may have strong business motives to avoid bankruptcy. Borrowers also may desire to retain the reputation advantage of never having filed bankruptcy. Therefore, it may make sense for a Borrower to make certain concessions in a workout in order to avoid bankruptcy and preserve maximum value for a sale or refinance of the property.

The second most important factor to consider when evaluating bankruptcy risk is the presence of significant junior creditors. Confirming a bankruptcy plan requires the vote of at least one class of creditors. Any significant creditor, other than the first mortgage lender, changes the leverage by increasing the chances the Borrower could confirm a plan.

Another preliminary factor to consider relating to bankruptcy risk is cash collateral. If the Borrower has assets other than the real property, such as large cash or escrow reserves, these assets can be used in a bankruptcy plan to provide necessary liquidity to make the plan feasible. Once an Event of Default has been declared, I generally recommend that Lenders consider liquidating and applying to the debt any cash or cash equivalent collateral such as cash escrows held by third parties, letters of credit, etc. The pre-petition bankruptcy issue to consider is whether these cash recoveries might be considered preferences subject to set aside if bankruptcy is later filed. However, even if preference risk exists, seizing the cash is usually better as a practical matter than not seizing it and the preference period may expire before the bankruptcy is filed. Local law should also be considered such as whether any one action rule applies (such as in California) that might limit the other remedies of Lender following realization of cash or cash equivalent collateral. Post petition, the bankruptcy issue is whether the automatic

stay might be violated by a letter of credit draw or other similar demand on a third party holding collateral of the Lender.

In general, bankruptcy law evolved in a creditor favorable direction since the last major real estate downturn of the late 1980s/early 1990s. Examples include the demise of the new value exception and the new single asset real estate provisions of the bankruptcy code. However, a possible major exception to this trend occurred with the 2004 Supreme Court decision, *Till v SCS Credit Corp*, 541 U.S. 465 (2004). In the current economic environment, one might expect further debtor favorable developments in the law. *Till* determined the appropriate interest rate for a cram down in a Chapter 13 case. It rejected all previous theories of interest rate determination and selected a formula based on the national prime rate with adjustments for default risk (citing examples of adjustments in the 1% to 3% range). The Court was motivated by a desire for a rate that not complicated, avoided significant evidenciary costs and aim to provide present value rather than making the lender whole. The Court in footnote 10 suggested this same formula might apply to Chapter 11 cases.

The prime rate is rarely used as a measure for permanent real estate mortgages; Treasuries are more typical as a reference rate. In addition, commercial mortgage spreads would generally be much larger than 1% to 3% especially for a troubled asset with a high non-conforming loan to value ratio. In footnote 14, the court noted that in Chapter 11 cases, DIP financing is available and thus an efficient market may exist for determining the appropriate rate of interest in a bankruptcy plan. However, DIP financing generally does not exist for single asset real property cases in bankruptcy. Even for larger cases, DIP financing generally is much more difficult to obtain than when the *Till* case was decided. In the 2009 General Growth Properties bankruptcy case, DIP financing was obtained at a rate of 12% over LIBOR. Most lenders would be happy with that spread, but it is unclear if GGP will be a benchmark for determining what a bankruptcy rate of interest should be in a more typical single asset Chapter 11 real estate case. Courts may determine no such efficient market exists and the GGP case is aberrational.

The 6<sup>th</sup> Circuit has decided *Till* applies to Chapter 11 cases. *In Re American Homepatient Inc.*, 420 F3d 559 (6<sup>th</sup> Cir 2005), but see *In Re Prussia Associates*, 322 B.R. 572 (Bankr. E. D. Pa 2005). *American Homepatient* involved a \$250,000,000 mortgage loan crammed down at 100% loan to value. Following footnote 14 of *Till*, the court decided an efficient market should be used, but rejected expert testimony from the lender that a blended rate of 12.16% would reflect combined mortgage and mezzanine market rates for an 100% LTV. Since 2007, the CMBS mezzanine loan market has shut down and I am not sure anyone could produce this kind of evidence today. In any event, the court said mezzanine rates were inappropriate for a first mortgage lien, and instead confirmed the lower court's determination of 6.785% based on Debtor's expert testimony using the 6 year Treasury note plus an adjustment of 3.5%. This analysis is consistent with how commercial mortgage loans are typically priced although spreads have widened considerably since 2005, and certainly 3.5% would not be adequate for a 100% LTV. Perhaps courts will recognize the wider spreads and tighter underwriting standards in

today's market. However, in the current economic environment, one might also expect a trend toward making it easier for distressed debtors to confirm a plan. *Till* and its progeny could be a powerful tool for Debtors seeking to limit the interest rate in a bankruptcy cramdown.

### 1. *Perfection Considerations/Document flaws*

A key part of any strategic evaluation of a possible bankruptcy filing is the adequacy of the existing mortgage loan documentation and how it will hold up in bankruptcy. If a bankruptcy is filed, will the Lender have a perfected lien on the real estate and all other necessary assets? Even in the absence of a bankruptcy, document flaws and deficiencies can hinder enforcement of the loan. Most mortgages are properly recorded, but were the UCC financing statements also properly filed and continued? Has the loan been amended or partially released in ways that may have impaired the effectiveness of the original documents? If the property was transferred by the original Borrower, was the assumption of the loan adequately documented and correct UCCs filed against the new Borrower? Under revised Article 9, the Lender should consider unilaterally filing UCCs previously omitted; signatures are no longer required and authorization to file is deemed given by a security agreement. Have the documents been properly assigned of record to the current holder of the loan? This problem may be particularly acute for securitized loans with multiple transfers among several players, most of whom are no longer involved in the loan and some of whom may no longer exist. However, under the UCC, the holder of the note should be entitled to the mortgage even if the mortgage has not been assigned. *See Provident Bank v. Community Home Mortgage Corp.*, 498 F.Supp 2<sup>nd</sup> 558 (E.D.N.Y 2007). Therefore, if a proper trail of assignments of the note can be produced, that may be sufficient. With securitized loans, flaws or omissions in the loan documents or loan servicing files may also establish the basis for claims by and among the parties to the PSA and provide additional remedies for the current holders of the loans or certificates.

### 2. *Jurisdictional Advantages or Disadvantages*

In what jurisdiction is the Borrower likely to file bankruptcy? Where the property is located? Where the Borrower is organized or has its principal office? How might the caselaw in a particular jurisdiction affect the treatment of the loan in bankruptcy? Jurisdictions differ in their approach on a variety of issues in bankruptcy. Do the courts have a track record with the single asset bankruptcy provisions that now apply to all cases regardless of the size of the mortgage loan? Some jurisdictions are very hostile to single asset real estate cases and the Borrower is unlikely to fare very well. Other jurisdictions are more receptive, but treat various issues differently. Will default interest or prepayment premiums be recognized under state law and in bankruptcy? Can the Borrower alter material terms of the loan documents in a cramdown? The attitude of the courts on these issues affect the possible outcome in bankruptcy and therefore shape the leverage of the parties in a workout discussion. Workout structures can be designed to take advantage of, or avoid the pitfalls of, bankruptcy and other caselaw.

### 3. *Presence of Other Creditors*

As noted above, other than the presence or absence of equity, perhaps the most important bankruptcy consideration is the presence of significant junior creditors. Any operating piece of real estate will have service providers who would form a small class of unsecured creditors. Typically, however, these creditors are few and owed small amounts relative to the mortgage loan. These creditors may not take an active role in the bankruptcy and in appropriate cases may even be bought out by the mortgage holder to insure control of the bankruptcy. However, the presence of significant and potentially active junior debt materially alters the bankruptcy analysis. A junior creditor or group of unsecured creditors can form the impaired accepting class necessary to confirm or “cram down” a plan over the senior creditor’s objection. The bankruptcy process exists in large part to protect such junior interests, and the first mortgage holder may have a difficult time extracting its collateral where the Borrower and junior creditors join forces, especially where there may be equity in the property. Eliminating the likelihood of any significant junior creditors is the purpose for many of the features of non-recourse mortgage loans particularly CMBS loans. Intercreditor agreements may also exist which mitigate the risk of junior creditors.

### 4. *SPE Bankruptcy Remote & Independent Director Provisions*

Many securitized loans incorporate bankruptcy remoteness provisions in the loan documents or Borrower organizational documents including separateness and single purpose entity requirements and special conditions for the filing of bankruptcy such as the approval of independent directors. What is sometimes misunderstood is that most of these provisions are not designed to prevent a bankruptcy by the Borrower, but are primarily designed to insulate the Borrower and the collateral from the bankruptcy of principals in the Borrower and from the claims of other creditors. In a macro or underwriting sense, these provisions may tend to reduce bankruptcy filings by eliminating some of the external circumstances which might force otherwise healthy properties into bankruptcy or which increase the likelihood of a successful cram down on mortgage lenders of marginal properties. The general feeling in the industry is that bankruptcy filings are down compare to the last major real estate downturn of the early 1990s. On the other hand, in a micro sense applied to a specific case, I am not sure SPE/independent director provisions appreciably decrease the legal risk of a bankruptcy filing. For example, many smaller conduit loans do not contain the independent director requirement, but merely require the decision to file bankruptcy be unanimous among directors or members and unanimity should not be hard to achieve. Where an independent director does exist, if the property specific circumstances are ripe for a bankruptcy filing, *i.e.* there is equity in the property and junior creditors to protect, independent directors should consent to the bankruptcy filing based on their fiduciary duty to the other creditors and to equity holders. Perhaps an independent director will prevent some otherwise bad faith filings, however, even in those cases, if the Debtor is bent on a bad faith filing, it may find a way to file *ultra vires* without the independent director consent.

In the GGP bankruptcy, the CMBS marketplace was upset to see GGP put otherwise performing properties into bankruptcy, including trophy properties such as the Ala Moana Mall in Hawaii. The undercut one of the key purposes of the SPE structures, i.e., the SPE provisions failed to prevent performing properties becoming entangled in the parent's bankruptcy. Many of these loans had independent directors and the argument exists these directors should not have voted for a bankruptcy where the single purpose entity (in contrast to its parent) had no pressing need to be in bankruptcy. GGP settled with most of its secured real estate creditors prior to this issue being fully litigated and so the case did not yield any guidance on this issue.

## II. LOAN WORKOUTS

### B. Forbearance Agreements

A forbearance agreement is a vehicle by which the Lender does not waive the default, but agrees not to exercise remedies for a specified period of time to facilitate payoff or reinstatement of the loan. The central issue in any forbearance discussion is hope – the exist strategy for paying off the defaulted loan or perhaps reinstating the loan and returning to full compliance. The 18<sup>th</sup> century English poet Alexander Pope wrote the oft-quoted line, “Hope springs eternal in the human breast...” Even in default, Borrowers are typically optimists and have a plan that will rescue the property from its current predicament if only the Lender would grant more time and perhaps make other concessions. Lenders must determine whether the hope is real and whether the requested concessions make sense or whether they should just press ahead with enforcement. My discussion of forbearance agreements is divided into three parts: (1) short term forbearance agreements designed to lead to near term payoff of the loan; (2) reinstatement agreements designed to lead to near term restoration of the loan to non-delinquent status; and (3) more complex forbearance agreements including “one bite at the apple” structures for circumstances where the Borrower has hope but the Lender has none. As noted earlier, prior to any discussions, a Lender should insist on a Pre-Negotiation Agreement. A form is attached as **Schedule 6**.

#### 1. *Short Term Forbearance*

Borrowers may request a short period of time following loan default or loan maturity in which to arrange for a payoff of the loan. The loan may have matured with a sale or refinance pending or the Borrower may need additional time to raise payoff funds from another source. The Borrower may request waiver of default interest, exit fees or prepayment premium. In some instances, a discounted payoff might be negotiated where the payoff is less than the outstanding principal balance, but equals or exceeds what the Lender might reasonably anticipate from foreclosure and resale of the property. Lender and Borrower may otherwise have a good relationship or other factors exist (such as a signed contract or loan takeout commitment or a large well-capitalized parent of the Borrower) which lend credibility to the Borrower's near term plans. In these sorts of circumstances, a short term forbearance agreement may be the best bet. The hope is real and imminent and more elaborate arrangements are not necessary. A form is attached as

**Schedule 1.** In return for the additional time, the Borrower makes forbearance payments, perhaps simply continuing monthly payments under the loan, and agrees to a few acknowledgements and waivers confirming there is no current dispute with the Lender. Such an arrangement may also be appropriate for an otherwise healthy loan at maturity and has the added benefit of avoiding the transaction costs associated with formally amending the loan documents to extend maturity for only a brief time.

## 2. *Reinstatement Agreements*

For a variety of reasons, Borrowers may fall behind on monthly payments. However, the cash flow problem may have been short term and the Borrower is otherwise able to continue paying the loan and intends over time to make up the missed payments. The Lender may be unwilling or unable to modify the loan terms or to forgive or reamortize the missed payments. This situation may occur most frequently in the securitized loan setting where the servicer's discretion to modify the loan is limited. Often the PSA will allow the servicer to afford the Borrower time to catch up and also authorize the servicer to forgive late fees and default interest. The parties may be able to reach agreement on a reinstatement of the loan where regular loan payments are resumed at some point, expenses of the loan default are reimbursed and the missed payments are paid back over an interim period through supplemental monthly payments. Again the hope is real and reasonably imminent and the parties act accordingly. A form is attached as **Schedule 2.**

## 3. *Complex Forbearance Structures/One Bite at the Apple*

Many defaulted loans don't have a quick and easy business solution and therefore may not be conducive to a simple short term forbearance or reinstatement agreement. Although the Borrower may still have "hope", Lenders may quote the next line from Pope's *Essay on Man*: "...Man never *is*, but always *to be* blest." The Lender may not see any salvation for the property in this present life, but only in the next life after the market returns and/or serious rehabilitation/redevelopment occurs. Granting more time often only delays the inevitable and may cause further deterioration in property value. Borrowers will often ask for concessions in terms of more time and reduced payment obligations, but offer little in return. I always advise Lenders to insist on something in return for any concessions. The Borrower must bring sufficient value to the table to induce concessions from the Lender.

The classic example of a mortgage loan workout is a modification of the loan which provides economic benefits to both parties. The Borrower obtains some form of debt relief from the Lender and in return the Lender also gains some material business or economic benefit. A typical Lender "wish list" includes:

- paydown of the loan or other cash infusion
- additional collateral
- increase the interest rate or amortization, shorten the period to maturity or retrade other business terms such as payoff provisions

- add guarantors or recourse to a non-recourse loan
- establish escrows going forward (tax, insurance, capital reserves, tenant work)
- activate or establish a lockbox to control cash flow
- obtain/require supplemental property information or reports
- reduce/eliminate Borrower rights such a partial releases/substitution of collateral
- increase/enhance lender rights such as approval over budget or leasing
- correct any legal weaknesses/deficiencies in the existing documents
- waive existing offsets, defenses or lender liability claims
- change in property management/leasing agent

Sometimes, however, the Borrower has little to offer in terms of new consideration. No new money, no new collateral, nothing new from the wish list that the existing loan documents don't already incorporate. The Lender's only realistic course of action may be to simply press ahead with foreclosure. However, Lenders may still be reluctant for a variety of reasons. The Lender may have internal reasons for wanting to delay realization of losses. Full exercise of remedies may be costly and time-consuming (such as judicial foreclosure) or may precipitate a Borrower bankruptcy which causes additional delay and expense. On the other hand, ganting concessions to the Borrower with little in return is not a good strategy and runs the risk of what I call "two bites at the apple." The Lender grants concessions, but the situation doesn't improve and then the Borrower seeks further concessions perhaps by threatening bankruptcy or by actually filing bankruptcy and then negotiating further concession from Lender in a bankruptcy plan. In these circumstances of limited hope and limited new consideration from the Borrower, there is another forbearance structure that may avoid costly litigation and avoid two bites at the apple. In response to the Borrower's request for more time and other concessions, the Lender wants finality in return. The Lender agrees to the concessions, but in return, if the Borrower fails to pay off the loan by the end of the forbearance period, the Lender will receive the collateral promptly without further opposition. The Borrower receives "one bite at the apple" - one last chance to realize its hope; but in return grants the Lender greater certainty of collateral recovery.

A forbearance agreement can be crafted where the Borrower agrees not to oppose Lender's remedies following the forbearance period. The Borrower makes a number of waivers, acknowledgements, and factual stipulations which enhance and accelerate Lender's ability to enforce the loan documents following the forbearance period. Springing recourse liability may be used to encourage the Borrower's compliance with the "do or die" feature. Discounted payoff rights which expire after the forbearance period (such as a conditional waiver of default interest, prepayment fees and the like) may be part of the arrangement. Releases of guaranties and recourse liability may be conditioned upon the Borrower's compliance with the covenant not to oppose the Lender's exercise of remedies. Additional features could include placing in escrow with the Lender a deed in lieu of foreclosure, which could be recorded immediately following expiration of the forbearance period (caselaw is admittedly thin, but see **Schedule 3**). In a judicial foreclosure state, the Borrower might deliver in escrow a consent judgment of foreclosure, which Lender could file after the forbearance period in a subsequent foreclosure action. If judicial foreclosure has already commenced, the forbearance

agreement may be folded into a consent order incorporating the forbearance terms. If bankruptcy has already been filed, the agreement can take the form of a consensual plan. In certain large or complex cases, the forbearance may take the form of a prepackaged bankruptcy.

Some of the “one bite” features may not be fully enforceable in every jurisdiction, but they nonetheless serve to increase the Lender’s leverage and decrease the chances of successful Borrower opposition later. The main goal of the structure as a practical matter is Borrower “buy-in” to the concept. I like to imagine Borrower’s counsel advising their client that the various features may not be enforceable, but “if you sign this, don’t come crying to me later.” The Borrower’s litigation option has become so impaired as to be no longer worth the effort. In the end, if the hoped for payoff does not materialize, the Lender receives title without litigation within a time much shorter than if the Lender enforced remedies and was opposed by the Borrower. From a Borrower’s perspective, these techniques may persuade a Lender otherwise bent on foreclosure to grant one last chance and avoid the time, expense and reputational impact of foreclosure and bankruptcy.

### **C. Bankruptcy Mitigation Techniques**

The biggest obstacle to the success of a one bite at the apple forbearance structure is the Borrower’s ability to file bankruptcy prior to title transfer and thereby receive a second bite at the apple in the form of a bankruptcy plan of reorganization. The concept of bankruptcy mitigation aims to eliminate this second bite by offering the Borrower a choice between bankruptcy and forbearance. The Borrower is offered the alternative of whether to file bankruptcy now or whether to negotiate an out of court settlement with the Lender which includes provisions that seriously impair its ability to confirm a successful bankruptcy plan in the future. Absolute prohibitions against bankruptcy filing (so called *ipso facto* clauses) are unenforceable, however, other techniques exist which serve to discourage, hinder or impair the Borrower’s ability to file bankruptcy or successfully confirm a plan. Such techniques reduce a Borrower’s potential leverage in bankruptcy to the point that the bankruptcy option no longer is worth the investment of the Borrower’s time, effort and legal fees. [“Don’t come crying to me.”] The techniques may not be 100% enforceable in all jurisdictions, but once again the idea is if the Borrower buys into the concept, the bankruptcy filing will never occur. Various techniques are listed below, some or all of which could be utilized.

#### *1. Stay Relief Stipulations and Covenants*

Some jurisdictions have enforced a covenant by the Borrower in a forbearance/workout context that the Lender is entitled to stay relief if a bankruptcy is subsequently filed. Courts approving such covenants cite the policy of encouraging out of court settlements. Few courts have given unqualified approval to such covenants and several courts have rejected or limited the use of such covenants. However, the list of bankruptcy courts enforcing or approving such covenants is quite extensive including a recent 2008 case from the Southern District of Florida. See **Schedule 4** for the list of

cases addressing the enforceability of such covenants. Under appropriate circumstances, the covenant can be a significant factor in a court's determination to grant stay relief. In addition to the covenant itself, the forbearance agreement can include factual stipulations from the Borrower which provide grounds for granting a stay relief motion by the Lender. The factual stipulations estop the Borrower from later contrary assertions. The most important of these stipulations would be the absence of equity in the property or the absence of any ability to provide adequate protection. Other factors include the sophistication of the Borrower and its counsel and the absence of significant other creditors in the case. The Borrower could stipulate the single asset provisions of the bankruptcy code apply and the inability to file a plan with a reasonable chance of success or to commence payments to the Lender within the required deadline. Stipulation of additional facts may help establish grounds for a bad faith dismissal of the bankruptcy such as the absence of employees or other creditors, the two party nature of the dispute and the fact that the forbearance was entered into as a settlement in lieu of bankruptcy. Caselaw in the applicable jurisdiction may provide helpful guidance concerning the facts which would support dismissal or stay relief.

## 2. *Assignment of Equity Interests*

Similar to a mezzanine loan structure, the principals of the Borrower may assign their equity interests in the Borrower to the Lender as additional collateral for the Loan. Once the forbearance period expires, the Lender is entitled to exercise the assignments (through a relatively quick and easy UCC sale) and become the owner of the Borrower. The Lender then controls the property without a foreclosure sale or could complete foreclosure without opposition from the Borrower entity now owned by the Lender. If a bankruptcy is filed by the Borrower prior to the transfer of equity interests to the Lender, then the automatic stay would not apply to Lender's rights under such collateral assignments against the principals of the Borrower since the equity interests are not assets of the estate. (The Borrower could seek a Section 105 extension of the automatic stay.) Accordingly, even after a bankruptcy filing, the Lender could exercise its rights under the collateral assignments, become the owner of the Borrower and take over the bankruptcy process. Taking over the ownership of the Borrower raises other complications such as assuming potential liabilities of the Borrower.

## 3. *Springing Guaranties*

Principals of the Borrower execute guaranties of the Loan which are enforceable only in the event of a bankruptcy filing by the Borrower. Many non-recourse mortgage loan documents already build this feature into the recourse carveouts and the forbearance agreement may simply reaffirm this existing feature. There may also be existing claims of recourse liability under the exceptions to exculpation and the forbearance agreement could include a waiver of this recourse conditioned upon the absences of a bankruptcy filing or other opposition to Lender's remedies. Also, in some instances, only the single asset Borrower may be liable and the forbearance adds the Borrower's principals to the guaranty. In all such cases, recourse liability provides a powerful incentive to honor the terms of the forbearance agreement and not interfere with the Lender's remedies with a

bankruptcy filing. Courts have enforced such provisions (cases are listed on **Schedule 5**). Commentators often assume bankruptcy courts may not look with favor upon such springing guaranties and may be more willing to grant Section 105 extensions of the automatic stay or even find the guaranty void as against public policy. See Alvin L. Arnold and Marshall Tracht, *Construction and Development Financing*, §6:72 (3d ed.), [Westlaw citation is CDF §6:72] stating that “The enforceability of these instruments [springing and exploding guaranties] is an open question, and one that we can expect will be hotly contested come the next recession.” However, we are now well into the “next recession” and I am not yet aware of cases indicating such provisions are not enforceable. Even if an argument against enforceability might prevail in front of some courts, the Borrower’s principals may not want to risk that determination and the document will serve its purpose if the guarantors buy into the concept that no bankruptcy should be filed. In my experience, solvent guarantors take these provisions very seriously.

#### 4. *Absolute Assignment of Rents*

Forbearance agreements frequently include or reaffirm a lockbox feature by which the rent from the property is brought under the control of the Lender. Such an arrangement could include a stipulation establishing that absolute title to the rents has passed to the Lender. Caselaw in certain jurisdictions recognizes absolute assignment of rents in a forbearance or delinquent loan context by which absolute title to the rents passes to the Lender. Accordingly, the rents are therefore no longer part of the bankruptcy estate of the Debtor and reorganization becomes effectively impossible. As a result, the absolute assignment of rents becomes the basis for stay relief or dismissal of the bankruptcy case. **Schedule 6** lists cases both recognizing and rejecting absolute assignment of rents.

**SCHEDULE 1**

**FORM SHORT TERM FORBEARANCE AGREEMENT**

[Date]

[Borrower name]

[Borrower address]

Attn: [Borrower Contact]

Re: Forbearance Agreement  
Loan No. \_\_\_\_\_ (the "Loan")  
[Property name or address]  
City and State of property]

Dear \_\_\_\_\_:

As you are aware, the above-referenced Loan held by \_\_\_\_\_ ("Lender") encumbering property of \_\_\_\_\_ ("Borrower"), is due and payable in full as of \_\_\_\_\_ ("Maturity Date") due to either scheduled maturity or acceleration of maturity following a default. You have indicated the Borrower's inability to pay the Loan in full on the Maturity Date and have requested some relief or extension. Although Lender is unwilling to extend or reinstate the Loan, Lender is willing to forbear exercising remedies (other than any remedies previously exercised) from the date of Borrower's execution of this letter until \_\_\_\_\_ ("Forbearance Period"), on the following terms and conditions ("Forbearance Conditions"):

1) The Borrower executes this letter (the "Forbearance Agreement") where indicated below and returns the same to Lender by \_\_\_\_\_, along with an administrative fee of \$\_\_\_\_\_, which fee is hereby deemed fully earned and shall not be applied to sums due under the Loan documents.

2) Payments ("Forbearance Payments") shall be made to Lender as follows: \_\_\_\_\_ . Lender will have the right, at its sole discretion, to apply Forbearance Payments received to principal first, then to any other sums due under the Loan Documents, then to interest.

3) The entire remaining Loan balance must be paid in full by the end of the Forbearance Period.

4) No defaults exist or occur during the Forbearance Period under the documents evidencing and securing the Loan (the "Loan Documents") other than the failure to pay the Loan in full on the Maturity Date.

5) [Insert any other business terms which vary from the existing requirements of the Loan documents]

6) If the Borrower complies in a timely fashion with all of the Forbearance Conditions, Lender will waive default interest accruing prior to or during the Forbearance Period, and interest will be collected only at the coupon rate of \_\_\_% upon payoff in full. However, in the event the Borrower does not comply in a timely fashion with all of the Forbearance Conditions, interest will remain due at the default rate of \_\_\_% from and after the Maturity Date.

7) By execution below, Borrower acknowledges that [its license to collect rents under the Loan Documents has expired and absolute title to the rents has passed to Lender][Lender has a perfected security interest in and to the rents generated by the real property securing the Loan], and that from and after the Maturity Date, but for the forbearance set forth herein, Lender could have enforced the assignment of rents in the Loan documents under applicable state law.

8) This is a one-time forbearance and Lender does not presently intend to forbear beyond the date set forth above. Borrower should not expect similar arrangements on other loans to the Borrower.

9) Borrower acknowledges and agrees that

(a) the entire agreement of the parties with respect to the Loan is incorporated in the Loan Documents and this Forbearance Agreement, and such instruments supercede any prior or contemporaneous oral or written understandings to the contrary;

(b) the Loan Documents are in full force and effect (subject to the outstanding default) enforceable in accordance with their terms and have not been amended or modified, other than by this Forbearance Agreement;

(c) the Loan matured on the Maturity Date and the entire outstanding principal balance and all accrued interest and other fees and charges secured by the Loan Documents, including, without limitation, the Exit Fee and Prepayment Premium (as such terms are defined in the Loan Documents), are due and payable in full, except as otherwise provided in this Forbearance Agreement;

(d) the terms and conditions of the Loan Documents, including, without limitation, the Exit Fee, Prepayment Premium and default interest rate, are commercially reasonable;

(e) an Event of Default occurred under the Loan Documents on \_\_\_\_\_, 200\_\_, all rights of notice and cure have expired or are hereby waived by Borrower, and default interest at the rate specified in the Loan Documents is accruing, subject to the provisions of this Forbearance Agreement.

10) In the event any of the Forbearance Conditions are not met in a timely fashion, Lender's obligation to forbear shall terminate and be null and void, and Lender shall be entitled to exercise any available remedies for default. Except for the limited forbearance set forth above, Lender reserves all of its rights and remedies under the Loan documents or under applicable law, and this Forbearance Agreement shall not be deemed an election of remedies, nor shall it constitute a waiver of any rights or remedies otherwise available to Lender.

11) As a further material inducement for Lender to enter into this Forbearance Agreement without which Lender would not have agreed to a Forbearance Period, Borrower hereby makes the following irrevocable waivers:

a) BORROWER WAIVES AND RELEASES ANY EXISTING OFFSETS, DEFENSES OR COUNTERCLAIMS RELATING TO THE LOAN OR THE LOAN DOCUMENTS.

b) BORROWER ALSO WAIVES THE RIGHT TO A TRIAL BY JURY IN THE EVENT THE LOAN DOCUMENTS OR THIS FORBEARANCE AGREEMENT BECOME THE BASIS OF LITIGATION.

12) Time is of the essence of this Forbearance Agreement and all of the Loan Documents.

Sincerely,

cc:

Accepted and agreed to this \_\_\_ day of 200\_\_

BORROWER:

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_

**SCHEDULE 2**

**RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:**

**MORTGAGE LOAN REINSTATEMENT AGREEMENT**

This Agreement is executed, delivered and made effective as of DATEFORDOCS, by and among NAMEOFBORROWER, WHATISBORROWER (herein called "Borrower"); and NAMEOFTRUSTEE, AS TRUSTEE FOR THE REGISTERED HOLDERS OF TRUSTENTITY MORTGAGE PASS-THROUGH CERTIFICATES, SERIES SERIES# (herein called "Lender").

**W I T N E S S E T H :**

**WHEREAS**, Borrower is the owner of certain property located in COUNTYOFCOLLATERAL County, STATEOFCOLLATERAL, generally known as NAMEOFPROJECT, which property is more particularly described in Exhibit A attached hereto (the "Property"); and

**WHEREAS**, Lender is the owner and holder of the following instruments pertaining to a loan made to Borrower by Lender (the "Loan"): (i) that certain Promissory Note (the "Note") dated ORIGINALDATE in the original principal amount of \$LOANAMOUNT, payable to ORIGINALLENDER or its order, which Note is secured by (ii) a certain NAMEOFMTG (the "Security Instrument") of even date therewith and recorded in MTGBK&PG, Recorder's Office, COUNTYOFCOLLATERAL County, STATEOFCOLLATERAL and (iii) a certain Assignment of Leases and Rents (the "Assignment") as recorded in ASSIGNBK&PG, Recorder's Office, COUNTYOFCOLLATERAL County, STATEOFCOLLATERAL, all of which encumber or relate to the Property (the Assignment, the Note, the Security Instrument, and all other documents entered into by Borrower in connection therewith are hereinafter referred to collectively as the "Loan Documents"); and

**WHEREAS**, Borrower defaulted in its payment obligations under the Loan Documents and failed to cure such defaults following notice from Lender, whereupon Lender exercised its right to accelerate the entire outstanding principal balance of the Loan and demanded payment in full; and

**WHEREAS**, Borrower desires to reinstate the Loan and Lender has agreed on the terms and conditions hereinafter set forth.

**A G R E E M E N T :**

**NOW, THEREFORE**, in consideration of the sum of Ten and No/100 Dollars (\$10.00) cash in hand paid by the parties hereto each to the other and in consideration of the premises herein contained and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

**1. Representations and Warranties.** Borrower represents, warrants and covenants with Lender as follows:

(a) Borrower has the full power and authority to enter into and perform this Agreement and the execution, delivery and performance of this Agreement by each of the Borrower (a) has been duly and validly authorized by all necessary action on the part of the Borrower, (b) does not conflict with or result in a violation of Borrower's governing organizational documents or any judgment, order or decree of any court or arbiter in any proceeding to which the Borrower is a party, and (c) does not conflict with or constitute a material breach of, or constitute a material default under, any contract, agreement or other instrument by which the Borrower is bound or to which it is a party.

(b) No consent of any person or entity not a party hereto is required for Borrower to enter into and perform this Agreement, and the Borrower hereby agree to and does indemnify, defend and hold harmless the Lender from and against any and all loss, damage or liability whatsoever, including, without limitation, attorneys' fees and costs, arising from any failure to obtain the consent of any such person or entity which is not a party hereto.

(c) There is no pending, nor, to Borrower's actual knowledge, is there any threatened, litigation proceeding involving the Properties or Borrower's ownership, leasing, operation or maintenance thereof, except for routine litigation concerning the Property that would not have any material adverse impact on Borrower's ability to perform the obligations contained in this Agreement.

(d) The Loan Documents are enforceable in accordance with their respective terms. The terms and conditions of the Loan Documents, including, without limitation, the default interest rate, are commercially reasonable and constitute good faith and fair dealing on the part of Lender.

(e) As of the date hereof, the following amounts remain outstanding on the Loan and are secured by the Loan Documents: (i) the unpaid principal balance of the Note in the amount of \$\_\_\_\_\_ ; (ii) contract interest accruing from and after \_\_\_\_\_ as provided in the Note; (iii) [ANY DELINQUENT AMOUNTS TO

BE REPAID OVER TIME]; (iv) accrued default interest (in excess of contract interest) in the amount of \$\_\_\_\_\_ (the "Default Interest Accrual"); and (v) other amounts to be paid to Lender simultaneously herewith set forth in Paragraphs 2(a) and 2(b) below.

**2. Reinstatement of Loan.**

(a) Borrower shall make the following payments to Lender simultaneously with the execution of this Agreement, totaling \$\_\_\_\_\_:

- (i) MISSEDPAYMENTS (#) principal and interest payments of \$P&I each;
- (ii) MISSEDPAYMENTS (#) monthly tax escrow payments of \$TAXES each;
- (iii) MISSEDPAYMENTS (#) monthly insurance escrow payments of \$INSURANCE each; and
- (iv) MISSEDPAYMENTS (#) monthly reserve escrow payments of \$RESERVE each.

(b) In addition to the payments to Lender under subparagraph (a) above, Borrower shall make the following payments to Lender simultaneously with the execution of this Agreement, totaling \$\_\_\_\_\_ and representing reimbursement for the costs indicated:

- (i) engineering report in the amount of \$\_\_\_\_\_;
- (ii) survey in the amount of \$\_\_\_\_\_;
- (iii) appraisal in the amount of \$\_\_\_\_\_;
- (iv) appraisal review in the amount of \$\_\_\_\_\_;
- (v) Lender's legal fees in the amount of \$\_\_\_\_\_;
- (vi) travel expenses in the amount of \$\_\_\_\_\_;
- (vii) accrued interest on advances in the amount of \$\_\_\_\_\_;
- (viii) accrued late fees of \$\_\_\_\_\_; and
- (ix) for Lender's time and effort in negotiating this Agreement, a reinstatement fee of \$\_\_\_\_\_, which fee shall not be applied to any other sums due on the Loan but shall be deemed fully earned upon execution hereof.

(c) On \_\_\_\_\_, 200\_\_, Borrower shall resume monthly payments in accordance with the terms of the Note in the amount of \$\_\_\_\_\_, consisting of \$P&I principal and interest payment, \$TAXES tax escrow payment, \$INSURANCE insurance escrow payment and \$RESERVE reserve escrow payment, subject to adjustment thereafter in accordance with the terms of the Loan Documents.

(d) Subject to the terms and conditions of this Agreement, Lender hereby waives the existing payment defaults under the Loan Documents, rescinds the acceleration of maturity and reinstates the Loan with the original Maturity Date set forth in the Note of \_\_\_\_\_. Lender reserves the right to declare any subsequent payment default under the Loan Documents or this Agreement or any other default under the Loan Documents that may exist now or in the future.

**3. Modification of Loan Documents.** Borrower and Lender hereby modify the terms of the Loan Documents as follows:

(a) In addition to all other payments required by the Loan Documents, Borrower shall pay the \$\_\_\_\_\_ delinquent sum due Lender in twelve equal monthly installments of \$\_\_\_\_\_ each, commencing on \_\_\_\_\_ 1, 200\_\_, and continuing on the first day of each month thereafter through and including \_\_\_\_\_ 1, 200\_\_. Any failure to make any such payment within five (5) days of the date due shall be an Event of Default under the Loan Documents.

(b) Payment of the Default Interest Accrual is hereby deferred by Lender and shall be due and payable only upon an Event of Default under the Loan Documents. If no Event of Default occurs and the Loan is paid in full on or before the Maturity Date (as defined in the Note), Lender shall waive the Default Interest Accrual.

(c) The obligations of Borrower under this Agreement shall be secured by the Loan Documents. This Agreement shall be deemed one of the "Loan Documents" as such term is defined in all of the Loan Documents.

**4. Fees and Expenses.** If any party to this Agreement is required to employ counsel to enforce any of the terms of this Agreement, or to collect damages by reason of any alleged breach of this Agreement or for a declaration of rights hereunder, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs actually incurred.

**5. No Offsets or Defenses; Waiver of Claims.** Borrower hereby acknowledges, confirms and warrants to Lender that as of the date hereof, Borrower has nor claims any offset, defense, claim, right of set-off or counterclaim against Lender, its trustee, servicer or special servicer or against the officers, directors, agents, employees, attorneys or contractors of Lender, its trustee, servicer or special servicer, under, arising out of or in connection with this Agreement, the Note, the Security Instrument or any other Loan Document or with respect to any of the indebtedness evidenced or secured thereby, with respect to the servicing or enforcement of the Loan or with respect to the Property. In addition, Borrower covenants and agrees with Lender that if any offset, defense, claim, right of set-off or counterclaim exists as of the date hereof, Borrower hereby irrevocably and expressly waives the right to assert such matter.

**6. Confirmation.** Except as specifically set forth herein, all other terms and conditions of the Loan Documents shall remain unmodified and in full force and effect, the same being confirmed and republished hereby; and except as otherwise specifically set forth herein, the undersigned Borrower hereby affirms, reaffirms and republishes all of the warranties, covenants and agreements as set forth in the Loan Documents.

**7. Modifications, Waivers.** No waiver, modification, amendment, discharge, or change of this Agreement or any of the other Loan Documents shall be

valid unless the same is in writing and signed by the party against which the enforcement of such modification, waiver, amendment, discharge, or change is sought.

**8. Recitals True.** Borrower and Lender each hereby approve the recitations set forth in the preamble of this Agreement and agree that said recitations are true and correct in all respects.

**9. No Novation; No Effect on Priority; No Subordinate Matters.** The parties do not intend this Agreement nor the transactions contemplated hereby to be, and this Agreement and the transactions contemplated hereby shall not be construed to be, a novation of any of the obligations owing by the Borrower under or in connection with the existing Note, Security Instrument, Assignment and other Loan Documents. Further, the Property shall remain in all respects subject to the lien, charge or encumbrance of the Security Instrument, or conveyance of title (if any) effected thereby, and nothing herein contained, and nothing done pursuant thereto, shall affect or be construed to affect the lien, charge or encumbrance of, or warranty of title in, or conveyance effected by, the Security Instrument, or the priority thereof over other liens, charges, encumbrances or conveyances, or, except as expressly provided herein, to release or affect the liability of any party or parties whomsoever who may now or hereafter be liable under or on account of the Loan Documents; nor shall anything herein contained or done in pursuance hereof affect or be construed to affect any other security or instrument, if any, held by Lender as security for or evidence of the aforementioned indebtedness. Borrower and Borrower represent and warrant to Lender that there is no second mortgage, deed to secure debt, deed of trust or other subsequent lien now outstanding against the Property; that the lien of the Security Instrument is a valid first and subsisting lien and security interest on the Property (subject to real estate taxes); and that the execution, delivery and recording of this Agreement will not impair the lien or priority of the Security Instrument.

**10. Successors and Assigns.** This Agreement shall be binding upon each party hereto and such party's successors and assigns and shall inure to the benefit of each party hereto and such party's successors and permitted assigns; notwithstanding the foregoing, the interest of Borrower under the Loan Documents is not assignable, and any attempted assignment shall be null and void.

**11. Notices.** The Loan Documents are hereby amended to provide that, notwithstanding anything in any of the Loan Documents to the contrary, any notice, request or demand to be given or made under any of the Loan Documents shall be in writing and shall be hand delivered or sent by Federal Express, Airborne Express, United Parcel Service, or other reputable nationally recognized overnight courier service or by registered or certified mail, postage prepaid, return receipt requested, and addressed as follows:

If to the Lender:

With a copy to:

If to the Borrower:

NAMEOFBORROWER  
BORROWERC/O  
STREETADDRESSOFBORROWER  
CITY/STATE/ZIPOFBORROWER  
Attn: BORROWERCONTACT

Each party to this Agreement may designate a change of address by notice given, as herein provided, to the other party fifteen (15) days prior to the date such change of address is to become effective.

**12. Counterparts.** This Agreement may be executed in any number of counterparts all of which taken together shall constitute one and the same instrument and any of the parties or signatories hereto may execute this Agreement by signing any such counterpart.

**13. Severability.** If all or any portion of any provision of this Agreement shall be held to be invalid, illegal or unenforceable in any respect, then such invalidity, illegality or unenforceability shall not affect any other provision hereof or thereof, and such provision shall be limited and construed in such jurisdiction as if such invalid, illegal or unenforceable provision or portion thereof were not contained herein or therein.

**14. Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of STATEOFCOLLATERAL

**15. TRIAL BY JURY WAIVER.** BORROWER AND LENDER HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT OR COUNTERCLAIM ARISING IN CONNECTION WITH, OUT OF OR OTHERWISE RELATING TO THE LOAN, THE NOTE, THE SECURITY INSTRUMENT, THIS AGREEMENT OR THE OTHER LOAN DOCUMENTS.

(Signatures Begin on Next Page)

IN WITNESS WHEREOF, each party has executed and delivered this Agreement to each other party and has made it effective as of the date first written above.

Signed, sealed, and delivered in the presence of the following witnesses:

**BORROWER:**

**NAMEOFBORROWER,  
WHATISBORROWER**

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

By: \_\_\_\_\_, a

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address:

BORROWERC/O  
STREETADDRESSOFBORROWER  
CITY/STATE/ZIPOFBORROWER  
Attn: BORROWERCONTACT

**ACKNOWLEDGMENT**

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me this DATEFORDOCS by \_\_\_\_\_, known or identified to me to be the \_\_\_\_\_ of NAMEOFBORROWER, WHATISBORROWER, on behalf of such \_\_\_\_\_. S/He is personally known to me or s/he has produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, and did take an oath.

My Commission Expires:

\_\_\_\_\_

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

Title: Notary Public

[NOTARIAL SEAL]

Notary Expiration Date: \_\_\_\_\_

Serial Number (if any): \_\_\_\_\_

Signed, sealed, and delivered in the presence of the following witnesses:

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

**LENDER:**

**NAMEOFTRUSTEE, AS TRUSTEE  
FOR THE REGISTERED HOLDERS  
OF TRUSTENTITY MORTGAGE  
PASS-THROUGH CERTIFICATES,  
SERIES SERIES#**

By:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Vice President

Address:

**ACKNOWLEDGMENT**

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me this DATEFORDOCS by \_\_\_\_\_, known or identified to me to be a \_\_\_\_\_ of \_\_\_\_\_, acting solely as Special Servicer to **NAMEOFTRUSTEE, AS TRUSTEE FOR THE REGISTERED HOLDERS OF TRUSTENTITY MORTGAGE PASS-THROUGH CERTIFICATES, SERIES \_\_\_\_\_** (the "Trust"), on behalf of such corporation as general partners of such limited partnership as Special Servicer for such Trust. S/He is personally known to me or s/he has produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, and did take an oath.

My Commission Expires: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: Notary Public

[NOTARIAL SEAL]

Notary Expiration Date: \_\_\_\_\_  
Serial Number (if any): \_\_\_\_\_

**CONSENT OF GUARANTOR**

The undersigned acknowledge the foregoing Mortgage Loan Reinstatement Agreement and acknowledges and agree that the Indemnity and Guaranty Agreement, dated as of ORIGINALDATE, relating to the Loan Documents, and the Environmental Health and Safety Indemnity Agreement, dated as of ORIGINALDATE, relating to the Property, remain in full force and effect and are each hereby ratified and confirmed in accordance with their respective terms.

Signed, sealed, and delivered in the presence of the following witnesses:

**GUARANTORS:**

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

Signed, sealed, and delivered in the presence of the following witnesses:

\_\_\_\_\_

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

ACKNOWLEDGMENT

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me this DATE FOR DOCS by \_\_\_\_\_ S/He is personally known to me or s/he has produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, and did take an oath.

My Commission Expires:

\_\_\_\_\_

\_\_\_\_\_  
Printed Name: \_\_\_\_\_

Title: Notary Public

[NOTARIAL SEAL]

Notary Expiration Date: \_\_\_\_\_

Serial Number (if any): \_\_\_\_\_

### **SCHEDULE 3**

#### **Case enforcing deed in lieu of foreclosure in escrow in workout context**

*Ringling Joint Venture II v. Huntington Nat. Bank*, 595 So.2d 180 (Fla Dist. Ct. App. 1992)

#### **Case discussing *Ringling* favorably**

*In Re Greene*, 2007 WL 1309047 (Bankr. E.D. Va 2007)

See also John C. Murray, *Mortgage Workouts: Deeds in Escrow*, 41 Real Prop. Prob. & Tr. J. 185 (2006)

## SCHEDULE 4

### Cases approving/enforcing prepetition stay relief covenants

*In Re Bryan Road, LLC*, 382 B. R. 844 (Bankr. S.D. Fla 2008)  
*In Re Shady Grove Tech Center Assoc. LP*, 216 B.R. 386 (Bankr. D. Md. 1998)  
*In Re Darrell Creeek Assoc., L.P.*, 187 B.R. 908 (Bankr. D. S.C. 1995)  
*In Re Powers*, 170 B.R. 480 (Bankr. D. Mass. 1994)  
*In Re Cheeks*, 167 B.R. 817 (Bankr. D. S.C. 1994)  
*In Re McBride Estates, Ltd.*, 154 B.R. 339 (Bankr. N.D. Fla. 1993)  
*In Re Hudson Manor Partners*, 1991 WL 472592 (Bankr. N.D. Ga. 1991)  
*In Re Club Tower, L.P.*, 138 B.R. 307 (Bankr. N.D. Ga. 1991)  
*In Re Citadel Properties, Inc.*, 86 B.R. 275 (Bankr. M.D. Fla. 1988)  
*In the Matter of Int'l Supply Corp.*, 72 B.R. 510 (Bankr. M.D. Fla 1987)

### Cases approving/enforcing stay relief covenants incorporated in prior bankruptcy plans

*In Re Virginia Frye*, 320 B.R. 780 (Bankr. D. Vermont 2005)  
*In Re Excelsior Henderson Motorcycle*, 272 B.R. 920 (Bankr. S.D. Fla 2002)  
*In Re Atrium High Point LTD.*, 189 B.R. 599 (Bankr. M.D. N.C. 1995)

### Cases limiting prepetition stay relief covenants

*In Re DEB-LYN, Inc.*, 2004 WL 452560 (N.D. Fla. 2004) (single asset real estate)  
*In Re Rohit N. Desai*, 282 B.R. 527 (M.D. Ga 2002) (absence of equity)  
*In Re Drawdy*, 2001 WL 1805998 (Bankr. D.S.C. 2001) (default)  
*In Re South East Financial*, 212 B.R. 1003 (Bankr. M.D. Fla 1997) (no other creditors)  
*In Re Graves*, 212 B.R. 692 (BAP, 1<sup>st</sup> Cir. 1997) (change in circumstances)  
*Farm Credit of Cent. Florida, ACA v. Polk*, 160 B.R. 870 (M.D. Fla. 1993) (single asset real estate)

### Cases rejecting prepetition stay relief covenants

*In Re Pease*, 195 B.R. 431 (Bankr. D. Neb. 1996)  
*In Re Jenkins Court Assoc. LP*, 181 B.R. 33 (Bankr. E.D. Pa. 1995)  
*In Re Sky Group Int'l, Inc.*, 108 B.R. 86 (Bankr. W.D. Pa. 1989)

## **SCHEDULE 5**

### **Cases enforcing springing liability**

*Blue Hills Office Park LLC v J.P.Morgan Chase Bank*, 477 F.Supp. 2d 366 (D. Mass. 2007).

*Heller Fin., Inc. v. Lee*, 2002 U.S. Dist. LEXIS 15183, \*2-5, 11 (N.D. Ill. Aug. 12, 2002).

*Heller Fin., Inc. v. Whitemark at Fox Glen, Ltd.*, 2004 U.S. Dist. LEXIS 18974 \*3-6, 11-15 (N.D. Ill. 2004).

*First Nationwide Bank v. Brookhaven Realty Assocs.*, 637 N.Y.S.2d 418 (1996), *appeal dismissed*, 88 N.Y.2d 963 (1996)/

*FDIC v. Prince George Corp.*, 58 F.3d 1041 (4<sup>th</sup> Cir. 1995).

## SCHEDULE 6

### Cases finding absolute assignment of rents

*Sovereign Bank v. Schwab*, 414 F.3d 450 (3<sup>rd</sup> Cir. 2005)  
*In Re JP Realty II, Inc.*, 2003 Bankr.LEXIS 1719 (Bankr. M.D. Tenn 2003)  
*In Re Robin Associates*, 275 B.R. 218 (Bankr. W.D. Pa. 2001)  
*In Re Kingsport Ventures, L.P.*, 251 B.R. 841 (Bankr. E.D. Tenn. 2000)  
*First Fidelity Bank, N.A. v. Jason Realty, L.P.*, 59 F.3d 423 (3<sup>rd</sup> Cir. 1995)  
*Commerce Bank v. Mountain View Village, Inc.*, 5 F.3d 34 (3<sup>rd</sup> Cir. 1993)  
*Federal Deposit Ins. Corp. vs. Int'l Property Management*, 929 F.2d 1033 (5<sup>th</sup> Cir. 1991)

### Cases rejecting absolute assignment of rents

*In Re Hrapchak*, 2008 WL 1780939 (Bankr. N.D. W. Va. 2008)  
*In Re Allen*, 357 B. R. 103 (Bankr. S.D. Tex. 2006)  
*In Re Spears*, 352 B.R. 83 (Bankr. N.D. Tex. 2006)  
*In Re 5877 Poplar, L.P.*, 268 B.R. 140 (Bankr. W.D Tenn 2001)  
*In Re Cavros*, 262 B.R. 206 (Bankr. D. Conn. 2001)  
*In Re Lyons*, 193 B.R. 637 (Bankr. D. Mass 1996)  
*In Re Foundry of Barrington Partnership* (Bankr. N.D. Ill 1991)  
*In Re Bethesda Air Rights, Ltd.* (Bankr. D. Md. 1990)  
See also *Restatement (Third) Property (Mortgages)* § 4.2, Reporter's Notes, cmt. a (1997)

## SCHEDULE 6

### FORM PRE-WORKOUT AGREEMENT

[Date]

[Borrower's Name & Address]

Dear \_\_\_\_\_:

When executed by both parties below, this letter constitutes an agreement between \_\_\_\_\_ ("Borrower") and \_\_\_\_\_ ("Lender").

1. **Negotiations.** The parties have commenced or are about to commence negotiations concerning certain obligations known as Loan No. \_\_\_\_\_ (the "Obligations") Debtor has to Lender. Without liability for such discussions, the parties each plan to discuss various courses of action that might be in their mutual interests. Either party, in its sole and absolute discretion, may terminate these discussions at any time and for any reason; and upon such termination of discussions, the respective obligations to one another shall be only as set forth in the existing mortgage loan documents evidencing and securing the Obligations (collectively, the "Loan Documents"). The discussions hereunder, and any correspondence, proposals, offers, or documents prepared in connection therewith (other than this letter and any final documents fully executed and delivered in accordance with paragraph 2 below), may **not** be introduced in any legal proceeding involving Lender and Borrower, such matters being privileged in the same manner as settlement offers in litigation.

2. **Only Written Agreements and Amendments.** The contemplated discussions may be lengthy and complex. While the parties may reach preliminary agreement on one or more issues that are part of the problem they are trying to resolve, the parties have agreed that neither of them shall be bound by any agreement on individual issues until (a) agreement is reached on **all** issues, and (b) such agreement has been reduced to a written agreement and signed by each of the parties. It is acknowledged by the parties that, to facilitate negotiations, proposals may be stated in writing, but these writings shall not be binding until both (a) and (b) have taken place. Furthermore, in order to avoid any confusion or misunderstanding, each of the parties also agrees that this agreement may only be amended in a writing signed by both parties which expressly states an intent to amend this agreement.

3. **Loan Documents Still in Force.** Notwithstanding any other provisions of this agreement, or any claims of the parties to the contrary, the Loan Documents are in full force and effect (subject to the defaults, if any, listed in paragraph 8 of this agreement and any remedies that may have been exercised by Lender), and shall remain in full force and effect unless and until a written document is signed that complies with the provisions of paragraph 2 of this agreement.

4. **No Waivers.** No negotiations or other action undertaken pursuant to this agreement shall constitute a waiver of any party's rights under the Loan Documents, except to the extent specifically stated in a written agreement complying with the provisions of paragraph 2 hereof. Borrower acknowledges that Lender may commence or, if previously commenced may continue to pursue, its remedies (including, without limitation, acceleration and foreclosure) for any default now existing or which occurs in the future under the Loan Documents, notwithstanding ongoing discussions between the parties.

5. **Authorized Representatives.** By execution hereof, Borrower acknowledges that the addressee hereof shall be authorized to negotiate on its behalf. Borrower is advised that the representatives of Lender negotiating with Borrower will in most instances not have final authority to bind Lender and will need to seek formal approval prior to entering into a binding agreement.

6. **Attorneys Fees.** Borrower hereby further acknowledges and agrees that: (i) all attorneys fees and expenses incurred by Lender in connection with discussions hereunder (whether or not such discussions result in execution of a binding agreement), together with any such fees and expenses incurred in connection with a dispute hereunder or any legal proceedings whatsoever to determine the rights of the parties hereunder or under the Loan Documents, are incurred pursuant to the attorneys fees provisions of the Loan Documents; and (ii) all such fees and expenses therefore constitute a portion of the indebtedness secured by the Loan Documents subject to repayment in accordance with the Loan Documents.

7. **Miscellaneous.** This agreement constitutes the entire agreement of the parties concerning its subject matter and supersedes any prior or contemporaneous representations or agreements (other than the Loan Documents) concerning the Obligations or the subject matter of this agreement. This agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors, and assigns, and shall be governed by the law of the State in which the Loan Documents are recorded, without giving effect to principles of conflicts of laws. Paragraph headings used herein are for convenience only and shall not be used to interpret any term hereof. This agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which taken together shall constitute one agreement. Each party executing this agreement represents that such party has the full authority and legal power to do so.

[SELECT ONE]

8. **Loan Not in Default.** Borrower and Lender are not currently aware of any default under the Loan Documents, but Lender reserves the right to declare any default which subsequently occurs or otherwise comes to its attention notwithstanding any ongoing discussions pursuant to this agreement.

[OR]

8. **Loan in Default.** Borrower acknowledges that the Obligations are in default as follows:  
. The foregoing is not intended to be an exhaustive list of existing defaults.

If the foregoing accurately summarizes the terms of our binding agreement, please sign this letter in the space provided below and return one copy to \_\_\_\_\_ at your earliest convenience.

Sincerely yours,

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

CONSENTED AND AGREED TO ON \_\_\_\_\_, 20\_\_.

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_