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Syndicated Loan Facilities With Lenders and Agents Facing Default

Minimizing Risks for Co-Lenders and Borrowers Through Credit Agreements and Post-Default Remedies

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

Today's panel features:

Susan C. Alker, Partner, **Reed Smith**, Los Angeles
Catherine Ozdogan, Partner, **Bracewell Guiliani**, Houston
Colleen H. McDonald, Partner, **Reed Smith**, San Francisco

Tuesday, April 6, 2010

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Defaulting Lenders: Risks and Remedies for the Borrower

Susan C. Alker

Partner, Reed Smith LLP

April 6, 2010

ReedSmith

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Initial Issues

- What happens when there is a default?
  - Other lenders must continue to fund
  - Borrower must continue to perform - not relieved of any obligations, including requirement to make payments
  - Borrower sends multiple borrowing notices to get the full amount it needs
  - Confusion reigns . . .

Loan Agreement Terms

- Borrowers can protect themselves in the event of a lender default by:
  - Limiting voting rights
  - Commitment fee elimination
  - Replacement of lender provisions
  - Non-ratable reduction of commitments
  - Other

Voting Rights

- Defaulting Lenders should be prohibited from voting:

  "**Required Lenders**" shall mean Lenders whose Proportionate Shares then exceed 50% of the total Proportionate Shares of all Lenders; **provided that at any time a Lender is a Defaulting Lender, such Defaulting Lender shall be excluded** in determining 'Required Lenders' . . .

Voting Rights

- Specific voting terms can also be included:

  Notwithstanding anything to the contrary herein, **no Defaulting Lender shall have any right to approve or disapprove any amendment, waiver or consent hereunder**, except that the Commitment of such Lender may not be increased or extended without the consent of such Lender.

Voting Rights

- Why is this important to the Borrower?
  - Borrower may need a waiver or amendment, especially if in a distressed situation
  - The Defaulting Lender has different interests from the rest of the bank group
  - If the Lender is taken over by the FDIC, the Lender probably will not vote; elimination of the right to vote means you can pass the amendment without them

Commitment Fees

- Defaulting Lenders should be excluded from receiving a share of the commitment fee:

  The Borrower shall pay to the Administrative Agent, for the ratable benefit of the Lenders **(other than any Defaulting Lender with respect to the period during which it is a Defaulting Lender)** as provided in Section 2.10(a), a commitment fee equal to . . .

  The Borrower shall pay a facility fee equal to . . . provided that **no such fee shall be paid on the unused Commitments of any Lender that is a Defaulting Lender**.

Commitment Fee

- Borrowers want to exclude Defaulting Lenders from commitment fees because:
  - Not fair to the Borrower to have to pay for a "commitment" that the Lender has demonstrated is worthless
  - Concept that Defaulting Lenders should be penalized so that there is strong disincentive to default
  - Sometimes provide for the other Lenders to share the fee, or the agent to hold it as collateral

Replacement of Lenders

- Typical “yank-a-bank” provisions provide for removal of a Defaulting Lender:

  If any Lender (i) requests compensation under Section 2.14 . . . (ii) does not consent to an amendment that requires approval of the Required Lenders . . . or (iii) **becomes a Defaulting Lender or Impaired Lender**, . . . then the Borrower may [remove such Lender, on certain conditions].

Replacement of Lenders

- Helpful for the Borrower to have the right to remove a troublesome Lender
- But:
  - Have to find someone willing to take out the Defaulting Lender at par
  - Practical difficulties in distressed situations
  - Definitions of “Defaulting Lender” and “Impaired Lender” matter as to timing

Non-Ratable Reduction of Commitment

- In some credit agreements, the Borrower has the right to "zero out" the Defaulting Lender's commitment:

  The Borrower shall have the right, upon three Business Days' notice to a Defaulting Lender, **to terminate in whole such Defaulting Lender's commitments** . . . provided that [all outstanding Loans are repaid and other conditions are met]

Non-Ratable Reduction of Commitment

- Conditions:
  - Only for revolving lines of credit
  - Commitment reduction is permanent – Borrower must be able to live with a reduced facility size
  - Must pay Defaulting Lender all amounts due to it
  - If repaying loans, must pay down loans of all Lenders equally (but can reborrow from remaining Lenders if no default)
  - Retain all rights against Defaulting Lender

Non-Ratable Reduction of Commitment

Full text of provision:

Non-Ratable Reduction: The Borrowers shall have the right, at any time, upon at least three Business Days' notice to a Defaulting Lender (with a copy to the Administrative Agent), to terminate in whole such Defaulting Lender's Commitments. Such termination shall be effective, (x) with respect to such Defaulting Lender's unused Commitments, on the date set forth in such notice, provided, however, that such date shall be no earlier than three Business Days after receipt of such notice and (y) with respect to each Loan outstanding of such Defaulting Lender, if such Loan is a Base Rate Loan or Canadian Prime Rate Loan, on the date set forth in such notice and, if such Loan is a Eurocurrency Rate Loan, a Money Market LIBOR Loan or a Money Market Absolute Rate Loan, on the last day of the then current Interest Period relating to such Loan. Upon termination of a Lender's Commitment under this Section 2.5(b), the Borrowers will pay or cause to be paid all principal of, and interest accrued to the date of such payment on the Loans owing to such Defaulting Lender and pay any accrued facility fee payable to such Defaulting Lender pursuant to the provisions of Section 2.8(a), and all other amounts payable to such Defaulting Lender hereunder (including, but not limited to, any increased costs or other amounts owing under Section 3.4 and any indemnification for Taxes under Section 3.1); and upon such payments, the obligations of such Defaulting Lender hereunder shall, by the provisions hereof, be released and discharged; provided, however, that (i) such Defaulting Lender's rights under Sections 3.1, 3.4 and 9.4, and its obligations under Section 8.7 shall survive such release and discharge as to matters occurring prior to such date; and (ii) no claim that the Borrowers may have against such Defaulting Lender arising out of such Defaulting Lender's default hereunder shall be released or impaired in any way. Subject to Section 2.14, the aggregate amount of the Commitments of the Lenders once reduced pursuant to this Section 2.5(b) may not be reinstated; provided further, however, that if pursuant to this Section 2.5(b), the Borrowers pay or cause to be paid to a Defaulting Lender any principal of, or interest accrued on, the Loans owing to such Defaulting Lender, then the Borrowers shall pay or cause to be paid a ratable payment of principal and interest to all Lenders who are not Defaulting Lenders.

Breach of Contract

- Borrower has claims against a Defaulting Lender for losses it suffers as a result of the Lender's failure to comply with the terms of the loan agreement
- Breach of contract action, tort case, etc.
- In addition to remedies the contract itself provides
- But: lengthy and costly process

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Ms. Alker is a partner in Reed Smith's financial industry practice group. She has extensive experience representing major banks, financial institutions, private equity funds and hedge funds in corporate lending transactions. She frequently advises clients in connection with syndicated credit facilities, leveraged acquisition financings, cross-border loans, asset-based loans, debtor-in-possession credit facilities, and real estate financings. She has expertise in dealing with intercreditor issues in subordinated debt transactions, mezzanine debt, and second-lien loans, and in the establishment of interest rate swaps and other derivatives transactions. She also advises clients in workouts and restructurings of credit facilities. Ms. Alker is admitted to practice law in California and New York. She frequently writes and speaks on topics of interest to financial institutions, and is the editor of the Lending Law Report blog (http://www.lendinglawreport.com).

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Lender and Administrative Agent Risks and Remedies

Catherine Özdoğan

April 6, 2010

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General Overview

- Definition of Defaulting Lender
- Definition of Impaired Lender
- Whose problem is it when a lender defaults?
- What can the Agent and other Lenders do?
- Defaulting Administrative Agent
- Sample Provisions

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Elements of Typical Definition of Defaulting Lender

- Typically limited to problems related to loan agreement
  - Payment default
    - Failure to fund
    - Gives notice that it will not fund
    - Makes a public statement that it will not fund generally
  - Bankruptcy

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Elements of Emerging Definition of Impaired Lender

- Alternatively referred to as "Potential Defaulting Lender" or "Impacted Lender"

- Typically unrelated to loan agreement

  - Failure to fund under other loan agreements
  - Failure of lender's affiliates to fund other loan agreements
  - Bankruptcy of parent company or affiliates
  - Deterioration in credit rating of lender, its parent or affiliates

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Whose problem is it when a lender defaults?

- Borrower
- Other syndicate banks
- Administrative agent
- Letter of credit issuing bank
- Swingline lender

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What can the Agent and Other Lenders do?

- Assumption of Defaulting Lender's Commitment
- Reallocation of Payments
- Escrow of Payments
- Reallocation of Commitments
- Agent's Indemnity

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Defaulting Administrative Agent

Required Lenders may by notice to the Borrower and the Administrative Agent remove the Administrative Agent and [, in consultation with the Borrower,] appoint a replacement Administrative Agent hereunder

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Sample Provisions – Definition of Defaulting Lender

"Defaulting Lender" means, at any time, a Lender as to which the Administrative Agent has notified the Borrower that (i) such Lender has failed for three or more Business Days to comply with its obligations under this Agreement to make a Loan, make a payment to the Issuing Bank in respect of an LC Payment and/or make a payment to the Swingline Bank in respect of a Swingline Loan (each a "funding obligation"), (ii) such Lender has notified the Administrative Agent, or has stated publicly, that it will not comply with any such funding obligation hereunder, or has defaulted on its funding obligations under any other loan agreement or credit agreement or [other similar/other financing] agreement, (iii) such Lender has, for three or more Business Days, failed to confirm in writing to the Administrative Agent, in response to a written request of the Administrative Agent, that it will comply with its funding obligations hereunder, or (iv) a Lender Insolvency Event has occurred and is continuing with respect to such Lender (provided that neither the reallocation of funding obligations provided for in Section ___ [Reallocation of Defaulting Lender Commitment, Etc.] as a result of a Lender's being a Defaulting Lender nor the performance by Non-Defaulting Lenders of such reallocated funding obligations will by themselves cause the relevant Defaulting Lender to become a Non-Defaulting Lender). Any determination that a Lender is a Defaulting Lender under clauses (i) through (iv) above will be made by the Administrative Agent in its sole discretion acting in good faith. The Administrative Agent will promptly send to all parties hereto a copy of any notice to the Borrower provided for in this definition.

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Sample Provisions – Definition of Impaired Lender

"Impaired Lender" means, at any time, a Lender (i) as to which the Administrative Agent has notified the Borrower that an event of the kind referred to in the definition of "Lender Insolvency Event" has occurred and is continuing in respect of any [Subsidiary/Significant Subsidiary/financial institution affiliate] of such Lender, (ii) as to which the Administrative Agent[, the Issuing Bank or the Swingline Bank] has in good faith determined and notified the Borrower [and (in the case of the Issuing Bank or the Swingline Bank) the Administrative Agent] that such Lender or its Parent Company or a [Subsidiary/Significant Subsidiary/financial institution affiliate] thereof has notified the Administrative Agent, or has stated publicly, that it will not comply with its funding obligations under any other loan agreement or credit agreement or [other similar/other financing] agreement or (iii) that has, or whose Parent Company has, a non-investment grade rating from Moody's or S&P or another nationally recognized rating agency. Any determination that a Lender is a Impaired Lender under any of clauses (i) through (iii) above will be made by the Administrative Agent [or, in the case of clause (ii), the Issuing Bank or the Swingline Bank, as the case may be,] in its sole discretion acting in good faith. The Administrative Agent will promptly send to all parties hereto a copy of any notice to the Borrower provided for in this definition.

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Sample Provisions – Conditions Precedent

If any Lender becomes, and during the period it remains, a Defaulting Lender or a Impaired Lender, the Issuing Bank will not be required to issue any Letter of Credit or to amend any outstanding Letter of Credit, and the Swingline Bank will not be required to make any Swingline Loan, unless the Issuing Bank or the Swingline Bank, as the case may be, is satisfied that any exposure that would result therefrom is fully covered or eliminated by any combination satisfactory to the Issuing Bank or Swingline Bank of the following:

(i) in the case of a Defaulting Lender, the LC Exposure and the Swingline Exposure of such Defaulting Lender is reallocated, as to outstanding and future Letters of Credit and Swingline Loans, to the Non-Defaulting Lenders as provided in clause (1) of Section ____ [Reallocation of Defaulting Lender Commitment, Etc.];

(ii) in the case of a Defaulting Lender or a Impaired Lender, without limiting the provisions of Section ____ [Cash Collateral Call], the Borrower Cash Collateralizes the obligations of the Borrower in respect of such Letter of Credit or Swingline Loan in an amount at least equal to the aggregate amount of the unreallocated obligations (contingent or otherwise) of such Defaulting Lender or Impaired Lender in respect of such Letter of Credit or Swingline Loan, or makes other arrangements satisfactory to the Administrative Agent, the Issuing Bank and the Swingline Bank in their sole discretion to protect them against the risk of non-payment by such Defaulting Lender or Impaired Lender; and

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Sample Provisions – Conditions Precedent

(iii) in the case of a Defaulting Lender or a Impaired Lender, then in the case of a proposed issuance of a Letter of Credit or making of a Swingline Loan, by an instrument or instruments in form and substance satisfactory to the Administrative Agent, and to the Issuing Bank and the Swingline Bank, as the case may be, the Borrower agrees that the face amount of such requested Letter of Credit or the principal amount of such requested Swingline Loan will be reduced by an amount equal to the unreallocated, non-Cash Collateralized portion thereof as to which such Defaulting Lender or Impaired Lender would otherwise be liable, in which case the obligations of the Non-Defaulting Lenders in respect of such Letter of Credit or Swingline Loan will, subject to the first proviso below, be on a pro rata basis in accordance with the Commitments of the Non-Defaulting Lenders, and the pro rata payment provisions of Section ____ will be deemed adjusted to reflect this provision;

provided that (a) the sum of each Non-Defaulting Lender's total Revolving Credit Exposure, total Swingline Exposure and total LC Exposure may not in any event exceed the Commitment of such Non-Defaulting Lender, and (b) neither any such reallocation nor any payment by a Non-Defaulting Lender pursuant thereto nor any such Cash Collateralization or reduction will constitute a waiver or release of any claim the Borrower, the Administrative Agent, the Issuing Bank, the Swingline Bank or any other Lender may have against such Defaulting Lender, or cause such Defaulting Lender or Impaired Lender to be a Non-Defaulting Lender.

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Sample Provisions – Cash Collateral Call

If any Lender becomes, and during the period it remains, a Defaulting Lender or a Impaired Lender, if any Letter of Credit or Swingline Loan is at the time outstanding, the Issuing Bank and the Swingline Bank, as the case may be, may (except, in the case of a Defaulting Lender, to the extent the Commitments have been fully reallocated pursuant to Section ____ [Reallocation of Defaulting Lender Commitment, Etc.]), by notice to the Borrower and such Defaulting Lender or Impaired Lender through the Administrative Agent, require the Borrower to Cash Collateralize the obligations of the Borrower to the Issuing Bank and the Swingline Bank in respect of such Letter of Credit or Swingline Loan in amount at least equal to the aggregate amount of the unreallocated obligations (contingent or otherwise) of such Defaulting Lender or such Impaired Lender in respect thereof, or to make other arrangements satisfactory to the Administrative Agent, and to the Issuing Bank and the Swingline Bank, as the case may be, in their sole discretion to protect them against the risk of non-payment by such Defaulting Lender or Impaired Lender.

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Sample Provisions – Reallocation of Defaulting Lender Commitment

If a Lender becomes, and during the period it remains, a Defaulting Lender, the following provisions shall apply with respect to any outstanding LC Exposure and any outstanding Swingline Exposure of such Defaulting Lender:

(1) the LC Exposure and the Swingline Exposure of such Defaulting Lender will, subject to the limitation in the first proviso below, automatically be reallocated (effective on the day such Lender becomes a Defaulting Lender) among the Non-Defaulting Lenders pro rata in accordance with their respective Commitments; provided that (a) the sum of each Non-Defaulting Lender's total Revolving Credit Exposure, total Swingline Exposure and total LC Exposure may not in any event exceed the Commitment of such Non-Defaulting Lender as in effect at the time of such reallocation and (b) neither such reallocation nor any payment by a Non-Defaulting Lender pursuant thereto will constitute a waiver or release of any claim the Borrower, the Administrative Agent, the Issuing Bank, the Swingline Bank or any other Lender may have against such Defaulting Lender or cause such Defaulting Lender to be a Non-Defaulting Lender;

(2) to the extent that any portion (the "unreallocated portion") of the Defaulting Lender's LC Exposure and Swingline Exposure cannot be so reallocated, whether by reason of the first proviso in clause (1) above or otherwise, the Borrower will, not later than ____ Business Days after demand by the Administrative Agent (at the direction of the Issuing Bank and/or the Swingline Bank, as the case may be), (a) Cash Collateralize the obligations of the Borrower to the Issuing Bank and the Swingline Bank in respect of such LC Exposure or Swingline Exposure, as the case may be, in an amount at least equal to the aggregate amount of the unreallocated portion of such LC Exposure or Swingline Exposure, or (b) in the case of such Swingline Exposure, prepay (subject to clause (3) below) [waterfall] and/or Cash Collateralize in full the unreallocated portion thereof, or (c) make other arrangements satisfactory to the Administrative Agent, and to the Issuing Bank and the Swingline Bank, as the case may be, in their sole discretion to protect them against the risk of non-payment by such Defaulting Lender; and

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Sample Provisions – Reallocation of Payments

(3) any amount paid by the Borrower for the account of a Defaulting Lender under this Agreement (whether on account of principal, interest, fees, indemnity payments or other amounts) will not be paid or distributed to such Defaulting Lender, but will instead be retained by the Administrative Agent in a segregated [non-interest bearing] account until (subject to Section ___ [Cure]) the termination of the Commitments and payment in full of all obligations of the Borrower hereunder and will be applied by the Administrative Agent, to the fullest extent permitted by law, to the making of payments from time to time in the following order of priority: first to the payment of any amounts owing by such Defaulting Lender to the Administrative Agent under this Agreement, second to the payment of any amounts owing by such Defaulting Lender to the Issuing Bank or the Swingline Bank (pro rata as to the respective amounts owing to each of them) under this Agreement, third to the payment of post-default interest and then current interest due and payable to the Lenders hereunder other than Defaulting Lenders, ratably among them in accordance with the amounts of such interest then due and payable to them, fourth to the payment of fees then due and payable to the Non-Defaulting Lenders hereunder, ratably among them in accordance with the amounts of such fees then due and payable to them, fifth to pay principal and unreimbursed LC Disbursements then due and payable to the Non-Defaulting Lenders hereunder ratably in accordance with the amounts thereof then due and payable to them, sixth to the ratable payment of other amounts then due and payable to the Non-Defaulting Lenders, and seventh after the termination of the Commitments and payment in full of all obligations of the Borrower hereunder, to pay amounts owing under this Agreement to such Defaulting Lender or as a court of competent jurisdiction may otherwise direct.

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Sample Provisions – Removal of Administrative Agent

Anything herein to the contrary notwithstanding, if at any time the Requisite Lenders determine that the Person serving as Administrative Agent is (without taking into account any provision in the definition of "Defaulting Lender" or "Impaired Lender" requiring notice from the Administrative Agent or any other party) a Defaulting Lender or a Impaired Lender, the Requisite Lenders (determined after giving effect to Section ____ [Amendments]) may by notice to the Borrower and such Person remove such Person as Administrative Agent and [, in consultation with the Borrower,] appoint a replacement Administrative Agent hereunder. Such removal will, to the fullest extent permitted by applicable law, be effective on the earlier of (i) the date a replacement Administrative Agent is appointed and (ii) the date __ Business Days after the giving of such notice by the Requisite Lenders (regardless of whether a replacement Administrative Agent has been appointed).

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Catherine has 15 years of experience in energy finance. Her practice focuses exclusively on syndicated lending and other financial transactions. She has extensive experience representing commercial banks, finance companies, mezzanine funds, and borrowers in connection with a wide variety of commercial lending transactions, including the structuring, negotiating and documenting of all types of senior, subordinated, secured, second lien, and unsecured syndicated transactions, including secured asset-based and cash-flow debt financings, acquisition finance, working capital facilities, term b loans, bond credit enhancement facilities, hedging arrangements, securitization and conduit lending transactions, as well as loan restructurings and workouts. The majority of Catherine's practice consists of the representation of large commercial banks in connection with syndicated credit facilities to borrowers in a wide variety of energy-related industries. Catherine also devotes a significant amount of time to the representation of borrowers in their finance matters. She is lead counsel to the Kinder Morgan family of companies in substantially all of their credit facilities.

Impact of Lender Insolvency on Lending Syndicate

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April 6, 2010

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What if a Lender is taken over by the FDIC?

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12 USC § 1821(e)(13)(c)(i)

- [N]o person may exercise any right or power to terminate, accelerate, or declare a default under any contract to which [a depository institution in conservatorship or receivership] is a party, or to obtain possession of or exercise control over any property of the institution or affect any contractual rights of the institution, without the consent of the conservator or receiver, as appropriate, during the 45-day period beginning on the date of the appointment of the conservator, or during the 90-day period beginning on the date of the appointment of the receiver, as applicable.

Effect of the FDIC Automatic Stay

- What does it mean?
  - No Lender or Agent can exercise any right against the Bank for a period of 90 days following the commencement of the receivership (45 days if conservatorship).
  - There is no provision for relief from the FDIC automatic stay comparable to the Bankruptcy Code relief from automatic stay.

Effect of the Automatic Stay

- The other parties to the contract can't exercise any right or power that would affect the contractual rights of the Defaulting Lender for the applicable period of time following take-over by the FDIC.
- What does it restrict?
  - Restricts loan document amendments without Defaulting Lender's consent.
  - Restricts terminating or replacing the Defaulting Lender and restricts terminating the Agent if it is Defaulting Lender.
  - Restricts withholding payments of principal and interest from Defaulting Lender, at least to the extent of obligations it has previously funded.
  - Lenders have to continue to fund their pro rata share.

12 USC § 1821(e)(13)(A)

- The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of or the exercise of rights or powers by a conservator or receiver.
- In BNY v. FDIC (the "NextBank decision"), the United States District Court affirmed the right of the FDIC to enforce a contract entered into by the financial institution notwithstanding a provision in the contract providing for its termination, default, acceleration or exercise of rights upon its insolvency or the appointment of a conservator or receiver.
- The FDIC may choose to ignore an "ipso facto" provision which would impact it's continued rights as Agent or Lender.

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Effect of the Automatic Stay

- What actually happens?
  - Lenders and Borrower are in a holding pattern.
  - Act like business as usual, but it's not …
  - Multiple borrowing notices, to get the borrower the full amount it needs.
  - Confusion among the bank group.

What can you do?

- How can Agent/ Lenders be proactive?
- Analyze documents in terms of Lender actions vis-à-vis the Borrower which are not prohibited by the stay i.e. not funding for the Defaulting Lender, as opposed to Lender actions vis-à-vis the Defaulting Lender i.e. not making payments to the Defaulting Lender, which actions are prohibited by the FDIC automatic stay.
- Defaulting Lender definition should include an FDIC Receivership so as not to require funding advances on behalf of Defaulting Lender.
- Pro Rata Share should not be used so as to permit principal and interest payments on amounts the Defaulting Lender didn't fund.

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What if the FDIC takes over the Agent?

- FDIC takeover could bring everything to a halt - at least temporarily.
- The Agent manages the funding and payment processes, and often holds the Borrower's bank accounts and controls other collateral for the loan.

What can you do?

- The scope of permitted activities against a Defaulting Lender under USCA § 1821(e)(13)(c)(i), is relatively unknown as the provision hasn't been often utilized until recently.
- Under USCA § 1821(e)(13)(A) and the NextBank decision, the FDIC is not likely to permit its take-over of a Lender to constitute the basis for action against such Lender by the Defaulting Lenders.
- Consider adding certain insolvency indicators to the definitions of Defaulting Lender and Agent Default, such as
  - Failure to fund
  - Ratings downgrade
  - FDIC watchlist
  - Stock price volatility

For Lenders - Agent Default

- Obtain the right to replace the Agent with another lender prior to takeover by the FDIC?
- What do the documents say about collateral and bank accounts?
- Consider a power of attorney in favor the Lender group permitting a Non-Defaulting Lenders to act as successor Agent and move the accounts.
- Provide a springing mechanism whereby the Agent's rights and duties are automatically assigned to a successor, including moving collateral and accounts to the successor Agent, upon Agent Default.

Amending the Loan Agreement

- If you are going to amend the Loan Agreement, make sure you do it correctly. The D'Oench Dhume doctrine (*D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942) and 12 U.S.C. Section 1823(e) impose specific requirements on modifications of loans involving financial institutions. Contracts which do not meet the requirements can be avoided altogether by the FDIC.

Bankruptcy of Lender/Agent Under the Code

- Automatic stay would prevent removal without relief.
- Same issues as FDIC takeover. Can you build in provisions so as to be in a position to remove lender prior to bankruptcy?
- Lehman bankruptcy
  - Lehman agent on a number of facilities.
  - Obtained bankruptcy court order affirming bank accounts used for facilities were not property of the bankruptcy estate.

Questions?

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