

GRABBING THE COLLATERAL: DISPOSSESSION, REPOSSESSION, AND DISPOSITION OF MORTGAGED PROPERTY

PART 1 – APRIL 21, 2010

PART 2 – JUNE, 2, 2010

PART 3 – JULY 21, 2010

THE MATERIAL USED IN THIS MANUAL IS FOR TEACHING
THE PHILADELPHIA CLE SEMINAR.

Moderator (Real Estate and Finance):

Gregory G. Gosfield, Esquire

1835 Market Street

Philadelphia, PA 19103

Tel.: 215-569-4164

Email: Ggosfield@klehr.com

Panelist (Insolvency):

Francis M. Correll, Jr., Esquire

1835 Market Street

Philadelphia, PA 19103

Tel: 215-569-4094

Email: fcorrell@klehr.com

Panelist (Corporate):

Jon M. Katona, Esquire

1835 Market Street

Philadelphia, PA 19103

Tel: 215 569 4142

Email: jkatona@klehr.com

Panelist (Real Estate and Finance)

Jon S. Robins, Esquire

1835 Market Street

Philadelphia, Pennsylvania 19103

Tel: 215-569-1689

Email: jrobins@klehr.com

July 21, 2010

GRABBING THE COLLATERAL:
DISPOSSESSION, REPOSSESSION, AND DISPOSITION
OF MORTGAGED PROPERTY

TABLE OF CONTENTS

	Page
INTRODUCTION	1
1. Power of Attorney.....	3
1.1. Purpose	3
1.2. Pros.....	3
1.3. Cons	3
2. Mortgagee in Possession.....	4
2.1. Purpose	4
2.2. Intended Status.....	4
2.3. Unintended Status.....	4
2.4. Rights	5
2.5. Accounting.....	6
2.6. Risks	6
2.7. Environmental Liability.....	6
3. Confession of Judgment.....	8
3.1. Strictly Construed.....	8
3.2. Strike or Open	8
3.3. Procedure to Open.....	8
3.4. Explicit Sums.....	9
3.5. Defense Based on Lender's Fault	9
3.6. Lender Duty	9
3.7. Lender Fraud.....	10
4. Consent and Stipulation to Judgment.....	11
4.1. Purpose	11
4.2. Mortgagor Admissions.....	11
4.3. Releases.....	11
5. Appointment of Receiver.....	12
6. Deed-in-lieu; DEED-IN-THE-DRAWER; Consent and Stipulation of MORTGAGE FORECLOSURE Settlement.....	13
6.1. Purpose	13
6.2. Mortgagor's Position.....	13
6.3. Mortgagee's Position.....	13
6.4. Typical Terms	13
6.5. Deed in the Drawer	16
7. Mortgage Foreclosure	18
7.1. The Searches	18
7.2. Notice.....	18
7.3. The Sheriff's Sale.....	20

7.4.	Sheriff Sale Strategies.....	20
7.5.	Postponements.....	22
8.	Deficiency Judgment.....	24
8.1.	Purpose	24
8.2.	Framework	24
8.3.	Multiple Liens	24
8.4.	Exclusions	24
8.5.	Valuation.....	24
8.6.	Limited Guaranties.....	24
9.	Tax Issues for Loan Workouts	26
9.1.	Background	26
9.2.	Borrower Tax Consequences.....	26
9.3.	Recourse Indebtedness.....	26
9.4.	Nonrecourse Indebtedness.....	26
9.5.	Borrower Repurchases of Debt	26
9.6.	Related Party Repurchase of Debt.....	27
9.7.	Exclusions to the Recognition of Cancellation of Debt Income.....	27
9.8.	Title 11 Bankruptcy.....	27
9.9.	Insolvency.....	27
9.10.	Qualified Real Property Indebtedness.....	28
9.11.	Election to Defer Cancellation of Debt Income.....	28
9.12.	Lender Tax Consequences.....	28
10.	Execution Strategies for Investing in Distressed Real Estate Opportunities	30
10.1.	Circumstantial Risks Applicable to All Strategies.....	30
10.2.	Foreclosure.....	30
10.3.	Deed-in-lieu.....	35
10.4.	Buy First Mortgage Debt	38
10.5.	Buy Equity.....	43
10.6.	Buy Mezzanine Debt	46
10.7.	Master lease with Option to Purchase	47
10.8.	Manager with Option to Purchase.....	48

EXHIBITS

Exhibit 1 -	Contractual Terms and a Simple Power of Attorney.
Exhibit 2.7	Excerpt of statutory safe harbors under Federal and Pennsylvania law.
Exhibit 4	Consent and Stipulation to Judgment Filings
Exhibit 5	Receiver Order
Exhibit 6.1.1	Deed in Lieu
Exhibit 6.1.2	Consent and Stipulation
Exhibit 6.1.3	Settlement Agreement
Exhibit 8.1	Pennsylvania Deficiency Judgment Act

INTRODUCTION

The constant issues in each of the various methods of taking collateral are: (1) what is the formula for setting the proper value of the collateral, and (2) how much will the mortgagor and guarantors be released by cooperating. To achieve these goals consensually the parties have the mutual threats that the non-consensual alternatives are more costly and the outcomes predictable.

The mortgagee has at least four shades of fear. One would be the proximate risk that by assuming more involvement with the collateral, its duty to the mortgagor increases to a fiduciary duty with greater arguments for lender liability. A second theoretical risk is whether the out of court recoveries would be recharacterized as the equivalent of a judicial foreclosure and be deemed to inequitably clog the equity of redemption¹ and therefore be void. Another more remote risk is whether the failure to provide for a fair accounting of the value of the collateral against the outstanding debt would be deemed to discharge the debt by applying the same public policy which resulted in adopting the applicable deficiency judgment act.² A fourth fear is that by participating too much in the management or disposition of the collateral, mortgagee has engaged in inequitable conduct to the detriment of other creditors, and its interest should be equitably subordinated to them.

The mortgagor typically argues: that it will not give the mortgagee more than it would get in a formal foreclosure; that by waiving rights to defend and rights to claim lender liability it is providing mortgagee valuable savings in time and cost; that every drafting mistake and instance of Lender control can be used against the mortgagee; and, that in any event, the mortgagor can always file for bankruptcy causing further delay and unpredictability.

The mortgagee typically argues: that the mortgagor cannot stop the ultimate repossession of the collateral, but can only cause delay and extra costs; that those costs of extra time and money are already factored as a component of mortgagee's projections for its business plan and not something that it fears; and, that to the extent a creditworthy guarantor is liable, then mortgagee will recover regardless of delay.

At each step of the process, the mortgagor and mortgagee must ask and analyze what liability and cost may be triggered. With respect to third parties, that would typically be reflected in who should bear the cost for (1) taxes and municipal claims, (2) environmental responses, (3) covenants running with the land such as condominium assessments or reciprocal easement obligations, and (4) tort liabilities such as nuisance, encroachment and similar real property violations. As between the mortgagee and the mortgagor, it would primarily be a question of who has the better argument to broaden or narrow both lender's liability for misconduct, and borrower's and guarantor's liability for breach of contract.

¹ "Following its original invention equity developed three doctrines which stem directly from it, all three of which may be grouped under the generic heading of clogging the equity of redemption and may be classified by the labels: (1) "Once a mortgage, always a mortgage"; (2) the mortgagee shall not have a "collateral advantage"; and (3) there must be no stipulation in the mortgage which will "fetter" the property on redemption * * * § 16.61. Fettering. The third doctrine has been summed up as meaning "that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it." *Noakes and Co., Ltd. v. Rice*, [1902] A.C. 24, 33." 4 American Law of Property §16.58, §16.61.

² See Exhibit 8.1.

A brief squint at the history of how these issues arose may be fun. Around 55 B.C.E. Julius Caesar conquered Gaul, stopped in Normandy, short of Britain, turned around, went back to Rome and launched the Empire. Other emperors followed and penetrated a bit north up to Hadrian's Wall and set up various Romano-British towns with Roman law that apparently disappeared when Rome gave up Britain around 310 C.E. The Mongols shoved the Huns, the Huns shoved the Franks and a bunch of other tribes, they shoved the Angles and Saxons, and for 300 years they invaded and settled in Britain, imposing their Germanic laws, which survived as a basis for farm leases for feudal and canon estates. 700 to about 900 the Vikings and other North Germanic tribes from Norway, Denmark and Sweden ravaged Britain and Europe. The French gave the fiefdom of Normandy to appease one tribe of Norman attackers, whose Franco-Norman descendents, William the Bastard and his gang of bastards, conquered Britain and imposed his unique feudal system of estates in property upon it. Though it was a miserable failure, it was the template used to create subsequent real estate law in Britain and consequently imported to the United States. When he died, there was anarchy for two generations and massive land theft, or dispossession, which was finally controlled by Henry II who imposed the common law of the King on all subjects: Normans and natives. Parallel to that development of common law, usury was forbidden under both common and canon law, and was punishable by death and damnation. So giving land (with its rents, issues and profits) in exchange for a loan until it was paid off was a neat way for debtor's to secure their borrowings and lenders to get the equivalent of interest. The abuse by lenders of preventing borrowers from paying these contractual debts resulted in the creation of Henry's equity court to provide fairness where the law was solely driven by freedom of contract. Equity forced lenders to accept rights of redemption. The tension between freedom of contract and fairness of equity remains the critical dynamic in creating strategies for the retention or disposition of collateral.

1. POWER OF ATTORNEY.

1.1. Purpose. The purpose of the power of attorney is to allow the mortgagee to engage in disposition of the mortgagor's collateral with actual authority. It is used to overcome the reticence of prospective buyers who may otherwise be concerned that the mortgagee is either involving the buyer in a conspiracy to tortiously interfere with a business relationship, or simply engaging in negotiations for which it has no authority and therefore a waste of time.

1.2. Pros. The benefits to the mortgagee are that it provides a strong argument that the mortgagee is out of the loop of ownership or control, meaning it insulates the mortgagee from typical mortgagee-in-possession liabilities and ownership liabilities. Some critical economic benefits of using a power of attorney is that the mortgagee avoids liability for a realty transfer tax upon the grant to the third party, a tax it would need to pay upon being a grantor after taking a deed-in-lieu or a sheriff's deed even though the deed into the mortgagee may have been exempt from realty transfer tax.

1.3. Cons. The weaknesses for the mortgagee are like those of the other remedies that depend on the consent of the mortgagor without being able to enlist equivalent cooperation from third parties in interest. The property sale remains subject to pre-existing conditions of title, of contract, and of law which relate to the mortgagor and its property, just as in the case of a deed in lieu of foreclosure. As to title, therefore if there is a subordinate lien or judgment holder, it would remain enforceable under the power of attorney transaction. As to contract, though the mortgage may be senior to a recorded right of first refusal and would extinguish it upon a foreclosure, a power of attorney sale would be subject to all matters to which the mortgagor is subject. As an example of a violations of law, some jurisdictions permit a lawful subdivision by foreclosure of a mortgage on an unsubdivided parcel, but that exception is not available on a power of attorney sale. The sale may also be troubled by issues relating to how much of the debt is discharged: is it a total discharge as in a strict foreclosure without preserving a deficiency; is it a discharge to the extent of an agreed value; or, is it a discharge to the extent of actual net proceeds received? See Exhibit 1 for an example of contractual terms and a simple power of attorney. Lastly, for the mortgagee, the power of attorney brings into play a large body of law imposing fiduciary duties upon the agent, and acts by the mortgagor which might otherwise be free from liability without agency, become more risky, such as statements and representation related to the operations of the mortgage property.

PRACTICE POINTS

1. The mortgagee should be careful to build further protections with contractual provisions that the mortgagor releases any claims it may have against the mortgagee, waives any defenses, acknowledges and accepts the mortgagee's disclaimer of liability, and indemnifies mortgagee from third party claims relating to the property.
2. The mortgagor should be careful to limit the power, so that the mortgagee does not enlarge mortgagor's liabilities to third parties, even if they are related to the real estate.
3. Establish a formula for the amount of debt to be discharged.

2. MORTGAGEE IN POSSESSION.

2.1. Purpose. A “mortgage in possession” acquires possession to protect or enforce its security interest. Possession can be required as a condition to the right to collect rent, depending on the jurisdiction.³ Once in possession, the mortgagee can remain until the mortgagor redeems the property by paying the debt, or loses the property at foreclosure.⁴ The mortgagee is not a successor owner, but rather a trustee.⁵

2.2. Intended Status. The mortgagee must be the holder of a mortgage.⁶ The mortgagee must acquire possession either by implied or express consent of the mortgagor,⁷ or by legal right under the title theory principle that a mortgagor is a grantor of the property to the mortgagee.⁸ For the same reason there is some debate as to whether a mortgagee can become a mortgagee in possession in a lien theory state⁹ unless there is a contractual right.

2.3. Unintended Status. The mortgagee may sometimes be deemed to be in possession if it either exercises physical possession, or it exercises sufficient “dominion and control” as to enjoy the equivalent of physical possession. Determining the existence of the status is a question of fact.¹⁰ One indicia for possession by the mortgagee is for a mortgagee to grant a third party the privilege of possession through the mortgagee’s entitlement. Tenants or purchasers in possession would qualify.¹¹ A similar issue would be where the mortgagee took over management and control while exercising its rights under the assignment to rents.¹² A mortgagor who cooperates with a mortgagee and grants into possessory control to perspective buyers recommended by mortgagee does not

³ See also *In re Wright*, 128 Bankr. 838 (Bankr. ND Ga. 1991), which describes a creditor's rights to rents and profits under Georgia law as incorporeal hereditaments which were part of the possessory bundle of rights known as seizin and therefore were inextricably bound to the real property itself. The creditor could therefore collect rents and profits only upon default of the debtor and “entry upon the property.” Entry upon the property describes the contract right of the creditor to take possession of the property after default.

⁴ *Valley Int’l Properties v. Brownsville Sav. & Loan*, 581 S.W.2d 22, 225 (Tex. Ct. App. 1979).

⁵ When a mortgagee goes into possession, he does not become the owner of the real estate. *Provident Trust Co. of Philadelphia v. Judicial Building and Loan Asso.*, 112 Pa. Super. 352, 171 A.2d 87 (1934); *Malamut v. Haines*, 51 F. Supp. 837 (M.D. Pa. 1943). Rather, he becomes a quasi trustee, managing the property for the benefit of the mortgagor, but at the same time protecting his own interest. *Zisman v. City of Duquesne*, 143 Pa. Super. 263, 18 A.2d 95 (1941); *McNicholas’ Appeal*, 137 Pa. Super. 415, 9 A.2d 200 (1939).

⁶ *Id.*

⁷ *Nelson v. Bowen*, 12 P.2d 1083, 1086 (Cal. Ct. App. 1932).

⁸ “Concededly, before default in payment of the mortgage debt, the right to possession of the mortgaged premises remains in the mortgagor and that right continues until after a sale of the premises under a judgment of foreclosure and sale unless the mortgage, by its terms, expressly gives the right to have a receiver appointed with authority to take possession of the premises from the mortgagor or unless a receiver is given that authority for reasons extrinsic to the agreement contained in the mortgage.” *Holmes v. Gravenhorst*, 263 N.Y. 148, 188 N.E. 285, 91 A.L.R. 1230.

⁹ *In re Century Inv. Funds VIII Ltd. Partnership*, 937 F.2d 371 (7th Cir. 1991), Wisconsin is a lien theory state, and the mortgagor remains the legal owner of the mortgaged property until judgment of foreclosure and sale has been held. However, a right to rents and profits is an incident of possession of the real estate and not title, and an immediate assignment of rents on default is enforceable when it is clearly the intent of the parties.

¹⁰ *Nettles v. First Nat’l Bank of Birmingham*, 388 So.2d 916, 920 (Ala. 1980).

¹¹ *Miami Gardens, Inc. v. Conway*, 102 So.2d 622 (Fla. 1958).

¹² *Zisman v. City of Duquesne*, 18 A.2d 95 (Pa. Super. 1941).

create the equivalent of a mortgagee in possession.¹³ When the mortgagee enters into the possessory contract, it is exercising rights of a mortgagee in possession.¹⁴

2.4. Rights. The rights of the mortgagee include (1) collecting rent,¹⁵ (2) administering and operating the property in a reasonable manner,¹⁶ (3) prosecuting breach of contract claims against misuse of the property,¹⁷ (4) prosecuting negligence claims for damage to the property,¹⁸ (5) enjoining waste, and (6) appointing a receiver.¹⁹

¹³ *Nettles v. First Nat'l Bank of Birmingham*, 388 So.2d 916, 920 (Ala. 1980).

¹⁴ *Nelson v. Bowen*, 12 P.2d 1083, 1086 (Cal. Ct. App. 1932).

¹⁵ See, e.g., *In re Aloma Square, Inc.*, 85 Bankr. 623 (Bankr. MD Fla. 1988); *In re Butz*, 86 Bankr. 595 (Bankr. SD Iowa 1988). See also *In re Cooper*, 273 B.R. 297, 39 Bankr. Ct. Dec. (CRR) 26 (Bankr. D.D.C. 2002). Applying DC law, the court found that when a mortgagor remains in possession of the property, he is entitled to the rents even after default. The rule applies only to those rents which accrue prior to the foreclosure and sale of the mortgaged property. See also *Barclays Bank P.C., New York Branch v. 865 Centennial Ave. Associates Ltd. Partnership*, 26 F. Supp. 2d 712 (D.N.J. 1998), appeal dismissed (3d Cir. July 27, 1999), a mortgagee-in-possession of leased premises assigned its landlord right to rent and the landlord stood in the shoes of the mortgagee-in-possession and was subject to any defenses and right of setoff the tenant had against the mortgagee-in-possession. The landlord also assumed the duties and liabilities of the mortgagee-in-possession with respect to the tenant's claims in action. See also *TMG Life Ins. Co. v. Ashner*, 21 Kan. App.2d 234, 898 P.2d 1145 (1995), assignment of rents as security does not automatically vest the mortgagee with title to the rents upon default; the mortgagee's right to the rents vests when it initiates proper legal action to enforce its right. See also *United Nat. Bank v. Parish*, 330 N.J. Super. 654, 750 A.2d 238 (Ch. Div. 1999). A mortgagee's right to collect rents does not arise until appointment of a receiver or the mortgagee's taking possession. See also *Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150 (7th Cir. 1996), a trust beneficiary under a deed of trust trustor could recover rents paid the trustor following deed-in-lieu of foreclosure because the beneficiary owned the property prior to trustee's possession. See also *Fidelity Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 71 F.3d 1306 (7th Cir. 1995), Illinois common-law rents and profits rule requires the mortgagee to take possession of the property or a receiver must have been appointed to administer the property. See also *In re Riverside Nursing Home*, 100 Bankr. 683 (Bankr. SDNY 1989), which indicates that under New York law, a mortgagee is not entitled to rents and profits from the mortgaged premises until (1) the mortgagee takes actual possession of the mortgaged property; (2) a receiver is appointed; or (3) the mortgagee demands and is refused possession. See also *In re Thymewood Apartments, Ltd.*, 123 Bankr. 969 (SD Ohio 1991), under the lien theory, the mortgagee can succeed to the rights in the property and rents derived from the property only after foreclosure and sale.

¹⁶ See *Florida Bahamas Lines, Ltd. v. Steel Barge Star 800 of Nassau*, 433 F.2d 1243 (11th Cir. 1970). See, e.g., *Essex Cleaning Contractors, Inc. v. Amato*, 127 NJ Super. 364, 317 A.2d 411 (1974). But see *New York Life Ins. Co. v. Gulf States Utils. Co.*, 336 So.2d 320 (La. Ct. App. 1976). *Prince v. Brown*, 856 P.2d 589 (Okla. Ct. App. 1993), mortgagee in possession has a right and duty to collect rents and profits but must apply them to the mortgage debt and account for any surplus, must exercise care and diligence just as a prudent owner would, and is liable for any waste or gross mismanagement or wrongful or tortious acts that injure the property. For discussion of an issue related to a mortgagee in possession, see *Kerr v. Miller*, 159 Or. App. 613, 977 P.2d 438 (1999), review denied, 329 Or. 287, 994 P.2d 122 (1999). The mortgagee in possession who improved the property in good faith reliance on the mortgagor's inability and professed lack of desire to redeem, was entitled to restitution for the improvements.

¹⁷ See, e.g., *Wheeler v. Peterson*, 331 SW2d 81 (Tex. Civ. App. 1960). See *Evans v. California Trailer Court, Inc.*, 33 Cal. Rptr. 646 (1994). The California antideficiency statutes precluded the deed of trust holders from maintaining a contract claim to recover a deficiency, but did not preclude tort claims. Specifically, antideficiency statutes do not apply when a deed of trust borrower has impaired the security bad faith waste which is reckless, intentional, or malicious injury to the property.

¹⁸ *Kulp v. Trustees of Iowa College*, 217 Iowa 310, 251 NW 703 (1933); *Douglas v. Lowery*, 130 Ill. App.2d 910, 266 NE2d 107 (1971). But see *Frio Invs., Inc. v. 4M-IRC/Rohde*, 705 SW2d 784 (Tex. Ct. App. 1986), a mortgagee who does not own the property, cannot bring an action for damages to the property only for an injury to his security. Thus, if the property value remains greater than the debt, the mortgagee has suffered no injury.

¹⁹ *Federal Land Bank of New Orleans v. Southmont Mfg. Co.*, 219 Fla. 447, 122 So. 426 (1929); *Fourth Ave. Amusement Co. v. Glenn*, 201 F.2d 600 (6th Cir. 1953); *American Medical Servs., Inc. v. Mutual Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 188 NW2d 529 (1971); cf. *Mutual Benefit Life Ins. Co. v. Frantz Klodt & Son, Inc.*, 306 Minn. 244, 237 NW2d 350 (1976).

2.5. Accounting. The mortgagee, as trustee, has a duty to account for the income²⁰ as properly applied to taxes, maintenance, and the debt.²¹ The privilege to collect rents is bound by a duty to apply the proceeds properly.²²

2.6. Risks. The mortgagee has a fiduciary duty to the borrower and is therefore more exposed to traditional lender liability attacks.²³ Those duties may run not only to the mortgagor,²⁴ but to those parties claiming through the mortgagor, such as junior lien holders²⁵ and possibly tenants.²⁶ The duties can include (1) collecting rent,²⁷ (2) actively managing to obtain market rent,²⁸ (3) maintenance and repair to the standard of a reasonably prudent man,²⁹ (4) preventing vandalism,³⁰ and (5) protecting invitees from injury.³¹ If the mortgagee does not take constructive ownership or actual possession, it is not tortiously liable for injury resulting from the condition of the premises.³²

2.7. Environmental Liability. Each state may have different tests and safe harbors for lenders to avoid environmental liability. Under CERCLA, a mortgagee may, as an “owner and operator” become liable for clean-up, but only if it flunks several tests. A lender is exculpated if it is not (1) an owner or operator, or (2) even if it might otherwise be an owner or operator, does not participate in management and holds ownership primarily to protect its security interest, including owning the real estate if it seeks to divest itself of the property at the earliest commercially reasonable time taking into account current market conditions.³³ See Exhibit 2.7 for an excerpt of statutory safe harbors under Federal and Pennsylvania law. Unfortunately, CERCLA does not define “commercially reasonable.” EPA has stated that the test will generally be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

²⁰ *Martinez v. Continental Enters.*, 697 P.2d 789 (Colo. Ct. App. 1984), where the mortgagee takes back peaceful possession of property subject to a mortgage but does not collect rent on the property, the mortgagor is entitled to an accounting and offset against the indebtedness in the amount of the property's fair market rental value during possession by the mortgagee.

²¹ *Landau v. Western Pa. Nat'l Bank*, 445 Pa. 217, 282 A.2d 335 (1971). See *Karnes v. Morrow*, 315 Ark. 37, 864 SW2d 848 (1993), mortgagee in possession of the mortgaged property is liable for all rents and profits collected or that could have been collected by ordinary diligence and must apply these amounts to the mortgaged debt.

²² *Elliott v. Moffett*, 74 A.2d 164, 365 Pa. 247; A mortgagee who goes into possession of mortgaged land assumes responsibility for management and preservation of the property. *Zanzonico v. Zanzonico*, 66 A.2d 530, 2 NJ 309. Equity treats a mortgagee lawfully in possession as a constructive trustee instead of as a grantee under a deed. *Armstrong v. Germain*, 98 NYS2d 946.

²³ *Johns v. Moore*, 336 P.2d 579, 581 (Cal. Ct. App. 1959); *Myers-Macomber Eng'rs v. M.L.W. Constr. Corp.*, 414 A.2d 357 (Pa. Super. Ct. 1979); *New York and Suburban Fed. Sav. & Loan Ass'n v. Sanderman*, 392 A.2d 635 (N.J. Super. Ct. Ch. Div. 1978).

²⁴ *Provident Trust Co. of Philadelphia v. Judicial Building and Loan Assn.*, 112 Pa. Super. 352, 171 A. 287 (1934); *Peugh v. Davis*, 113 U.S. 542, 28 L. Ed. 1127.

²⁵ *Id.*

²⁶ *Leeds v. Gifford*, 41 N.J. Eq. 464, 5 Atl. 795.

²⁷ *Id.*

²⁸ *Johns v. Moore*, 336 P.2d 579, 581 (Cal. Ct. App. 1959).

²⁹ *Landau*, 282 A.2d at 339.

³⁰ *Zanzonico v. Zanzonico*, 66 A.2d 530, 533 (N.J. 1949), cert denied, 338 U.S. 868 (1949).

³¹ *City of Newark v. Sue Corp.*, 304 A.2d 567, 569 (N.J. Super. Ct. App. Div. 1973); *New York and Suburban Sav. & Loan Ass'n*, 392 A.2d at 638.

³² In *Central Pennsylvania Savings Association v. Carpenters of Pennsylvania, Inc.*, 502 Pa. 17, 463 A.2d 414 (1983), the first mortgagee had every right to finish the construction project, particularly since it was a potential danger to third parties, (presumably trespassers), due to its unfinished condition. In this regard, the Supreme Court noted that a mortgagee-in-possession could bear tort liability to a third party (citing to *Sansotta v. City of Pittsburgh*, 330 Pa. 199, 199 A. 164 (1938). for support), if in control of real property.

³³ See Exhibit A.

But it does not explore the consequences of the failure to sell within the 12 months and will depend upon the market conditions and fact findings of what business judgments are reasonable. Considering the unknown, the lender with possession of the property needs to evidence its efforts (1) to actively market the property; (2) to avoid managing or operating the property, except to preserve the property value and to prevent waste; and (3) and to document any decisions choosing to reject offers showing reasonable business judgment.

PRACTICE POINTS

1. A mortgagee attempting to avoid being deemed a mortgagee in possession should disclaim dominion and control over property.
2. A mortgagee attempting to avoid being deemed mortgagee in possession should not enter into contracts as if it were the owner.
3. If the mortgagee seeks to qualify for rights to rent, it should determine if the jurisdiction requires possession.

3. CONFESSION OF JUDGMENT

3.1. Strictly Construed. An obligor could waive its due process rights to a notice and hearing when the party voluntarily, knowingly and intelligently consents to an agreement containing a cognovit clause.³⁴ The general rule is that confessions of judgment are not favored in Pennsylvania.³⁵ A warrant to confess judgment must be explicit and will be strictly construed,³⁶ with any ambiguity resolved against the party in whose favor the warrant is given.³⁷ A warrant of attorney to confess judgment does not arise by implication or by general and nonspecific reference.³⁸ Any doubts as to the validity of such judgments must be resolved against the party entering the judgment.³⁹

3.2. Strike or Open. A petition to strike a confessed judgment, as distinct from a petition to open, is proper when the defect in the judgment appears on the face of the record. One common ground for opening is when there is a dispute over the existence of default or the calculation of the amount due. If a confession is opened but not stricken, the opened judgment remains of record during the litigation. That weakens an obligor's negotiating position because the continuing existence of a judgment may breach covenants in other loans of the obligor, even though unrelated to the subject loan.

3.3. Procedure to Open. A party seeking to open a confessed judgment must timely file a petition,⁴⁰ aver a meritorious defense, and present evidence sufficient to go to the jury.⁴¹ In

³⁴ See *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994) the court stated, "judgment against a reasonably sophisticated, corporate debtor who has signed an instrument containing a document permitting judgment by confession as part of a commercial transaction is enforceable in the same manner as any other judgment. Also see *Germantown Savings Bank v. Talacki*, 657 A.2d 1285,1289 (Pa. Super. Ct. 1995) which stated, "in commercial transactions where parties are represented by counsel and of equal bargaining power, Pennsylvania's confession of judgment procedure has been upheld."

³⁵ See *Beckett v. Laux*, 395 Pa. Super. 563, 577 A.2d 1341, 1347 (1990); *Drum v. Leta*, 354 Pa. Super. 448, 452,512 A.2d 36, 38 (1986).

³⁶ "In Pennsylvania, because of the severity of the consequences attached to a warrant of attorney to confess judgment, the courts have required that as a matter of public policy the consent of the party authorizing confession be clearly given." *Egyptian Sands Real Estate, Inc. v. Polony*, 294 A.2d 799,804 (1972).

³⁷ *Beckett*, 577 A.2d at 1347 (1990); *Drum*, 512 A.2d at 38.

³⁸ "The underlying rationale common to both the *Latshaw* and the instant cases is that a warrant of attorney to confess judgment confers such plenary power on the donee in respect of the adjudication of his own claims that certain specific formalities are to be observed in order to effectuate the granting of such a power, viz., (a) the warrant must be in writing (Section 28 of the Act of February 24, 1806, P.L. 334, 12 P.S. § 739, so provides) and (b) it should be signed by the party against whom it is asserted." *Frantz Tractor Co. v. Wyoming Valley Nursery*, 384 Pa. 213, 216, 120 A.2d 303, 305 (1956).

³⁹ *Scott Factors, Inc. v. Hartley*, 425 Pa. 290, 228 A.2d 887, 888 (1967); *Housing Mortgage Corp. v. Tower Dev. & Inv. Corp.*, 402 Pa. 388, 389, 167 A.2d 146, 147 (1961) stated, "It is a firmly established rule of construction in the case of warrants of attorney to confess judgments that the authority thus given must be clear, explicit and strictly construed, that if doubt exists it must be resolved against the party in whose favor the warrant is given, and that all proceedings thereunder must be within the strict letter of the warrant" *Housing Mortgage Corporation v. Tower Development & Investment Corporation*, 402 Pa. 388, 389, 167 A.2d 146 (PA 1961); *Dameron v. Woods Restaurant, Inc.*, 305 Pa. Super. 346, 350, 451 A.2d 681, 683 (1982) (The court "must resolve any doubts about [any] default in [defendant's] favor, since confession of judgment is oppressive.").

⁴⁰ *First Seneca Bank v. Laurel Mt. Dev.*, 506 Pa. 439, 485 A.2d 1086, 1088 (Pa 1984); "A judgment taken by confession will be opened in only a limited number of circumstances, and only when the person seeking to have it opened acts promptly, alleges a meritorious defense and presents sufficient evidence of that defense to require submission of the issues to the jury."

determining whether to open a judgment, the trial court must examine the evidence in the light most favorable to the petitioner.⁴² A court may not weigh the evidence in support of the defense, but must only determine whether there is sufficient evidence to allow the issue to go to the jury.⁴³ A challenge to the amount due and owing, including a challenge as to whether the debt was in fact due when the judgment was confessed, constitutes a meritorious defense requiring that a judgment be opened.⁴⁴

3.4. Explicit Sums. A warrant of attorney which authorizes the confession of judgment only for sums due “hereunder,” but does not include interest, late charges, real estate taxes, attorney’s commission or cost of suit can be stricken if the motion pleads for any of them.⁴⁵ The legal principle is that “if the confessed judgment includes an item not authorized in the warrant, the judgment is void in its entirety and must be stricken.”⁴⁶

3.5. Defense Based on Lender’s Fault. A party who caused the alleged default cannot use that as the basis for the confessed judgment. An averment, with supporting evidence, that the confessing party’s breach of contract or other wrongdoing in fact caused the alleged default upon which it confessed judgment constitutes a meritorious defense to the judgment and the debt underlying same, thereby requiring that the judgment be opened to permit the defendant to assert that defense.⁴⁷ Thus, the law does not permit the lender to complain of a breach by the borrowers, when the alleged breach has been caused by the lender’s own actions or inactions.⁴⁸

3.6. Lender Duty. Pennsylvania follows the general rule that a lender is not normally a fiduciary of the borrower.⁴⁹ This principle stems from a rebuttable presumption that the relationship between lenders and borrowers is usually conducted at arms-length and the parties are each acting in their

⁴¹ “The Pennsylvania Rules of Civil Procedure provide, however, in relevant part: ‘If evidence is produced which in a jury trial would require the issues to be submitted to a jury, the court shall open the judgment.’ Pa.R.C.P. 2959(e)” Kardos v. Morris, 470 Pa. 337,368 A.2d 657 (1977)

⁴² Rittenhouse, 625 A.2d at 1210. Pa. R. Civ. P. 2959(e) provides that “[i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment.”

⁴³ Tenreed Corp v. Philadelphia Folding Box Co., 256 Pa. Super. 49, 389 A.2d 594, 597 (1978) (quoting Wolgin v. Mickman, 233 Pa. Super. 218, 222, 335 A.2d 824,826 (1975)); GOODRICH-AMRAM 2d, § 2959(e):1.

⁴⁴ “When a motion to open judgment is directed to a default judgment, three factors are considered on review: whether the motion to open was promptly filed; whether a meritorious defense appears; and whether the default can be reasonably explained or excused.” See H. A. Steen Indust., Inc. v. Richer Communications, Inc., 314 A.2d 319, 321 (Pa. 1973).

⁴⁵ See PNC Bank v. Bolus, 655 A.2d 997, 1000 (1995). “In numerous decisions, the courts have ruled that if the confessed judgment includes an item not authorized in the warrant, the judgment is void in its entirety and must be stricken.”

⁴⁶ Germantown Savings Bank v. Talacki, 657 A.2d 1285, 1288 (1995); “A petition to strike a judgment by confession will be granted where there is an apparent defect on the face of the record on which the judgment was entered. * * * Our supreme court held that a confessed judgment properly was stricken where it erroneously included an item of taxes where the warrant of attorney authorized only the entry of judgment for rentals due.” Germantown Savings Bank v. Talacki, 657 A.2d 1285,1287 (Pa. Super. 1995). see also, DAP Financial Management Co. v. Ciotti, 2000 WL 33711071, *5 (CCP Phila. May 16,2000) (noting that if the Plaintiff had confessed judgment for late charges that were not clearly within the warrant of attorney, the court would have been required to strike the judgment),affirmed, 769 A.2d 1212 (Pa. Super. Ct. 2000)

⁴⁷ “[A] party to a contract may not complain of a breach caused by his own default.” Kolbe v. Aegis Ins. Co., 537 A.2d 7, 8 (1987).

⁴⁸ Weinglas v. Gibson, 14 Pa. D.& C. 445, 447 (Phila. C.C.P. 1930) (“Performance of a contract or offer to perform it is excused and rendered unnecessary when it is prevented by the acts of the other party or is rendered impossible by him.”), aff’d, 155 A. 439 (Pa. Super. Ct. 1931).

⁴⁹ Federal Land Bank of Baltimore v. Fetner, 410 A.2d 344, 348 (Pa. Super 1979), cert denied, 446 U.S. 918 (1980).

own interest.⁵⁰ However, a fiduciary relationship will likely arise if the lender gains substantial control over some portion of the borrower's business affairs.⁵¹ Control over the borrower is demonstrated when there is evidence that the lender was involved in the actual day-to-day management and operations of the borrower's business or that the lender had the ability to compel the borrower to engage in unusual transactions.⁵² A fiduciary relationship is also established when "the borrower has developed a close and trusting relationship with the lender."⁵³ Courts routinely hold that the determination as to whether a fiduciary relationship exists is a fact-intensive inquiry.⁵⁴ Determining the amount of control necessary to establish a fiduciary duty is necessarily a fact-intensive inquiry.⁵⁵ When "a fiduciary duty exists between the lender and the borrower, the lender must act with fairness and good faith and must refrain from using its superior position to the other party's detriment."⁵⁶

3.7. Lender Fraud. A confessed judgment may be opened to allow a defendant to assert fraud and/or breach of fiduciary duty claims against a plaintiff.⁵⁷ A fiduciary relation applies generally to all persons "who are associated by any relation of trust and confidence," and "[w]hen the relation exists, the consequent duties and obligations are perfectly well established by long-settled law."⁵⁸ Once established, the fiduciary has a duty to act in good faith and an obligation to deal fairly and openly toward those to whom the duty applies.⁵⁹ Thus, fiduciary duties comprise, inter alia, "obligation of loyalty, fairness, good faith and full disclosure."⁶⁰

PRACTICE POINTS

1. Lender must slavishly repeat the components allowed under the cognovit clause when preparing the account for damages, because divergence permits the judgment to be stricken.
2. Borrower will try to open judgment by showing bad acts or breach of fiduciary duty by lender.

⁵⁰ Frowen v. Blank, 425 A.2d 412, 416 (Pa. 1981).

⁵¹ Chrysler Credit Corporation v. B.J.M., Jr., Inc., 834 F.Supp. 813, 842 (E.D. Pa. 1993).

⁵² Blue Line Coal Co., Inc. v. Equibank, 683 F.Supp. 493, 496 (E.D. Pa. 1988).

⁵³ Simon v. Provident National Bank, 44 Ches. Co. Rep. 326, 334 (1996).

⁵⁴ Services, Inc. v. Pinnacle Mortg. Inv. Corp. 897 F.Supp. 854, 863 (E.D. Pa. 1995).

⁵⁵ See also In re Scott's Estate, 316 A.2d at 885 ("each cause must be analyzed on its own facts"); Blue Line Coal, 683 F.Supp. at 497 (borrower's fiduciary duty claim against lender depends on factual demonstration of the kind of control on which the count depends).

⁵⁶ Busy Bee, Inc. v. Wachovia Bank, 2006 WL 723487 (CCP Lackawanna 2006), affirmed, 932 A.2s 248 (Pa. Super. Ct. 2007), appeal denied, 598 Pa. 778, 959 A.2d 318 (2008).

⁵⁷ See Hellam Township v. DiCicco, 287 Pa. Super. 227, 233, 429, A.2d 1183, 1186 (1981); O'Reilly v. Cellco Industries, Inc., 265 Pa. super. 558, 568-69, 402 A.2d 686, 691-92 (1979).

⁵⁸ Appeal of Darlington, 23 A. 1046, 1047 (Pa. 1892).

⁵⁹ Dercoli v. Pennsylvania Nat'l Mutual Ins. Co., 554 A.2d 906, 909 Pa. 1989).

⁶⁰ McRoberts v. Phelps, 138 A.2d 439, 445 (Pa. 1958).

4. CONSENT AND STIPULATION TO JUDGMENT

4.1. Purpose. To avoid the delay, can possible future risky objections and defenses, a mortgagee will seek from a mortgagor an advance consent and stipulation to entry of judgment. See Exhibit 4 for an example of the filings.

4.2. Mortgagor Admissions. The mortgagee would seek to buffer the action from future attack by having mortgagor acknowledge its understanding of the consequence, its advice from counsel, its release of claims against mortgagee, and its waiver of defenses.

4.3. Releases. Mortgagor will want to confine the calculation of costs to a present formula and would release claims that exist at the time of executing the verification to consent, not future claims.

5. APPOINTMENT OF RECEIVER.

Receivership, like mortgagee-in-possession, is undertaken to preserve the assets of the mortgagor. The fundamental difference between a receiver and a mortgagee-in-possession is that the receiver is a court supervised property manager and therefore ruled by orders of the court. The mortgagee-in-possession is not under court supervision and therefore enjoys a greeted freedom of discretion, but also scant cover from attacks of negligent performance or criminal performance. Sometimes the receiver motion attempts to circumvent lien priority issues for future advances that would otherwise be limited by statute for an equivalent advance by a mortgagee-in-possession. On the other hand, while a receiver may be constrained in the amount of money it can advance for tenant improvements, the mortgagee-in-possession's constraint is based on whether in its commercially reasonable discretion it is in the best interest of the mortgagor. The receivership can also include a right of sale similar to the mortgagee's power of attorney. Because the receivership motion attempts to subject all parties with an interest in the real estate to the jurisdiction of the court, the receivership motion also attempts to shield the receiver from claims by third parties as well as by the mortgagor. Further, the order may attempt to mimic the imposition of the automatic stay by prohibiting third parties from filing actions or exercising recovery methods like those in this outline. See Exhibit 5 for an example of a receiver order.

PRACTICE POINTS

1. Mortgagee will move for appointment of a receiver with whom it has some relationship conducive to Lender's goals.
2. Mortgagee may try to expand the rights of the receiver beyond the power the mortgagee would have had under the mortgage agreement or as successful bidder at a sheriff's sale – both as to mortgagor and as to third parties.

6. DEED-IN-LIEU; DEED-IN-THE-DRAWER; CONSENT AND STIPULATION OF MORTGAGE FORECLOSURE SETTLEMENT.

6.1. Purpose. The deed-in-lieu is designed to provide the mortgagee with control of the collateral without having to undertake foreclosure.⁶¹

6.2. Mortgagor's Position. The mortgagor's approach is to offer the minimum needed to provide the mortgagee with as close to the equivalent of a foreclosure result as the mortgagor can deliver. Consequently, the mortgagor proceeds under the principle that there should be no covenants, representations, warranties or indemnities, because upon a foreclosure, the mortgagee cannot obtain more than a sheriff's deed to the property in whatever condition it is in as to title, physical elements, and legal compliance. The mortgagor looks to surrender liability and ongoing operating costs.

6.3. Mortgagee's Position. The mortgagee's approach is to seek representations and warranties to dispose of ancillary issues as to title that would otherwise be achieved in a foreclosure. The benefit to the mortgagee is to accelerate its ability to control the property whether that adds value by avoiding waste, averting the loss of expiring permits, preventing the accumulation of unsecured debt, ordinarily speed of control over the collateral is a benefit. Sometimes a mortgagee will be uninterested in a deed in lieu when there are complications and disputes among the mortgagor's owners because there may be a greater liability to the mortgagee being accused of interfering in a business dispute than the continuing incurrence of potentially priming liens and postponement of control. See exhibits for an example of a Deed in Lieu at Exhibit 6.1, Consent and Stipulation at Exhibit 6.2 and Settlement Agreement at Exhibit 6.3.

6.4. Typical Terms. Typically, if there is a settlement agreement, it addresses the following contractual issues:

6.4.1. Deed Delivery. Borrower covenants to deliver a deed: either (i) currently delivered in lieu of foreclosure, (ii) promised to be delivered in future, or (iii) "in the drawer" and held in escrow until a condition subsequent occurs. Some Lender's refuse to take deeds-in-the-drawer fearing it could be recharacterized as an equitable mortgage and set the stage for another claim for clogging the equities or otherwise supervening the non-waivable protection of mortgage foreclosure statutes.

6.4.2. Further Cooperation. Borrower covenants to cooperate in summary remedies of mortgagee: (i) stipulate to and allow entry of judgment subject to suspension by Lender pending outcome of settlement agreement, (ii) waive rights (some waivers are unenforceable such as right to deficiency judgment) to contest, object, retrain, or appeal, (iii) waive and withdraw defenses, (iv) release claims and counterclaims.

6.4.3. Deed Absolute. Borrower acknowledgement in the case of deed-in-lieu that conveyance is absolute and not an equitable mortgage.⁶²

⁶¹ Russo v. Wolbers, 323 N.W.2d 385 (Mich. Ct. App. 1982) (Purchaser in a land contract entered into a novation contract to avoid foreclosure. The novation contract included a waiver of the post foreclosure statutory redemption period. Since independent consideration was given, and the waiver was not part of the original contract, the clogging doctrine was not applicable.). Carter Oil Co. v. Durbin, 34 N.E.2d 407 (Ill. 1941) (recognizing the duty of a mortgagor's conveyance of the equity of redemption to a mortgagee, subsequent to execution of the mortgage).

- Title Insurance. Mortgagee may choose to rely on its lender's title policy and take the risk that there are subsequent parties in interest to which takes subject rather than insure the owner's title as of the deed delivery date. Transfer Tax. In Pennsylvania and some other jurisdictions, there is no transfer tax upon a deed-in-lieu conveyance by a mortgagor to the mortgagee who is the owner of the defaulted mortgage.⁶³

1. Bulk Sales Tax. It is possible that a bulk sales tax will be imposed on the Borrower, Lender and real estate if the Borrower has past due taxes for labor and employment.⁶⁴

6.4.4. Risks/Rewards.

1. Avoid Publicity. The lender and borrower may each have reasons to keep low profiles. The mortgagee may not want publicity about its bad loans being misinterpreted as market weakness. The Borrower may worry its other lenders will start to feel insecure about its creditworthiness.

2. Cost Savings: A deed-in-lieu negotiation may take time but it should take less time than the foreclosure process of obtaining a judgment, even if is uncontested, then advertising, scheduling the sale on one the sheriff's scheduled days, and then taking the recorded sheriff's deed after any objections to the sale have been surfaced. The negotiation would also cost attorney's fees similar to negotiating a purchase agreement but should provide more information than a sheriff's foreclosure, and so the Borrower would take some time to gather data for schedules of its representations. A contested foreclosure would take more time and money. A Borrower may prefer to contest if it believes it can improve its position, or worsen the Lender's position, given enough time. But a Borrower contest would also likely provoke the Lender to sue the guarantor, whereas a deed-in-lieu frequently contemplates the release of the guarantor, and sometimes a premium or fee to the Borrower for its cooperation.

3. Borrower Cooperation: The Borrower's cooperation can provide valuable benefits to the Lender at several points. In addition to providing better information and more disclosure than in a foreclosure, a deed-in-lieu transaction can also provide better transition of control and transfer of information, contracts, warranties, escrows and permits. The cooperative

⁶² Absolute Conveyance. The Borrowers and the Guarantors acknowledge and agree that: (a) the conveyance of the Project to the Lender, or its assignee or nominee, pursuant to the terms of this Agreement is an absolute conveyance of all of the Borrowers' and all of the Guarantors', right, title and interest in and to the Project in fact as well as in form and the deed, bill of sale and other conveyance documents are not intended to be a mortgage, trust conveyance, deed of trust or security instrument of any kind; (b) the consideration for such conveyance is exactly as recited in this Agreement; (c) after the Closing Date the Borrowers and the Guarantors will have no further interest (including rights of redemption) or claims in, to or against the Project or to the proceeds or profits that might be derived therefrom except for the accounting of Discharge Consideration after the Closing Date, (d) the conveyance herein is in consideration of the Lender's covenants and releases contained in this Agreement, (e) the conveyance is not intended to secure in any way whatsoever either the Indebtedness or the performance of any other obligation by Borrowers or Guarantors and (f) the negotiations which led to the consummation of this Agreement were conducted in good faith and purely from the standpoint of the Lender or its nominee or assignee holding title to the Project from Borrowers for a good and adequate consideration, with the intent to take and continue to hold full and complete possession of the Project as its new owner.

⁶³ 72 P.S. §8102-3(16) A transfer by a mortgagor to the holder of a bona fide mortgage in default in lieu of a foreclosure or a transfer pursuant to a judicial sale in which the successful bidder is the bona fide holder of a mortgage, unless the holder assigns the bid to another person.

⁶⁴ 72 Pa. Stat Ann. §§7240, 7321.1 and 1403; 43 Pa Stat. Ann. §788.3.

transfer of software data, staff institutional knowledge, even keys and security codes, relieves stress on the value of the property and unnecessary costs. Tenant files, original leases, condominium books and records can all be more efficiently transferred, and with planning the transition can include estoppels from third parties and acknowledgment of assignments by governmental and third party entities. The parties usually include a mutual cooperation clause in the agreement to address items that were overlooked.

4. Premium or Deficiency: Depending on the various values of the transaction's components, the Borrower may expect to be paid a premium or cooperation fee, or to be saddled with a deficiency. The fee to Borrower may reflect that the value of the real estate is greater than the debt, or the Lender's quantification of the values of both the benefit of Borrower's cooperation and the avoidance of delay. Release of the Borrower and Guarantor from further liability is another common form of consideration provided to the Borrower. On the other hand, in some instances, the real estate value is so low, the Lender will require a further payment as a condition of closing.

5. Cleared Title: The mortgagee can prevent merger of estates by express disclosure, and preserve the mortgage. That allows the mortgagee to subsequently foreclose and divest any liens that arose after the recording of the mortgage and the issuance of the Lender's title policy. The Lender receives the benefit of current ownership and the back up benefit of being able to subsequently clear title of objections.

6. Releases: If, as is common, the Borrower asserts or intimates rights against the Lender, a deed-in-lieu allows the Lender to orchestrate a release by Borrower and Guarantor all claims against the Lender. Lenders will frequently negotiate for the release as a condition of entering into the deed-in-lieu. The Borrower and Guarantor may seek reciprocal releases from the Lender. But the Lender will condition that release, and reserve the right to sue, if the Borrower repudiates the agreement, files bankruptcy or supports any actions against Lender.

7. Recharacterized as Mortgage: If there is a chance the Lender would give the deed back to Borrower the deed could be recharacterized as a mortgage, and Lender's interest would not be a fee estate but only a security interest in the fee estate. To prevent recharacterization the Lender would expressly state the deed is a deed absolute without any subsequent rights or conditions that it be returned to Borrower.

8. Mortgage Foreclosure Violation: If the Lender has been given both a deed and a mortgage prior to a default, the Lender should be concerned that the deed would be recharacterized as a mortgage and that recording impermissibly circumvents the mortgagor's right of redemption and other mortgagor protections built into the mortgage foreclosure statutes, such as notice to all third parties interest to promote bidding activity at a sale.

9. Subject to Subordinate Claims: The grantee of the deed takes subject to encumbrances arising after the date of the insured mortgage. If one of those is a subordinate lienholder who initiates foreclosure, that could instigate a need for the Lender to foreclose at an inopportune time or in a manner inconsistent with the Lender's strategy. In addition, in Pennsylvania, if the senior mortgage is subordinated to a non-mortgage lien, such as a slip-and-fall judgment creditor, a subordinate judgment lien foreclosure would divest all of the encumbrances starting with the most senior judgment lienholder. Lastly, if the pre-existing mortgage is deemed to

have merged into the deed, then the mortgagee loses the ability to divest the subordinate claims by foreclosure

10. Voidable Transfer. The transfer may be subject to attack as voidable on two theories. One would be based on the premise that the property is worth more than the debt, and therefore is a fraudulent transfer to the detriment of Borrower's creditors.⁶⁵ The other theory is that the transfer may be a voidable preference to Lender if the Lender has received more than it would have received in a liquidation.⁶⁶

11. Cancellation of Debt. A Borrower may have to recognize taxable income or gain if it is relieved of debt liability.

6.5. Deed in the Drawer

6.5.1. Procedure. The Lender will typically require the Borrower to execute a deed, deliver it into escrow, and upon a default, the Lender can record, or direct the escrow agent to record, the deed.

6.5.2. Clogging the Equity. When a deed is delivered with the intent that it will be returned to the grantor upon discharge of the debt, but will be recorded upon a default, there is a presumption that by recording the deed upon default that the Lender has interfered or prevented the Borrower from exercising the longstanding right to redeem the debt. Similarly if a deed is recorded, but subject to reconveyance to the Borrower, then it is the structure as a mortgage. This interference is the "clogging" of the equity of redemption, and subject to rescission by the court of

⁶⁵ 11 U.S.C. §548(a) "Fraudulent transfers and obligations (a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily— (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. (2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which— (A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or (B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions."

⁶⁶ 11 U.S.C. §547(b) "(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property-- (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made-- (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if-- (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title."

equity. The common law rules relating to mortgages requires mortgagees to expose the property to reasonable sale with payment to be applied to the debt, and any excess paid to the Borrower.

6.5.3. Extending the Debt. When a mortgagor defaults on a mortgage, entitling the mortgagee to foreclose, the mortgagee may take an escrowed deed in exchange for extending the cure period and has a better argument against the defenses of clogging the equity or violating rules for foreclosure, because to take a deed in escrow and subsequently record it is a less oppressive and inequitable remedy than exercising the then available right to foreclose.⁶⁷

PRACTICE POINTS

1. For Borrower, a significant weakness of a deed-in-lieu is that it does not divest junior liens. If the lender takes the deed-in-lieu, it should include non-merger language to preserve the option to foreclose later, if necessary.
2. Preserve confidentiality.
3. Mortgagee seeks to preserve debt until avoidance period is over.
4. Transfer tax issues may arise as to both the deed transfer and the subsequent foreclosure against itself. A forward-looking Lender would seek to reduce the real estate tax assessment prior to taking the deed so as to reduce the transfer tax.
5. Mortgagor and Guarantor should be released of personal liability.
6. Mortgagee seeks release of liability claims.
7. Mortgagee should undertake standard diligence: environmental, title, physical.

⁶⁷ “In sum, under the terms of the Conditional Extension Agreement and Escrow Agreement, the Plaintiff was given additional time to cure its continuing default on the Promissory Notes without the threat of a date-certain, impending foreclosure sale, and in exchange, the Plaintiff executed the Quit Claim Deeds, which were simply deeds in lieu of foreclosure to be placed into escrow during the agreed-upon forbearance period. Had the Plaintiff cured the default prior to or on the June 25, 2007 deadline, the conditions of the Conditional Extension Agreement would have been satisfied, and pursuant to those conditions and the Escrow Agreement, the escrowed Quit Claim Deeds would have been returned to the Plaintiff, and the previously scheduled and postponed foreclosure sale would have been canceled, as any authorization to foreclose would have been nullified by the cure.” In re Webb Mtn, LLC, 2009 WL 425033 (Bkrcty.E.D.Tenn. (2009)).

7. MORTGAGE FORECLOSURE

7.1. The Searches. A title search provides a necessary foundation to executing on real property. First, it reconfirms the correct name of the owner and the pertinent information in the vesting deed. Second, it identifies all other parties in interest entitled to receive notice of the sheriff's sale of the real property, whether lien holders, easement holders, or holders of rights of first refusal. Third, it provides the information for calculating the "strike price" meaning how high an executing creditor would bid to protect the recovery of its debt in full. The calculation is based on the amount of senior liens and other claims that would be paid from foreclosure sale proceeds before the executing creditor would be paid, plus the amount the executing creditor would accept for discharge of its debt. Fourth, a title report, in the form of a commitment, can be convertible to title insurance after the sale if the executing creditor is the successful bidder. If the mortgagee, as executing creditor, is insured with a loan policy issued at the origination of the loan, it would continue to insure the mortgagee as owner after the sale. But that policy, on the one hand, is for the debt which usually is far less than the value of the real estate at the origination of the loan, so upon a total failure of title the insured amount of the debt is covered up to the actual value of the real estate. But on the other hand, the policy does not insure against foreclosure defects, such as that all necessary parties were notified; nor does it insure for the first loss to the extent the fair market value of the property is greater than the liquidation value. Fifth, a title report insulates the mortgagee and the attorney from subsequent claims of negligence for failure to act in a customary and commercially reasonable manner. A title search can take as little as a few days and as long as a few weeks, depending on the complexity.

PRACTICE POINTS:

1. Early on order a title commitment for the Property
2. If mortgagee's prior policy is available, forward it to title company.
3. Order an environmental audit
4. Reconfirm zoning and subdivision compliance, and the consistency of property description among the zoning, subdivision and mortgage records.
5. Order estoppels from tenants, easement beneficiaries and similar parties with senior interest.
6. Review loan documents for potential defenses by mortgagor.

7.2. Notice. A writ of execution to sell real property is substantially similar to a writ of execution to sell personal property. In addition to the Praeipere and writ of execution, however, additional forms are called for in the execution package.

Generally after judgment the mortgagee as plaintiff files an affidavit with the sheriff setting forth (i) the date the writ of execution was filed; (ii) the name and address of the current owner of the

property; (iii) parties of record with potentially affected interests; and (iv) parties not of record with potentially affected interests if they are known to the mortgagee.⁶⁸

The mortgagee arranges for notice of the foreclosure to the parties it identified in the affidavit as parties in interest. It monitors the sheriff's posting the sale information at the sheriff's office and on the property. In addition, the sheriff also must publish once a week for three successive weeks in a newspaper of general circulation or legal publication designated by the court.⁶⁹ The posting and the publishing can take four weeks.

7.2.1. Method of Service of Notice: Generally, service of the notice of sale can be made upon a party in interest in the following ways:⁷⁰

if the party has not entered an appearance.
by the sheriff or competent adult who is not a party to the action, or
by mailing a copy in the prescribed manner, or
otherwise by special court order.

As to the mortgagor, if it has entered an appearance, then by mail, and

for each other person named in the affidavit, by ordinary mail.

Then, the person serving the notice files a return of service.⁷¹ If the service is made by mail, the return must contain the certificate of mailing and, if returned, the letter.

7.2.2. Timing of notices: All notices and posting are generally effectuated at least thirty (30) days prior to the sale.⁷² Publication by the sheriff in a newspaper of general circulation and/or legal publication must be commenced within twenty-one (21) days of the sale.⁷³

7.2.3. Realty and Personalty: In Pennsylvania actions in mortgage foreclosure can list both real and personal property for sale in one execution proceeding as provided by Section 9604(a) of the Uniform Commercial Code.

PRACTICE POINTS:

1. Reconcile accuracy of name in title records with current name of party in interest.
2. Reconcile accuracy of address in title records with current address of party in interest.
3. Query partners and similar owners of mortgagee of their "knowledge" of affected parties not of record.

⁶⁸ Pa. R.C.P. 3129.1 Affidavit: Pa. R.C.P. 3129.1.

⁶⁹ Pa. R.C.P. 3129.2 Notice:

⁷⁰ Pa. R.C.P. 3129.2.

⁷¹ Pa. R.C.P. 3129.2(c)(2).

⁷² Pa. R.C.P. 3129(c)(3).

⁷³ Pa. R.C.P. 3129.2(d).

7.3. **The Sheriff's Sale.** Each county determines the time and periodicity of the sheriff's sale. They are conducted usually once a month. This can, therefore, add more days to the timetable based on when the other notices are completed.

Determining the dates in advance with the appropriate sheriff's office is a prerequisite to ensuring ample time to satisfy the applicable notice requirements.⁷⁴ The period between the filing of a writ of execution and the actual sale date can vary from a couple months to over a year, depending on the county.

7.3.1. "Bringdowns" Through Writ Date: Updates of the title search are critical to identifying any late arriving party in interest and preserving the commitment of the title company to insure clear title.

7.3.2. IRS Searches: The executing mortgage should give notice to the United States when it has a federal tax lien against property which is being sold pursuant to a judgment by confession. Federal statute requires that notice of such a sale should be given to the IRS, in writing, by registered mail or personal service, not less than 25 days prior to such a sale.⁷⁵

PRACTICE POINTS:

1. Contact sheriff's office to confirm schedule of sale dates and times.
2. Contact sheriff's office for local procedures, charges and performance milestone.

7.4. **Sheriff Sale Strategies.**⁷⁶ In addressing public foreclosure auctions there are several core characteristics that shape the mortgagee's management of the process: (1) it must be advertised and performed at the cost of the executing mortgagee, (2) anyone can attend and bid, and (3) sales are final.

7.4.1. Costs: The Sheriff must collect a minimum amount to pay for real estate taxes, realty transfer taxes, and sheriff's charges.

7.4.2. Realty Transfer taxes. In some counties there is a realty transfer tax exemption for a mortgagee who is the successful bidder in a mortgage foreclosure.⁷⁷

7.4.3. Sheriff's Charges. In Pennsylvania, the sheriff is entitled to a statutory commission based on the total amount bid. Similarly, the Federal sheriff is entitled to charges up to \$50,000.⁷⁸ Consequently, the mortgagee, prior to selecting the forum in which to conduct the foreclosure sale, to verify how commissions are calculated, and which venue provides better savings. Proceeds are

⁷⁴ Pa. R.C.P. 3129; Pa. R.C.P. 3129.2.

⁷⁵ 26 U.S.C. § 7425(c)(1).

⁷⁶ Practice Points: 1) contact sheriff's office to confirm schedule of sale dates and times; and 2) contact sheriff's office for local procedures, charges, and time periods.

⁷⁷ 72 P.S. §8102 – c.3 (16); but compare the Philadelphia tax that limits the exemption to the grantee of a purchase money mortgage.

⁷⁸ 28 C.F.R. Subpart T Title 28 §114(h); charge commission of 1.5% of collections but no more than \$50,000.

used first to pay the commission before any distributions are made. Therefore, the Sheriff's commission should be calculated prior to the sale.

7.4.4. Prior Tax and Municipal Liens Not Divested: Generally, prior tax (real estate and transfer) and municipal liens, are paid first out of the proceeds of sale before any distributions are made to subordinate parties.

7.4.5. Prior Liens Unaffected: The general rule in Pennsylvania is that a judicial sale of real estate discharges all subordinate liens on the property sold but not prior liens if the sale is expressly made subject to a prior lien⁷⁹ or unless protected by statute. In Pennsylvania, the execution of a junior judgment lien which is subordinate to senior judgment lien (other than a mortgage lien) can divest all prior liens (including mortgages) prior to the junior lien starting with the senior judgment lien. Under Pennsylvania common law, a foreclosure on a lien, and subsequent sheriff's sale of the encumbered real property discharges all liens which are not satisfied of record at the time of sale.⁸⁰ Pennsylvania's Lien Priority Law,⁸¹ carves out statutory exceptions for the lien of a mortgage if the mortgage is preceded by certain other classes of prior liens (e.g., other mortgages, ground rents, purchase money due the Commonwealth and specified statutory liens). When a mortgage lien is junior to a lien not of the class specified by 42 Pa. C.S.A. § 8152 section 8152(a)(1)-(3), a sale of a property upon foreclosure of another lien that is junior to the mortgage lien will completely divest that mortgage lien.⁸²

(b) Example

- Lien 1 Mortgage - Year 1
- Lien 2 Judgment - Year 2
- Lien 3 Mortgage - Year 3
- Lien 4 Judgment - Year 4

Lien 4 is foreclosed. By operation of Section 8152, the Lien 3 Mortgage would be divested. The Lien 3 Mortgagee could, in order to preserve the priority of Lien 3 Mortgage, either: (1) pay off the Lien 2, but would also need to remove it from the record, or (2) if the Lien 2 is not (or cannot) be satisfied of record at closing, have title company to discharge the lien of record by Mortgagor's funds or indemnity, and affirmatively insure over loss resulting from Lien 2 foreclosure.

Lease is an encumbrance; ground rent (rent service) is a lien.

7.4.6. Title endorsement: "The Company affirmatively insures against any loss or damage to the insured mortgagee arising from the foreclosure of any liens or encumbrances subordinate to the insured mortgagee, regardless of the existence of any liens or encumbrances which have not been removed and extinguished of record and which are prior to the insured mortgage.

⁷⁹ The statute governing priority of liens in Pennsylvania is 42 P.S. § 8141.

⁸⁰ Liss v. Medary Homes, Inc., 388 Pa. 139, 130 A.2d 137 (1957); Public Federal Savings & Loan Ass'n v. Neumann, 334 Pa. Super. 389, 483 A.2d 505 (1984).

⁸¹ 42 Pa. C.S.A. § 8152.

⁸² Liss, 388 Pa. 139, 130 A.2d 137 (1957); Neumann, 334 Pa. Super. 389, 483 A.2d 505 (1984).

7.4.7. Minimum Bid: Generally, the mortgagee calculates its minimum bid based on (1) sheriff's costs; (2) undivested liens that must be paid such as realty transfer taxes, real estate taxes, other state revenue liens; and (3) sheriff's poundage.

7.4.8. Bidding at the Sale: As a general rule, at a public sale any party may actively bid and the executing mortgagee is driven to bid up to the "strike price" so that it collects at least as much as it would expect at a private sale.

7.4.9. "Second Bids": As in most auctions, if the successful bidder fails to complete the sale, then the second highest bidder may be substituted as the successful bidder. To take advantage of this rule, the second bidder usually must register its bid and leave a deposit with the sheriff equal to what the second bidder would have paid if it had been the successful bidder. If the second bidder fails to register and the first successful bidder fails to close, then the executing mortgagee re-lists the property for sheriff sale and repeats the advertising and notice procedures.

7.5. Postponements.

7.5.1. Postponement Request: The foreclosing mortgagee may postpone a sale twice by written request to the sheriff so long as the sheriff's sale is ultimately held within 120 days of the date of the originally-scheduled date. After those two postponements, any additional postponements must be by Court Order. If a public announcement of the postponement is made to the assembled bidders, new notice is not required. Nevertheless the number of postponements without new notice may be limited.⁸³

7.5.2. Extension Sale⁸⁴: The execution sometimes may be stayed, as distinct from postponed, after written direction of the mortgagee or any party in interest posting a bond in the amount of the mortgagee's judgment, including probable interest and costs. Sometimes, a bond in a lesser amount may be posted upon approval by the court, conditioned upon payment of the full amount due within ninety (90) days of the entry of the bond, absent an extension by the court. In other instances a stay will be imposed if there is a curable defect in the procedure, if an exemption or immunity of the subject property is available, or for other legal or equitable grounds.⁸⁵

7.5.3. Setting Aside the Writ, Service or Levy: Even more momentous than a postponement or a stay, the court may, upon application of any party in interest, set aside the writ, service or levy if it is defective, exempt or qualifies for immunity.

7.5.4. Appearance at the Sale: In some counties a property may not be sold unless the plaintiff or its representative is present at the sale.⁸⁶ If the executing mortgagee or its representative is not present, the sheriff may return the writ to the court and file a return on the basis that the property was not sold because the executing mortgagee or its representative was not present at the sale.

7.5.5. Bankruptcy Considerations: A mortgagor defendant can always stop, or at least stay, a sale by filing a voluntary petition for relief under the United States Bankruptcy Code (the

⁸³ Pa. R.C.P. 3129.3(b).

⁸⁴ As a matter of practice, may postpone sheriff's sales upon any equitable grounds.

⁸⁵ Pa. R.C.P. 3121 a.b.

⁸⁶ Pa. R.C.P. 32129.3(c).

“Bankruptcy Code”).⁸⁷ Similarly, three creditors can together file a petition for an involuntary Bankruptcy where a debtor has 12 or more creditors.⁸⁸ The usual practice is that a sheriff will automatically stay a sale upon the filing of a bankruptcy petition. Sometimes a sheriff will allow an executory judgment creditor to postpone the sale as often as necessary until it has relief from the automatic stay provisions of the Bankruptcy Code. This eliminates the cost in time and money for filing new writs of execution and new notices once the action is resumed.

7.5.6. Closing with the Sheriff and Recording the Deed: A successful bidder must usually deposit a fixed amount with the sheriff. The amount varies by county, but is usually a percentage of the bid amount. In many instances, the sheriff requires a deposit from the executing mortgagee prior to the sale, to cover the Sheriff's anticipated costs of sale. If the executing mortgagee purchases the property at sale for costs only, and the percentage of the costs is less than the amount on deposit with the Sheriff, then no further deposit needs to be made at the sale. In some jurisdictions, the sheriff holds the deed for twenty (20) days after either the filing of the schedule of distribution, or the date of the sale if no schedule of distribution is required to be filed. The sheriff then delivers the deed to the appropriate recorder's office without the need for confirmation by the court. The time delay between sale and deed recordation can sometimes be unexpected and needs to be factored into the risk/reward analysis of pursuing foreclosure.

PRACTICE POINTS:

1. Calculate in advance minimum price and strike price for state court sheriff's sale.
2. Calculate price for federal sheriff sale.
3. Consider need for postponing or staying sale.
4. Analyze effect of foreclosure on liens of record as to relative priorities and the kinds of liens.

⁸⁷ 11 U.S.C. § 362(a)(ii)(2).

⁸⁸ 11 U.S.C. § 303(b).

8. DEFICIENCY JUDGMENT.

8.1. Purpose. If a mortgagee purchased the mortgaged property for the minimum bid (sheriff's costs, taxes and sheriff's poundage) and then deducted only that amount from the debt due, the mortgagee could enjoy a windfall to the extent the mortgaged property value was greater than the minimum bid. Consequently, Pennsylvania adopted the Deficiency Judgment Act⁸⁹ to discharge a judgment and release all liable parties if the creditor fails to file a deficiency judgment petition within 6 months of the Sheriff's delivery of its deed to the recorder, the theory being that the sale can be obstructed until the time the Sheriff delivers the deed.

8.2. Framework. Whenever any property is sold in execution proceedings directly or indirectly to the executing mortgagee for less than the debt owed, and the mortgagee fails to file the requisite petition for a deficiency judgment within the requisite period, then its ability to collect a deficiency will be extinguished because the debt will be deemed satisfied as a matter of law.⁹⁰ The power of the Act cannot be waived.⁹¹ Prudence would dictate the filing within 6 months of the auction.

8.3. Multiple Liens. There has been some conflict whether a foreclosure of one lien held by a mortgagee discharges all liens held by the mortgagee. Earlier cases concluded that a senior lien wipes out the subordinate liens, but does not discharge their debts. A more recent case held that a foreclosure of a junior lien would discharge all senior debt if no deficiency judgment were taken. Subsequent analysts propose that the doctrine of subrogation would achieve an equitable result because the land acquired by the mortgagee under and subject to the senior liens remains burdened by their debt, and therefore as is the case of anyone purchased property under and subject to liens, the property must be applied to the senior debt before the purchaser can discharge the liens.

8.4. Exclusions. The Act has been deemed not to apply to voluntary deed-in-lieu transactions,⁹² bankruptcy sales, judicial sales that are not "execution proceedings", tax sales, installment sale agreement forfeitures. Failure to comply with the Act prevents the mortgagee from taking recovery for the debt on other property or the guarantor. Other creditors can assert the discharge.

8.5. Valuation. If the mortgagor fails to answer the fair market value set in the complaint it is deemed determined to be that amount. "Fair market value" is what parties who are willing but not obligated would agree upon.

8.6. Limited Guaranties. In the case of limited recourse debt the Act calls for the value to be applied to non-recourse debt before recourse debt, so upon a shortfall the limited recourse guarantor would remain liable.⁹³

PRACTICE POINTS:

1. In Pennsylvania, obtain a personal judgment before proceeding on the collateral.

⁸⁹ See Exhibit 8.1 for the text.

⁹⁰ 42 P.S. § 8103(a).

⁹¹ 42 P.S. § 8103(d).

⁹² PNC Bank v. Balsamo, 634 A.2d 645 (Pa. Super. Ct. 1993)

⁹³ Exhibit 8.1, §8103(g)(1).

2. In Pennsylvania, recover non-real estate collateral before real estate collateral, so as not to freeze the effort to repossess personalty during the period of confirming the deficiency.
3. Obtain a judgment without the use of confession of judgment if the judgment needs to be moved to other jurisdictions to collect on multi-state assets.
4. In multi-state collateral transactions, split mortgage loans so that the senior debt more closely conforms to the applicable real estate value this could permit simultaneous actions in different states, except in those states, like Pennsylvania, where there is a risk that multiple mortgage liens will be consolidated for deficiency judgment calculations.
5. A mortgagor, and its guarantor, is at risk if a third party buys the property for less than the fair market value, because the mortgagor would have been deemed to discharge the debt to the extent of its fair market value if a mortgagee buys in the property, but not if a third party buys it.
6. The tolling of the period to obtain a deficiency starts with the delivery of the deed to the recorder which can provide a mortgagee more time to recover other property, but may also allow a mortgagor more time to file bankruptcy before the deed is "technically" transferred.
7. Creditors may consider buying the property at foreclosure sale conducted by other executing creditors or at tax sales.
8. In the case of multiple property within the same county, the executing mortgagee should consider advising the auction attendees that the properties may be sold as a group or individually, and that the process which results in the highest aggregate price will be the one that will prevail. The mortgagee then may need to pay higher sheriff's costs even though the mortgagee ultimately buys in the properties

9. TAX ISSUES FOR LOAN WORKOUTS

9.1. Background

In the real estate context, there are two common types of loan workout transactions: (1) The lender forecloses on the property, or otherwise takes title to the real property securing the liability; and (2) The borrower or a related party repurchases the debt. Both of the above transactions will have federal income tax consequences to the lender and borrower. The following slides will first cover the federal income tax consequences to the borrower. Later, there will be a short discussion of the federal income tax consequences to the lender.

9.2. Borrower Tax Consequences

In general, a borrower is required to include in gross income, cancellation of indebtedness income. Section 61(a)(12) of the IRC. As will be later discussed, the borrower may not be subject to immediate taxation for cancellation of indebtedness income or may be able to defer taxation, if an exception applies. In the context of transfers of collateral, such as real property, in satisfaction of indebtedness, whether cancellation of indebtedness will be realized depends on whether the indebtedness is recourse or nonrecourse.

9.3. Recourse Indebtedness

If the real property is transferred to the lender in satisfaction of a recourse liability, the transaction is bifurcated into two separate transactions. One is a sale of the property for its fair market value. The second is a satisfaction of the liability for the fair market value of the property. The borrower would recognize cancellation of indebtedness income if the fair market value of the property was less than the amount of the debt. Treasury Regulation Section 1.1001-2(c), Example 8. Example, if recourse debt in the amount of \$1,000 is satisfied with real property having a fair market value of \$700 and a tax basis of \$200, the consequences are as follows: The borrower is treated as selling the real property for \$700, realizing a taxable gain of \$500. The borrower is treated as satisfying the debt of \$1,000 with an asset worth \$700, realizing \$300 of cancellation of indebtedness income. It is possible that the cancellation of debt income may be deferred or excluded from taxable income, as will be discussed later.

9.4. Nonrecourse Indebtedness

If the real property is transferred to the lender in satisfaction of a nonrecourse liability, the transaction is treated as if the borrower sold the property for the amount of the debt. No cancellation of debt income would be realized. However, the borrower may realize taxable gain on the transfer. Treasury Regulation Section 1.1001-2(c), Example 7. Example, if nonrecourse debt in the amount of \$1,000 is satisfied with real property having a fair market value of \$700 and a tax basis of \$200, the consequences are as follows: The borrower is treated as selling the real property for \$1,000, realizing a taxable gain of \$800.

9.5. Borrower Repurchases of Debt

If the borrower acquires the borrower's debt for an amount of cash less than the amount of the debt, the borrower will realize cancellation of debt income for the amount of such difference.

9.6. Related Party Repurchase of Debt

If a party related to the borrower purchases the debt of the borrower, the borrower shall be treated as acquiring the debt for the amount paid by the related party. See Section 108(e)(4). A related party is a person who bears a relationship to the debtor, as specified in Section 267(b) or Section 707(b)(1) of the Code. A related party includes a person's spouse, brother, sister, ancestors and descendants. A related party also includes a shareholder and a corporation that is owned 50% by such shareholder. A related party also includes a partner and a partnership that is owned 50% by such partner.

9.7. Exclusions to the Recognition of Cancellation of Debt Income

Section 108 of the Code provides for the exclusion of cancellation of debt income in the following circumstances.

9.7.1. The discharge of debt occurs in a Title 11 Bankruptcy case. – The borrower was insolvent at the time of the discharge.

9.7.2. The debt discharged is “qualified real property indebtedness”.

9.7.3. An election to defer the recognition of cancellation debt income is made. The following slides will discuss each of the above exceptions.

9.8. Title 11 Bankruptcy

Cancellation of debt income attributable to the discharge of debt granted by the Bankruptcy Court or pursuant to a plan approved by the Bankruptcy Court is excluded from taxable income. The price for the exclusion of income is that the borrower is required to reduce its tax attributes for the amount of cancellation of debt excluded from taxable income. Such tax attributes include the net operating losses, tax credits and capital losses of the taxpayer. In addition, to the extent of any excess, the tax basis in the assets of the borrower must be reduced.

9.9. Insolvency

Cancellation of debt income attributable to the discharge of debt is excluded from taxable income if the discharge occurs when the taxpayer is insolvent. The amount excluded from taxable income cannot exceed the amount by which the taxpayer is insolvent. See Section 108(a)(3) of the Code. The cancellation of debt income excluded from taxable income will reduce the tax attributes of the borrower in the same manner as amounts excluded by reason of the bankruptcy exclusion. A borrower is “insolvent” to the extent that the borrower's liabilities exceed the fair market value of the borrower's assets, determined on the basis of assets and liabilities immediately before the discharge. See Section 108(d)(3) of the Code. In the context of partnerships, insolvency is determined at the partner level. See Section 108(d)(6). Thus, even if a partnership or LLC is insolvent, the insolvency exception will not apply if the partner or member is solvent. Example: LLC has debt of \$1,000 and has an asset of \$100. If \$500 of the debt is discharged at a time when the members of the LLC are solvent, the LLC cannot use the insolvency exception to avoid recognition of cancellation of debt income. In the context of S corporations, insolvency is determined at the corporation level. See Section 108(d)(7). If the S corporation is insolvent, the

insolvency exception can apply, even if the shareholders of the S corporation are solvent. Example: S corporation has debt of \$1,000 and has an asset of \$100. If \$500 of the debt is discharged at a time when the shareholders of the S corporation are solvent, the S corporation can use the insolvency exception to avoid recognition of cancellation of debt income.

9.10. Qualified Real Property Indebtedness

In order for the exception for qualified real property indebtedness to apply, the outstanding principal amount of qualified real property indebtedness must exceed the fair market value of the real property. The exclusion from taxable income for cancellation of indebtedness income is limited to such excess. See Section 108(c)(2)(A). Qualified real property indebtedness is indebtedness incurred to acquire or improve the real property used in a trade or business and is secured by such real property. The borrower must make an election in order for this exception to apply. The exclusion for qualified real property indebtedness does not apply to borrowers that are corporations. The price for excluding the cancellation of debt income from taxable income is the requirement to reduce the tax basis in the depreciable real property of the borrower.

9.11. Election to Defer Cancellation of Debt Income

A borrower can elect to defer the recognition of cancellation of debt income if the borrower reacquires an “applicable debt instrument” during the period beginning 1/1/09 and ending 12/31/10. If the exception applies, the cancellation of debt income is recognized by the borrower ratably over a five-year period beginning 2014. An “applicable debt instrument” is any debt instrument issued by a Subchapter C corporation, or any other person in connection with the conduct of a trade or business by such borrower. Example: S corporation is the issuer of a note for \$100. The note was issued to fund the working capital needs of S corporation’s trade or business. S corporation reacquires the note for \$10. S corporation elects to defer the recognition of cancellation of debt income. Accordingly, S corporation must recognize \$19 of cancellation of debt income for each year for a five-year period beginning in 2014.

9.12. Lender Tax Consequences

For an institutional Lender, a discharge of debt will result in an ordinary loss deduction under Section 166 of the Code. The timing of the deduction will depend on the date when the debt becomes wholly or partially worthless. For individual lenders, the loss deduction under Section 166 may be treated as a capital loss, as opposed to an ordinary loss if the loan is a nonbusiness bad debt. In addition, a loss on a nonbusiness bad debt can be deducted only if the debt is wholly worthless. Because the use of capital losses is very limited, it is imperative that the debt be characterized as a business bad debt. In order to be a business bad debt, the individual lender must be engaged in the business of lending or the debt must be proximately related to the conduct of a trade or business of the lender.

9.12.1. For example, an individual engaged in the construction business may be treated as having a business bad debt if he loans funds to a client to indirectly help the client fund purchases from the individual’s construction business, treating the loan as proximately related to the individual’s construction business.

9.12.2. An individual may loan funds to his employer in order to maintain his employment. Such loan could be treated as a business debt, treating the loan as proximately related to the individual's business of being an employee.

9.12.3. A loan by a partner to his partnership may be treated as a business debt, treating the partnership's business as the partner's business. With respect this example, commentators have questioned the validity of the case law reaching this result.

CIRCULAR 230 NOTICE. Any advice expressed above as to tax matters was neither written nor intended by the sender or Klehr, Harrison, Harvey, Branzburg & Ellers LLP to be used and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. If this document is delivered to any person or party other than to our client to whom the advice is directed, the recipient may not and should not rely upon any advice expressed above for any purpose and should seek advice based on the recipient's particular circumstances from an independent tax advisor.

10. EXECUTION STRATEGIES FOR INVESTING IN DISTRESSED REAL ESTATE OPPORTUNITIES

10.1. Circumstantial Risks Applicable to All Strategies

10.1.1. Judgment Proof Mortgagor. Either contractually because of non-recourse provisions or structurally because it is usually a single purpose entity, collection of the debt from Mortgagor is usually unavailable.

10.1.2. Limited Liability Guarantor. Either for a portion of the debt, or for all of the debt upon limited “bad boy” events. The exposure makes the release of the Guarantor a key negotiating point.

10.1.3. Mortgagee Liability. The Mortgagor constructs claims based on mortgagee’s post origination course of conduct to supersede contractual releases and waivers. The exposure, even if remote, makes the mortgagee release a key component of negotiations and takes on even greater importance for a loan investor who would be without knowledge of pre-existing events.

10.1.4. Impairment. Guarantor claims of mortgagee’s impairment of the guaranty would be based on its negligent, rather than contractual, failure to meet the standard of commercial reasonableness.

10.1.5. Value. Debt is greater than basis, and basis is greater than liquidation value.

10.1.6. Negotiation v. Litigation. The time and cost is less; but negotiation can be ignored, litigation cannot.

10.1.7. Costs. Increase in time almost axiomatically results in increase in costs for professionals, both to remain current and to conform document changes to changes in events.

10.2. Foreclosure.

10.2.1. Mortgagees Procedure:

1. Filings. File complaint, [negotiate consent to judgment], obtain judgment, advertise sale, notify parties in interest, coordinate sale date, purchase title insurance, have deed recorded.

2. Timing. Complaint to judgment could be at least 30 days, judgment to sale (could be 30 to 360 days depending on sheriff), sale to recorded deed (could be 10 to 30 days depending on sheriff). See Attachment 2.5.1.2

3. Costs. Professional fees, priming taxes and municipal claims, sheriff’s fees and costs, title insurance.

10.2.2. Investors Procedure:

1. Order title commitment.

(a) All sales are as-is where is with all faults. Therefore traditional diligence of the underlying asset as disclosed in the title report is key: proper name, address, legal description, consistency with corresponding zoning lot, tax lot, mortgaged premises description, vesting deed.

(b) Determine the existence and effect of senior encumbrancers. You will pay taxes, but you may have a senior judgment which in Pennsylvania raises the technical problem that even if paid off, so long as it is of record, if you grant a new mortgage and subsequently another slip and fall creditor files a judgment and forecloses, the divesture relates back to the prior judgment and consequently divests the new mortgage, making the property difficult to finance.

(c) In addition, creditors and other parties in interest of record are not subject to foreclosure if they did not get proper notice, so a comparison of the notice in the foreclosure case (if it is available) with the title search list should reveal that problem. However, up to date service lists are often only available from the plaintiff's lawyer, and thus it is not always possible to obtain them on short notice.

(d) If you are the successful bidder you want to be sure all conditions to issuance of an owner's policy have been met.

(e) Get a bring down to reveal any late arriving parties in interest

10.2.3. Review the Docket.

1. Confirm Notices. The foreclosure specialists should check to see if the notices went to the parties in the title or otherwise known to the mortgagee, and if the right notices were sent in compliance with timing and disclosure requirements.

2. Check Mortgagee's Affidavit. The names and addresses of the parties in interest in the mortgagee's affidavit should match up with those who received notice.

3. IRS Liens. If judgment was obtained by confession and an IRS lien exists, special notice must be addressed.

10.2.4. Calculate the bid price

1. Taxes. Sheriff must pay taxes: past due real estate taxes, realty transfer taxes based on the higher of the successful bid or computed value, and bulk sales taxes may be a further obligation, though not collected at sale.

2. Sheriff Costs. Sheriff costs: the Sheriff is paid a commission called "poundage" based on a statutory formula of 2% of the first \$250,000 and 0.5% of additional amount of the successful bid, and is also reimbursed for its costs of the distribution title policy.

10.2.5. Bidding

1. Attorney in the Writ. The attorney for the mortgagee who filed the writ of execution, the “Attorney on the Writ,” starts the bidding at the “cost of sale”. The bidders are recognized by gesture of the Sheriff, can shout out their bids, which are then usually repeated by the Sheriff.

2. Deposit. When the bidding stops the successful bidder must pay the Sheriff 10% of the successful bid with the form of payment cash, certified check, money order or attorney’s check.

3. Second Bidder. The second highest bidder can also register its bid by registering with the Sheriff and paying 10% of its bid amount. If the highest bid is set aside or fails to close, the second bidder is instituted as the new “successful bidder”.

10.2.6. Surprises

1. Mortgagee Postpones. The mortgagee can postpone the sale by request to the Sheriff

2. Extension. Any party in interest can extend the sale for sufficient legal or equitable grounds but must usually post a bond.

3. Set Aside. Any party in interest can set aside the writ or service if it is defective

4. Bankruptcy. The defendant may file bankruptcy, staying the sale.

5. Bidder Default. If the successful bidder fails to post the deposit, the Sheriff may attempt to resell the property at the end of the auction.

6. Foreclosure Defects. Any irregularities in the underlying foreclosure process could leave the ultimate purchaser with defective title, potentially subject to any lien or encumbrance that was not properly addressed.

10.2.7. Foreclosure Timeline

1. Writ of Summons Against Mortgagor.

(a) Default occurs and remains uncured after expiration of cure period, file permits

(b) Pre-hearing discovery while mortgagee filings are contested by Mortgagor.

(c) Preparation time: 1 hour.

2. Mortgagee Files Complaint.

(a) Confession of judgment on note; complaint in mortgage foreclosure; and petition for receiver.

(b) Preparation Time for Complaint 1-3 days; identifying proposed receiver 10 days.

3. Service of Process.

(a) Service upon Mortgagor in accordance with either Rule 440 or 2958.1 et seq. Certified mail or return receipt request mailing of complaint, and filing of actions with court required to achieve notice or process.

(b) Preparation time: 1 hour.

4. Mortgagor Response.

(a) Within 20-30 days after service of process; Confession (30 days) – move to open and to strike; Complaint in mortgage foreclosure (20 days) – deny actions; Petition for receiver (20-30 days)- deny actions.

(b) Preparation time and response within 20 days.

5. Mortgagor counterclaims.

(a) Bad faith; delays in site improvements; reasonable reliance damages from failure to close; temporary frustration of purpose

(b) Preparation time for Complaint 1 to 7 days.

6. Mortgagor Preliminary Objections. Preparation time: 1 day

7. Response to Preliminary Objections. Preparation time and response 20 days.

8. Discovery.

(a) Document Production and Depositions (5 days at deposition)

(b) Time period: 60-180 days.

9. Summary Judgment. Preparation time: 1-5 days

10. Answer to Summary Judgment. Preparation time: 30 days

11. Order on Summary Judgment and Schedule Trial. Time Period. 1-180 days

12. Appeal.

(a) Requires bond unless otherwise ordered by the Court.

(b) Time period: 180-360 days

13. Foreclosure.

(a) Sheriff advertisement then sale on a pre-set sale date, frequency of sale dates depends on county.

(b) Time period: 42-360 days

14. Sheriff's Deed.

(a) Payment of balance due within 30 days.

(b) Time period: recording 30-60 days thereafter.

15. Bankruptcy.

(a) Preparation time: 7-14 days.

16. Bankruptcy Stay. Time period: 90-180 days.

10.2.8. Closing with the Sheriff.

1. Schedule of Distribution. The sheriff must post a schedule of distribution of foreclosure proceeds within 30 days after the sale, usually within 10 days after the sale.

2. Deed Delivery. The Sheriff will sometimes hold the deed until 20 days after the posting of the schedule of distribution.

3. Final Payment. The remaining 90% of the bid price is paid and the deed for execution delivered to the sheriff within 30 days after the successful bid is accepted.

4. Recorder. The sheriff delivers the deed to the recorder without the need of further court involvement. Timing for the delivery of the deed varies and can take several months depending on the sheriff's backlog and the complexity of title.

10.2.9. Pros:

1. Court Supervision. The sanction of the court prevents a number of challenges that may otherwise arise in a private sale, such as whether it is conducted in a commercially reasonable fashion, due notice was given to the appropriate parties, and whether the foreclosing party may buy in the asset at a significantly low value.

2. Routine Procedures. The long historical use of the foreclosure procedure has created a framework of decisions and legal principles that make the execution of the foreclosure process predictable and relatively free from novel attacks.

10.2.10. Cons:

1. Cost. The cost in time, money, resources and focus of an contested foreclosure can be much higher than a deed-in-lieu, even a vigorously negotiated deed-in-lieu settlement.

2. Procedural Challenges. The foreclosure process is a creature of statute and di minimus defects can cause delay, or even derail the initial filings. A contractual solution, whether by deed-in-lieu settlement or similar out of court resolution of disputes, avoids the need to reconcile the goals of the parties with the requirements of the statute, or with local rules of procedure.

3. Failure of Notice. If a party in interest is overlooked, the sale is final but the unnamed party is not subject to it, and can then subject the successful bidder to the rights, including rights of foreclosure, the unnamed lienor may have.

4. Local requirements. Single action, deficiency judgment or similar limits on creditors' rights may cause discharge of debt.

10.3. Deed-in-lieu.

10.3.1. Procedure:

1. Terms. Deed in lieu agreements proceed through the same kinds of negotiations as a property purchase and sale agreement with the representations and warranties providing the framework for transition, but collectability is remote for a breach by the grantor.

2. Timing. The negotiation of the agreement is not bound to any particular requirement, though lenders may be compelled to declare a default when a loan has been non-performing for 90 days.

3. Costs. The lender playing the part of a investor would engage third parties and undertake diligence at least to analyze the real estate risks of the project. In addition, the lender would need to manage the costs related to realty transfer tax, recording charges and possible title insurance if lender's policy coverage is an amount less than value of settlement. In general, these costs remain with the lender.

10.3.2. Pros:

1. Low Publicity. The lender and Mortgagor may each have reasons to keep low profiles. The mortgagee may not want publicity about its bad loans being misinterpreted as market weakness. The Mortgagor may worry its other lenders will start to feel insecure about its creditworthiness.

2. Cost Savings. A deed-in-lieu negotiation may take time but it should take less time than the foreclosure process which requires (1) obtaining a judgment, even if it is uncontested, (2) advertising, (3) scheduling the sale on one the sheriff's scheduled sale days, and then (4) taking the recorded sheriff's deed after any objections to the sale have been surfaced. See Attachment 2.4.2.2. The negotiation would also cost attorney's fees similar to negotiating a purchase agreement but should enable the investor to obtain more information than a sheriff's

foreclosure. The Mortgagor would take some time to gather data for schedules of its representations. A contested foreclosure would take more time and money. A Mortgagor may prefer to contest if it believes it can improve its position, or worsen the investor's position, given enough time. But a Mortgagor contest would also likely provoke the mortgagee to sue the Guarantor, whereas a deed-in-lieu frequently contemplates the release of the guarantor, and sometimes a premium or fee to the Mortgagor for its cooperation.

3. Mortgagor Cooperation. The Mortgagor's cooperation can provide valuable benefits to the investor at several points. In addition to providing better information and more disclosure than in a foreclosure, a deed-in-lieu transaction can also provide better transition of control and transfer of information, contracts, warranties, escrows and permits. The cooperative transfer of software data, staff institutional knowledge, even keys and security codes, relieves stress on the value of the property and unnecessary costs. Tenant files, original leases, condominium books and records can all be more efficiently transferred. With planning, the transition can include estoppels from third parties and acknowledgment of assignments by governmental and third party entities. The parties usually include a mutual cooperation clause in the agreement to address items that were overlooked.

4. Premium or Deficiency. Depending on the various values of the transaction's components, the Mortgagor may expect to be paid a premium or cooperation fee, or to be saddled with a deficiency. The fee to Mortgagor may reflect that the value of the real estate is greater than the debt, or the lender's quantification of the values of both the benefit of Mortgagor's cooperation and the avoidance of delay. Release of the Mortgagor and Guarantor from further liability is another common form of consideration provided to the Mortgagor. On the other hand, in some instances, the real estate value is so low, the mortgagee will require a further payment as a condition of closing.

5. Cleared Title. The investor can prevent merger of estates by express disclosure, and thereby preserve the mortgage.⁹⁴ Unless it is clearly inequitable.⁹⁵ That allows the

⁹⁴ PNC Bank v. Philben, Inc., 1997 Del. Super. LEXIS 467 (Del. Super. Ct. 1997) (not reported in A.2d). GBJ, Inc., II v. First Ave. Inv. Corp., 520 N.W.2d 508, 511 (Minn. App. 1994) (ruling that "[the mortgagee] did not forfeit its rights as mortgagee when it took the deed in lieu of foreclosure. To the contrary, the doctrine of merger presumes that the mortgagee retains all rights"; the court further stated that "[the mortgagee] therefore retained the right to foreclose"); Union Bank & Trust Co. v. Farmwald Development Corp., 181 Mich.App.538, 547, 450 N.W.2d 274, 278 (1989) (ruling that junior mortgagee's objection to entry of foreclosure of mortgages of first mortgagee was unfounded, because first mortgagee's interest was not extinguished and discharged by mortgagor's conveyance of the secured property to the first mortgagee); But see restat. 3d of property: mortgages § 8.5, Reporter's Notes, Comment E.: "Under this section, however . . . the mortgagee who takes a deed in lieu with actual knowledge of a junior lien will lose the right to foreclose irrespective of whether there is merger intent. As Professor Burkhardt emphasizes: 'By focusing on merger, the courts have defined this second type of case too narrowly. In tune with the usual merger analysis, courts have defined this group of cases to include only mortgagees that express an intent to merge However, the senior mortgagee should be prohibited from exercising its lien in this situation regardless of whether it has manifested any intent concerning merger. Each time a deed in lieu transaction is negotiated with the understanding that the mortgagee will acquire title subject to junior liens, the senior mortgagee has waived its right to eliminate those liens. Courts' focus on merger diverts them from focusing on the substance of the transaction.'"

⁹⁵ United States Leather, Inc. v. Mitchell Mfg. Group, Inc., 276 F.3d 782 (6th Cir. 2002), exception to the merger rule (based on the intention of the parties stated in the quitclaim deed in lieu of foreclosure that no merger of the mortgage and fee would occur) would not be enforced because it would inequitably permit the mortgagor to void its obligations to an intervening judgment creditor to the sole advantage of the mortgagor's corporate parent.

investor, as assignee of the mortgage, to subsequently foreclose and divest any liens that arose after the recording of the mortgage and the issuance of the lender's title policy. The investor receives the benefit of current ownership and the back up benefit of being able to subsequently clear title of objections.

6. Releases. If, as is common, the Mortgagor asserts or intimates rights against the mortgagee, a deed-in-lieu allows the mortgagee and its investor to orchestrate a release by Mortgagor and Guarantor of all claims against the mortgagee. Mortgagees will frequently negotiate for the release as a condition of entering into the deed-in-lieu. The Mortgagor and Guarantor may seek reciprocal releases from the mortgagee. But the mortgagee and its investor will condition that release, and reserve the right to sue, if the Mortgagor repudiates the agreement, files bankruptcy or supports any actions against mortgagee.

10.3.3. Cons:

1. Recharacterized as Mortgage. If there is a chance the investor would give the deed back to Mortgagor the deed could be recharacterized as a mortgage, and investor's interest would not be a fee estate but only a security interest in the fee estate. To prevent recharacterization the investor would expressly state the deed is a deed absolute without any subsequent rights or conditions that it be returned to Mortgagor.

2. Mortgage Foreclosure Violation. If the mortgagee has been given a deed prior to a default, the investor should be concerned that the deed would be recharacterized as a mortgage and that recording it would be deemed to impermissibly circumvents the Mortgagor's right of redemption and other mortgagor protections built into the mortgage foreclosure statutes, such as notice to all third parties interest to promote bidding activity at a sale.⁹⁶

3. Subject to Subordinate Claims. The grantee of the deed takes subject to encumbrances arising after the date of the insured mortgage. If one of those is a subordinate lienholder who initiates foreclosure, that could instigate a need for the mortgagee to foreclose at an inopportune time or in a manner inconsistent with the lender's strategy. In addition, in Pennsylvania, if the senior mortgage is subordinated to a non-mortgage lien, such as a slip-and-fall judgment creditor, a subordinate judgment lien foreclosure would divest all of the encumbrances starting with the most senior judgment lienholder. Lastly, if the pre-existing mortgage is deemed to have merged into the deed, then the mortgagee loses the ability to divest the subordinate claims by foreclosure

⁹⁶ In sum, under the terms of the Conditional Extension Agreement and Escrow Agreement, the Plaintiff was given additional time to cure its continuing default on the Promissory Notes without the threat of a date-certain, impending foreclosure sale, and in exchange, the Plaintiff executed the Quit Claim Deeds, which were simply deeds in lieu of foreclosure to be placed into escrow during the agreed-upon forbearance period. Had the Plaintiff cured the default prior to or on the June 25, 2007 deadline, the conditions of the Conditional Extension Agreement would have been satisfied, and pursuant to those conditions and the Escrow Agreement, the escrowed Quit Claim Deeds would have been returned to the Plaintiff, and the previously scheduled and postponed foreclosure sale would have been canceled, as any authorization to foreclose would have been nullified by the cure.* * * Nothing in any of the documents at issue, or in the record itself, remotely hints at the prospect of the Plaintiff being able to retain or remain in possession of the Webb Mountain Property unless it satisfied its obligations under the Promissory Notes on or before June 25, 2007, or that there was any subsequent event in which the Defendants would be required to re-convey title in the Webb Mountain Property back to the Plaintiff following recordation of the escrowed Quit Claim Deeds or a completed foreclosure sale." In re Webb Mtn, LLC (Bankruptcy Ct. Case No. 07-32016 E.D. Tenn.)

4. Voidable Transfer. The transfer may be subject to attack as voidable on two theories. One would be based on the theory that the property is worth more than the debt, and therefore the deed is a fraudulent transfer to the detriment of Mortgagor's creditors. The other theory, in a bankruptcy of the Mortgagor, is that the transfer may be a voidable preference to mortgagee if the mortgagee has received more than it would have received in a liquidation.

5. Cancellation of Debt. A Mortgagor may have to recognize taxable income or gain if it is relieved of debt liability.

10.4. Buy First Mortgage Debt

10.4.1. Buy the debt at discount equal to liquidation value.

1. Procedure:

(a) Negotiation. Negotiate loan purchase agreement, assignments of mortgages, assignment of UCC, assignment of loan documents, assignment of ancillary documents, assignment of diligence documents.

(b) Special Costs. Recording charges, possible intangibles taxes based on jurisdiction.

2. Pros:

(a) Economic Upside. If Mortgagor pays, investor gets higher IRR, if Mortgagor defaults, investor receives the property. Control of the debt and therefore the distressed situation is immediate.

(b) Firewall and Limit Ownership Liabilities. Claims against the Mortgagor do not reach the property unless they are (a) covenants running with the land, or judgments, which should still be subordinate to the mortgage, or (b) taxes and municipal liens, which can prime a mortgage, but even then are not liabilities of the mortgagee. Common ownership liabilities include (1) taxes, municipal claims, (2) physical condition for contamination, waste, tortious injury or damage, (3) covenants running with the land, (4) obligations to tenants and third parties, (5) operating risk of collecting sufficient revenue to pay expenses.

(c) Use Priority for Divestiture. The investor can "clean" title by foreclosing and divesting subordinate parties in interest.

(d) Cutoff Pre-existing Claims. Upon foreclosure prior creditors and claimants cannot enforce against the subsequent owner pre-existing claims which are subordinate to the mortgage.

3. Cons:

(a) Assignment Risk. The sale of the loan to investor may be unenforceable, whether due to document deficiency such as the prior transfers into Seller cannot be adequately traced; procedural deficiency such as the operative documents are missing, or

substantive deficiencies such as a predecessor in the chain of title assigned or encumbered the loan prior to the investor's purchase.

(b) Foreclosure Risk. Foreclosure can be defeated, delayed, or impaired based on document deficiencies, procedural defenses, or substantive defenses. The Seller does not usually represent to the investor it will be able to successfully foreclose.

(c) Successor Mortgagee Liability Claims. Predecessor holders of the mortgage may have engaged in acts that provide defenses against enforcement or claims against the mortgage holder for property damage due to the bad acts, such as faulty construction, contamination, or waste.

(d) Successor Liability. The successor lender may have other contractual liability to subordinate creditors, partial participants or co-lenders, mezzanine or preferred equity, or other parties holding rights under intercreditor agreements.

(e) Incomplete Diligence. Investor's diligence is limited to the information in the loan file. The uncertainty is whether the loan file is incomplete, such as missing important amendments or notices which would jeopardize enforcement of the loan or reveal defects in the underlying real estate's condition and value.

(f) Release of Seller. If Mortgagor releases Seller, it might not cover investor.

(g) No Mortgagor Contact. Seller usually prohibits investor interaction with Seller under confidentiality agreements out of lender liability fear. Investors are strategically driven to negotiate with Mortgagor first to avoid that restriction.

(h) No Representations or Warranties. Except for no assignment or encumbrance of loan, investors will be compelled to take the loan without complete knowledge of its defects nor disclaimers from Seller.

(i) Forfeitable Deposit. Sellers will sometimes require a forfeitable deposit after a diligence period for document review.

10.4.2. Buy the Debt at Discount and Restructure. Buy with either (1) shared appreciation kicker, (2) participation interest in operating income and appreciation, or (3) An A/B note structure with "B" as "slow hope" note.

1. Procedure:

(a) Additional Documents; Bifurcated Note Terms. Loan modification, inter-tranche subordination provisions; separate assignments of mortgage, UCC, and loan documents.

(b) Additional Costs. Professionals, new title insurance if mortgage is materially modified.

(c) Contingent Interest and Shared Appreciation Mortgage Loan.

The lender, in exchange for taking interest at a fixed rate below market rates, also participates in profits from operations (“contingent interest” or “participating mortgage”), and in capital appreciation upon a capital event such as a sale, refinance, insured loss, or condemnation, or a scheduled valuation date (“shared appreciation” or “SAM”). Drafting issues include (1) whether the formula is based on gross or net values and how they are described, (2) what the period of payment should be, (3) whether there is an adjustment on a look-back basis, (4) whether accounting is on a cash or accrual basis and if the Mortgagor is accrual how the conversion of data is made to achieve a cash equivalent accounting, (5) whether the contingent interest agreement will be secured by a separate mortgage to be senior (to preserve the past due obligation upon foreclosure of the base rate mortgage) or sub ordinate (to pre-empt arguments of clogging the equity) to the base rate mortgage, (6) how to factor in improvements and other investments made by Mortgagor prior to the calculation of the appreciation (for example, it could be based on whether it is capitalized for tax purposes, or on the other hand whether it adds to appraised value), and (7) whether the appreciation will be discounted to the extent it is due to inflationary pressure rather than “true” value increases. The Mortgagor enjoys protection from having to pay debt service when there is not sufficient income or principal when there is not sufficient value.

(d) Convertible Mortgage . In exchange for a lower interest rate, and for separate consideration of a fee to the Mortgagor, the investor can reserve the option right to convert its loan into an equity position in the Mortgagor rather than require repayment of the outstanding principal. During the loan period, the investor has a traditional lender-Mortgagor relationship, at conversion, the lender can take on more control as would be consistent between partners. The loan should also be less than the value of the Property, just as a conventional loan would.

(e) Equity Participation Loans. Some states have safe harbor statutes for equity or shared appreciation loans that shield against recharacterization, but are not exclusive as to allowing parties to adopt other structures. Other states have express prohibitions against them. Each state’s statutes need to be considered.

(f) Sale-Leaseback. Another arrangement that lends itself to the investor controlling the asset, but allowing the Mortgagor an ability to derive benefits if it can become economically stable is a sale leaseback where the Mortgagor would sell the property to the investor for an amount sufficient to discharge the debt, whether at par or at discount, and then lease the property for a long term period.

2. Pros:

(a) Retains Mortgagor/Operator. The belief is they have a better chance to restabilize property after receiving cash flow relief and allocating to the B Note the burdens of DSC, LTV, default rate interest, late charges, and enforcement costs.

(b) Postpones Liquidation Risk. Makes covenants more liberal, it cushions against default during a down market.

(c) Incentives for Mortgagor. In order to reach its equity, the equivalent of a return, the Mortgagor must exceed B Note performance requirements.

3. Cons:

(a) Failed Management. Remains in place and may lack skills to improve.

(b) Mortgagee Liability. Exposes potential liability for heightened mortgagee fiduciary duty under the B Note structure which grants Mortgagor more flexibility but mortgagee more discretion. Mortgagee may be considered at risk either to have too much control, or to have an interest too much like equity, to protect the mortgagee.

(c) Recharacterization Risk. Like lender liability, the debt could be recharacterized as equity if the mortgagee/investor participates too much in profit and loss, or could be equitably subordinated in a bankruptcy to all other debt. Then, the investor would fall prey to several attacks. The investor could be jointly and severally liable to Mortgagor's creditors either as a deemed co-owner of the Property or as a co-owner of Mortgagor.⁹⁷ The investor could be a partner liable for the pre-existing malfeasance or misfeasance of the partnership.⁹⁸ In a bankruptcy of the Mortgagor, the investor could be equitably subordinated. The investor could lose the right to foreclose. The investor may be deemed to have taken action that was ultra vires of its authority. The relationship between partners imposes a fiduciary duty that does not exist between a Mortgagor and a lender.⁹⁹ Just as the mortgage would disappear when the interest is deemed to be equity not debt, the lender's title policy would likely disappear because the insured instrument does not exist as a mortgage. The test for recharacterization is (1) intent to be an owner based on circumstances, (2) sharing in profits, (3) sharing in losses, which becomes more problematic in a non-recourse loan because the named Mortgagor and lender would have equivalent exposure to loss, with the lender having greater exposure due to its greater investment, and (4) control. There were designed structures known as equity participation agreements between lenders and mortgagors which embedded the problem of buying out the lender. If the investor is a regulated institution, some state or federal regulations may apply to the use of the SAM.

(d) Intervening Creditor Impairment. The priority of lien attributable to participation in appreciation may be deemed to be subordinated to subsequent lien holders to avoid claims that they were subject to unquantified increases in senior debt which were therefore unenforceable. Limiting or capping participation in appreciation by stating a maximum amount may be avoid some of those arguments from future creditors.

(e) Usury. Where the fees, participation in profits and appreciation, and the higher interest rate aggregate an amount that exceeds the rate that would be deemed usurious, the investor may find the restructured agreement unenforceable. Generally intent is irrelevant in determining liability and a savings clause is frequently ineffective. There is, however, a common law principle that exempts a loan from usury if the risk of receiving the contingent interest which would otherwise be usurious is not probable, and if the base interest were materially below the market rate. If it were probable then it would be usurious.¹⁰⁰

⁹⁷ Minute Maid Corp. v. United Foods, Inc., 291 F.2d 577 (5th Cir. 1961).

⁹⁸ Conner v. Great Western Savings & Loan, 69 Cal. 2d 850 (1968)

⁹⁹ Tokarz v. Frontier Federal Savings & Loan Association, 33 Wash. App. 456 (1983); Skone v. Quanco Farms, 26l Cal. App. 2d 237 (1968)

¹⁰⁰ RESTATEMENT OF CONTRACTS S. 527

(f) Clogging the Equity. There are usually statutory rights to redemption of the debt that survive a foreclosure and which are waivable,¹⁰¹ and the common law right of redemption of the debt that expires upon foreclosure and is generally not waivable. If a mortgagee has a right to convert its debt into equity, there may be an argument that it clogs the equity of redemption, which prohibits a mortgagee from denying a mortgagor the right to redeem the debt prior to entry of a foreclosure decree. Similarly, in a contingent interest mortgage, once the base rate debt has been paid the investor may have the enforceability of the contingent interest challenged as a clog because the mortgagor is prevented from redeeming the property. The medieval principles behind the rule were to allow the mortgagor to redeem the debt even after it matured until ownership irrevocably passed to the mortgagee at which time the mortgagor was thereafter foreclosed from exercising its equitable right of redemption. The purpose was to prohibit the mortgagee from taking collateral advantage of the mortgagor, and to protect the mortgagor after the redemption by requiring that the property must remain unfettered.¹⁰² In modern times, the principles have been identified by commentators as five: (1) unconscionability, which is a broad tent to hold any number of fairness doctrines that have gone in and out of vogue when matched up against the principles of freedom of contract; (2) usury, though unlike the application of usury separately where intent is irrelevant, courts would look to the intent of the parties to see if usury were implicated in the context of clogging the equity; (3) evasion of foreclosure procedures, the courts generally find it anathema if the mortgagee is given a right to property concurrently with the original loan, but not if after the loan is made there is a transfer of the redemption right for separate consideration (4) forfeiture or penalty, and (5) lack of independent consideration. The tests in turn include whether (1) the mortgagee's right is related to the loan, (2) if the price is related to the loan rather than the fair market value of the interest, and (3) the mortgagor's prevention of the right does not affect the loan. The principle is commonly applied to mortgagees holding purchase options in addition to their mortgages. A companion rule, the "subsequent release rule", provides that a subsequent release of the equity of redemption after the grant of a mortgage shall be void if due to fraud, oppression or inadequate consideration.¹⁰³

(g) Prepayment. A prepayment could frustrate an investor's projected upside, and protections such as a freeze on prepayment or an acceleration of a minimum due on the contingent interest may be used. Another alternative is to project a hypothetical appreciation schedule to establish an acceleration and present value framework upon an early prepayment.

(h) Bankruptcy. The bankruptcy of the seller may promote claims that the consideration received by the seller was inadequate and therefore the transfer should be set aside as a fraudulent transfer. The bankruptcy of the seller may also allow it to reject and post closing executory contracts, such as cooperation agreements, indemnities, or repurchase agreements. The bankruptcy of the mortgagor would result in typical creditor risks of document deficiencies, cram down of the secured position, fraudulent transfer, preference, and lender liability claims.

¹⁰¹ 5 Am Jur 2nd Mortgages § 865

¹⁰² 706 F. Supp. 1364 (N.D.Ill. 1989)

¹⁰³ Carter Oil Co. v. Durbin, 34 N.E.2d 407 (Ill. 1941) (recognizing the duty of a mortgagor's conveyance of the equity of redemption to a mortgagee, subsequent to execution of the mortgage). Russo v. Wolbers, 323 N.W.2d 385 (Mich. Ct. App. 1982) (Purchaser in a land contract entered into a novation contract to avoid foreclosure. The novation contract included a waiver of the post foreclosure statutory redemption period. Since independent consideration was given, and the waiver was not part of the original contract, the clogging doctrine was not applicable)

(i) Federal Tax Risk. Ordinarily, interest paid on a loan is deductible by the mortgagor and recognized as ordinary income to the mortgagee. A tax-exempt lender, such as a pension fund, would be anxious to preserve the characterization of the transaction as a loan to avoid problems arising from unrelated trade or business income. In addition, the mortgagor retains all of the rights to depreciation. If a participating or shared appreciation mortgage is recharacterized as equity, the IRS may treat the initial advance as a loan, and subsequent participations in cash as equity.¹⁰⁴ This risk may be further heightened when the right to contingent interest survives the payment of the original principal amount.¹⁰⁵

(j) Suppressed Appreciation. The mortgagor may by neglect or intent deprive the investor of expected appreciation.

(k) Unconscionability. As a general rule, all contracts are governed by a rule of reason which will void unconscionable contracts.¹⁰⁶

10.5. Buy Equity.

10.5.1. All interests.

1. Procedure:

(a) Negotiation. Negotiate purchase and sale agreement, standstill and consent with mortgagee, assignment and assumption documents, releases and indemnities, amendments to entity.

(b) Timing requirements. None, except mortgagee regulatory issues.

(c) Costs. Professional fees, possible realty transfer tax, possible title insurance (non-imputation).

2. Pros:

(a) Information. The selling owners should be able to get better information from the principals of the owner than from the mortgagee.

(b) Property Transfer Tax. An equity acquisition may be more susceptible to minimizing realty transfer and real estate taxes than an asset transfer or loan transfer or purchase at foreclosure.

(c) No Other Partners. The investor can avoid teaming with the current partners which means that the decisions and funding obligations are under the investor's sole control.

¹⁰⁴ See *Farley Realty Corp. v. Commissioner*, 279 F.2d 701 (2d Cir. 1960) (Internal Revenue Service allows interest deductions for fixed-rate interest payments but disallows deductions for payments of contingent interest obligation).

¹⁰⁵ *Leahy v. Commissioner*, 87 T.C. 56 (1986)

¹⁰⁶ *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942) as authority for invalidating contractual provisions On grounds of unconscionability).

(d) Third Party Contracts. Third party contracts are preserved, except for those which expressly prohibit change of control (they could either be void or could cause the transaction to be void), and other special situations such as some permits and approvals and some insurance prohibitions. Title insurance, liability insurance may need to be revised or specially endorsed.

(e) Governmental Approvals. Land use and similar approvals may remain in place with the named applicant and permittee.

(f) Claims. Third party obligations are preserved.

(g) Title. In personam actions against mortgagor directly affect new owners, such as tort, breach of contract and indemnitees.

3. Cons:

(a) Pre-existing Liability. The acquisition preserves the prior Entity and its obligations, so that the investment of the investor is subordinated to the claims and encumbrances of third parties for pre-existing conditions and acts.

(b) Imputed knowledge. The investor is not excused from liability for the Company's pre-existing unknown liabilities. The investor is subject to the principle of imputed knowledge of the mortgagor relating back to its inception and through the initial asset purchase.

(c) Control. Notwithstanding change of control and lack of continuing participation in the ownership of seller, ex-principals may remain liable on guaranties after assignment of their interests even though they have no surviving control, unless they are expressly released.

(d) Change of Control. Contracts such as service contracts, lease contracts, and loans frequently contain restrictions against sale of equity. Because they may be breached unless their consent is obtained, it is misguided to hope that a transfer of equity avoids addressing equivalent issues to a transfer of that asset.

(e) Title Insurance. One of the contracts that may be affected by a change of control has been title insurance which at one point required a special endorsement to cover a partnership after a change of its constituent partners. Similarly, there are conflicts whether a judgment creditor can attach partnership interests in the state of organization of the entity or the state of domicile of the partner.¹⁰⁷

10.5.2. Purchase of Some Equity Interests.

¹⁰⁷ [An out-of-state judgment debtor's ownership or membership interests in business entities formed under state laws outside the state are still considered "property" subject to pre-judgment attachment in this state, even when the interests in question are not evidenced by a certificate or other written instrument. Citing a U.S. Supreme Court decision (Harris v. Balk), the New York high court said the situs of intangible property "clings to and accompanies the debtor wherever he goes" for the purpose of attachment.."] Hotel 71 Mezz Mortgage LLC v. Falor, 2010 WL 519821 (N.Y. 2010).

1. Procedure:

(a) Negotiation. As in the purchase of all equity interests, this would require the negotiation of assignments of interest, amendments of organization documents, consent of mortgagees and similar third party contractors, and assumption of partner liabilities such as contribution for guaranties, grants of powers of attorney, indemnifications by partners, and the like. Partial

(b) Timing requirements. None.

(c) Costs. Professional fees, possible realty transfer tax.

(d) General Issues. . Purchases of partial interests may create risks: (1) at acquisition other purchasers may have rights of first refusal to take over the purchase investor was attempting to complete, or rights to tag-along and force investor to acquire all of their interests as well as the sellers ; (2) during operations the impositions of “preferred interest” or “promote” may need amendment; (3) Control of capital call requirements and affects may need to be amended: elections as capital or debt; rights of dilution and catch up; accrual of default; interest as compounding or not-compounding; (4) Veto rights over material control issues may need to be changed; and (5) Guarantor defenses may weaken volume based on impairment, breach of fiduciary duty.

2. Buy Manager / General Partner Equity.

(a) Pros:

(i) Assume control. The operator day-to-day control is an important component of straightening out a troubled asset. Taking the operating control may include the accessory benefits of terminating contracts with the affiliates of the operating partner. The indirect benefit is that the investor of the operating partner interest may install its own vendors and consultants.

(ii) Subrogate to the Promote. The investor may step into all or some of the operator’s promote, notwithstanding that the operator’s “investment” is discounted to zero. One reason the operator will frequently create a very small percentage for the general partner or the manager, and a large percentage for the limited partner or non-managing member, is to allow the operator to assign all of the control rights without giving up significant economic interests. That in turn allows the economic interests to be split so that the operator can give up all control but retain some economic interest.

(b) Cons:

(i) Loss of Control. For the manager/general partner default triggers loss of control and dilution of percentage interest.

(ii) Successor Liability. Successor liability to prior acts and pre-existing conditions. For the investor, the interest may have pre-existing liabilities, whether unpaid prior capital calls, breach of fiduciary duties or other contract or tort liabilities.

3. Buy Investor Non-Manager/General Partner Equity.

(a) Pros:

(i) Acquire “Preferred Return” and Veto Rights. The investor steps in the shoes of the seller. The non-managing partner usually has both a preferred return and a veto right for major issues. The investor may also have rights to dilute the other partners.

(ii) Discount of Purchase Price Increases IRR. The investor will negotiate a discount for the interest if the value of the property is less than the debt. In addition, to the extent there are obligations for future capital calls, the investor may instead take an assignment of the interest with a right to become a substitute partner if formulas are met, such as loan to value.

(b) Cons:

(i) Perpetuate Bad Management. The investor faces the risk when the project is floundering it frequently means the operator is mismanaging the project. In that case even if the investor succeeds to very strong veto powers, the mismanagement by the operator may not be easy to prevent or overcome.

(ii) Risk for Future Capital Calls. There are several unique characteristic duties possessed by the investor partner. One is the simple issue of traditional partner liabilities: fiduciary duty to each other, non-complete, no usurpation of a business opportunity. On top of standard intra-partner duties is the investor's special duties in the form of capital contribution. The investor's rights, by contrast, are usually a right of major event veto, take over advancing party where another partner fails to advance as required.

10.6. Buy Mezzanine Debt

10.6.1. Procedure:

1. Negotiation. Negotiate for assignment of loan documents, assign UCC-1, possession of certificated interests under UCC Article 8; “opt-in” treatment from Article 9 to Article 8.

2. Timing requirements. None.

3. Costs. Professional fees, possible intangibles tax, UCC insurance, negotiation of intercreditor.

10.6.2. Pros:

1. Control. The Investor adds debt in return for a security interest in mortgagor, rather than over the mortgaged land. This buffers against risk of land ownership, such as environmental risk. Obtain control over acquiring equity.

2. Leverage. The Investor indirectly controls the project without liability for mortgage debt.

10.6.3. Cons:

1. Subordinate. All creditors of the mortgagor are senior to the security interest in the equity.

2. UCC Foreclosure Risk. Time, expense, and risk of UCC foreclosure or implementing charging order.

3. Intercreditor. Negotiate of restrictions on rights to declare default exercise remedies for subordinate loan default; rights to cash flows during Senior default; rights to exercise remedies during Senior default; rights during bankruptcy of mortgagor; standstill on first mortgage except for material adverse effects.

10.7. Master Lease with Option to Purchase

10.7.1. Procedure:

1. Negotiation. Negotiate concurrent or sandwich master lease, space tenant estoppels, recording memo of lease, consent and SNDA of first mortgagee.

2. Timing requirements. None.

3. Costs. Professional fees, possible realty transfer tax, mortgagee's expenses, possibly anchor tenant expenses.

10.7.2. Pros:

1. Control Property. As tenant, the Investor has direct control of the mortgaged property, subject to the mortgagor's right of reversion as landlord.

2. Cash Flow. The tenant has the right to rents and profits from the space tenants.

3. Possession Survives Bankruptcy. The tenant has the rights of possession which survive mortgagor's bankruptcy.

4. Firewall Ownership Liabilities. The tenant's duties generally do not include pre-existing liabilities of the mortgagor.

5. Option Survives Bankruptcy. Arguably a purchase option by party in possession survives bankruptcy of mortgagor/landlord, but a master lease by its nature may be recharacterized as a guaranty contract, not a lease, and rejectable in mortgagor's bankruptcy.

10.7.3. Cons:

1. Encumbrances on Fee. Because the master lease is subject to pre-existing liens and encumbrances of mortgagor, it can be divested without non-disturber from superior creditors, and is subject to performance requirements and restrictions for mortgagor's realty covenants and easements.

2. Liabilities of Mortgagor/Landlord. The master tenant may also become liable to mortgagor and its mortgagee for ownership risks during the tenant's tenure such as waste, contamination, defense against interloper's claims.

3. Recharacterization. A master lease may be deemed ownership, not a lease, for GAAP, reporting requirements, tax recognition (including transfer tax), and state law..

4. Tenant Approvals. The intervention of a master lease may require pre-existing space tenant consent and attornment which does not automatically arise as in a deed transfer. Space tenants may condition consent upon recognition agreements from landlords if the master lease is terminated..

5. Collateral Assignment. The intervention of a master lease may need to be collaterally assigned to mortgagee, and the master tenant may need a non-disturbance agreement from the mortgagee.

10.8. Manager with Option to Purchase

10.8.1. Procedure:

1. Negotiation. Negotiate management agreement and option.
2. Timing requirements. None.
3. Costs. Professional fees.

10.8.2. Pros:

1. Firewall Ownership Liabilities. The manager lacks priority for liability for ownership and occupancy duties during its tenure.
2. No Liability for Mortgagor. The manager controls the real estate without successor liability for pre-existing conditions or future mortgagor misfeasance.

10.8.3. Cons:

1. Recharacterization. The management risk may be recharacterized as ownership, depending on the indicia of ownership granted to the investor.
2. Agency Duty. The manager may assume "alter ego" liability and fiduciary duty to mortgagor as its agent.
3. Remedy. The management agreement is a contract without real estate rights, and termination manager's remedy is damages, not specific performance for reinstatement.

4. Bankruptcy. The management agreement is a contract without real estate rights, and upon bankruptcy of the mortgagor the management agreement and purchase option can be rejected as executory contracts.

COMPARISON - ACQUISITION

	MORTGAGE FORECLOSURE	ASSET PURCHASE	DEBT PURCHASE	MEZZANINE FORECLOSURE	EQUITY PURCHASE
TRANSFER RISK					
1)	Defective collateral: physical, title, survey, land use	Defective collateral: physical, title, survey, land use	Defective collateral: physical, title, survey, land use Defective loan and organizational documents	Defective collateral: , title, survey, land use Defective loan and organizational documents	Defective collateral: physical, title, survey, land use Defective organizational documents
2)	Public auction dilutes control	Can be coupled with exclusivity	Can be coupled with exclusivity	Public auction dilutes control	Can be coupled with exclusivity
3)	Transfer authority irrelevant	No transfer authority: Deadlock; General Partner / Member Bankruptcy	No transfer authority: Deadlock; General Partner / Member Bankruptcy	No transfer authority: Deadlock; General Partner / Member Bankruptcy	No transfer authority: Deadlock; General Partner / Member Bankruptcy
4)	Defective Sale such as: Notice; overlooked party in interest not subject; priming party discovered after deposit may forfeit; after title insurance – may be a claim	Transferor failure to close	Transferor failure to close	Defective Sale such as: Notice; overlooked party in interest not subject; priming party discovered after deposit may forfeit; after title insurance – may be a claim	Transferor failure to close
POST-TRANSFER RISK					
1)	Collateral incomplete for operations	Collateral incomplete for operations	Collateral incomplete for operations either of loan level or ground level	Collateral incomplete for operations either of loan level or ground level	Collateral incomplete for operations
2)	No transfer of permits, (zoning, building, highway, healthcare, liquor, hotel)	Can transfer permits	May be missing permits, or assignment is ineffective	Change of control may affect transfer of permits, (zoning, building, highway, healthcare, liquor, hotel)	Change of control may affect transfer of permits, (zoning, building, highway, healthcare, liquor, hotel)
3)	No transfer of personalty	Transfer title and possession of personalty	Possession of personalty may be impaired	Possession of personalty may be impaired	Possession of personalty may be impaired
4)	Ejecting mortgagor	N/A	N/A	N/A	N/A
5)	Transition of operations interrupted	Negotiated smoother transition	N/A	Transition of operations interrupted	Negotiated smoother transition
6)			Lender liability claims may transfer		Fiduciary liability claims may transfer

COMPARISON - ACQUISITION

	MORTGAGE FORECLOSURE	ASSET PURCHASE	DEBT PURCHASE	MEZZANINE FORECLOSURE	EQUITY PURCHASE
ASSIGNEE LIABILITY FOR PRE-EXISTING CONDITIONS					
1)	Subject to prior and priming liens and encumbrances including superior "secret" liens: bulk sales tax; perishable agricultural commodities; IRS lien.	Subject to all encumbrances	Subject to prior and priming encumbrances	Subject to all encumbrances	Subject to all encumbrances
2)	Subject to liabilities that run with the land, BUT NOT by ground owner contract or tort: environmental conditions, bulk taxes, transfer taxes, SNDA	Subject to liabilities that run with the land, BUT NOT by ground owner contract or tort: environmental conditions, bulk taxes, transfer taxes, SNDA	No liability for ground owner realty covenants; standard mortgagee liability for control; environmental; equitable subordination	Subject to liabilities that run with the land, AND by ground owner contract or tort: environmental conditions, bulk taxes, transfer taxes, SNDA	Subject to liabilities that run with the land, AND by ground owner contract or tort: environmental conditions, bulk taxes, transfer taxes, SNDA
3)	Real property torts: support; run-off, waste	Real property torts and supports run-off, waste			
4)	No liability for ground owner partnership or partner liabilities	No liability for ground owner partnership or partner liabilities	No liability for ground owner partnership or partner liabilities	Liability for ground owner partnership liabilities, no partner liabilities	Liability for ground owner partnership AND assumed partner liabilities
5)				Ownership liability for liens against partnership interests under charging orders or UCC liens or judgment creditors	Ownership liability for liens against partnership interests under charging orders or UCC liens or judgment creditors
6)				partnership violations of securities laws in aiding and abetting	partnership violations of securities laws in aiding and abetting

COMPARISON - ACQUISITION

	MORTGAGE FORECLOSURE	ASSET PURCHASE	DEBT PURCHASE	MEZZANINE FORECLOSURE	EQUITY PURCHASE
PROPERTY					
1)	Real estate no personalty	Real estate and accessory rights	Loan Level: :Loan Documents/ Guaranty Ground Level: Mortgaged Premises	Equity Level: Partnership interests Ground Level: Mortgaged Premises	Equity Level: Partnership interests Ground Level: Mortgaged Premises
2)	Alienable: subdivided	Alienable: subdivided	Enforceable contracts	Enforceable contracts: Mezzanine Security Interests – Art 8 or 9	Enforceable contracts: Mezzanine Security Interests – Art 8 or 9
3)	Due-on transfer, rights of first refusal; usually unenforceable	Due-on transfer, rights of first refusal - enforceable	Due-on transfer, rights of first refusal - uncommon	Due-on transfer, rights of first refusal; also buy-sell, drag along, tag along	Due-on transfer, rights of first refusal; also buy-sell, drag along, tag along
4)	Compliant with foreclosure requirements	compliant with conveyance requirements	Enforceable assignments of contracts	Compliant with foreclosure requirements: commercially reasonable for Secured Party to credit bid; complaint with organization document	Enforceable assignment; compliant with organization document
SELLER					
1)	Sheriff	Mortgagor	Mortgagee	Pledgee	Partners
2)	Insolvency	Insolvency	Insolvency	Insolvency	Insolvency
3)	Transferor split control and ownership: Transferor TIC, BK, Insolvent Estate	Transferor split control and ownership: Transferor TIC, BK, Insolvent Estate	Transferor split control and ownership: Transferor TIC, BK, Insolvent Estate	Transferor split control and ownership: Transferor TIC, BK, Insolvent Estate	Transferor split control and ownership: Transferor TIC, BK, Insolvent Estate
4)	Undisclosed encumbrances	Undisclosed encumbrances	Undisclosed encumbrances	Undisclosed encumbrances	Undisclosed encumbrances
5)	Consideration not an issue	Consideration	Consideration	Consideration not an issue	Consideration

COMPARISON - ACQUISITION

	MORTGAGE FORECLOSURE	ASSET PURCHASE	DEBT PURCHASE	MEZZANINE FORECLOSURE	EQUITY PURCHASE
TRANSFeree					
	Successful bidder, or registered second bidder if highest bidder fails to close	Grantee of real estate	Assignee of loan documents	Successful bidder, or registered second bidder if highest bidder fails to close	Assignee of Partnership Interests
TITLE INSURANCE					
1)	Owner's Title Insurance of Good Title to Land	Owner's Title Insurance of Good Title to Land	Mortgagee's Title Insurance	UCC Insurance/Owner's title Insurance	UCC Insurance/Owner's title Insurance
2)	Owner's Policy	Owner's Policy	Automatic assignee of Mortgagee's title policy	Insures Assignment of Partnership Interests	Insures Assignment of Partnership Interests
3)		Title Affidavit	Separate insurance for sufficiency of assignment	UCC Covenant of Good Title to Personalty	UCC Covenant of Good Title to Personalty
4)				Non-imputation Endorsement to Owner Policy	Non-imputation Endorsement to Owner Policy
PA RRT					
	Higher of computed value or bid	Tax on consideration	Philadelphia tax unless purchase money grantor No PA Tax to mortgagee as credit bidder	Tax on computed value if 90% or more is transferred or subject to transfer in any 3 year period No tax in NJ or OK	Tax on computed value if 90% or more is transferred or subject to transfer in any 3 year period No tax in NJ or OK

COMPARISON - ACQUISITION

	MORTGAGE FORECLOSURE	ASSET PURCHASE	DEBT PURCHASE	MEZZANINE FORECLOSURE	EQUITY PURCHASE
REPRESENTATIONS					
1)	None	Only as good as collectability	Only as good as collectability	None	Only as good as collectability
2)		Limited – Good Title and no known but undisclosed liabilities	Limited – As to transferor's loan documents; good title, no prior transfer and no encumbrance - As to mortgagor: default; notices of violations; notices of conflicts; notices of litigation		Limited - Good title and no known but undisclosed liabilities
3)		As is waiver	As is waiver		As is waiver

COMPARISON - FINANCE

	MORTGAGE FORECLOSURE	ASSET PURCHASE	DEBT PURCHASE	MEZZANINE FORECLOSURE	EQUITY PURCHASE
COLLATERAL					
	Mortgaged real estate	Mortgaged real estate and personal property	Liens and loan documents	Partnership interests	Partnership interests and approvals
TITLE INSURANCE					
	Land	Land	Lien	Partnership Interests	Partnership interests and approvals

EXHIBIT 1

Power of Attorney.

1. Borrower shall immediately take, or cause to be taken, steps to market, advertise and publicize, the sale of the Mortgage Property ("Mortgaged Property Sale"), including, without limitation, entering into a listing agreement for the sale of Mortgage Property with a listing agent or broker acceptable to Lender ("Broker"), provided that such listing agreement shall terminate no later than such time and date that Lender directs. Borrower shall cause Broker to inform Lender of the names of all potential purchasers of Mortgage Property, names of parties responding with interest, the terms of any proposed Mortgaged Property Sale, and any other information requested by Lender with respect to the Mortgaged Property Sale. Such Mortgaged Property Sale shall meet the following conditions: (1) the agreement shall be for a sale price satisfactory to Lender; (2) closing to occur on or before such time and date that Lender directs; (3) any deposit or escrow funds to be held by Lender, and if forfeited by the prospective buyer to be directly to Lender on account of accrued and unpaid interest of the Indebtedness, then its principal, and (4) satisfaction of the Borrower Loans to be on or before closing thereunder.

2. Contemporaneously with Borrower's effort to sell Mortgage Property, Borrower hereby authorizes Lender, and Lender shall have the right, to either procure a buyer and sell or conduct an auction for the Mortgaged Property Sale. Borrower will, at any time hereafter upon the request of Lender, execute and deliver such documents as may be necessary, in Lender's sole discretion, to effectuate such Mortgaged Property Sale, and to grant such rights to Lender. Consistent with this paragraph, Borrower shall execute and deliver to Lender together with this agreement a Special Power of Attorney in the form attached hereto as Exhibit "[2]" and such other powers of attorney, deeds in lieu of foreclosure, certificates and other documents necessary, in Lender's sole discretion, to permit Lender to sell, whether by auction or otherwise, all of Borrower's assets, including without limitation Mortgage Property.

3. Borrower hereby acknowledges the Lender's rights under Section 1 and 2 do not (1) cause Lender to obtain any control, dominion or management over the business conducted by Borrower, nor its owners and officers; or (2) create any fiduciary duty of Lender to Borrower.

4. Additional definitions for purposes of this Agreement:

a. "Lender Parties" means Lender and all of its shareholders, partners, employees, executives, principals, officers, directors, joint venturers, subsidiaries, parents, affiliates, agents, representatives, brokers, attorneys, insurers, reinsurers, and any individual or entity entitled to contribution, indemnification, exoneration or reimbursement from any of the foregoing, and their respective heirs, executors, administrators, assigns, predecessors and successors, jointly and severally.

b. "Claims" means all, and all manner of, actions and causes of action, suits, debts, damages, costs, expenses, obligations, offsets, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims, counterclaims, demands, allegations or rights, individual or derivative whatsoever in law or equity, including, without limitation, claims of fraud, duress, mistake, tortious interference whether based on events or actions occurring prior to or on the date hereof or based on

EXHIBIT 1

Page 1

events or actions occurring after the date hereof, to the extent provided for, consistent with, or appropriate to realize the purpose of this Agreement, including, without limiting the generality of the foregoing, any and all suits, claims, demands, debts, liabilities, obligations, promises or controversies which any claimant ("Claimant") ever had, now has or may hereafter have, including, but not limited to, Unknown Claims, and any of the facts, circumstances, representations, statements, communications, transactions, promises, breach of contract, fraud, violation of statute or law, commission of tort, reports, disclosures, transactions, events, occurrences, acts, omissions, or failures to act, of whatever kind or character whatsoever, irrespective of the state of mind of the actor performing or omitting to perform the same, that are or at any time could have been alleged, referred to, alluded to or reflected in an action, either as an individual, class or derivative claim, as well as all allegations in any action against the Lender Parties as well as all actions, appearances, consents, discovery, testimony or interventions by Lender Parties, together with such other actions or events as the parties hereto may agree are appropriate, relating to the Mortgaged Property Sale.

c. "Unknown Claims" means those respecting the Lender Parties, known or unknown, suspected or unsuspected, contingent or non-contingent, liquidated or non-liquidated, direct or indirect, whether or not concealed or hidden, which now exist, may hereafter exist, or heretofore have existed, and without regard to the subsequent discovery or existence of such different or additional facts.

d. "Costs" shall include all reasonable attorneys' fees, retainers, court costs, transcript costs, fees of experts, witness fees, travel expenses, duplicating costs, printing and binding costs, telephone charges, postage, delivery service fees and all other disbursements or expenses of the types customarily incurred in connection with prosecuting, defending, preparing to prosecute or defend, investigating, participating, or being or preparing to be a witness in a proceeding, or responding to, or objecting to, a request to provide discovery in any proceeding. Costs also shall include Costs incurred in connection with any appeal resulting from any Proceeding and any federal, state, local or foreign taxes imposed on the Indemnatee as a result of the actual or deemed receipt of any payments under this Agreement, including without limitation the premium, security for, and other costs relating to any cost bond, supersede as bond, or other appeal bond or its equivalent.

5. "Waiver and Release" Borrower hereby waives and releases any Claims and assumes liability for, hereby guarantees payment to Lender of, hereby agrees to pay, protect, defend and save Lender Parties harmless from and against, and hereby indemnifies Lender Parties from and against any and all Claims and all Costs incurred by Lender Parties by reason of any Claims.

EXHIBIT 1

Page 2

SPECIAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that we, [_____] , a [_____] , do hereby irrevocably appoint, authorize and empower [_____] , a [_____] corporation, our true and lawful attorney for us and on our behalf and in our name to (i) execute any and all agreements, documents, instruments, certificates, affidavits and deed necessary to auction or otherwise sell certain of our real property located in [_____] , as more particularly described in Exhibits "A-1" and "A-2" attached hereto and made a part hereof (the "Property"), and (ii) take any and all other actions as may be necessary to auction or otherwise sell the Property.

Our attorney may delegate the foregoing powers to any person or entity whom our attorney may select.

This appointment is made for security for our obligations under that certain letter agreement dated this date between us and [_____] , is coupled with an interest and is, therefore, irrevocable.

We hereby ratify and confirm all that our attorney shall do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, and intending to be legally bound, we have hereunto set our hand and seal this ____ day of _____, 20__.

[_____]

By: _____
Name:
Title:

Attest: _____

Name:
Title:

Acknowledgment

EXHIBIT 1
Page 3

EXHIBIT 2.7

Federal Secured Creditor Exemption

(20)

(A) The term “owner or operator” means

(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel,

(ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and

(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607 (a)(3) or (4) of this title,

(i) the term “owner or operator” shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation,

(ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607 (a)(3) or (4) of this title,

(i) the term “owner or operator” shall not include such common or contract carrier, and

(ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term “owner or operator” does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

(E) Exclusion of lenders not participants in management.—

(i) Indicia of ownership to protect security.— The term “owner or operator” does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

EXHIBIT 2.7

Page 1

(ii) Foreclosure.— The term “owner or operator” does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 9607 (d)(1) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition, if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(F) Participation in management.— For purposes of subparagraph (E)—

(i) the term “participate in management”—

(I) means actually participating in the management or operational affairs of a vessel or facility; and

(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person—

(I) exercises decision-making control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility—

(aa) for the overall management of the vessel or facility encompassing day-to-day decision-making with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

(iii) the term “participate in management” does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

(iv) the term “participate in management” does not include—

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

EXHIBIT 2.7

Page 2

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(IX) conducting a response action under section 9607 (d) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

(G) Other terms.— As used in this chapter:

(i) Extension of credit.— The term “extension of credit” includes a lease finance transaction—

(I) in which the lessor does not initially select the leased vessel or facility and does not during the lease term control the daily operations or maintenance of the vessel or facility; or

(II) that conforms with regulations issued by the appropriate Federal banking agency or the appropriate State bank supervisor (as those terms are defined in section 1813 of title 12 [2] or with regulations issued by the National Credit Union Administration Board, as appropriate.

(ii) Financial or administrative function.— The term “financial or administrative function” includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(iii) Foreclosure; foreclose.— The terms “foreclosure” and “foreclose” mean, respectively, acquiring, and to acquire, a vessel or facility through—

(I)

(aa) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

(bb) a deed in lieu of foreclosure, or similar conveyance from a trustee; or

(cc) repossession,

if the vessel or facility was security for an extension of credit previously contracted;

(II) conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

(III) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a vessel or facility in order to protect the security interest of the person.

(iv) Lender.— The term “lender” means—

(I) an insured depository institution (as defined in section 1813 of title 12);

(II) an insured credit union (as defined in section 1752 of title 12);

(III) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.);

EXHIBIT 2.7

Page 3

(IV) a leasing or trust company that is an affiliate of an insured depository institution;

(V) any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

(VI) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(VII) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

(VIII) a person that provides title insurance and that acquires a vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

(v) Operational function.— The term “operational function” includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(vi) Security interest.— The term “security interest” includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

35 PS § 6027.5. Limitation of lender environmental liability

(a) Scope of lender liability.--A lender who engages in activities involved in the routine practices of commercial lending, including, but not limited to, the providing of financial services, holding of security interests, workout practices, foreclosure or the recovery of funds from the sale of property shall not be liable under the environmental acts or common law equivalents to the Department of Environmental Resources or to any other person by virtue of the fact that the lender engages in such commercial lending practice unless:

(1) the lender, its employees or agents directly cause an immediate release or directly exacerbate a release of regulated substances on or from the property; or

(2) the lender, its employees or agents knowingly and willfully compelled the borrower to:

(i) do an action which caused an immediate release of regulated substances; or

(ii) violate an environmental act.

(b) Limitation of lender liability.--Liability pursuant to this act shall be limited to the cost for a response action which may be directly attributable to the lender's activities as specified in subsection (a). Liability shall arise only if the lender's actions were the proximate and efficient cause of the release or violation. Ownership or control of the property after foreclosure shall not by itself trigger liability. No lender shall be liable for any response action if such response action arises solely from a release of regulated substances which occurred prior to or commences before and continues after foreclosure, provided, however, that the lender shall be responsible for that portion of the response action which is directly attributed to the lender's exacerbation of a release. A release of regulated

EXHIBIT 2.7

Page 4

substances discovered in the course of conducting environmental due diligence shall be presumed to be a prior or continuing release on the property.

35 PS § 6027.7. Defenses to liability

A lender, fiduciary or economic development agency can avoid liability under the environmental acts by showing evidence that a release or threatened release of regulated substances for which the lender, fiduciary or economic development agency otherwise is responsible under sections 4, 5 and 6 was caused by any of the following:

- (1) An act of God.
- (2) An intervening act of a public agency.
- (3) Migration from property owned by a third party.
- (4) Actions taken or omitted in the course of rendering care, assistance or advice in accordance with the environmental acts or at the direction of the department.
- (5) An act of a third party who was not an agent or employee of the lender, fiduciary or economic development agency.
- (6) If the alleged liability for a lender or economic development agency arises after foreclosure and the lender or economic development agency exercised due care with respect to the lender's or economic development agency's knowledge about the regulated substances and took reasonable precautions based upon such knowledge against foreseeable actions of third parties and the consequences arising therefrom. A lender, fiduciary or economic development agency can avoid liability by proving any other defense which may be available to it under the environmental acts or common law.

PA Hazardous Sites Cleanup Act

35 PS § 6020.701(b) Exceptions.—

(1) An owner of real property is not responsible for the release or threatened release of a hazardous substance from a site in or on the property when the owner demonstrates to the department that all of the following are true:

- (i) The real property on which the site concerned is located was acquired by the owner after the disposal or placement of a hazardous substance on, in or at the site.
- (ii) The owner has exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances.
- (iii) The owner took precautions against foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts or omissions.
- (iv) The owner obtained actual knowledge of the release or threatened release of a hazardous substance at the site when the owner owned the real property, and the owner did not subsequently transfer ownership of the property to another person without disclosing such knowledge.
- (v) The owner has not, by act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the response action relating to the site.
- (vi) The owner meets one of these requirements:

EXHIBIT 2.7

Page 5

(A) At the time the owner acquired the site, the owner did not know, and had no reason to know, that a hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the site. For purposes of this subparagraph, the owner must have undertaken, at the time of acquisition, all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. The department shall take into account specialized knowledge or experience on the part of the owner, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate inspection.

(B) The owner is a government entity which acquired the site by escheat, through any other involuntary transfer or acquisition or through the exercise of eminent domain authority by purchase or condemnation.

(C) The owner acquired the site by inheritance or bequest.

(D) The owner is a financial institution or an affiliate of a financial institution or a corporate instrumentality of the Federal Government which acquired the site by foreclosure or by acceptance of a deed in lieu of foreclosure.

(vii) The only basis of liability for the landowner is ownership of the land.

EXHIBIT 2.7

Page 6

EXHIBIT 4

OFFICE OF PROTHONOTARY
COURT OF COMMON PLEAS
[_____]

{_____, Prothonotary

TO: [_____]

[_____,

Plaintiff,

v.

_____,

Defendant.

[_____] Term [_____]

No.

Civil Action

NOTICE

Pursuant to Rule 236 of the Supreme Court of Pennsylvania, you are hereby notified that a Judgment has been entered against you in the above proceeding as indicated below.

[_____] PROTHONOTARY

_____	Judgment by Default
_____	Money Judgment
_____	Judgment in Replevin
_____	Judgment for Possession
_____	Judgment on Award of Arbitration
_____	Judgment on Verdict
_____	Judgment on Court Findings
<u> X </u>	Judgment by Consent

IF YOU HAVE ANY QUESTIONS CONCERNING THIS NOTICE, PLEASE CALL:
ATTORNEY [_____]. Esquire at this telephone number: (____) _____.

EXHIBIT 4

Page 1

[_____],	[_____]	Term [_____]
v.	Plaintiff,	
[_____],	Defendant.	No.
		Civil Action

[_____] , being duly sworn according to law, deposes and states that he is an attorney at the law firm of [_____] , attorneys for the plaintiff, [_____] , and, as such, is authorized to make this Affidavit on its behalf; and to the best of his knowledge, information and belief, the defendant [_____] is not an individual and therefore not in the military or naval service of the United States or its allies or otherwise within the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and/or its amendments or the Servicemens' Civil Relief Act, and that [_____] 's last-known address is [_____].

Sworn to and subscribed
before me this day
of 20[].

Grabbing the Collateral: Dispossession, Repossession, and
Disposition of Mortgaged Premises – Part III
PHIL 944023-3 07/20/2010 03:21 PM

IN THE COURT OF COMMON PLEAS
OF [] COUNTY

[]	:	[] Term []
	:	
Plaintiff,	:	
v.	:	No.
[]	:	Civil Action
	:	
Defendant.	:	
	:	

PRAECIPE FOR ENTRY OF JUDGMENT AND FOR
ASSESSMENT OF DAMAGES

TO THE PROTHONOTARY:

Pursuant to (i) the Amended (Consenting) Answer and New Matter/Stipulation to Entry of Judgment (attached hereto as Exhibit "A"), and (ii) the Consent to Judgment (attached hereto as Exhibit "B"), filed by the defendant in this matter, kindly enter judgment in favor of [] and against [], in the amount of \$[], plus interest from and after [] at the per diem rate of \$[], and additional legal fees and costs, which may be fixed upon further application to the Court.

[]

BY: _____
[], Esquire
Attorney for Plaintiff

I CERTIFY THAT THE FOREGOING ASSESSMENT OF DAMAGES IS FOR SPECIFIED AMOUNTS AND RELIEF ALLEGED TO BE DUE IN THE COMPLAINT AND/OR AGREED TO BY THE DEFENDANT.

I certify that written notice of the intention to file this praecipe is not necessary because judgment is being entered by consent.

EXHIBIT 4
Page 3

Attorney for Plaintiff
[_____] , Esquire
I.D. NO. [_____]

AND NOW _____, _____, Judgment is entered by Consent,
in favor of the Plaintiff [_____] and against the defendant [_____]
in the amount of \$[_____] , plus interest from and after [_____] , at the per diem rate of \$[_____] , and additional legal fees and costs, which may be fixed upon further application to the Court.

Prothonotary

EXHIBIT 4
Page 4

[_____],	:	
	:	[_____] Term [_____]
v.	:	No.
	:	Civil Action
[_____],	:	
	:	
Defendant.	:	

The defendant hereby consents to the entry of judgment in favor of the plaintiff and against him as follows:

Principal: \$[]

Late Charges (as of []): []

Other Authorized Charges []
(as of [])

Legal Fees and Costs (as of []):

TOTAL \$[]

EXHIBIT 4

IN WITNESS WHEREOF, and intending to be bound legally hereby, the defendant sets his hand and seal hereto, and authorizes his attorney to do so on his behalf.

[DEFENDANT'S LAW FIRM]

By: _____
[_____]
Attorney I.D. Nos.: [_____]
[Address]
[Tel. No.]

Attorneys for the Defendant

_____,
[_____]
DEFENDANT

LIMITED LIABILITY COMPANY ACKNOWLEDGMENT

COMMONWEALTH OF PENNSYLVANIA :
 :
COUNTY OF _____ : SS.

On this _____ day of _____, 20[____], before me, Notary Public, personally appeared [____], who acknowledged himself to be [____] of [____], a [____] corporation, the Sole General Partner of [____], a [____] limited partnership, the Sole Member of [____], a Pennsylvania limited liability company, and that he, as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing his name on behalf of the company as such officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public
[Notarial Seal]
My commission expires:

[_____],	[_____]	Term [_____]
v.	Plaintiff,	
[_____],	Defendant.	No.
		Civil Action

TO THE PROTHONOTARY:

[] [FIRM NAME]

Attorneys for the Plaintiff

Attorneys for the Defendant

IN THE COURT OF COMMON PLEAS
OF [] COUNTY

[]	:	[] Term []
	:	
Plaintiff,	:	
v.	:	No.
	:	
[]	:	Civil Action
	:	
Defendant.	:	
	:	

CONSENT/STIPULATION TO ENTRY OF JUDGMENT

The defendant, [], hereby files this consent/ stipulation to entry of judgment, and in support hereof, avers as follows:

It is admitted that, as of [], the amount due and owing to Beneficial Mutual Savings Bank, equals \$[], comprised as follows:

Principal:	\$[]
Interest (as of []):	[]
Late Charges (as of []):	[]
Other Authorized Charges (as of [])	[]
Legal Fees and Costs (as of []):	[]
TOTAL	<u>\$[]</u>

The defendant further admits that interest at the daily rate of \$[] and additional legal fees and costs continue to accrue in favor of the plaintiff from and after [].

EXHIBIT 4

Page 9

WHEREFORE, [] consents to the entry of judgment in favor of [] and against him, in the amount of \$[], plus interest from and after [], at the per diem rate of \$[], and additional legal fees and costs.

AFFIRMATION OF NO DEFENSES

1. The defendant hereby affirms and states that he has no defenses to the entry of judgment against it.

[DEFENDANT'S LAW FIRM]

By: _____
[], Esquire
Attorney I.D. Nos.: []
[Address]
[Telephone No.]

Attorneys for the Defendant

[],
DEFENDANT

LIMITED LIABILITY COMPANY ACKNOWLEDGMENT

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF _____ :

On this _____ day of _____, 20[____], before me, Notary Public, personally appeared [____], who acknowledged himself to be [____] of [____], a [____] corporation, the Sole General Partner of [____], a [____] limited partnership, the Sole Member of [____], a Pennsylvania limited liability company, and that he, as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing his name on behalf of the company as such officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

[Notarial Seal]
My commission expires:

VERIFICATION

I, [_____] , state that I am the [_____] of [_____] , a
[_____] corporation, the Sole General Partner of [_____] , a
[_____] limited partnership, the Sole Member of [_____] , a
[_____] limited liability company, and verify that I am authorized to make this
Verification on the defendant's behalf. I verify that I have read the foregoing pleading and that the
averments of fact contained therein are true and correct to the best of my knowledge, information
and belief. I acknowledge and understand that the statements made herein are subject to the
penalties of 18 Pa C.S.A. §4904, relating to unsworn falsifications to authorities.

EXHIBIT 5

ORDER OF COURT APPOINTING RECEIVER

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

[_____]

Plaintiff,

v.

Civil Action No [__]

[_____,

Defendant[s].

ORDER OF COURT APPOINTING RECEIVER

AND NOW, this ____ day of _____, 20[__], upon consideration of [

] (“Plaintiff,” or “Lender”) having filed a Motion for entry of an Order Appointing Receiver (the “Motion”), it is hereby ordered as follows:

A. Findings of Fact and Law Relating to Appointment of Receiver.

1. Defendant[s] [_____] (“Defendants”) are indebted to Lender under certain loan documents set forth in the Motion (collectively, the “Loan Documents”).

2. The Defendants are in default under Loan Documents.

3. Service of the Motion was properly made upon Defendants.

4. The appointment of a receiver for Defendants is necessary to preserve their assets and to liquidate the assets in an orderly manner.

B. Appointment of Receiver.

EXHIBIT 5

Page 1

5. Effective as of 12:00 p.m. on _____, _____, 20[____] (the “Effective Date”), [_____] is appointed as Receiver (the “Receiver”) for Defendants’ personal property, business, shares of stock, rights, assets, and effects of whatsoever nature and kind and wheresoever the same may be situated, all its machinery, tools, merchandise, bills and accounts receivable, cash on hand and in banks, and all of its contracts, rights, and all contracts, rights, insurance policies (including without limitation property, liability, errors and omissions, directors and officers liability, crime, theft, and other policies of insurance, hereafter “Claim Policies”), claims, chooses in action, (including without limitation all claims, rights, and coverage available under any applicable insurance policy, indemnity agreement, insured contract, fidelity bond, or similar arrangement to pay, reimburse, or defend any loss, direct loss, damages, punitive damages, defense costs, investigative costs, liability, or similar sums), intangibles, licenses, patents, trademarks and names, copyrights, corporate franchises, and its income and profits, books of accounts, records and other books, papers and accounts, deeds, leases, contracts, muniments of title, and all interests, easements, privileges, rights and assets of every kind (collectively the “Business Assets”) for a period commencing on the date of this Order and ending upon termination of such appointment by further Order of Court, is hereby confirmed. Notwithstanding the foregoing, the Receiver shall have no responsibility to administer any pension, profit sharing, 401(k), health, insurance or other employee benefit plans.

6. Receiver is also appointed the Receiver of Defendants’ real property and fixtures located at [_____] in [_____] ([collectively,]the “Property”). The Receiver shall have all of the usual and statutory powers of a Receiver over the Property, either personally or through its employees, agents, and independent contractors, to:

EXHIBIT 5
Page 2

- a. Enter into and terminate leases;
- b. Collect rents and profits;
- c. Manage and maintain the Property;
- d. Apply the rents and profits to the necessary expenses of operating the Property including without limitation taxes, utilities, insurance premiums, and service contracts on the Property, and leasing commissions in accordance to this Order;
- e. To take possession of the Property and all personalty located thereon, including without limitation, all related books, records, bank accounts, keys, combinations for locks or other access information, equipment and such other personalty as may be found on or off the Property which relates in any manner to the management, ownership or operation of all or any portion of the Property;
- f. To supervise and oversee the operation and management of the Property and to assume all responsibility for letting or re-letting space at the Property. The Receiver or its designee, prior to entering into any new leases with respect to the Property or entering into or authorizing the renewal or expansion of any existing leases, shall deliver to Plaintiff (I) standard forms of leases that the Receiver or his designee will utilize for all leases of retail and commercial office space in the Property and (II) a statement of leasing parameters, in form and detail satisfactory to Plaintiff, with which all leases of space in the Property will comply (collectively with the standard forms of leases, the "Approved Leasing Provisions"). Upon Plaintiff's written approval of the Approved Leasing Provisions, the Receiver or his designee may enter into new leases or lease renewals or expansions without Plaintiff's prior written consent so long as such leasing transactions comply in all respects with the Approved Leasing Provisions; any departure from the Approved Leasing Provisions in any leasing transaction shall require the prior written consent of the Plaintiff;
- g. To direct Defendants and their agents, employees or other representatives immediately to turn over and deliver or cause to be delivered to the Receiver or his designee all personalty which relates in any manner to the ownership management or operation of the Property including, without limitation, all keys, combinations for locks or other access codes, books, records, accounts, rents (whenever received), security deposits (including any prepaid rents, and other deposits, if any, with a list by tenant of the amount of each

EXHIBIT 5

Page 3

security deposit or prepaid rent) leases, operating statements, reserve accounts and the like pertaining to the operation of the Property;

- h. Within forty five (45) days from the date of this Order, the Receiver or his designee shall prepare a preliminary monthly operating budget for the Property and shall submit such preliminary budget for the review and approval of the Plaintiff. Within sixty (60) days from the date of this Order, the Receiver or his designee shall prepare a final monthly operating budget for the Property and shall submit such final budget for Plaintiff's review and approval. The final monthly operating budget, as approved by Plaintiff, shall be updated periodically by the Receiver or his designee to take into account changes in circumstances; provided however, that any updates or other changes to the final monthly operating budget shall be subject to the review and approval of the Plaintiff. Any and all sums collected by the Receiver over and above those necessary to operate the Property, as reflected in the final monthly operating budget, or those necessary to make the payments authorized by this Order, shall be paid to Plaintiff or applied as directed by Plaintiff during the pendency, or at the termination of, the receivership authorized hereby;
- i. To take such steps with regard to the outstanding accounts payable and the status of operations of the Property in order to maintain, preserve, and protect the Property including, without limitation, to discern the status of the outstanding accounts payable and to settle or compromise such accounts as the Receiver or his designee deems necessary and the power to demand, collect and receive from Defendants and all present and future tenants, occupants or other parties in possession of all or any portion of the Property all sums now due and unpaid or which hereafter shall become due with respect to or arising out of the Property during the pendency of the receivership authorized hereby;
- j. To terminate or abrogate any or all agreements, contracts, understandings or commitments entered into by Defendants with respect to the Property, including without limitation any management agreements, leases of space in the Property, and Defendant shall pay any and all termination and/or other fees, costs and expenses in connection with said termination;
- k. To open new accounts with, or negotiate, compromise or otherwise settle Defendants' existing obligations to utility companies or other service providers or suppliers of goods and services to the Property and to otherwise enter into such agreements, contracts or understandings with such utility companies or other service providers

EXHIBIT 5

Page 4

or suppliers as are necessary to maintain, preserve and protect the Property;

- I. To open new bank accounts with respect to the Receiver's or his designee's management, operation or leasing of the Property;
- m. To secure such monies as Plaintiff may be willing to advance for the completion of incomplete construction, new construction, preservation and maintenance of the Property, including current costs of repairs and general maintenance, security, utilities, insurance and other necessary services, with all such funds so advanced by Plaintiff to be added to Defendant's indebtedness to Plaintiff and to be secured by the Plaintiff's Loan Documents and all such monies so advanced, including interest thereon, shall be secured by the Mortgage. All such monies advanced according to the Loan for the preservation and maintenance of the Property together with interest thereon, shall be repaid, to the extent feasible, from the operating revenues of the Property whether such operating revenues are generated before, during or after the receivership; and
- n. To apply to this Court for further directions and for such further powers as may be necessary to enable the Receiver to fulfill its duties.

7. At Plaintiff's option and sole discretion, and without further court order, the Receiver may engage a broker to market the Property for sale ("Broker") and complete a transaction for the sale of the Property, so long as the agreement with the Broker and any sale transaction is approved by Plaintiff on terms and conditions acceptable to Plaintiff in its sole discretion. In connection with the marketing and sale of the Property:

- a. The Receiver is authorized and directed to cause the Property to be listed for sale at any price the Receiver determines in the exercise of its business judgment, to be an appropriate list price so long as Plaintiff has approved the list price.
- b. The Receiver is authorized and directed to assist in marketing the Property for sale.
- c. The Receiver is authorized and directed to negotiate proposed sale terms with a buyer for the Property.
- d. Without further court order, the Receiver is authorized and directed to sell the Property by any means including, without limitation, using

EXHIBIT 5

Page 5

any power of attorney granted to the Receiver by the Defendants to any buyer on any terms and conditions acceptable to Plaintiff in its sole discretion.

- e. In addition, Defendants shall, upon entry of the Order, execute and deliver to the Receiver a power of attorney in recordable form, which Power of Attorney also grants the Receiver the right (in Defendants' name) to lease, market and/or sell (with or without Plaintiff's Loan ("Loan") in place) the Property, including the right to execute and deliver any and all necessary documents to consummate any lease or sale of the Property including, but not limited to, any leases, contracts, deeds and/or, if the Property is sold with the Loan in place to a party assuming the Loan on terms satisfactory to Plaintiff in its sole discretion, Loan modification documents.
- f. In connection with any sale of the Property by the Receiver in accordance with this Order, Plaintiff shall have the right, but not the obligation, in its sole discretion, to permit a purchaser of the Property to assume the Loan and to make any modifications to the Loan to which Plaintiff agrees.
- g. Defendants shall be deemed to consent to any such sale of the Property by the Receiver and assumption and modification of the Loan in a manner determined by Plaintiff, in Plaintiff's sole discretion, and all without obtaining the consent or participation of Defendants in any manner and without further order of the Court. If the Loan is being assumed, any portion of the purchase price in excess of the Loan balance, after payment of all accrued and unpaid interest, late charges, all other expenses associated with the Loan and all other amounts due with respect to the Loan shall be used by Plaintiff in its sole discretion to create new reserves, add to the existing reserves for the Loan or to pay down the Loan. If the Loan is not being assumed, Plaintiff shall apply the proceeds from the sale of the Property, less Plaintiff's expenses in connection with the sale, to the payment of the Loan. To the extent that any such sale without an assumption of the Loan results in a full payoff of all amounts due under the Loan (including principal, contract rate interest, default interest, late charges, expenses and prepayment premiums) and there are excess proceeds, Plaintiff shall deliver such excess proceeds to Defendants.

8. At Plaintiff's option and sole discretion, and without further Court order, the Receiver may engage a Construction Manager ("Construction Manager") who shall manage the completion of any incomplete construction at the Property or any new construction at the Property

EXHIBIT 5

Page 6

or both so long as any such construction plans are approved by Plaintiff and financed by Plaintiff.

In connection with any such construction:

- a. The Receiver and/or Construction Manager is authorized and directed to solicit or develop construction plans and cost estimates.
- b. The Receiver and/or Construction Manager is authorized and directed to solicit bids for all construction work.
- c. The Receiver and/or Construction Manager is authorized and directed to negotiate contracts with the Construction Manager and all subcontractors.
- d. The Receiver and/or Construction Manager is authorized and directed to supervise the construction process and report regularly to Plaintiff on the process.

9. Upon Plaintiff's written consent, and on terms acceptable to Plaintiff in its sole discretion, the Receiver may engage itself or one of its divisions as Broker or Construction Manager.

10. The Receiver shall serve without bond, provided that the Receiver will well and truly perform its duties and shall account for all of the monies and properties which come into its hands and shall abide by and perform all of the things which it shall be required to do under this Order.

11. The Receiver is appointed hereunder for the benefit and protection of the rights and interests of Lender under the Loan Documents.

12. The Receiver shall be paid out of the cash flows of the Defendants, and if no such cash is available, by the Plaintiff. Receiver shall be paid for all reasonable expenses. All payments to the Receiver, Receiver's Agent, the Broker and Construction Manager by Plaintiff shall be added to the total indebtedness owed by Defendants to Plaintiff. The Receiver's fees shall be as follows:

EXHIBIT 5

Page 7

- a. Receivership services, no fee.
- b. Management, accounting and personnel fee of \$2,504.00 per month.
- c. If the Receiver is approved by Plaintiff as Construction Manager, for any construction management services, compensation not to exceed the following:

<u>Construction Cost</u>	<u>Fee • % Gross Construction Cost</u>
\$0 • \$250,000	5%
\$250,001 • \$500,000	4%
Greater than \$500,000	3%

- d. Leasing:
 - (i) 6% of the value of the first year of the lease term.
 - (ii) 5% of the value of the second year of the lease term.
 - (iii) 4% of the value of the third year of the lease term.
 - (iv) 3% of the value of the fourth year of the lease term.
 - (v) For all lease deals where another broker is involved, the fees shall be 150% of the above fees, with the outside broker receiving 100% of the fee, and the Receiver receiving the 50% balance.
- e. If the Receiver is approved by Plaintiff as the Broker, compensation not to exceed the following:
 - (i) 4.25% of the gross sale price on the sale of any buildings or improvements.
 - (ii) 10% of the gross sales price on the sale of any land.

13. The Receiver is authorized to conduct investigations of, and analyses concerning, the operation and value of the Business Assets and to assume responsibility for the liquidation of the Business Assets. The Receiver shall have all necessary powers to manage the Business Assets including, without limitation, the following powers and responsibilities:

EXHIBIT 5

Page 8

- a. To take possession of the Business Assets and all personalty related thereto, including without limitation, all related books, records, bank accounts, keys, combinations for locks or other access information, or which relate in any manner to the management or operation of all or any portion of the Business Assets;
- b. To direct Defendants, their equity owners, officers, agents, employees or other representatives immediately to turn over and deliver or cause to be delivered to the Receiver or his designee all personalty which relates in any manner to the management or operation of the Business Assets including, without limitation, all keys, combinations for locks or other access codes, books, records, accounts, operating statements, reserve accounts and the like pertaining to the operation of the Business Assets;
- c. Subject to the rights and interests for the benefit of Lender, to sell all or any portion of the Property or Business Assets and to do all acts and things necessary or advisable in connection with such sale(s);
- d. To negotiate all bills, drafts, notes or other instruments in the name of Defendants;
- e. Subject to the rights and interests for the benefits of Lender, to take such steps with respect to the outstanding accounts payable and the status of operation of the Business Assets in order to maintain, preserve, and protect the Business Assets including, without limitation, to discern the status of the outstanding accounts payable and to settle any such accounts that the Receiver or its designee deems necessary and the power to demand, collect and receive from all present and future account debtors, all sums now due and unpaid or which hereafter shall become due with respect to or arising out of the Business Assets during the pendency of the receivership authorized hereby;
- f. To employ such counsel, accountants or other professionals, as may be necessary in order to carry out its duties as Receiver and to preserve, maintain and liquidate the Business Assets, conduct discovery, provide notice, pursue claims, cooperate, negotiate, and otherwise take all steps necessary to recover or obtain coverage from any entity relating to:
 - (i) the acts, conduct, property, liabilities, or financial condition of Defendants;
 - (ii) the Claim Policies; or

EXHIBIT 5

Page 9

- (iii) any other matter or item that may affect the Receiver's administration of the Business Assets;
- g. Subject to the rights and interests of Lender, to commence and prosecute such actions at law or in equity that the Receiver deems necessary to fulfill its duties to liquidate or preserve the Business Assets, provided that the Receiver shall have a non-exclusive right to pursue claims under the Claim Policies and shall consult and cooperate with Lender so as to not impair any right or claim Lender may have under the Claim Policies;
- h. Subject to the rights and interests for the benefit of Lender to commence and prosecute such actions at law or in equity that the Receiver deems necessary to fulfill its duties to liquidate or preserve the Property or Business Assets;
- i. Subject to the rights and interests for the benefit of Lender to determinate or abrogate any or all agreements, contracts, understandings or commitments entered into by Defendants with respect to the Property or Business Assets, to the extent permitted by applicable law;
- i. To open new accounts with, or negotiate, compromise or otherwise resolve Defendants existing obligations to utility companies or other service providers or suppliers of goods and services to Defendants to otherwise enter into such agreements, contracts or understandings with such utility companies or other service providers or suppliers as are necessary to maintain, preserve and protect the Business Assets;
- j. To open new bank accounts with respect to the Receiver or its designee's management and liquidation of the Business Assets;
- l. To secure such monies as Lender may be willing to advance for preservation and maintenance of the Business Assets, including current costs of construction, repairs and general maintenance, security, utilities, insurance and other necessary services; and
- k. To apply to this Court for further direction and for such further powers as may be necessary to enable the Receiver to fulfill its duties.

All such monies advanced by Lender following appointment of the Receiver for the preservation and maintenance of the Business Assets together with interest thereon shall be repaid, to the extent

EXHIBIT 5
Page 10

feasible, from the revenues generated from the Business Assets whether such revenues are generated before, during or after the receivership.]

14. All monies advanced by Lender pursuant to this Order shall be secured by and under the Loan Documents and this Order of Court, by which Lender is and will continue to be secured in all Defendants' Property and Business Assets, including but not limited to accounts (including health care receivables), cash, chattel paper, collections, contracts, copyrights, documents, equipment, fixtures, general intangibles, instruments, inventory, investment property, patents, proceeds, remittances, secured obligations, trademarks, trade secrets, insurance proceeds and commercial tort claims whether such Business Assets come into existence before, during or after the receivership. In order to exercise the authority conferred upon it under this Order, the Receiver is hereby vested with the standing and all power and authority of, but without the liability of or associated with, or obligation to act as: (a) the boards of directors or members of Defendants, and (b) Defendants in their capacity and relationship as "employer," as the Receiver deems necessary for the management and liquidation of the Property and Business Assets, including without limitation the power and authority to (i) assert or waive attorney/client, work product, joint defense or other privilege, (ii) execute documents, instruments and resolutions in connection with sale or finance transaction, (iii) have and obtain access to employee records, reports, communications and other work product, and (iv) commence a case under Title 11 of the United States Code. The Receiver may apply to this Court for further direction and for such further powers as may be necessary to enable the Receiver to fulfill its duties.

15. The Receiver is authorized in its discretion to employ, fix and pay the compensation, salaries and wages of all managers, agents, employees, servants as may be advisable or necessary in its judgment for the operation, management, conduct, control or custody of the affairs

EXHIBIT 5

Page 11

of the Property or Business Assets or both. The Receiver may employ counsel for the Receiver for the limited purpose of advising the Receiver in matters relating to securing the receivership.

Counsel for the Receiver may be paid on a regular basis from the cash flows of the Defendants, and if no cash is available, shall be advanced by the Plaintiff. Counsel for the Receiver shall submit invoices for services rendered and costs incurred to Lender and other interested parties on a monthly basis.

16. To the extent Defendants have not already done so, the Receiver is authorized to terminate Defendants' employees, and the Receiver, its officers, directors, agents, representatives, counsel, consultants and employees (the "Receiver Entities") shall have no personal liability for any liabilities arising from any such termination. The Receiver is authorized in its discretion to employ, fix and pay the compensation, salaries and wages of all managers, agents, employees, servants as may be advisable or necessary in its judgment for the operation, management, conduct, control or custody of the affairs of the Property or Business Assets or both.

17. The Receiver or its designee shall conduct an inspection of the Property and Business Assets and shall perform a complete inventory of the Business Assets coming under its control or possession pursuant to this Order. Such inspection and inventory shall be conducted with the cooperation of Lender, Defendants and its agents, employees or other representatives and the Receiver or its designee shall file with the Clerk's Office a true and complete inventory of the property and proposed plan of liquidation of the Property and Business Assets under oath within ninety (90) days after the date of this Order. The Receiver or its designee shall keep a true and accurate account of any and all receipts and expenditures and shall, so often as the Court directs, file with the Court an inventory and account under oath, of any additional property or effects which it has discovered which shall have come into its hands since its appointment, and of the amount

EXHIBIT 5

Page 12

remaining in its hands or invested by it, and of the manner in which the same is secured or invested, stating the balance due from or to it at the time of rendering its last account, the receipts and expenditure since that time. The account shall include detailed information concerning income, expenses, payables and receivables.

18. All rents, issues, profits, revenues, income or other payments which are now or hereafter become due (hereinafter collectively, the "Accounts") with respect to all or any portion of the Property or Business Assets or both whether pursuant to oral or written agreements shall be remitted by the account debtors directly to the Receiver.

19. The Receiver shall have no personal liability for any environmental liabilities arising out of or relating to Defendants, their business, the Property or the Business Assets.

20. The Receiver may obtain liability insurance to protect itself in carrying out its duties hereunder with a policy limit of not more than \$1,000,000 and the premium therefore should be paid from the cash flows of the Defendants, and if no cash is available, shall be advanced by the Plaintiff.

21. The Receiver shall have no duty or obligation to prepare and/or file any tax or pay any taxes of Defendants that are or may become due.

22. The Receiver, its employees and counsel are entitled to rely on all outstanding rules of law and Court Orders and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment or decree. In no event shall the Receiver be liable to anyone for good faith compliance with their duties and responsibilities, nor shall the Receiver, its employees or advisors be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence or reckless disregard of their duties.

23. The Receiver is authorized and directed to remit the proceeds of the operation of the Property and Business Assets and the sale of the Property and Business Assets, including the proceeds of Accounts as may remain after the payment of the ordinary and necessary business expenses of the receivership to Lender and other creditors in order of priority.

24. The Receiver shall permit existing insurance coverage for the Property or Business Assets or both to remain in force until the expiration of the current paid up term under such policy or policies and shall notify the insurance carriers immediately of the appointment of the Receiver hereby and request that the Receiver be added to the insurance policy or policies as an Additional Insured thereunder. Upon the expiration of the paid up portion of such policy or policies, the Receiver shall have the responsibility for keeping the Property and Business Assets insured and may as an option keep in force the existing insurance coverages or obtain new coverages for the Property and Business Assets, each of which coverages shall name the Receiver as an additional insured in the case of a liability policy or loss payee in the case of a property insurance policy.

25. Defendants, their members, directors, equity owners, officers, agents, employees or other representatives under this Order are hereby directed to use their best efforts to ensure a smooth transition of the preservation and liquidation of the Property and Business Assets to the Receiver or its designee and Defendants shall cooperate with the Receiver or his designee in consummating such transition.

26. Defendants, their members, directors, equity owners, officers, agents, employees or other representatives are hereby enjoined from interfering in any manner with the Receiver or their management and liquidation of the Property and Business Assets.

EXHIBIT 5
Page 14

27. The Receiver shall not be bound by all or any contracts, agreements, understandings or other commitments Defendants had, or may have with third parties, whether oral or written. The Receiver may, by an affirmative written ratification executed by the Receiver, agree to become bound to any such contracts, agreements, understandings or other commitments or may agree to enter into any new or amended contracts, agreements, understandings or other commitments. Nothing in this Order constitutes or shall be construed to constitute an assumption of any of the leases, contracts or agreements currently existing with respect to the Property or Business Assets by the Receiver or a waiver by the Receiver of any default under any such lease, contract or agreement.

28. Excluding Plaintiff, all directors, equity owners, creditors, and other persons, and all others acting on behalf of any such equity owner, creditor or other persons, including sheriffs, marshals, other officers, deputies, servants, agents, employees and attorneys are enjoined from:

- a. Commencing, prosecuting, continuing or enforcing any suit or proceeding in law, equity, bankruptcy, or otherwise against or affecting Defendants or any part of the Property or Business Assets without first obtaining leave of this Court except that such actions may be filed to toll any statutes of limitations;
- b. Using self help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any portion of the Property or Business Assets, wherever situated;
- c. Attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate the due date of any lease, loan, mortgage, indebtedness, security agreement or otherwise affecting the Property or Business Assets;
- d. Doing any act to interfere with the taking control, possession, or management, by the Receiver, of any portion of the Property or

EXHIBIT 5

Page 15

Business Assets or to interfere in any manner with the exclusive jurisdiction of this Court over the Property or Business Assets;

- e. Engaging in any act to create, perfect, or enforce any lien against the Property or Business Assets, unless specifically authorized by order of this Court;
- f. Engaging in any act to collect, assess, or recover a claim against Defendants that arose before the appointment of the Receiver; and
- g. Exercising a set off of any debt owing to Defendants that arose before the appointment of the Receiver against any claim against Defendants.

29. The receivership authorized and created hereby may be terminated at any time by Lender or Receiver filing with the Court and serving upon Defendants and other parties in interest a Motion to Terminate Appointment of Receiver. Upon proper notice thereof and upon hearing and determination of this Court that the purposes of this receivership have been served, this Court may terminate the receivership. Unless otherwise expressly provided therein, the entry of a judgment on the Complaint shall not operate as a termination of the Receivership.

Dated: _____, 20[]

,

ENTER:

Record and Return to:

Gregory G. Gosfield, Esquire
Klehr Harrison Harvey Branzburg LLP
1835 Market Street
Philadelphia, Pennsylvania 19103

Property ID No.: _____

Record and Return To:

DEED IN LIEU OF FORECLOSURE

This Deed (the “**Deed**”) made this _____ day of [_____,] by and between [_____] (hereinafter collectively referred to and obligated as “**Grantor**”), with an address of [_____,] and [_____] (hereinafter referred to as “**Grantee**”), having offices at [_____].

W I T N E S S E T H:

That the Grantor for and in consideration of the sum of Ten (\$10.00) Dollars lawful money of the United States of America, unto it well and truly paid by the Grantee, at or before the sealing and delivery hereof, and other good and valuable consideration, the receipt of which is hereby acknowledged, and intending to be bound legally hereby, has granted, bargained and sold, alienated, released and confirmed, and by these presents does grant, bargain and sell, alienate, enfeoff, release and confirm unto the Grantee, its successors and assigns, those premises described in Exhibit A attached hereto, incorporated herein by this reference and hereby made a part hereof (“Premises”).

TOGETHER with all and singular the Buildings, Improvements, Ways, Streets, Alleys, Passages, Waters, Watercourses, Rights, Liberties, Privileges, Hereditament and Appurtenances, whatsoever thereunto belonging, or in any way wise appertaining, and the Reversions and Remainders, Rents, Issues and Profits thereof; and all the Estate, Right, Title, Interest, Property, Claim and Demand whatsoever of Grantor as well in law as in equity, or otherwise howsoever, of, in, and to the same and every part thereof.

TO HAVE AND TO HOLD the said lots or pieces of ground described in Exhibit A to this Deed, together with the Buildings and Improvements thereon erected, and the Hereditaments and Premises hereby granted, or mentioned and intended so to be, with the Appurtenances, unto the said Grantee, its Successors and Assigns, to and for the only proper use and behoof of the said Grantee, its Successors and Assigns, forever.

AND the said Grantor, for itself, its Successors and Assigns, does by these presents covenant, grant and agree, to and with the said Grantee, its Successors and Assigns, that it the said Grantor, its Successors and Assigns all and singular the Hereditament and Premises herein above described and granted, or mentioned and intended so to be, with the Appurtenances, unto

EXHIBIT 6.1.1

Page 1

the said Grantee, its Successors and Assigns, against all and every Person or Persons whomsoever lawfully claiming or to claim the same or any part thereof, by, from and under it, them, or any of them, shall and will WARRANT and forever DEFEND.

This Deed is being given by Grantor to Grantee as, and is intended to be, a deed in lieu of foreclosure, subject to that certain Mortgage listed on Exhibit "B" hereto, (the "**Mortgage**"). This Deed is an absolute conveyance, the Grantor intending and hereby conveying title to the premises free of any equity of redemption by Grantor. This Deed is not nor shall be deemed to constitute a satisfaction and/or discharge, in whole or in part, of any of the terms and conditions of the Mortgage, which shall survive delivery and recordation hereof and remain in full force and effect. In accepting this Deed, Grantee reserves its rights to exercise the remedies provided for in the Mortgage on account of the existing defaults or any defaults that may hereafter occur. It is specifically intended that there shall be no merger of the estate conveyed by this Deed with the estate of Grantee under the Mortgage, or under any other mortgage or judgment held by Grantee that is a lien on the Premises.

IN WITNESS WHEREOF, the said Grantor has executed this Deed as of the day and year first above written.

BORROWER:

BORROWER:

[_____] , [_____]

By: [_____] , a
[_____] limited partnership, its
sole member

By: [_____] , a
[_____] business
corporation, its general partner

By: _____
Name:
Title:

COMMONWEALTH OF PENNSYLVANIA :
 :
 : SS.
COUNTY OF _____ :

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

[Notarial Seal]
My commission expires:

EXHIBIT A

DESCRIPTION OF PREMISES

EXHIBIT 6.1.1

Page 4

EXHIBIT B

MORTGAGE

Mortgagor: [_____] , a [_____] limited liability company
Mortgagee: [_____] , a [_____] bank
Dated: [_____]
Recorded: [_____]

EXHIBIT 6.1.1

Page 5

I certify that the precise address
of the within-named Grantee is:

[
]

KLEHR | HARRISON | HARVEY | BRANZBURG LLP

BY: []

I.D. NO.: []

1835 MARKET STREET, SUITE 1400

PHILADELPHIA, PA 19103

(215) 568-6060

ATTORNEYS FOR PLAINTIFF

LENDER []

[]	:	COURT OF COMMON PLEAS
	:	[] COUNTY
	:	
Plaintiff,	:	
	:	CIVIL DIVISION
v.	:	
	:	NO. _____
[]	:	
Defendant.	:	

COMPLAINT IN MORTGAGE FORECLOSURE

The plaintiff, [] ("Lender"), by way of complaint in mortgage foreclosure against the defendant, [] ("Borrower"), hereby avers and represents as follows:

2. Lender is a financial institution, organized and existing pursuant to the laws of the Commonwealth of Pennsylvania with a place of business at [].

3. The defendant Borrower is a limited partnership organized and existing pursuant to the laws of the Commonwealth of Pennsylvania, with an address of [].

4. On or about [], Lender entered into certain loan transaction with Borrower whereby Lender loaned Borrower the principal sum of [] ("the Loan"), and Borrower agreed, *inter alia*, to pay principal and interest in accordance with the terms and conditions of that certain promissory note (the "Note") in the original principal amount of [] and dated []. A true and correct copy of the Note is attached hereto, incorporated herein, and marked as Exhibit "A."

EXHIBIT 6.1.2

Page 2

5. As inducement for Lender to make the Loan to Borrower, and as further security therefor, on [], Borrower granted Lender a mortgage ("the Mortgage") on that certain piece of real property located at [] ("the Mortgaged Property"). The Mortgaged Property is more fully described on the metes and bounds description attached hereto, incorporated herein, and marked as Exhibit "B." The Mortgage was recorded on [], in the Office of the Recorder of Deeds of [] County at Mortgage Book [], page [] *et seq.*. A true and correct copy of the Mortgage is attached hereto, incorporated herein, and marked as Exhibit "C."

6. Upon information and belief, Borrower is the real owner of the Mortgaged Property.

7. The Mortgage specifies that any default by Borrower under the Note which is not cured within any applicable grace period is also an event of default under the Mortgage.

8. Borrower is in default of its obligations pursuant to the Note and the Mortgage as a result of, *inter alia*, its failure to make payments as and when due thereunder.

9. As a result of the aforementioned defaults, the entire principal balance of the Loan, together with the interest thereon and attorneys' fees secured by the Mortgage is currently due and owing.

10. As a result of its default under the Note and Mortgage, the sum of \$_____ is due and owing to Lender, comprised as follows:

Principal	\$_____
Interest (through _____)	

TOTAL DUE:	\$_____
------------	---------

Interest continues to accrue from and after _____, at the per diem rate of \$_____ on the Loan. Borrower is also responsible for accrued and continually accruing attorneys' fees and costs.

11. The notice provisions of Act 6, 41 P.S. §§ 101, *et seq.*, are not applicable to this action because, *inter alia*, the original principal amount of the Loan secured by the Mortgage exceeds \$50,000.00.

12. The provisions of Act 91, 35 P.S. § 1680.401C, are not applicable to this action because, *inter alia*, the Mortgage is not a "residential mortgage" as that term is defined in Act 91.

EXHIBIT 6.1.2

Page 3

WHEREFORE, plaintiff Lender Mutual Savings Bank demands judgment in mortgage foreclosure in its favor and against defendant [], in rem, in the amount of \$_____, plus interest from and after _____ at the aggregate per diem rate of \$_____, plus costs of suit and accrued and continually accruing attorneys' fees, and for judicial sale of the Mortgaged Property, and such other and further relief as is just.

KLEHR | HARRISON | HARVEY |
BRANZBURG LLP

Dated:_____

By:_____

[], Esquire
1835 Market Street, Suite 1400
Philadelphia, PA 19103
(215) 568-6060

Attorneys for Plaintiff

EXHIBIT 6.1.2

Page 4

VERIFICATION

I, [] hereby state that I am a Vice President of [], the plaintiff herein; and as such am authorized to make this Verification on its behalf; that I have read the statements contained in the foregoing complaint in mortgage foreclosure, and that the statements set forth therein are true and correct to the best of my knowledge, information and belief. The undersigned also understands that these statements are made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

Date: _____

[]

EXHIBIT 6.1.2

Page 5

[		]	:
	Plaintiff,		:
v.		NO.	:
[		]	:
			:

The Defendant, [], hereby files this answer and consent/stipulation to entry of judgment, and in support hereof, avers as follows:

- EXHIBIT 6.1.2
Page 6

WHEREFORE, [] consents to the entry of judgment in favor of [] and against it in the amount of \$[], plus interest from and after [], at the per diem rate of \$[], and additional legal fees and costs as they accrue.

AFFIRMATION OF NO DEFENSES

The Defendant hereby affirms and states that it has no defenses to the allegations set forth in the Complaint in Mortgage Foreclosure filed in this matter or to the entry of judgment against it in this matter.

[]

By: _____
[], Esquire
Attorney I.D. Nos.: []
[Address]
[Telephone No.]

Attorneys for the Defendant

EXHIBIT 6.1.2

Page 7

VERIFICATION

I, [], state that I am the President of [], a Pennsylvania corporation, and verify that I am authorized to make this Verification on the Defendant's behalf. I verify that I have read the foregoing pleading and that the averments of fact contained therein are true and correct to the best of my knowledge, information and belief. I acknowledge and understand that the statements made herein are subject to the penalties of 18 Pa C.S.A.§4904, relating to unsworn falsifications to authorities.

[]

EXHIBIT 6.1.2

Page 8

EXHIBIT 6.1.3

Settlement Agreement

SETTLEMENT AGREEMENT

OF [_____], AS BORROWER,

THE PARTIES NAMED HEREIN ON SCHEDULE 1, AS GUARANTORS,

AND [_____] AS LENDER

DATED [_____] ,20[]

EXHIBIT 6.1.3

TABLE OF CONTENTS

	<u>Page</u>
1. Current Default.....	7
2. No Successor Liability.....	7
2.1 Deed	7
2.1.1 Real Property.....	7
2.1.2 Personal Property.....	7
2.2 Intentionally Omitted.	7
2.3 No Successor Liability	8
3. Intentionally Omitted.....	8
4. Closing Date.....	8
5. Covenants.....	8
5.1 Maintain Structure.....	8
5.2 No Alterations.....	8
5.3 No Contracts	8
5.4 Maintain Title	8
5.5 Notice	8
5.6 Convey.....	9
6. Representations and Warranties.	9
6.1 Representations and Warranties of Lender.....	9
6.1.1 Incorporation	9
6.1.2 Authority	9
6.2 Representations and Warranties of Borrower and Guarantors	9
6.2.1 Labor	9
6.2.2 Contracts	9
6.2.3 Condemnation.....	9
6.2.4 Assessments	10
6.2.5 Leases.....	10
6.2.6 Compliance with Law	10
6.2.7 Broker Fees	10
6.2.8 Permits	10
6.2.9 Title	10
6.2.10 FIRPTA.....	10
6.2.11 Mechanic's Lien	10
6.2.12 Access	10
6.2.13 Payables.....	11
6.2.14 Environmental	11
6.2.15 Value	11
6.2.16 Financial Capacity	11

EXHIBIT 6.3.1

Page i

6.2.17	Solvency.....	11
6.2.18	Compliance.....	12
6.2.19	Commercial Business Purpose	12
6.2.20	Lien Effect.....	12
6.2.21	No Default	12
6.2.22	Indebtedness	12
6.2.23	Ratification	12
6.2.24	Reaffirmation.....	12
6.2.25	Due Formation.....	12
6.2.26	No Third Party Consent	13
6.2.27	No Conflict.....	13
6.2.28	Binding Effect	13
6.2.29	No Litigation	13
6.2.30	Disclosure Accuracy	13
6.2.31	Complete Copies.....	13
6.3	Representations and Warranties of Guarantors.....	13
6.3.1	Ratification.....	14
6.3.2	Reaffirmation.....	14
6.3.3	Due Formation; Due Power.....	14
6.3.5	No Third Party Consent	14
6.3.6	No Conflict.....	14
6.3.7	Binding Effect	14
6.3.8	No Litigation	14
6.3.9	Disclosure Accuracy	15
6.3.10	Complete Copies.....	15
7.	Possession	15
8.	Deliveries.	15
8.1	Pre-Closing Deliveries	15
8.1.1	Lease Documents.....	15
8.1.2	Land Use Agreements.....	15
8.1.3	Contract Documents	15
8.1.4	Permit Documents	15
8.1.5	Design Documents.....	16
8.1.6	Guaranty Documents	16
8.1.7	Title Documents	16
8.1.8	Potential Tenant Statement.....	16
8.1.9	Contractor Statements.....	16
8.1.10	Cash Flow Statement	16
8.1.11	Expense Statement.....	17
8.1.12	Payable Statement.....	17
8.1.13	Inventory	17
8.1.14	Employee Statement	17

EXHIBIT 6.3.1

Page ii

8.1.15	Utility Account List	17
8.1.16	Contract Certification.....	17
8.1.17	Manager/Leasing Agreement List	18
8.1.18	Survey Certification.....	18
8.1.19	Environmental Report Certification.....	18
8.1.20	Structural Engineering Report Certification	18
8.2	Closing Deliveries.....	18
8.2.1	Deed	18
8.2.2	Bill of Sale.....	19
8.2.3	Tenant Letter	19
8.2.4	Assignment of Leases	19
8.2.5	Assignment of Permits.....	19
8.2.6	Letter to Third Parties	19
8.2.7	Intentionally omitted.....	19
8.2.8	FIRPTA.....	19
8.2.9	Title Affidavit.....	19
8.2.10	Intentionally Omitted.....	19
8.2.11	Borrower Organization Documents.....	19
8.2.12	Guarantors Organization Documents.....	20
8.2.13	Intentionally Omitted.....	20
8.2.14	Estoppel.....	20
8.2.15	Intentionally Omitted.....	20
8.2.16	Assignment of Indemnities.....	20
8.2.17	Intentionally Omitted.....	20
8.2.18	Disbursement Agreement.....	20
8.2.19	Consent and Stipulation to Judgment	20
8.3	Ancillary Documents.....	20
8.3.1	Opinions	20
8.3.2	Title Insurance	20
8.3.3	Title Easements	20
8.3.4	Lender Expenses.....	20
9.	Conditions.....	21
9.1	Conditions Precedent.....	21
9.1.1	Due Representation.....	21
9.1.2	Due Performance	21
9.1.3	Due Diligence.....	21
9.1.4	Casualty.....	21
9.1.5	Condemnation.....	22
9.2	Conditions Subsequent	22
9.2.1	Litigation.....	22
9.2.2	Avoidance	22
9.2.3	Breach	22
9.2.4	Access	22

EXHIBIT 6.3.1

Page iii

9.2.5 No Release.....	23
9.2.6 Insolvency or Bankruptcy	23
10. Covenant Not to Sue Borrower Parties.....	23
10.1 Covenant Not to Sue.....	23
10.2 Other Loans.....	23
11. Absolute Conveyance	24
12. No Merger	24
13. Lien Priority	24
14. Intentionally Omitted.....	25
15. Reaffirmation of Guarantor.....	25
15.1 Guaranty Reaffirmation.....	25
15.2 Guaranties Valid	25
15.3 Waiver of Indemnity and Contribution	25
16. No Bankruptcy Intent; Voidable Transfers.....	25
16.1 No Bankruptcy Intent	25
16.2 Voidable Transfers	26
17. Pre-existing Conditions and Claims.....	26
17.1 Ratification and Warranty.....	26
17.2 Waiver	26
17.3 Release.....	27
17.4 Acknowledgments.....	27
17.5 No Admission	28
17.6 Indemnification	28
17.7 No Waiver.....	28
17.8 No Course of Conduct.....	29
17.9 No Cure.....	29
17.10 Future Negotiations	29
18. Incorporation.....	29
18.1 Incorporation of Recitals and Exhibits	29
18.2 Incorporated Documents.....	29
18.2.1 Modification Paramount.....	29
18.2.2 No Novation; Continuing Validity	30
18.2.3 Further Compliance with Loan Documents	30
19. Miscellaneous.....	30
19.1 No Enterprise	30
19.2 Counterparts.....	30
19.3 Binding Effect.....	30
19.4 Choice of Law.....	30
19.5 Jurisdiction.....	30

EXHIBIT 6.3.1

Page iv

19.6 Intentionally Omitted.	30
19.7 Time of Essence	30
19.8 No Brokerage	30
19.9 Lender’s Expenses.....	31
19.10 Additional Documents; Appointment of Lender As Attorney-In-Fact	31
19.11 Notices	31
19.12 Joint and Several Liability	31
19.13 Severability	31
19.14 Third Party Obligations	31
19.15 Confidentiality	32
19.16 Cooperation.....	32
19.17 JURY TRIAL WAIVER	32

EXHIBITS:

Exhibit A	Glossary
Exhibit 2.1.1	Property Legal Description
Exhibit 5.4	Title Exceptions
Exhibit 6.2.2	Contracts
Exhibit 6.2.5	Oral or Written Leases, Rights of Occupancy, Grants or Claims of Right, Title or Interest
Exhibit 6.2.11	Mechanic’s Liens
Exhibit 6.2.13	Payables
Exhibit 6.2.22	Indebtedness
Exhibit 8.2.1	Deed
Exhibit 8.2.19	Consent and Stipulation to Judgment

EXHIBIT 6.3.1

Page v

SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT (this "Agreement") is dated as of [____], 20[____], but effective as of _____ ("Effective Date"), and is by and among Beneficial [____], a _____ having its principal address at [____] ("Lender") and [____], a [____] having its principal address at [____] ("Borrower"), and the parties named on Schedule 1 hereto (each a "Guarantor" and collectively "Guarantors" and, with Borrower and Lender, each a "Party" and collectively the "Parties").

RECITALS:

A. On [____], the Lender made available to Borrower a credit facility of up to the original principal amount of \$[____] (the "First Loan"). The First Loan is memorialized by, among other things, an Acquisition/Site Improvement Construction Note in the original principal amount of \$[____], also dated [____] (the "First Note"). Also on [____], the Lender made available to Borrower a second credit facility of up to the original principal amount of \$[____] (the "Second Loan"). The Second Loan is memorialized by, among other things, a Revolving Construction Line of Credit Note in the original principal amount of \$[____], also dated [____] (the "Second Note"). The First Note and Second Note (sometimes herein together called the "Note") are secured by, among other things, (i) an Open-End Mortgage and Security Agreement ("Mortgage") dated [____], and recorded in Record Book [____] Page [____], Clerk's Office of [____], Pennsylvania (the "Official Records"), which Mortgage encumbers that certain real property (the "Property") situated in the [____], as more particularly described on Exhibit 2.1.1 attached hereto and by this reference incorporated herein, (ii) an Assignment of Leases dated [____] from Borrower to Lender covering rents, leases and profits, and (iii) Financing Statements filed under the Uniform Commercial Code covering fixtures and personal property at the Property (sometimes individually or collectively the "Security Instruments"). Each Guarantor has also executed a separate Guaranty and Suretyship Agreement dated [____] in favor of Lender (each a "Guaranty" and collectively, the "Guaranties").

B. The Note and the Security Instruments, together with any and all other documents executed for and delivered to Lender in connection with the First Loan and Second Loan (sometimes herein together called the "Loan"), and any and all extensions, modifications, guarantees and renewals thereof, shall hereinafter be referred to collectively as the "Loan Documents," and all Borrower obligations under the Note and the other Loan Documents (and any Guarantor obligations thereunder and under the Guaranties) shall hereinafter be referred to collectively as the "Obligations". All capitalized terms not otherwise defined in the text or Glossary at Exhibit A shall have the meaning ascribed to them in the Loan Documents.

C. Borrower has failed, among other things to make certain required payments under the Note and has failed to pay real estate taxes on the property securing the Loan (collectively, "Borrower's Default"). Borrower has requested that the Parties resolve Borrower's Default by providing for the

EXHIBIT 6.1.3

Page 6

transfer and conveyance of the Property to Lender by means of a deed in lieu of foreclosure in exchange for Lender's agreements as hereinafter set forth.

D. Borrower is the owner of fee simple title to the Property.

E. Lender has agreed, under and subject to the terms set forth herein, to accept the conveyance of the Property under this Agreement ("Covenant Consideration"). Lender may, in its sole discretion, elect to assign some or all of its rights under this Agreement and/or direct that conveyance of the Property be made to a nominee or affiliate of Lender designated by Lender.

NOW THEREFORE, in consideration of the foregoing premises, and for other good and valuable consideration, the sufficiency and receipt of which are hereby mutually acknowledged, and intending to be legally bound hereby, the Borrower, Guarantors and Lender hereby agree and covenant as follows:

1. Current Default. Borrower agrees and acknowledges (i) one or more Events of Default (as defined in the Loan Documents) have occurred and are continuing, threatened, or anticipated to occur with notice or lapse of time or both including, without limitation: the failure to pay the debt due under the Obligations; failure of Borrower to pay certain real estate taxes as required by the Loan Documents], (ii) such Event of Default is continuing beyond any applicable cure period, (iii) Borrower has no defenses or counterclaims to such Event of Default, (iv) Lender is entitled to exercise any and all remedies provided in the Loan Documents, at law or in equity as a result of such Event of Default, including the right to foreclose on the Mortgage and (v) Lender has no obligation to extend the maturity date of any Loan(s) or advance any further funds in connection with any Loan(s) to Borrower, except as otherwise set forth in this Agreement.

2. No Successor Liability.

2.1 Deed. Borrower agrees to deliver or cause to be delivered on the Closing Date (as hereafter defined) to the Lender, or its nominee or assignee, absolutely and free and clear of any right of redemption or other right or interest of the Borrower, the Guarantors or anyone claiming by or through the Borrower or the Guarantors, a deed in lieu of foreclosure as further described in Section 8.2.1 hereof (the "Deed") and such other instruments required by Lender conveying the following real and personal property of the Borrower:

2.1.1 Real Property. All or such part as Lender may direct from time to time of the land situate in [_____], described at Exhibit 2.1.1 attached as a part hereof, together with all buildings, fixtures and other improvements now or hereafter located thereon and all appurtenances thereunto belonging.

2.1.2 Personal Property. All tangible and intangible personal property located on or in, or used in connection with the ownership, financing, operation and maintenance of the Property or the business conducted thereon.

2.2 Intentionally Omitted.

EXHIBIT 6.1.3

Page 7

2.3 No Successor Liability. It is specifically understood that the Lender has not and will not agree to assume or incur any liability or responsibility with respect to the “Payables” defined in Paragraph 6.2.14 below or any other accrued but unpaid obligation of the Borrower or the Guarantors, and any or all of such Payables and/or other obligations as the Lender may hereafter designate shall be paid in full by the Borrower or the Guarantors at the time of transfer of the Property, or such portion thereto as is transferred.

3. Intentionally Omitted.

4. Closing Date. The transactions contemplated by this Agreement will be consummated on or before 5:00 p.m. eastern standard time on [_____] (the “Closing Date”) at the offices of [_____] or by escrow. If for any reason, except the Lender’s material breach of this Agreement, the conditions precedent to Closing required to be performed by the Borrower and the Guarantors under this Agreement have not been performed and the transactions consummated on or before the Closing Date, the Lender, at the Lender’s sole option, may by written notice to the Borrower and Guarantors: (a) extend the Closing Date to a date provided in such written notice; or (b) terminate all of the obligations of the Lender under this Agreement and proceed to exercise or renew the exercise of all of the rights and remedies held by the Lender under the Loan Documents and applicable law.

5. Covenants. Borrower shall after the Effective Date and at all times prior to the Closing Date:

5.1 Maintain Structure. Maintain the Property, including all improvements thereon, in the same repair and condition as their current condition, reasonable wear and tear and casualty damage excepted to the extent proceeds of insurance issue therefor by Closing;

5.2 No Alterations. Not make or permit to be made any alterations, improvements or additions to the Property prior to the Closing Date;

5.3 No Contracts. Not enter into or permit any other agreements or liabilities which affect the Property or the transactions contemplated by this Agreement other than real estate taxes, special assessments or utility charges;

5.4 Maintain Title. Maintain title to the Property such that at Closing Borrower shall be able to convey good, marketable and insurable title to the Property to Lender, its nominee or assignee as grantee of the Property, free and clear of all liens, encumbrances, judgments, claims and litigation, and subject only to the covenants, conditions, encumbrances, easements, restrictions and other title exceptions (together “Title Exceptions”) shown on Exhibit 5.4;

5.5 Notice. Promptly notify Lender of any written notice which Borrower may receive with respect to condemnation or eminent domain proceedings, assessments of the

EXHIBIT 6.1.3

Page 8

Property or violations of any contractual, legal or governmental requirements applicable to the Property; and

5.6 Convey. Promptly deliver any portion of the Property which remains in Borrower's possession after the Closing Date at Lender's direction.

6. Representations and Warranties.

6.1 Representations and Warranties of Lender. Lender does hereby represent and warrant to Borrower and Guarantor as follows:

6.1.1 Incorporation. Lender is a corporation organized, existing and in good standing under the laws of the state of its incorporation and if the state of incorporation is other than the state in which the Property is located, Lender is authorized to conduct the business of this Agreement in such state, to the extent required by applicable law.

6.1.2 Authority. Lender has and will through the Closing Date continue to have the right, power, and authority to execute this Agreement and to perform its obligations under this Agreement. The execution and delivery of this Agreement by Lender and the performance by Lender under this Agreement has been authorized by all necessary corporate action of Lender.

6.2 Representations and Warranties of Borrower and Guarantors. In order to induce the Lender to enter into this Agreement, the Borrower and the Guarantors, each as to itself, as the case may be, hereby warrants and represents to the Lender, in addition to any other representations and warranties contained in this Agreement, that the following warranties and representations are true now and will be true at Closing and that the representations and warranties of the Borrower and the Guarantors shall survive the Closing and the delivery of the Deed for the applicable period of the statute of limitations pertaining thereto.

6.2.1 Labor. There are no labor disputes pending, or to the best of Borrower's knowledge, contemplated pertaining to the operation or maintenance of the Property or any part thereof and no employee shall remain employed in connection with the Property after the Closing Date.

6.2.2 Contracts. Except as listed on Exhibit 6.2.2, there are no service, equipment, supply and maintenance contracts, nor any other undertaking and arrangements of Borrower including, but not limited to, agreements, commitments, licenses, franchise agreements, equipment leases, rental agreements, and guaranties with respect to the Property ("Contracts").

6.2.3 Condemnation. There is no condemnation or eminent domain proceeding pending with regard to any part of the Property and the Borrower does not know of any proposed condemnation or eminent domain proceeding with regard to the Property or any part thereof.

EXHIBIT 6.1.3

Page 9

6.2.4 Assessments. Borrower has not received any notice of any assessments for public improvements against the Property and to the best of Borrower's knowledge no such assessment is pending or threatened.

6.2.5 Leases. Except as shown on Exhibit 6.2.5, there are no oral or written leases or rights of occupancy or grants or claims of right, title or interest in any portion of the Property ("Leases"), there are no claims, offsets, termination or cancellation related to such lease, and there are no security deposits, rent inducements.

6.2.6 Compliance with Law. The Property and the continued maintenance, operation, and use of it comply with all requirements of law, federal, state and local, and all requirements of all governmental bodies or agencies having jurisdiction thereof.

6.2.7 Broker Fees. No brokerage or leasing commission or other compensation is now, or will at Closing be, due or payable to any person, firm, corporation, or other entity with respect to or on account of any lease, or any extensions or renewals thereof.

6.2.8 Permits. All required subdivision and land use agreements, certificates of occupancy, certificates of underwriters, certificates relating to electrical work, all zoning, building, housing, safety, fire and health approvals, and other permits licenses, approvals, certificates, necessary for the operation of the Property ("Permits"), are listed on Exhibit 6.2.8, and have been validly issued and are in good standing and shall remain so upon consummation of Closing. All charges and fees for such Permits have been paid in full for them to remain in full force and effect without any additional cost to Lender, its nominee or assignee, upon consummation of Closing. Borrower shall deliver to Lender at Closing all Permits, together with any plans and specifications respecting the Property and the construction thereof.

6.2.9 Title. Borrower holds good and marketable title to the Property, free and clear of any charges, claims, liens, trusts, security interests, encumbrances, or other rights or interests other than the Title Exceptions shown on Exhibit 5.4.

6.2.10 FIRPTA. Borrower is not a "foreign person" as such term is defined in Section 1445(f)(3) of the Internal Revenue Code of 1986, as amended (the "Code").

6.2.11 Mechanic's Lien. No work has been performed or is in progress at, and no materials have been furnished to the Property which, though not presently the subject of, might give rise to mechanic's, materialmen's, or other liens against the Property or any portion thereof, except that for which full and complete releases have been obtained or as shown on Exhibit 6.2.11. If any lien for any such work is filed before or after Closing, Borrower shall immediately discharge the same.

6.2.12 Access. No fact or condition exists which interferes with access, or could result in the termination of the current access, from the Property to any presently existing highways and public roads adjoining or situated on the Property.

EXHIBIT 6.1.3

Page 10

6.2.13 Payables. Except as set for in Exhibit 6.2.13, there are no lienable claims against the Property and all other payables owing in connection with the Property including, without implied limitation, all trade payables, real and personal property taxes, employee wages (including accrued vacation and fringe benefits, if any), utility charges, insurance premiums, lease payments, license, franchise and royalty payments (herein collectively called the “Payables”) as of the dates therein stated. The term Payables is intended to include all additional payables incurred through the Closing Date.

6.2.14 Environmental. There is not present in any medium at the Property (a) any hazardous substances, pollutants or contaminants, as those terms are defined pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601-9657, as amended by the Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986), or (b) any petroleum or petroleum products, as defined in title I to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6991-6991(i).

6.2.15 Value. Borrower and Guarantors have made an independent determination of the fair market value of the Property and as a result thereof, have concluded that: (i) the amount of the Indebtedness substantially exceeds the fair market value of the Property (ii) the Property is unable to generate sufficient income to repay the principal and interest in accordance with the terms of the Loan Documents; and (iii) the consideration to be received by the Borrower and the Guarantors pursuant to the terms of this Agreement represents the payment by the Lender of full, fair and adequate consideration to the Borrower.

6.2.16 Financial Capacity. Borrower has made adequate provision for the payment of all creditors of the Borrower other than the Lender; and neither the Borrower nor the Guarantors have entered into this transaction to provide preferential treatment to the Lender or any other creditor of the Borrower or the Guarantors in anticipation of seeking relief under the Bankruptcy Code.

6.2.17 Solvency. As of the date hereof, after giving effect to the transactions provided for herein, Borrower is Solvent (as herein defined). Solvency shall mean that: (i) the sum of the debts and liabilities (including, without limitation, contingent liabilities) of Borrower is not greater than all of the assets of Borrower at a fair valuation; (ii) the present fair salable value of the assets of Borrower is not less than the amount that will be required to pay the probable liability of Borrower on its debts as they become absolute and matured; (iii) Borrower has not incurred, and does not believe that it will incur, debts as they become absolute and matured; (iii) Borrower has not incurred, and does not believe that it will incur, debts or liabilities (including, without limitation, contingent liabilities) beyond Borrower’s ability to pay as such debts and liabilities mature; (iv) Borrower is not engaged in, and is not about to engage in, a business or a transaction for which Borrower’s property constitutes or would constitute unreasonably small capital; and (v) Borrower is not otherwise insolvent as defined in, or otherwise in a condition which would in any circumstances then or subsequently render any transfer, conveyance, obligation or act then made, incurred or performed by it avoidable or

EXHIBIT 6.1.3

Page 11

fraudulent pursuant to, any law or other legal requirement that may be applicable to Borrower pertaining to bankruptcy, insolvency or creditors' rights.

6.2.18 Compliance. Borrower and the Mortgaged Premises are in compliance in all material respects with all laws, regulations and requirements applicable to Borrower and/or the Mortgaged Premises, and Borrower has not received, and has no knowledge of, any order or notice of any governmental investigation or of any violations or claims of violation of any law, regulation or any governmental requirement applicable to Borrower or the Mortgaged Premises.

6.2.19 Commercial Business Purpose. The loan transaction consummated pursuant to the Loan Documents was a commercial business transaction and the entire proceeds thereof were used exclusively for commercial business purposes.

6.2.20 Lien Effect. Except as expressly modified herein, all security interests in the collateral set forth in the Loan Documents, as Lender is willing to modify them, subject to the terms and conditions stated herein, are and shall remain unchanged and in full force and effect.

6.2.21 No Default. Except as described in Section 1, as of the date hereof, no default or event of default exists under the Loan Documents, and no condition exists which, but for the passage of time or the giving of notice or both, would constitute a default or event of default under the Loan Documents.

6.2.22 Indebtedness. Shown on Exhibit 6.2.22, are the amounts due Lender as to (i) the outstanding balance of the principal, (ii) past due and unpaid interest, and (iii) total indebtedness, including late charges, default rate interests, and reimbursements of expenses ("Indebtedness").

6.2.23 Ratification. The Loan Documents, the Indebtedness, and the other obligations evidenced or secured thereby, as the case may be, are valid and binding agreements of Borrower, enforceable in accordance with their terms and have not been amended or modified by any oral or written agreement or course of conduct of the parties.

6.2.24 Reaffirmation. All of the representations and warranties set forth in the Loan Documents are hereby reasserted and restated by Borrower as of the date hereof, as if each such representation and warranty were set forth at length herein. Borrower hereby acknowledge that such representations and warranties are being specifically relied upon by Lender as an inducement to Lender to enter into this Agreement and as partial consideration for the terms and conditions contained herein.

6.2.25 Due Formation. Borrower is a limited partnership, duly formed, validly existing and in good standing under the laws of the Commonwealth of Pennsylvania, and has taken all necessary partnership or other action to duly authorize the

EXHIBIT 6.1.3

Page 12

execution, delivery and performance of this Agreement and all documents, agreements and instruments executed in connection herewith and therewith.

6.2.26 No Third Party Consent. No consent to or approval of the execution, delivery and performance of this Agreement or any documents or actions contemplated herein is required to be obtained from any other person or entity, public or private, or any court, administrative agency or other governmental or quasi-governmental authority.

6.2.27 No Conflict. The execution and delivery of this Agreement by Borrower will not conflict with, or result in a breach of (i) the terms, conditions or provisions of the partnership agreement of Borrower; or (ii) any mortgage, lease, contract, agreement, or other instrument to which Borrower is a party or by which any of its properties are bound; or (iii) any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental or quasi-governmental authority.

6.2.28 Binding Effect. This Agreement and all other documents executed pursuant hereto or in connection herewith have been or shall be duly and validly executed and delivered and constitute valid and legally binding obligations of Borrower, enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws affecting creditors' rights generally.

6.2.29 No Litigation. There is no litigation or governmental proceeding pending or, to the knowledge of Borrower, threatened against Borrower which affects Borrower's ability to fulfill any of its obligations under this Agreement or any of the other Loan Documents.

6.2.30 Disclosure Accuracy. Neither this Agreement nor any other document executed in connection herewith by Borrower contains any untrue statement of a material fact and/or omits any material fact necessary in order to make the statement made, in light of the circumstances under which it was made, accurate and not misleading.

6.2.31 Complete Copies. Where copies of any documents have been delivered by Borrower to Lender, pursuant to this Agreement, such copies: (i) are exact copies of the originals of said documents, as executed and delivered by all of the parties thereto; (ii) constitute, in each case, the entire agreement between the parties thereto with respect to the subject matter thereof, and the original instruments in the form delivered to the Lender, are now in full force and effect, are valid and enforceable in accordance with their respective terms and no party thereto is in default and no claim of default by any party has been made or is now pending and there does not now exist any default which, after either the giving of notice or the passing of time, or both, will or may constitute a default (other than as specified in this Agreement), or would excuse performance by any party thereto; and (iii) have not been changed or amended except for amendments, if any, specifically referred to therein.

6.3 Representations and Warranties of Guarantors.

EXHIBIT 6.1.3

Page 13

6.3.1 Ratification. The Loan Documents, the Indebtedness, and the other obligations evidenced or secured thereby, as the case may be, are valid and binding agreements of each Guarantor, enforceable in accordance with their terms and have not been amended or modified by any oral or written agreement or course of conduct of the parties.

6.3.2 Reaffirmation. All of the representations and warranties set forth in the Loan Documents are hereby reasserted and restated by each Guarantor as of the date hereof, as if each such representation and warranty were set forth at length herein. Each Guarantor hereby acknowledges that such representations and warranties are being specifically relied upon by Lender as an inducement to Lender to enter into this Agreement and as partial consideration for the terms and conditions contained herein.

 Due Formation; Due Power. Each Guarantor which is not an individual, as applicable, is a trust, duly organized, validly existing and in good standing under the laws of the Commonwealth of Pennsylvania, and has taken all necessary action, corporate or otherwise, to duly authorize the execution, delivery and performance of this Agreement and all documents, agreements and instruments executed in connection herewith and therewith; and each individual Guarantor, as applicable, has full capacity to make and perform this Agreement and all documents, instruments and agreements executed in connection herewith.

 No Third Party Consent. No consent to or approval of the execution, delivery and performance of this Agreement or any documents or actions contemplated herein is required to be obtained from any other person or entity, public or private, or any court, administrative agency or other governmental or quasi-governmental authority.

6.3.3 No Conflict. The execution and delivery of this Agreement by each Guarantor will not conflict with, or result in a breach of (i) the terms, conditions or provisions of the formation or governance documents of any trust Guarantor; or (ii) any mortgage, lease, contract, agreement, or other instrument to which any Guarantor is a party or by which any of its properties are bound; or (iii) any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental or quasi-governmental authority.

6.3.4 Binding Effect. This Agreement and all other documents executed pursuant hereto or in connection herewith have been or shall be duly and validly executed and delivered and constitute valid and legally binding obligations of the Guarantors, enforceable in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency or other laws affecting creditors' rights generally.

6.3.5 No Litigation. There is no litigation or governmental proceeding pending or, to the knowledge of any Guarantor, threatened against any Guarantor which affects such Guarantor's ability to fulfill any of its obligations under this Agreement or any of the other Loan Documents.

EXHIBIT 6.1.3

Page 14

6.3.6 Disclosure Accuracy. Neither this Agreement nor any other document executed in connection herewith by any Guarantor contains any untrue statement of a material fact and/or omits any material fact necessary in order to make the statement made, in light of the circumstances under which it was made, accurate and not misleading.

6.3.7 Complete Copies. Where copies of any documents have been delivered by any Guarantor to Lender, pursuant to this Agreement, such copies: (i) are exact copies of the originals of said documents, as executed and delivered by all of the parties thereto; (ii) constitute, in each case, the entire agreement between the parties thereto with respect to the subject matter thereof, and the original instruments in the form delivered to the Lender, are now in full force and effect, are valid and enforceable in accordance with their respective terms and no party thereto is in default and no claim of default (other than as specified in this Agreement) by any party has been made or is now pending and there does not now exist any default which, after either the giving of notice or the passing of time, or both, will or may constitute a default, or would excuse performance by any party thereto; and (iii) have not been changed or amended except for amendments, if any, specifically referred to therein.

7. Possession. Possession of the Property is to be given to Lender, its nominee or assignee, by delivery of all keys and codes thereto on the Closing Date.

8. Deliveries.

8.1 Pre-Closing Deliveries. Borrower shall deliver, or cause to be delivered, within the time period stated, the following:

8.1.1 Lease Documents. No later than ten (10) days after the Effective Date. The rent roll of all Leases, duly certified as true by Borrower as of the Closing Date, together with all the Leases, including prior amendments, estoppels, and subordination, non-disturbance and attornment agreements, if any, and all material correspondence with each tenant thereof (including, without limitation, proposed letters of intent), and any material correspondence or agreements relating to tenancies or third party use or occupancy of the Property;

8.1.2 Land Use Agreements. No later than ten (10) days after the Effective Date, all land use agreements or material correspondence relating to the site plan, tenancy, use, occupancy or development of the Property;

8.1.3 Contract Documents. No later than ten (10) days after the Effective Date, copies of all written Contracts, material correspondence (pertaining to Contracts), and written disclosure of all other contracts, relating to the ownership, leasing, operation, management, or maintenance of the Property;

8.1.4 Permit Documents. No later than ten (10) days after the Effective Date, certified copies of the Permits;

EXHIBIT 6.1.3

Page 15

8.1.5 Design Documents. No later than ten (10) days after the Effective Date, all plans, specifications, project manuals, drawings, engineering reports, maps, plans and specifications and other similar matters; any surveys of the Property;

8.1.6 Guaranty Documents. No later than ten (10) days after the Effective Date, all guarantees, bonds and warranties with respect to the Property (together with original counterparts of such instruments);

8.1.7 Title Documents. No later than ten (10) days after the Effective Date, to the extent not delivered to Lender before the initial disbursement of the Loan, a legible copy of each underlying recorded title document affecting or relating to the Property, including, without limitation all Title Exceptions;

8.1.8 Potential Tenant Statement. Not later than ten (10) days after the Effective Date, for those currently in existence, and within one (1) business day for those created after the Effective Date, a certified statement executed by an authorized officer of Borrower's general partner listing all nonresidential tenant prospects for leases of portions of Property with whom Borrower has engaged in discussions concerning the Property, specifying in reasonable detail the status of such discussions, listing the brokers through whom the potential tenants were submitted, and the basis, if any, for payment of commissions for those brokers (that statement, together with its related deliveries, the "Potential Tenant Statement") together with certified copies of any commission agreements with those brokers and lease proposals and/or letters of intent pertaining to those potential tenants and drafts of leases submitted by, or to, those potential tenants. The Potential Tenant Statement will be accompanied by letters addressed to Lender from the brokers identified in the Potential Tenant Statement continuing the list of prospective tenants and commission arrangements and containing agreements releasing Lender, its designee, and the Property for commissions for said tenants if leases are not entered into with such tenants within days after the Closing Date;

8.1.9 Contractor Statements. Not later than ten (10) days after the Effective Date for those currently in existence, a sworn statement executed by an authorized officer of Borrower's general partner and its general contractor(s) listing all contractors and subcontractors (and other persons who under the mechanics' lien laws of the Commonwealth of Pennsylvania may be entitled to a lien) who have performed work on the Property and who remain unpaid and the amounts due and owing each of those contractors or subcontractors (and other persons who under the mechanics' lien laws of Commonwealth of Pennsylvania may be entitled to a lien) (the "Contractor Statements");

8.1.10 Cash Flow Statement. On or before ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, all books and records pertaining to the Property; and all other documents, licenses, warranties, permits, certificates or other materials, required to be conveyed or transferred by Borrower to Lender, its nominee or assignee, pursuant to the provisions of this Agreement; and an accounting certified by the chief financial officer of Borrower's general partner of all cash receipts and disbursements, income and expenses relating to the Property for

EXHIBIT 6.1.3

Page 16

the three year period preceding the Effective Date (including, without limitation, true and correct copies of all bank statements and related bank reconciliations covered in such period of time) (together with the related deliveries, the “Cash Flow Statement”);

8.1.11 Expense Statement. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a reasonably detailed list certified by the chief financial officer of Borrower’s general partner of all expenses in any manner or respect relating to the operation, maintenance, management, and leasing of the Property (the “Expense Statement”) for the three (3) year period preceding the Closing Date;

8.1.12 Payable Statement. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a list (certified by the chief financial officer of Borrower’s general partner) of all Payables with respect to the Property or with respect to which Borrower is an obligor (the “Payable Statement”) of the period ending on the Closing Date;

8.1.13 Inventory. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, an inventory certified by an authorized officer of Borrower’s general partner of all of Borrower’s tangible personal property (the “Inventory”);

8.1.14 Employee Statement. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a list certified by the chief financial officer of Borrower’s general partner of all of Borrower’s employees, which list shall recite such employees’ then current salary and benefits (and the status of the then funding of such benefits), together with true and correct copies of all applicable union, collective bargaining, and employment agreements relating to those employees, and confirmation that employee withholding and employer taxes, pensions, vacation pay, and other benefits required by applicable law or agreements have been paid or reserved in a manner permitted by law (with the related deliveries, the “Employee Statement”);

8.1.15 Utility Account List. On or before ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a list certified by Borrower’s general partner of all account numbers for the gas, electric, and other utility companies that serve the Property, other than those relating to individual meters for portions of the Property to third parties, if any (the “Utility Account List”);

8.1.16 Contract Certification. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a list certified by an authorized officer of Borrower’s of all Contracts in existence for the Property together with true and correct copies of each such Contract (with the related deliveries, the “Service Contract Certification”); and

EXHIBIT 6.1.3

Page 17

8.1.17 Manager/Leasing Agreement List. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a list certified by an authorized officer of Borrower's general partner of all management agreements and leasing agreements or brokerage contracts with respect to the Property, together with true and correct copies of all of those agreements (with the related deliveries, the "Manager/Leasing Agreement List").

8.1.18 Survey Certification. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a list certified by an authorized officer of Borrower's of all Surveys in existence for the Property together with true and correct copies of each such Survey (with the related deliveries, the "Survey Certification") and

8.1.19 Environmental Report Certification. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a list certified by an authorized officer of Borrower's of all Environmental Reports in existence for the Property together with true and correct copies of each such Report (with the related deliveries, the "Environmental Report Certification") and

8.1.20 Structural Engineering Report Certification. Not later than ten (10) days after the Effective Date for those currently in existence, and within one (1) business day for those created after the Effective Date, a list certified by an authorized officer of Borrower's of all Structural Engineering Reports in existence for the Property together with true and correct copies of each such Report (with the related deliveries, the "Structural Engineering Report Certification")

8.2 Closing Deliveries. Borrower shall execute and deliver or cause to be executed and delivered to Lender, its nominee or assignee, as Lender may direct on or before the Closing Date; and, shall submit forms for Lender's review and approval at least ten (10) days prior to the Closing Date:

8.2.1 Deed. A Special Warranty Deed naming such grantee as Lender may direct and conveying title to all or the portions of the Property that Lender may direct, and is given in lieu of foreclosure, in proper form for recording and otherwise in form and substance as set forth in Exhibit 8.2.1) including, without limitation, the following statement:

"This Deed is executed, delivered and accepted as a deed in lieu of foreclosure, and not as additional security, for each of that certain Mortgage listed on Exhibit "B" attached hereto and made a part hereof which was recorded in the Clerk's Office for the Recording of Deeds in and for [_____], and for each other loan of record which is in default. It is the intention of the Grantor to transfer absolute title to the above described premises to the Grantee free of any equity of redemption by the Grantor. It is the further intention of the Grantor and Grantee that the lien created by

EXHIBIT 6.1.3

Page 18

the above described Mortgage and any other loans or encumbrances held by Grantee or its affiliates, will not merge into the fee title acquired by the Grantee pursuant to this Deed. No such merger will occur until such time as the Grantee executes a written instrument specifically effecting such merger and duly records the same.”

8.2.2 Bill of Sale. Warranty bill of sale for the personal property described in Section 2.1.2 hereof, specifying whether such property is owned or leased by the Borrower or by a person claiming by or through the Borrower and any insurance policies;

8.2.3 Tenant Letter. A letter to the respective tenant(s), if any, advising of the change in ownership and directing the payment of rent to such party as the Lender, its nominee or assignee, shall designate, said letter to be, in form reasonably satisfactory to Lender, and estoppel certificates from tenant(s) in form and substance satisfactory to Lender;

8.2.4 Assignment of Leases. Assignment of lessor’s interest in Leases, if any, duly executed, acknowledged and delivered;

8.2.5 Assignment of Permits. An assignment, duly executed and acknowledged by Borrower, of (and delivery to Lender or its assignee of originals or copies of) all Permits, and Borrower’s rights to all fees and/or security funds, deposits and other sums heretofore paid to any governmental authority or other third party in connection with the Property listing them in detail as to the Permit issuer, the holder of the funds, the amount held, and any amounts in dispute;

8.2.6 Letter to Third Parties. A letter to parties in interest advising of the change in ownership and directing all refunds or other payments due Borrower to instead be made to the Deed grantee;

8.2.7 Intentionally omitted

8.2.8 FIRPTA. Certificates required under Section 1445 of the Internal Revenue Code of 1986;

8.2.9 Title Affidavit. Such affidavit of title or other certifications as shall be required by the Title Company to insure Lender’s or its nominee or assignee, title to the Property as set forth in Section 6.2.9;

8.2.10 Intentionally Omitted

8.2.11 Borrower Organization Documents. Borrower’s Company Resolution; Certificate of Good Standing; and Incumbency Certificate, where applicable;

EXHIBIT 6.1.3

Page 19

8.2.12 Guarantors Organization Documents. As applicable, Corporate Resolution; Trust Resolution; Partnership Resolution; Certificate of Good Standing; and Incumbency Certificate;

8.2.13 Intentionally Omitted

8.2.14 Estoppel. Current Estoppel Certificates from “Major Tenants,” if any, meaning those under leases of more than 10% of the square footage of the buildings upon the Property;

8.2.15 Intentionally Omitted

8.2.16 Assignment of Indemnities. Assignment of Third Party Indemnification Obligations;

8.2.17 Intentionally Omitted

8.2.18 Disbursement Agreement. Disbursement Agreement as to funds in the Account; and

8.2.19 Consent and Stipulation to Judgment. Consent and Stipulation to Judgment by Borrower to expedite consensual foreclosure of the Mortgage in the form of Exhibit 8.2.19.

8.3 Ancillary Documents.

8.3.1 Opinions. Borrower shall have delivered to Lender such legal opinions, in form and substance satisfactory to Lender and its counsel, as Lender shall require.

8.3.2 Title Insurance. Borrower shall have delivered to Lender, at Borrower’s expense, a title bringdown endorsement issued by First American Title Insurance Company (“Title Company”) for Lender’s current Loan Policy (“Title Policy”) insuring that (i) the status of title to the Mortgaged Premises has not changed since the date of the Title Policy upon execution of this Agreement, (ii) the Mortgage, as amended, has not merged with the Deed; (iii) insured coverage of the Property is based on replacement value; and (iv) insured coverage of the Property includes removal of any “creditors rights” exception.

8.3.3 Title Easements. Borrower shall execute and deliver in recordable form such covenants, conditions, restrictions and easements as Lender may require for the future operation of the Property.

8.3.4 Lender Expenses. Borrower shall have paid or reimbursed Lender for all costs and expenses incurred in connection with this Agreement including, without limitation, all Title Company charges and recording costs and the legal fees and disbursements of Lender’s counsel in connection with this Agreement.

EXHIBIT 6.1.3

Page 20

9. Conditions.

9.1 Conditions Precedent. The obligations of Lender hereunder are subject to the fulfillment of the following conditions prior to or on the Closing Date (any one of which may be waived in whole or in part by Lender at or prior to the Closing) and in the event any of the conditions are not complied with, Lender may terminate this Agreement by notifying the Borrower and thereafter this Agreement shall be null and void:

9.1.1 Due Representation. The warranties and representations made by Borrower and Guarantors, as specified in this Agreement shall be true in all material respects on the Closing Date as though such representations and warranties were made on the Closing Date (except for changes in the Leases permitted under the terms of this Agreement).

9.1.2 Due Performance. Borrower shall have performed and complied with all of the material terms and conditions required by this Agreement to be performed and complied with by it prior to or on the Closing Date.

9.1.3 Due Diligence. Lender shall be satisfied with the results of its inspection of the Property (including, without limitation, structural and environmental conditions, and title and survey conditions), Borrower's books and records, and such other information which the Lender may deem pertinent in respect to the Property. Borrower agrees to allow Lender and Lender's agents, employees and representatives to inspect the Property, including taking measurements of and samples of materials from the Property, and copy the books, records and documents of Borrower and the Property, from time to time, at reasonable times during business hours. Borrower shall make the Property all such books, records and documents of Borrower available to Lender, Lender's agents, employees and representatives from time to time at reasonable times during business hours after request by Lender. Borrower agrees that Lender and Lender's agents and employees shall, at such times, have the right to inspect and measure the Property and interview the maintenance employees, project manager and construction manager or general contractor concerning the Property.

9.1.4 Casualty. In the case of damage or destruction to the Property before the Closing Date, Borrower shall promptly give Lender written notice of that damage or destruction, together with such reasonable details of which Borrower may have knowledge, including, without limitation, an estimate of the reasonable and necessary cost of restoration of the Property as nearly as practicable to its condition immediately before that damage or destruction. After Borrower's notice is given, Lender at its option may terminate this Agreement by giving written notice of termination to Borrower on or before the Closing Date without further obligation under this Agreement, or if Lender shall elect not to so terminate this Agreement, the parties to this Agreement shall close the transaction contemplated by this Agreement in accordance with the terms of this Agreement and Lender shall receive from Borrower an assignment by Borrower of all insurance proceeds, including rental loss insurance proceeds for the period from and after the Closing Date until the Property is fully restored, for such damage or destruction.

EXHIBIT 6.1.3

Page 21

9.1.5 Condemnation. If before the Closing Date written notice shall be received by Borrower of any action, suit, or proceeding to condemn or take all other or any part of the Property under the powers of an eminent domain, Borrower shall promptly send written notice thereof to Lender, and Lender shall have the right to terminate its obligations under this Agreement by notice in writing to Borrower given on or before the Closing Date. If the Lender shall not elect to terminate its obligations under this Agreement under this Paragraph, Lender shall receive an absolute assignment on the Closing Date of the entire proceeds of or right to the condemnation award. Borrower shall convey the Property less that part so taken or subject to the condemnation proceeding, as the case may be.

9.2 Conditions Subsequent. The Covenant Not to Sue will at Lender's election be void *ab initio* and will be of no force or effect and the Borrower and the Guarantors will be jointly and severally and personally obligated to repay to the Lender the Indebtedness if any one or more of the matters described below in this Section occurs. The reinstatement of the obligations of the Borrower and the Guarantors to pay the Indebtedness and the abrogation of the Covenant Not to Sue will not operate to affect or to alter the provisions agreed to by the Borrower and the Guarantors for the benefit of Lender pursuant to Sections 11, 12, 13, 15, 17, and 19.17 of this Agreement. The conditions subsequent are as follows:

9.2.1 Litigation. The Borrower, the Guarantors, or any person claiming by or through the Borrower or the Guarantors ever commence, join in, assist, cooperate in or participate as an adverse party or as an adverse witness (subject to compulsory legal process which requires testimony) in any suit or other proceeding against any Released Parties (defined in Section 17.3 below) relating to the Loan, the Loan Documents, the Indebtedness the Property including in the event of foreclosure of the Property, or which challenges the validity of the Deed, the Bill of Sale or the Assignment, the transfer of the Property to Lender or its assignee, the adequacy or sufficiency of the consideration for such transfer, or Lender's or its assignee's title to the Property, the Borrower or the Guarantors opposing, defending, or committing any act whatsoever which may delay, impede, or prohibit said foreclosure action.

9.2.2 Avoidance. The Deed or any other document evidencing a conveyance of the Property to the Lender is ever rendered void or is rescinded by operation of law, or by order of any state or federal court, by reason of an order arising out of any claim or proceeding initiated or commenced in favor of, against, on behalf of, or in concert with, directly or indirectly, the Borrower, the Guarantors or any person claiming by or through the Borrower or the Guarantors or any of their respective agents, employees, representatives, officers, directors, shareholders, subsidiaries, affiliates, heirs, personal representatives, successors or assigns.

9.2.3 Breach. The warranties contained in the Deed or any other document evidencing a conveyance of the Property to the Lender are breached.

9.2.4 Access. The Borrower, the Guarantors or any person claiming by or through the Borrower or the Guarantors deny the Lender, or the Lender's representatives, the right to inspect the Property, or to inspect, audit and transcribe the books, records, contracts, and insurance policies maintained by the Borrower, the Guarantors or any person claiming by or

EXHIBIT 6.1.3

Page 22

through the Borrower or the Guarantors in connection with the construction, operation or maintenance of the Property.

9.2.5 No Release. The release of the Released Parties set forth in Section 17.3 of this Agreement is ever rendered void, is rescinded or adjudicated unenforceable by operation of law or by order of any state or federal court of competent jurisdiction, by reason of an order arising out of any claim or proceeding initiated or commenced in favor of, against, on behalf of, or in concert with, directly or indirectly, the Borrower, the Guarantors or any person claiming by or through the Borrower or the Guarantors or any of their respective agents, employees, representatives, officers, directors, shareholders, subsidiaries, affiliates, heirs, personal representatives, successors or assigns.

9.2.6 Insolvency or Bankruptcy. The Borrower or Guarantors are the subject of a bankruptcy proceeding or insolvency or receivership proceeding after the Closing, and/or if the conveyance of the Property pursuant to this Agreement rescinded or reversed (including due to any action described in Section 9.2.2 hereof) or deemed a "Voidable Transfer" as defined in Section 16.1 hereof, pursuant to any claim of preference, "fraudulent conveyance" or otherwise arising out of or related to such bankruptcy or insolvency proceeding.

10. Covenant Not to Sue Borrower Parties.

10.1 Covenant Not to Sue. Effective on the Closing Date and only if the transactions contemplated by this Agreement are consummated in accordance with the terms of this Agreement, and subject to the satisfaction by Borrower and Guarantors of all the conditions of this Agreement, the Lender does hereby Covenant Not to Sue the Borrower or the Guarantors, their shareholders, directors, partners, agents, trustees, beneficiaries and employees, as well as the respective heirs, personal representatives, successors and assigns of any and all of them (hereafter collectively called the "Borrower Parties") for any personal liability which relates to, in whole or in part, directly or indirectly: (a) the Loan; (b) the Loan Documents; or (c) any agreement of the Borrower or the Guarantors relating to the Property or the Indebtedness; EXCEPTING ONLY the obligations of the Borrower and the Guarantors to perform the terms of this Agreement and the documents delivered pursuant to this Agreement which survive the Closing Date and liabilities, including the Indebtedness, such Covenant Not to Sue to be treated as a credit against liabilities due from Borrower and Guarantors in such order and among such liabilities as Lender may determine in its sole, unfettered discretion including, without limitation, to be applied as a credit only after all Indebtedness, except the Covenant Consideration, has been paid in full.

10.2 Other Loans. It is expressly understood and agreed that nothing contained in this Agreement shall, in any way, release Borrower, Affiliates or Guarantors from any obligation, duty or liability arising with respect to any other loans between Borrower, Affiliates, Guarantors and Lender including but not limited to those certain loans from Lender to [____], a [____] ("AB"), _____, a _____ ("CD"), and _____, a _____ ("EF" and together with AB and CD, the "Other Borrowers") as follows: (i) an \$[____] commercial

EXHIBIT 6.1.3

Page 23

mortgage loan to AB on or about [____]; and (ii) a \$[____] commercial mortgage loan to EF on or about [____] and (iii) an \$[____] commercial mortgage loan to CD on or about [____]. Further, nothing contained in this Agreement shall, in any way, release the Borrower, Other Borrowers, and the Guarantors from any obligation or duty arising pursuant to any documents or agreements executed contemporaneously herewith or hereafter.

11. Absolute Conveyance. The Borrower and the Guarantors acknowledge and agree that: (a) the conveyance of the Property to the Lender, or its assignee or nominee, pursuant to the term of this Agreement is an absolute conveyance of all of the Borrower's and all of the Guarantors', right, title and interest in and to the Property in fact as well as in form and the deed, bill of sale and other conveyance documents are not intended to be a mortgage, trust conveyance, Deed of trust or security instrument of any kind; (b) the consideration for such conveyance is exactly as recited in this Agreement; (c) after the Closing Date the Borrower and the Guarantors will have no further interest (including rights of redemption) or claims in, to or against the Property or to the proceeds or profits that might be derived therefrom except for the accounting of Covenant Consideration after the Closing Date, (d) the conveyance herein is in consideration of the Lender's covenants and releases contained in this Agreement, (e) the conveyance is not intended to secure in any way whatsoever either the Indebtedness or the performance of any other obligation by Borrower or Guarantors and (f) the negotiations which led to the consummation of this Agreement were conducted in good faith and purely from the standpoint of the Lender or its nominee or assignee holding title to the Property from Borrower for a good and adequate consideration, with the intent to take and continue to hold full and complete possession of the Property as its new owner.

12. No Merger. The Parties acknowledge and agree that notwithstanding the Covenant Not to Sue contemplated by this Agreement, all of the Loan Documents will remain in full force and effect after the transactions contemplated by this Agreement have been consummated. The parties further acknowledge and agree that the interest of the Lender, its nominee or assignee, in the Property created by all of the conveyances provided for herein will not merge with the interests of the Lender in the Property under the Loan Documents. Since the interests of the Lender under the Loan Documents are necessary to protect the Lender from intervening claims and junior liens of third persons, it is the express intention of each of the parties (and all of the conveyances provided for herein will so recite) that such interests of the Lender in the Property will not merge, but be and remain at all times separate and distinct, notwithstanding any union of said interest in the Lender at any time by purchase, termination or otherwise and that the liens held by the Lender against the Property created by certain of the Loan Documents will remain at all times valid and continuous liens against the Property.

13. Lien Priority. If it is determined that any other person or entity other than the Lender shall have a lien, encumbrance, or claim of any type which has a legal priority over any term of this Agreement, then the original terms of the Loan Documents shall be deemed severed from this Agreement and separately enforceable from the terms thereof as modified hereby in accordance with their original terms, and Lender shall retain all legal or equitable priorities which were in existence before the date of execution of this Agreement. It is understood by and

EXHIBIT 6.1.3

Page 24

is the intention of the parties hereto that any legal or equitable priorities of the Lender over any party which were in existence before the date of execution of this Agreement shall remain in effect after the execution of this Agreement.

14. Intentionally Omitted.

15. Reaffirmation of Guarantor.

15.1 Guaranty Reaffirmation. In consideration of the agreements and amendments made by Lender in this Agreement and to induce Lender to take such action (acknowledging that Lender would not do so without this reaffirmation and consent), each Guarantor hereby ratifies, reaffirms, and continues in full force and effect the Guaranty executed by such Guarantor. Each such Guaranty shall continue for all purposes notwithstanding the amendments, modifications, and other actions embodied in the foregoing Agreement.

15.2 Guaranties Valid. Each such Guaranty constitutes the valid, legal and binding obligation of the Guarantor executing it, enforceable against Guarantor in accordance with its terms.

15.3 Waiver of Indemnity and Contribution. Notwithstanding any provisions of any Guaranty to the contrary, until the Loan has been paid in full to Lender, each Guarantor hereby irrevocably waives any claims or other rights which it may now have or hereafter acquire against any other guarantor of the guaranteed obligations under the Loan that arise from the existence, payment, performance, or enforcement of Guarantor's obligations under its Guaranty, including, without limitation, any right of subrogation, reimbursement, exoneration, contribution, indemnification, any right to participate in any claim or remedy of Lender against such other guarantor of the guaranteed obligations under the Loan or any collateral which Lender now has or hereafter acquires, whether or not such right, claims or remedy arises in equity or under contract, statute, or common law, including, without limitation, the right to take or receive from any other guarantor, directly or indirectly, in cash or other property or by setoff or in any other manner, payment or security on account of such right, claim, or remedy. If any amount shall be paid to a Guarantor in violation of the preceding sentence and the guaranteed obligations under the Loan shall not have been paid in full, such amount shall be deemed to have been paid to such Guarantor, as the case may be, for the benefit, and held in trust for the benefit, of Lender and shall forthwith be paid to Lender to be credited and applied upon the guaranteed obligations under the Loan whether matured or unmatured, in accordance with the terms of the Loan Documents between Borrower and Lender. Each Guarantor acknowledges that it will receive direct and indirect benefits from the Loan, this Agreement and the other transactions evidenced by and contemplated in the Loan Documents, and that the waiver set forth in this paragraph is knowingly made in contemplation of such benefits.

16. No Bankruptcy Intent; Voidable Transfers.

16.1 No Bankruptcy Intent. Borrower represents and warrants that it does not have any intent to (i) file any voluntary petition under any Chapter of the Bankruptcy Code,

EXHIBIT 6.1.3

Page 25

Title 11, U.S.C.A. ("Bankruptcy Code"), or in any manner to seek any proceeding for relief, protection, reorganization, liquidation, dissolution or similar relief for debtors under any local, state, federal or other insolvency law or laws providing relief for debtors ("Debtor Proceeding"), or (ii) directly or indirectly to cause or permit any involuntary petition under any Chapter of the Bankruptcy Code to be filed against Borrower, or (iii) directly or indirectly to cause or permit the Property or any portion or any interest of Borrower in the Property to become the property of any bankrupt estate or the subject of any Debtor Proceeding. Borrower acknowledges that the filing of any petition or the seeking of any relief in a Debtor Proceeding by Borrower, whether directly or indirectly, would be in bad faith and solely for purposes of delaying, inhibiting or otherwise impeding the exercise by Lender of Lender's rights and remedies upon the occurrence of an event of default hereunder against Borrower and the Property pursuant to the Loan Documents. Without limiting the foregoing, Lender shall be and is entitled to and Borrower hereby consents to, relief from the stay imposed by Section 362 of the Bankruptcy Code, as amended, in any bankruptcy proceedings.

16.2 Voidable Transfers. Without limiting any of the foregoing, if any payments of money or other transfers made to Lender by the Borrower pursuant to this Agreement shall for any reason subsequently be declared to be "fraudulent" (within the meaning of any state or federal law relating to fraudulent conveyances), preferential, or otherwise voidable or recoverable, in whole or in part for any reason, under the Bankruptcy Code or any other state or federal law (collectively referred to as "Voidable Transfers") and Lender is required to repay or restore the amount of any such Voidable Transfers or any portion thereof, then, as to the amount repaid or restored (including all costs, expenses and attorneys' fees paid by Lender related thereto), the liability of Borrower shall automatically be revived, reinstated and restored in such amount or amounts, and shall exist as though such Voidable Transfers had never been made to Lender. Borrower expressly acknowledges and agrees that Lender may rely upon advice of counsel and, if so advised by counsel, may settle, without defending, any action to void any alleged Voidable Transfers, and that upon such settlement Borrower shall again be liable for any deficiency resulting from such settlement as provided in this Agreement

17. Pre-existing Conditions and Claims.

17.1 Ratification and Warranty. (i) All of Borrower's and Guarantors Obligations to the Lender as set forth in the Loan Documents are in full force and effect, (ii) the Loan Documents to which they are a party were all properly and duly executed and delivered, (iii) the Loan Documents to which they are a party are now, and at all times have been, in full force and effect in accordance with their terms and (iv) there are no amendments, waivers or modifications of the Documents, except for those made in writing and signed by the Lender and the Borrower and Guarantors, and identified in the Recitals, and (iv) Lender has complied properly performed and satisfied in a timely manner with all of its obligations under the Loan Documents, including delivery of notice and time for Borrower and Guarantors to cure its their defaults, if any.

17.2 Waiver. Borrower and Guarantor for themselves and their respective heirs, successors and assigns, and by their execution hereof hereby acknowledge, admit and

EXHIBIT 6.1.3

Page 26

agree that, as of the date of execution and delivery of this Agreement, the Borrower and Guarantors (i) have no defenses, counterclaims or offsets relating to obligations under or in respect of the Loan Documents or to the enforcement or exercise by Lender of any of its rights, powers or remedies under or in respect of the Loan Documents, or (ii) alternatively, hereby irrevocably waive, and relinquish, any and all such objections, claims, defenses, counterclaims or offsets, that may exist as of the date hereof including, without limitation, any and all such objections, claims, defenses, counterclaims or offsets that are unknown, unsuspected, unanticipated or undisclosed as of such date.

17.3 Release. Although Lender regards its conduct as proper and does not believe Borrower or Guarantors have any claim, cause of action, offset, or defense against Lender, its participating lenders, co-lenders, subsidiaries, affiliates, parents, predecessors in interest, nominees, assignees, officers, directors, agents, employees, servants, attorneys and representatives, as well as their respective heirs, personal representatives, successors and assigns, or any and all of them (hereinafter collectively called the “Released Parties”), Lender wishes and Borrower and Guarantors agree to eliminate any possibility that any conditions, acts, omissions, events, circumstances, or matters which occurred prior to the Effective Date could impair or otherwise subject Lender or any of the other Released Parties to any liability other than is expressly stated in this Agreement and the Loan Documents. Borrower and Guarantors on behalf of themselves and their respective heirs, successors and assigns (collectively the “Releasing Parties”) remise, release, acquit, satisfy and forever discharge the Released Parties from any and all manner of debts, accounts, bonds, warranties, representations, covenants, promises, contracts, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands and causes of action of any nature whatsoever, which existed, arose, or occurred at any time prior to or concurrently with the date hereof of any character whatsoever whether known or unknown, suspected or unsuspected, in contract or in tort, at law or in equity, including without implied limitation, such claims and defenses as fraud, mistake, duress and usury, which Borrower or Guarantors ever had or now has against the Released Parties, jointly or severally, for or by reason of any matter, cause or thing whatsoever occurring prior to the date hereof, which relates to, in whole or in part, directly or indirectly: (i) the Loan, including the administration or funding thereof, (ii) the Loan Documents, (iii) the Obligations, (iv) the Property, including the financing and operation of same, and (v) any other agreement or transaction between any of Releasing Parties and any of Lender Parties concerning matters arising out of or relating to the items set forth in subsections (i) and (iv) above.

17.4 Acknowledgments. The Borrower and each Guarantor hereby acknowledges that it is or is owned by sophisticated and experienced real estate developers and investors, each of whom has a full understanding of the terms and conditions of this Agreement and the risks involved in entering into this Agreement, that this Agreement has been fully negotiated and that compromises on the part of Lender and Borrower were made before agreement was reached on the final terms hereof, that at all times each Borrower and each Guarantor has been represented by its own attorneys and such other competent counsel as it has chosen to engage in the negotiation of the terms and the preparation and execution of all documents, and has relied solely on the advice and instruction of its own attorney who has had

EXHIBIT 6.1.3

Page 27

the opportunity to review and analyze all of the documents for a reasonable period of time prior to the execution by the Borrower and each Guarantor; that Borrower and each Guarantor is entering into this Agreement with the conviction that it is a fair agreement and that it represents an equitable compromise of the competing interests of the parties hereto and that, in addition, it was prepared and executed without fraud, duress, undue influence or coercion of any kind exerted by any party, and that Borrower and each Guarantor acknowledges this Agreement shall constitute a complete defense to any claim, cause of action, defense, liability or obligation released under this Agreement, and agrees that after the execution and delivery of this Agreement on the date hereof, the only claims or causes of action which it and/or he could possibly have against any of the Released Parties would be those arising under this Agreement, or a written contract hereafter executed by Lender in favor of Borrower and/or Guarantor those arising from conduct occurring after the execution and delivery of this Agreement. Neither Borrower nor any Guarantor shall institute or prosecute (or, except to the extent required by law, in any way, assist or cooperate with the institution or prosecution of) any action, suit, hearing, or other proceeding of any kind, nature, or character at law or in equity against Released Parties in order to collect, enforce, declare, assert, establish, or otherwise raise any defense, claim, cause of action, contract, liability, indebtedness, or obligation which is within the scope of those released in this Section or which arise out of any fact, contract, condition, claim, cause of action, indebtedness, liability, obligation, event, action, omission, circumstance, or other matter or reason of any kind which is the basis for any such defense, claim, cause of action, liability, indebtedness or obligation which is released hereunder.

17.5 No Admission. Nothing in this Agreement shall be construed as (or shall be admissible in any legal action or proceeding as) any admission by Released Parties that any defense, indebtedness, obligation, liability, contract, claim, or cause of action exists which is within the scope of those released within this Section, because Lender denies that any such matters exist and regards this release as unnecessary except to confirm its understanding of the position of the Parties.

17.6 Indemnification. Borrower hereby indemnifies, defends, and holds harmless Released Parties and all persons, firms, corporations, and organizations on their behalf (collectively, the "Indemnified Parties") of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever that any third party may now have or claim to have against such Indemnified Parties, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way touching, concerning, relating to, arising out of or founded upon the Loan, the Obligations or any of the Loan Documents, including all such loss or damage of any kind heretofore sustained, or that may arise as a consequence of the dealings between the Parties up to and including the Effective Date.

17.7 No Waiver. Borrower acknowledges and confirms that by not exercising the rights, remedies and privileges available to Lender, for any reason whatsoever, including the negotiation and execution of this Agreement, Lender is not waiving and has not waived any of its rights to exercise them in accordance with the Loan Documents and this Agreement.

EXHIBIT 6.1.3

Page 28

17.8 No Course of Conduct. Borrower acknowledges and agrees that by negotiating and entering into this Agreement, Lender is not establishing a course of conduct nor a pattern of operation nor an implicit or explicit understanding that Lender may or will ever further revise or modify any term or condition of the Loan Documents or this Agreement or agree to forebear at any time in the future if an event of default should occur under and pursuant to the Loan Documents, this Agreement and/or any document or instrument contemplated or referred to herein.

17.9 No Cure. Borrower hereby acknowledges and agrees that except as specifically set forth herein, neither this Agreement nor any actions pursuant to this Agreement nor any negotiations or discussions (including the Discussions) among Borrower, Guarantors any of their respective agents, officers or principals and any of the Lender Parties, shall be deemed or construed to cure any existing defaults under the Loan Documents, constitute a reinstatement, novation or release of the Loan or the Loan Documents or an extension of the maturity date of the Loan, or constitute a modification, amendment or waiver of the Loan or Loan Documents. In addition and not in limitation of the foregoing, it is expressly understood and agreed that Borrower's default(s) under the Loan Documents is/are not cured or waived by the acceptance of any funds paid by or on behalf of Borrower pursuant to this Agreement, including, without limitation, any Collateral Payment Amounts received hereunder.

17.10 Future Negotiations. Borrower and Guarantors acknowledge and agree that Lender has no obligation whatsoever to discuss, negotiate or to agree to any restructuring of the Loan, or any modification, amendment, restructuring or reinstatement of the Loan Documents or to forbear from exercising its rights and remedies under the Loan Documents, except as expressly provided in this Agreement.

18. Incorporation.

18.1 Incorporation of Recitals and Exhibits. Borrower and each Guarantor acknowledges that each of the Recitals is true and accurate, and each is incorporated herein by this reference as though fully set forth in the body of this Agreement.

18.2 Incorporated Documents. The documents referred to in the Recitals and the exhibits attached hereto are incorporated herein by reference and made a part hereof with the same force and effect as if herein restated in full. However, the following provisions of this Agreement shall prevail over any inconsistent provisions contained in the materials incorporated herein:

18.2.1 Modification Paramount. In the event that any term or provision of any of the Loan Documents is inconsistent or contrary to a specific and express term or provision of this Agreement, the explicit and express term or provision of this Agreement shall apply and shall be paramount. To the extent that no such express inconsistency exists, the terms and provisions of the Loan Documents, as amended, shall continue in full force and effect.

EXHIBIT 6.1.3

Page 29

18.2.2 No Novation; Continuing Validity. This Agreement is not intended to be nor shall it constitute a novation of the Loan Documents or the indebtedness and obligations evidenced or secured thereby, as the case may be.

18.2.3 Further Compliance with Loan Documents. Borrower hereby ratifies, reaffirms and agrees to all terms, conditions and remedies of and contained in the Loan Documents and the indebtedness and obligations evidenced and/or secured thereby, and warrants and agrees that Borrower shall fully and strictly comply with all such terms and provisions, with time being strictly of the essence.

19. Miscellaneous.

19.1 No Enterprise. The relationship between Borrower and Lender is that of debtor and creditor. Nothing in this Agreement shall be deemed to create a partnership, joint venture or other association between Borrower and Lender or between Lender and any other party, or cause Lender to be liable or responsible in any way for the actions, liabilities, debts or obligations of Borrower or any other party.

19.2 Counterparts. This Agreement may be executed in any number of identical counterparts, each of which shall be deemed to be an original, and all of which shall collectively constitute a single agreement, fully binding upon and enforceable against the parties hereto. No amendment or supplement to this Agreement shall be valid or binding unless made in writing and executed by all the parties hereto.

19.3 Binding Effect. This Agreement shall be binding upon the Borrower, Guarantor and Lender and their respective heirs, successors, and assigns.

19.4 Choice of Law. This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania, without giving effect to principles of conflicts of laws.

19.5 Jurisdiction. The state and federal courts located in the Commonwealth of Pennsylvania shall have exclusive jurisdiction to hear and determine any claims or disputes between Borrower and Lender, pertaining to this Agreement. Borrower expressly submits and consents in advance to such exclusive jurisdiction in any action or proceeding commenced in such courts.

19.6 Intentionally Omitted.

19.7 Time of Essence. Time is of the essence of this Agreement and each provision of this Agreement.

19.8 No Brokerage. The Parties represent and warrant each to the other that the transactions hereby contemplated are made without liability for any finder's, realtor's, broker's, agent's or other similar commission. The Parties mutually agree to indemnify and hold

EXHIBIT 6.1.3

Page 30

each the harmless from claims for commissions asserted by any party as a result of dealings claimed to give rise to such commissions.

19.9 Lender's Expenses. In addition to payments at Closing under Section 3, within thirty (30) days of receipt of an invoice therefor, Borrower shall pay to Lender all of its costs and expenses incurred in connection with this Agreement and any other matters related to the Property, including, but not limited to, the review and approval of any lease with respect to the Property and any related subordination, non-disturbance and attornment agreements, all of which costs and expenses, shall include, but not be limited to, outside and in-house attorney's fees and disbursements.

19.10 Additional Documents; Appointment of Lender As Attorney-In-Fact. At all times following the execution of this Agreement, Borrower and Guarantors shall execute and deliver to Lender, or shall cause to be executed and delivered to Lender, and shall do or cause to be done, all such other instruments, documents and actions as Lender may reasonably deem necessary or desirable to assure Lender of the benefit of this Agreement and the other Loan Documents. In the event Borrower or any Guarantor fails to execute and deliver any such instrument or document within ten (10) days of the request therefor, Borrower, Guarantors and each of them hereby irrevocably appoints any officer of Lender as his, her and/or its attorney-in-fact (which appointment is durable, irrevocable and coupled with an interest) for the purpose of executing and delivering such instruments or documents.

19.11 Notices. All notices which may be given pursuant to this Agreement or the Loan Documents shall be in writing and shall be personally delivered or sent by first-class certified or registered United States mail, postage prepaid, return receipt requested, and sent to the party at its address appearing above or such other address as any party shall hereafter designate by notice to the other party given as aforesaid. All notices shall be deemed effective upon receipt or, if mailed, upon the expiration of the third day following the date of mailing, whichever occurs first.

19.12 Joint and Several Liability. The obligations, undertakings and agreements of each of the Borrower and each Guarantor hereunder shall be joint and several.

19.13 Severability. If any clause or provision of this Agreement is determined to be illegal, invalid or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Agreement will not be affected thereby if the essential terms of the Agreement upon which Lender relied remain in effect. It is the intention of the parties that if any such provision is held to be illegal, invalid or unenforceable, there will be added in lieu thereof a provision as similar in terms to such provision as is possible and be legal, valid and enforceable.

19.14 Third Party Obligations. The Borrower and the Guarantors acknowledge and agree that the acceptance by the Lender, its nominee or assignee of the terms of this Agreement or ownership of the Property and the power of attorney to sell the Property pursuant to the terms of this Agreement and the assignment to the Lender, its nominee or

EXHIBIT 6.1.3

Page 31

assignee of various contracts and agreements pertaining to the Property will not create any obligation on the part of the Lender, its nominee or assignee, to third parties which might have claims of any kind whatsoever against the Borrower, the Guarantors, or the Property and that the Lender for itself and its nominee or assignee does not assume or agree to discharge any liabilities pertaining to the Property or Property which originated prior to the Closing Date, or undertake any obligation to complete the leasing or sale of the Property. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

19.15 Confidentiality. It is important to the Parties to maintain a reasonable confidentiality regarding the subject matter hereof. Accordingly, no Party shall disclose the undertaking of the terms or conditions of this Agreement, any materials, information (written, oral or observed) or incidents related to this Agreement, or any document executed or prepared in connection herewith, including, without limitation, correspondence, electronic transmissions, voice recordings, notes, analyses based on confidential material, budgets and projections, except as may be required by applicable law, pursuant to a court order or subpoena, or to such Party's counsel or advisers a reasonably necessary to assist such Party in the conduct of any negotiations related to this Agreement, or to the extent such information could have been derived through civil litigation discovery procedures will be admissible in any subsequent proceedings, if such evidence would otherwise be admissible, without regard to whether it was originally derived in the context of this Agreement.

19.16 Cooperation. Borrower and Guarantors agree to sign and deliver such additional documents as Lender may reasonably require to effectuate the purposes of this Agreement.

19.17 JURY TRIAL WAIVER. BORROWER AND GUARANTORS SHALL NOT SEEK A JURY TRIAL IN ANY ACTION BASED UPON OR ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT OR THE LOAN. TO THE EXTENT PERMITTED BY APPLICABLE LAW, BORROWER AND EACH GUARANTOR HEREBY IRREVOCABLY AND EXPRESSLY WAIVES ANY AND ALL RIGHT TO ANY SUCH JURY TRIAL AND AGREES THAT NO SUCH ACTION WITH RESPECT TO WHICH A JURY TRIAL HAS BEEN WAIVED SHALL BE SOUGHT TO BE CONSOLIDATED WITH ANY OTHER ACTION WITH RESPECT TO WHICH A JURY TRIAL CANNOT OR HAS NOT BEEN WAIVED. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF BORROWER AND EACH GUARANTOR AND ITS COUNSEL, AND SHALL NOT BE SUBJECT TO ANY EXCEPTIONS

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed and delivered effective as of the Effective Date.

BORROWER:

[_____] , [_____]

By: [_____] , a
[_____] limited partnership, its
sole member

By: [_____] , a
[_____] business corporation,
its general partner

By: _____
Name:
Title:

LENDER:

[_____]

By: _____
Name:
Title:

EXHIBIT 6.1.3

Page 33

GUARANTORS:

[_____] , as Trustee for
[_____]

By: _____
Name:

[_____] , as Trustee for
[_____]

By: _____
Name:

By: _____
[_____], an individual

By: _____
[_____], an individual

INDIVIDUAL ACKNOWLEDGMENT

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF _____ :

On this, the _____ day of _____, 20[____] before me,
[____], personally appeared known to me (or satisfactorily proven) to be the
person whose name is subscribed to the within instrument and acknowledged that he/she executed
the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

[Notarial Seal]
My commission expires:

INDIVIDUAL ACKNOWLEDGMENT

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF _____ :

On this, the _____ day of _____, 20[____] before me,
[____], personally appeared known to me (or satisfactorily proven) to be the
person whose name is subscribed to the within instrument and acknowledged that he/she executed
the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

[Notarial Seal]
My commission expires:

EXHIBIT 6.1.3

Page 35

EXHIBIT 8.1
DEFICIENCY JUDGMENT ACT

42 Pa.C.S.A. § 8103
§ 8103. Deficiency judgments
Effective: January 24, 2005

42 Pa.C.S.A. § 8103

Purdon's Pennsylvania Statutes and Consolidated Statutes [Currentness](#)
Title 42 Pa.C.S.A. Judiciary and Judicial Procedure ([Refs & Annos](#))

Part VII. Civil Actions and Proceedings

Chapter 81. Judgments and Other Liens (Refs & Annos)

Subchapter A. General Provisions

➔ **§ 8103. Deficiency judgments**

(a) General rule.--Whenever any real property is sold, directly or indirectly, to the judgment creditor in execution proceedings and the price for which such property has been sold is not sufficient to satisfy the amount of the judgment, interest and costs and the judgment creditor seeks to collect the balance due on said judgment, interest and costs, the judgment creditor shall petition the court to fix the fair market value of the real property sold. The petition shall be filed as a supplementary proceeding in the matter in which the judgment was entered. If the judgment was transferred from the county in which it was entered to the county where the execution sale was held, the judgment shall be deemed entered in the county in which the sale took place.

(b) Effect of failure to give notice.--Any debtor and any owner of the property affected thereby, who is neither named in the petition nor served with a copy thereof or notice of the filing thereof as prescribed by general rule, shall be deemed to be discharged from all personal liability to the judgment creditor on the debt, interest and costs, but any such failure to name such person in the petition or to serve the petition or notice of the filing thereof shall not prevent proceedings against any respondent named and served.

(c) Action on petition.--

(1) If no answer is filed within the time prescribed by general rule, or if an answer is filed which does not controvert the allegation of the fair market value of the property as averred in the petition, the court shall determine and fix as the fair market value of the property sold the amount thereof alleged in the petition to be the fair market value.

(2) If an answer is filed controverting the averment in the petition as to the fair market value of the property, but no testimony is produced at the hearing supporting such denial of the fair market value, the court shall determine and fix as the fair market value of the property sold the amount thereof alleged in the petition to be the fair market value.

EXHIBIT 8.1

Page 2

(3) If an answer is filed alleging as the fair market value an amount in excess of the fair market value of the property as averred in the petition, the judgment creditor may agree to accept as the fair market value of the property the value set up in the answer and in such case may file a stipulation releasing the debtors and the owners of the property affected thereby, from personal liability to the judgment creditor to the extent of the fair market value as averred in the answer, less the amount of any prior liens, costs, taxes and municipal claims not discharged by the sale, and also less the amount of any such items paid at distribution on the sale.

(4) If an answer is filed and testimony produced setting forth that the fair market value of the property is more than the value stated in the petition, the court shall hear evidence of and determine and fix the fair market value of the property sold.

(5) After the hearing, if any, and the determination by the court under paragraph (1), (2) or (4) of the fair market value of the property sold, then, except as otherwise provided in subsection (f), the debtor shall be released and discharged of such liability to the judgment creditor to the extent of the fair market value of said property determined by the court, less the amount of all prior liens, costs, taxes and municipal claims not discharged by the sale, and also less the amount of any such items paid at the distribution on the sale, and shall also be released and discharged of such liability to the extent of any amount by which the sale price, less such prior liens, costs, taxes and municipal claims, exceeds the fair market value as agreed to by the judgment creditor or fixed and determined by the court as provided in this subsection, and thereupon the judgment creditor may proceed by appropriate proceedings to collect the balance of the debt.

(d) Action in absence of petition.--If the judgment creditor shall fail to present a petition to fix the fair market value of the real property sold within the time after the sale of such real property provided by section 5522 (relating to six months limitation), the debtor, obligor, guarantor or any other person liable directly or indirectly to the judgment creditor for the payment of the debt, or any person interested in any real estate which would, except for the provisions of this section, be bound by the judgment, may file a petition, as a supplementary proceeding in the matter in which the judgment was entered, in the court having jurisdiction, setting forth the fact of the sale, and that no petition has been filed within the time limited by section 5522 to fix the fair market value of the property sold, whereupon the court, after notice as prescribed by general rule, and being satisfied of such facts, shall direct the clerk to mark the judgment satisfied, released and discharged.

(e) Waiver of benefit of section prohibited.--Any agreement made by any debtor at any time, either before or after or at the time of incurring any obligation, to waive the benefits of this section or to release any obligee from compliance with the provisions hereof shall be void.

(f) Certain special allocations.--Notwithstanding the provisions of subsection (c)(5), if the judgment creditor is a nonconsumer judgment creditor and:

(1) if the judgment has been entered with respect to a partial recourse obligation, the fair market value of the property, determined as provided in subsection (c) will be applied first to discharge, as provided in subsection (c)(5), all liability for the nonrecourse portion of the obligation before any portion of such value is applied to discharge any liability for the

EXHIBIT 8.1

Page 3

recourse portion of the obligation; and

(2) if the judgment has been entered with respect to an obligation of which only a portion is guaranteed, the fair market value of the property determined as provided in subsection (c) will be applied first to discharge, as provided in subsection (c), all liability for the portion of the obligation which is not guaranteed before any portion of such value is applied to discharge any liability for the portion of such obligation which is guaranteed.

(f.1) Collateral located in more than one county.--

(1) If the real property collateral is located in more than one county in this Commonwealth, a judgment creditor may elect not to file a valuation petition in the court in each of such counties as provided under subsection (a) and shall not be subject to the penalties for failure to file the petition under subsection (d) if the judgment creditor is a nonconsumer judgment creditor and the provisions of paragraphs (2) and (3) are satisfied.

(2) The judgment creditor shall petition the deficiency court to determine and fix the fair market value of all of the real property collateral as provided under subsection (c)(1), (2), (3) and (4). The value shall be determined on a parcel-by-parcel basis, and the amount so fixed for each parcel comprising the real property collateral shall be the fair market value for the parcel for all purposes under this subsection unless redetermined as provided in paragraph (4).

(3) The determination of the fair market value of the real property collateral by the deficiency court as provided in paragraph (2) shall be made before an execution sale is held with respect to any of the real property collateral.

(4) (i) If the execution sale of a parcel of real property is concluded and the judgment creditor is the purchaser of the parcel at the sale, then either the judgment creditor or the debtor may file a petition with the deficiency court seeking a redetermination of the fair market value of the parcel provided the petition is filed within the six-month period established under section 5522(b)(6).

(ii) If the petition is filed in a timely manner, the deficiency court shall redetermine the fair market value of the parcel in the manner provided in subsection (c)(1), (2), (3) and (4). The redetermined value shall be the fair market value of the parcel for all purposes under this subsection.

(iii) The filing of the petition for the redetermination shall not limit or affect the judgment creditor's ability to execute on the real property collateral unless and until the value is redetermined by the court. However, where the debtor alleges in its petition that an appropriate redetermination of value by the court with respect to property that has already been sold to the judgment creditor at an execution sale would be sufficient to satisfy the judgment in full, the deficiency court may issue a stay of further execution proceedings pending the court's ruling on the petition for redetermination of value.

(5) In cases subject to this subsection, the debtor shall be released and discharged from liability for the payment of the debt in the manner provided in subsection (c)(5) to the extent of:

(i) the fair market value determined by the deficiency court of all real property collateral

EXHIBIT 8.1

Page 4

purchased by the judgment creditor in execution proceedings on the judgment less the deductible items described in subsection (c)(5); and

(ii) the amount distributed to the judgment creditor as a result of the sale of the real property collateral purchased in the proceedings by third parties.

(f.2) Foreign collateral.--

(1) No deficiency court shall have the power to fix the fair market value of real property located outside this Commonwealth and may not take into account the value of that property in considering whether or not a deficiency exists under this section.

(2) This section shall not apply to the sale of any real property located outside this Commonwealth.

(g) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Adjusted value." The assessed value of a parcel of real property collateral determined for real estate tax purposes times the applicable common level ratio factor published by the State Tax Equalization Board.

"Consumer credit transaction." A credit transaction in which the party to whom credit is offered or extended is a natural person and the money, property or services which are the subject of the transaction are primarily for personal, family or household purposes.

"Debtor." A debtor, obligor, guarantor, surety and any other person liable directly or indirectly to a judgment creditor for the payment of a debt.

"Deficiency court." With respect to cases covered by subsection (f.1), the court of common pleas located in the county where the highest adjusted value land is located.

"Highest adjusted value land." The real property collateral located in a county that has a higher aggregate adjusted value than real property collateral located in any other county.

"Judgment." The judgment which was enforced by the execution proceedings referred to in subsection (a), whether that judgment is a judgment in personam such as a judgment requiring the payment of money or a judgment de terris or in rem such as a judgment entered in an action of mortgage foreclosure or a judgment entered in an action or proceeding upon a mechanic's lien, a municipal claim, a tax lien or a charge on land.

"Judgment creditor." The holder of the judgment which was enforced by the execution proceedings.

EXHIBIT 8.1

Page 5

"Nonconsumer judgment creditor." Any judgment creditor except a judgment creditor whose judgment was entered with respect to a consumer credit transaction.

"Nonrecourse portion of the obligation." The portion as to which the judgment creditor's recourse is limited to the mortgaged property or other specified assets of the debtor which are less than all of such assets.

"Partial recourse obligation." An obligation which includes both a nonrecourse portion and a recourse portion.

"Real property collateral." All of the real property subject to a lien securing the obligation evidenced by the judgment and located within this Commonwealth.

"Recourse portion of the obligation." All of the obligation except the nonrecourse portion thereof.

"Valuation petition." A petition to fix the fair market value of real property sold as required by subsection (a).

CREDIT(S)

1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978. Amended 1998, Dec. 21, P.L. 1082, No. 144, § 1, imd. effective; 2004, Nov. 24, P.L. 1243, No. 152, § 5, effective in 60 days [Jan. 24, 2005].

BAR ASSOCIATION COMMENT

2007 Main Volume

Source: Substantially a reenactment, except for the elimination and modification of procedural provisions, of act of July 16, 1941 (P.L. 400) (12 P.S. § 2621.1 et seq.)

HISTORICAL AND STATUTORY NOTES

2007 Main Volume

Act 1998-144 legislation

Act 1998-144, in subsec. (a), in the first sentence following "petition the court", deleted "having jurisdiction"; rewrote subsecs. (c)(2) and (c)(4) and designated the former second sentence as subsec. (c)(5); in subsec. (d), substituted "section 5522" for "statute after the sale"; and added subsecs. (f) and (g). Prior to amendment, subsecs. (c)(2) and (c)(4) read:

"(2) If an answer is filed controverting the averment in the petition as to the fair market value of the property, but no testimony is produced at the hearing supporting such denial of

EXHIBIT 8.1

Page 6

the fair market value, the court shall determine and fix as the fair market value of the property the amount thereof alleged in the petition to be the fair market value, and thereupon enter a decree directing the judgment creditor to file release of the debtors, obligors, guarantors or any other persons directly or indirectly liable for the debts, to the extent of the fair value so fixed, whereupon execution may be issued for the balance of the debt."

"(4) If an answer shall be filed and testimony produced setting forth that the fair market value of the property is more than the value stated in the petition, the court shall determine and fix the fair market value of the property, which shall in no event exceed the amount of the debt, interest, costs, taxes and municipal claims.

"After the hearing and the determination by the court of the fair market value of the property sold, the debtor, obligor, guarantor and any other person liable directly or indirectly to the judgment creditor for the payment of the debt shall be released and discharged of such liability to the judgment creditor to the extent of the fair market value of said property as previously agreed to by the judgment creditor or determined by the court, less the amount of all prior liens, costs, taxes and municipal claims not discharged by the sale, and also less the amount of any such items paid at the distribution on the sale, and shall also be released and discharged of such liability to the extent of any amount by which the sale price, less such prior liens, costs, taxes and municipal claims, exceeds the fair market value as agreed to by the judgment creditor or fixed and determined by the court as provided in this subsection, and thereupon the judgment creditor may proceed by appropriate proceedings to collect the balance of the debt."

Section 2 of Act 1998-144 provides that this act shall apply to all actions and proceedings pending on the effective date of that act.

Act 2004-152 legislation

Act 2004-152, § 5, in subsec. (a) added the third sentence; in subsec. (b) deleted ", obligor, guarantor, mortgagor, and any other person directly or indirectly liable to the judgment creditor for the payment of the debt," following "Any debtor"; in subsec. (c)(3) deleted ", obligors and guarantors, and any other persons liable directly or indirectly for the debt," following "releasing the debtors"; in subsec. (c)(5) deleted ", obligor, guarantor and any other person liable directly or indirectly to the judgment creditor for the payment of the debt" preceding "shall be released"; in subsec. (e) deleted ", obligor, surety or guarantor" following "any debtor"; added subsecs. (f.1) and (f.2); and in subsec. (g) added definitions of adjusted value, debtor, deficiency court, highest adjusted value land, real property collateral and valuation petition.

Prior Laws:

1941, July 16, P.L. 400, §§ 1, 4, 6, 7.1, and 10 (12 P.S. §§ 2621.1, 2621.4, 2621.6, 2621.7a and 2621.10).

1943, May 27, P.L. 681, § 1.

42 Pa.C.S.A. § 8103, PA ST 42 Pa.C.S.A. § 8103

Current through end of the 2008 Regular and 2007-2008 First Special Sessions

EXHIBIT 8.1

Page 7

EXHIBIT 10.2.5(b)
Foreclosure Timetable

Time Period		Foreclosure Timetable Actions
Cure Period	1.	<u>Default</u> occurs and remains uncured after expiration of cure period.
At any time; 1 hour to prepare	2.	<u>Writ of Summons</u> by Borrower, Permits Pre-hearing discovery while Lender filings are contested by Borrower
At any time; Preparation Time for Complaint 1-3 days; identifying proposed receiver 10 days	3.	<u>Lender Files Complaint</u> for a. confession of judgment on note b. complaint in mortgage foreclosure c. petition for receiver
Preparation time 1 hour	4.	<u>Service of Process</u> upon Borrower in accordance with either Rule 440 or 2958.1 et seq.. Without certified mail or return receipt request mailing of complaint, and filing of actions with court fails to achieve notice or process
Preparation time and response within 20 days	5.	<u>Borrower response</u> within 20-30 days after service of process a. Confession (30 days) – move to open and to strike b. Complaint in mortgage foreclosure (20 days) – deny actions c. Petition for receiver (20-30 days)- deny actions
At any time; Preparation time for Complaint 1 to 7 days	6.	<u>Borrower Counterclaims</u> : a. Bad faith

Time Period		Foreclosure Timetable Actions
		b. Delays in site improvements c. Reasonable reliance damages from failure to close d. Temporary frustration of purpose
Preparation Time 1 day	7.	<u>Borrower Preliminary Objections</u>
Preparation time and response 20 days	8.	<u>Response to Preliminary Objections</u>
60-180 days	9.	<u>Discovery</u> Document Production and Depositions (5 days at deposition)
Preparation 1-5 days	10.	<u>Summary Judgment</u>
30 days	11.	<u>Answer to Summary Judgment</u>
1- 180 days	12	<u>Order on Summary Judgment and Schedule Trial¹</u>
180 to 360 days	13	<u>Appeal</u> : requires bond unless otherwise ordered by the Court
42 to 360 days	14	<u>Foreclosure</u> : Sheriff advertisement then sale on a pre-set sale date, frequency of sale dates depends on county
30-60 days	15	<u>Sheriff's Deed</u> : Period for recording
Preparation 7-14 days	16	<u>Bankruptcy</u>
90-180 days	17	<u>Bankruptcy Stay</u>

¹ Philadelphia County: Complex case can be given an extended track, which would add another 180 days here. In the surrounding counties, cases can take even longer to get listed for trial in some circumstances.