

Strategies Used by Lenders and Loan Servicers

Moderator: Grant T. Stein, Alston & Bird LLP

Panelists: Jim Howard, GlassRatner Advisory & Capital Group LLP

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Association**

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Midland Loan Services**

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CMBS Trusts

- How are the notes in a CMBS Trust different
 - Generally nonrecourse to Borrowers
 - Carve-out guarantors
 - Fraud
 - Waste
 - Misrepresentation
 - Environmental
 - Bankruptcy

CMBS Trusts

- Who are the parties to a CMBS Trust?
 - ❑ Originator
 - ❑ Depositor (accumulator)
 - ❑ Trustee (hold/distribute)
 - ❑ Bondholder
 - ❑ Directing Certificate Holders (B Piece)

CMBS Trusts

- Who are the parties to a CMBS Trust?
 - ❑ Primary Servicer
 - ❑ Master Servicer (limited rights)
 - ❑ Special Servicer (greater rights)
 - ❑ Rating Agency

CMBS Trusts

- What is a Pooling and Servicing Agreement?
 - ❑ Operational agreement for the CMBS Trust
 - ❑ Identifies roles and responsibilities for parties
 - ❑ Limitations

CMBS Trusts

- What is a Pooling and Servicing Agreement?
 - Options afforded
 - Fair Value
 - Replace Special
 - Repurchase
 - Advancing requirements
 - Indemnification

CMBS Trusts

- What can the Special Servicer do?
 - ❑ Loan must be transferred (default/imminent default)
 - ❑ Best interest of the bondholders as a whole
 - ❑ Servicing Standard
 - ❑ Highest net present value

CMBS Trusts

- What the Special Servicer cannot do?
 - ❑ New lending
 - ❑ Extend “willfully” beyond Trust limitations
 - ❑ Effect REMIC Standing

CMBS Trusts

- Unique Resolutions and Rulings
 - ❑ Competing plans, claim purchases and 1111b elections
 - ❑ Resolutions inconsistent with B Piece approval
 - ❑ Limitations on credit bidding
 - ❑ Temporary restraining orders
 - ❑ Receivership actions
 - ❑ Federal Court vs. State Court

Things That Bank and Borrower Professionals May Not Understand About Banks and Their Workout Strategies

- Banks are in business to, among other things, make money.
 - Is this loan currently making money for the Bank? If not, what would you do with that loan?

- Loan's Capital Position and Risk Rating at the Bank influence Bank strategy
 - Has loan been written down? Not shared with borrower but influences bank thinking
 - Loans can be written down even when payments current
 - Bank's cost of capital is driven by risk ratings
 - Understand Basel capital changes and how that may drive Bank (e.g. NPAs, L/Cs)
 - Timing issues can matter

Things That Bank and Borrower Professionals May Not Understand About Banks and Their Workout Strategies

- Additional Regulatory Requirements Drive Bank Behavior
 - Yes, we do need a current appraisal/collateral audit
 - Yes, we do need more timely and frequent reporting as your loan is now subject to more frequent portfolio reviews / we need a story to tell

Things That Bank and Borrower Professionals May Not Understand About Banks and Their Workout Strategies

- Dynamics of Approval Process
 - ❑ How Many Layers of Credit Approval?
 - ❑ How Often Do They Meet?
 - ❑ Who Are the Personalities and What Do They Need?
 - ❑ Are they in the Bank's Workout Group?
 - ❑ Bank Decisions will take longer than you expect / Plan Ahead

Things That Bank and Borrower Professionals May Not Understand About Banks and Their Workout Strategies

■ Personalities Count

- ❑ Banks tend to have elephant memories / Lost trust can be very hard to regain
- ❑ Transparency – more information, faster, better
- ❑ Sense of Urgency – optics of urgency can be very helpful
- ❑ Remember that you are graded not only on results, but process
- ❑ Honest evaluation of management, especially CFO, is necessary
- ❑ Wrong attorney or FA can be a hindrance instead of a help

Things That Bank and Borrower Professionals May Not Understand About Banks and Their Workout Strategies

- Other Factors may be at work
 - ❑ Loss-Share Agreement affects potential available solutions/structures
 - ❑ Industry Exit – “It’s Not You, It’s Me”
 - ❑ Reputational Risk – high-profile borrower or industry can drive decisions
 - ❑ Products other than the loan itself – swap, credit cards, etc.

Five Cardinal Rules to Remember

- **The essence of workouts is to (1) identify all feasible options (2) analyze the most likely outcome resulting from the selection of each option and (3) to select the best possible outcome for the lender. *Don't expect your lender to do something that isn't in their best interest just because it's in yours.***

Five Cardinal Rules to Remember

- ❑ **All behavior is rational from that particular person's point of view. *Focus on understanding how your lender views the world and tailor your proposals accordingly.***

Five Cardinal Rules to Remember

- ❑ **Lenders can handle bad news. What they hate are surprises. *I've very rarely seen keeping a critical issue from a lender turn out well. They are far more likely to deal with a problem rationally and calmly if you tell them versus if they find it out from someone else***

Five Cardinal Rules to Remember

- ❑ **All loan work out plans that are not based on the realities of that particular situation have one thing in common: they are destined to fail. *Ignoring the facts doesn't change them. You don't have to accept them as unchangeable, but you do have to recognize that they need to be changed.***

Five Cardinal Rules to Remember

- ❑ **Everything works if you let it . . . just not always the way that you want it to. *A borrower taking a dogmatic approach on how to fix a problem is a recipe for disaster. Be flexible and open to changing circumstances. More often than not there is an opportunity hidden among the chaos; many times better than the original goal.***

Things all CMBS Borrowers need to know about Special Servicers:

- ❑ **Nothing can happen on a CMBS restructure until the loan has moved from the Master Servicer to a Special Servicer. Even if a loan has not defaulted, consider sending a 'notice of imminent default' to trigger the transfer.**

Things all CMBS Borrowers need to know about Special Servicers:

- ❑ **Special Servicers have distinct limits on what they can and can't do in a restructure, generally defined within the Pooling and Servicing Agreement ("PSA"). Advancing significant new dollars for tenant finish work, for instances, is most likely a non-starter for them no matter how logical it may sound. Restructuring proposals should be crafted accordingly.**

Things all CMBS Borrowers need to know about Special Servicers:

- ❑ **Even if a property doesn't generate sufficient income to keep a loan current, strongly consider sending whatever net operating income is being generated, together with an operating report documenting that number. You would be amazed how much trust and good will that can generate.**

Things all CMBS Borrowers need to know about Special Servicers:

- ❑ **There is a lot of data regarding a CMBS loan that is publicly available (such as the “Trepp Report”) which can be helpful in developing proposals.**

Things all CMBS Borrowers need to know about Special Servicers:

- ❑ **Special Servicers are NOT afraid to take title to a property. While traditional lenders don't necessarily fear it, overall I've found Special Servicers to be quicker to take steps to take title than a traditional lender.**

Things all CMBS Borrowers need to know about Special Servicers:

- **Special Servicers tend to be very focused on the net value (FAS 114-type analysis) of the property when considering a settlement proposal. The discount rate used to arrive at PV is normally the coupon rate of the loan.**

Things all CMBS Borrowers need to know about Special Servicers:

- ❑ **Special Servicers will almost never consider any proposal for restructure that doesn't require the sponsor to inject cash into the deal. They want to know you're fully 'bought in'.**

Things all CMBS Borrowers need to know about Special Servicers:

- ❑ Those “bad boy” clauses you signed are **VERY** much enforceable! Be particularly aware of recent court rulings regarding bankruptcy filings and insolvency.

Things all CMBS Borrowers need to know about Special Servicers:

- ❑ **The creativity, attention and effort that a Special Servicer is willing to put into a restructuring is directly proportional to the size of the deal. Don't look for them to consider a complicated bifurcation restructuring strategy on a \$1,500,000 loan. For a \$100 million loan, on the other hand, their creativity may stun you. Special Servicers don't always have a “dog in the fight” (i.e., a direct financial interest in the loan) but are rather selected by the B-Piece (‘first loss’) bond holder. They may or may not be related.**

Things all CMBS Borrowers need to know about Special Servicers:

- And finally, the Special Servicer assigned to a pool (issuance) can change, depending on the losses within the pool. Don't be surprised if the servicing suddenly changes from LNR to C-III.

And About Those Note Buyers

- ❑ **More and more lenders are considering note sales as a viable option to completing a work-out. The bank may or may not indicate they are considering a note sale before consummating a transaction.**
- ❑ **Note Buyers are almost always focused on the collateral. For traditional lenders taking title to collateral is one of the last options they might consider. For a Note Buyer, that could be “Plan A”.**

And About Those Note Buyers

- ❑ That being the case, a swap of deed for guaranty is generally a possibility.
- ❑ While there are some very experienced people buying notes, don't be surprised if your new Note Holder is less than sophisticated.
- ❑ In most (but not all) states, the price a Note Buyer paid for a note isn't legally relevant.

Loss Share Agreements:

- ❑ **In concept, Loss Share Agreements are extremely valid approaches to the problem of how to work through the problem loans of closed banks.**
- ❑ **The problem becomes a shift from concept to implementation. Many Loss Share Banks seem to have misinterpreted some of the clauses within those Agreements**

Loss Share Agreements:

- ❑ **Example 1: “The FDIC won’t approve your proposed settlement”. Reality: There is nothing within the agreement that gives requires FDIC approval of appropriate and justified settlements.**

Loss Share Agreements:

- ❑ **Example 2: “The FDIC mandates that I pursue your guaranty until you file bankruptcy.” Reality: While most Agreements mandate “exhausting collection efforts”, if the borrower can prove that further collection efforts are futile, the loss share bank has most likely fulfilled this requirement. Consider preparing and submitting a Liquidation Analysis to prove up an inability to perform.**

Loss Share Agreements:

- ❑ **Not all Loss Share Agreements are the same and they have evolved over time. Make it a practice to pull up the specific loss share agreement for the bank involved in your deal (FDIC.GOV).**

Best Practices for Borrower's to consider, no matter who the lender might be:

- ❑ **It's just business – keep emotions out of the equation!**
- ❑ **Be transparent**
- ❑ **Demonstrate that you have a very strong grasp on the nature of the problem.**
- ❑ **Be proactive in coming to the table with a proposal.**
- ❑ **Sometimes it's not what you ask but how you ask**

Best Practices for Borrower's to consider, no matter who the lender might be:

- ❑ Be realistic in your 'ask' – this is one business where the old saying, 'it doesn't hurt to ask' doesn't apply.
- ❑ Demonstrate that you understand the lender's realities
- ❑ And above all else, never ever say to your lender:
 - “Your share of the loss is. . .”
 - TARP
 - “Can I just get something off my chest?”

Jim Howard is a Senior Managing Director in the Miami offices of GlassRatner Advisory and Capital Group, a national restructuring and forensic accounting firm headquartered in Atlanta, GA. Jim has over 30 years of experience within the financial services industry, most of which has been focused on commercial lending and problem loan restructuring. Since joining GlassRatner, Jim has been advising both creditors and borrowers to help find solutions for a variety of stressed debt situations. In addition, Jim regularly serves as an "Expert Witness" testifying before courts around the country on matters involving banking and lending matters.

Jim started his career with the Bank of Oklahoma in Oklahoma City where he was selected to help form a problem loan management group to deal with the bank's mounting problem loans. In 1989, he was recruited by Hibernia Bank in New Orleans to join its Special Asset Group where he was primarily responsible for working on commercial loans, with a concentration in restructuring Highly Leveraged financings. In 1991, he accepted a position with First American Bank in Atlanta, GA to form and manage a new Special Asset lending group for that bank. In 1993, First American was acquired by First Union Bank, and Jim joined their Special Asset Department. He was ultimately selected to manage the bank's Special Asset group for the state of Georgia as well as to serve on the bank's Special Asset Management Steering Committee where he helped establish policies and procedures to be used throughout the corporation. In 1998, he was asked to head up First Union's Real Estate Financial Services Group for the State of Georgia. In 2000, Jim was transferred to Naples, FL where he served as the Market Manager for their West Florida Commercial Real Estate Financial Services division. In this capacity, Jim was responsible for originating and managing a portfolio of over \$2.4 billion in real estate loan commitments for a wide variety of project types including office, retail, industrial, resorts, hotels, residential, and land development. .

Chris Lenhart is Senior Vice President and Deputy General Counsel at U.S. Bank, where he leads the Commercial Lending, Commercial Workout/SAG and Capital Markets legal teams. He oversees a team of 30 attorneys and other professionals at U.S. Bank.

Chris clerked for Chief Judge Peter J. Walsh at the United States Bankruptcy Court for the District of Delaware in 1998. In 1999, Chris joined the law firm of Dorsey & Whitney, where he was an associate until his elevation to partnership in 2008. Chris was a Partner in the Finance & Restructuring Group, where he split his time between front-end commercial lending clients and clients needing assistance with commercial collections, workout and bankruptcy.

Chris graduated in 1995 from Whitman College in Walla Walla, Washington, receiving a B.A., with honors, in Politics. Chris graduated in 1998 from Cornell Law School in Ithaca, New York, receiving a J.D. *magna cum laude*. Chris was Order of the Coif and an Articles Editor on the Cornell Law Review.

Kevin Semon

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Mr. Semon is a Vice President and Special Servicing Manager for the Overland Park, Kansas based Midland Loan Services, a division of PNC Bank, NA.

With over 25 years of experience in this industry, his primary responsibilities include the workout of large balance notes with complex structures mostly secured by hospitality properties. Recent resolutions include over \$2 billion in hospitality secured CMBS loans through the confirmation of complex bankruptcy reorganization plans. Experience includes all forms of collateral in domestic and international markets for notes held by CMBS Trusts, investors or governmental entities. He is also the chief credit officer for Midland's Special Servicing department and a member of Midland's Asset Review Committee and Advancing Credit Committee. Mr. Semon has additional experience completing due diligence for new CMBS origination and the acquisition of loans and real estate assets in both domestic and international markets. Prior employers include special servicers, private investors, banks, real estate developers and pension fund advisors.

Mr. Semon has a B.S. in Business Administration from the University of Colorado, Boulder, and a B.A. in Environmental Design (Architecture) from the University of Colorado, Boulder.

Grant T. Stein

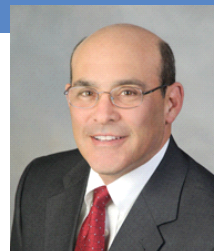
Grant Stein is a senior partner and former chair of Alston & Bird's Bankruptcy, Reorganization & Workouts Group. His diverse practice includes the representation of debtors, secured and unsecured creditors, creditors' committees, and fiduciaries in complex and difficult out-of-court workouts, debt restructurings, bankruptcy cases and financial transactions throughout the United States and internationally. He also regularly represents officers, directors and other parties in bankruptcy litigation of all kinds. His restructuring experience includes manufacturing, real estate, wholesale, retail, health care, aviation, communications, technology and intellectual property issues.

Mr. Stein is a Fellow of the American College of Bankruptcy, currently serves on its Board of Directors, served on its Board of Regents (2007-2011) and as co-editor of *College Columns*. He is identified as a top practitioner in *Chambers USA: America's Leading Lawyers for Business* and in *Super Lawyers* magazine, and was selected as the Best Lawyer for 2011 for Georgia Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Bankruptcy Litigation by *Best Lawyers*.

Mr. Stein served as law clerk to The Honorable W. Homer Drake, and has written numerous articles and regularly lectures around the country.

Experience

- Debtor's counsel to a manufacturing company in its financial restructuring and Chapter 11 case.
- Counsel to shopping center developers dealing with hundreds of millions of dollars of debt with numerous lenders and complex joint venture structures restructured out of court.
- Counsel to home builders dealing with hundreds of millions of dollars of debt with numerous lenders restructured out of court.
- Counsel to senior lenders in real estate workout, foreclosures, and bankruptcies including to a major lender on its \$1.2 billion in claims successfully resolved in the General Growth bankruptcy case.
- Bankruptcy litigation counsel for a national company in parallel bankruptcy and district court litigation concerning bankruptcy plan confirmation and lender liability issues.
- Counsel in numerous past and pending bankruptcy suits and investigations dealing with director and officer claims, and in the liquidation of a private equity fund.
- Counsel to a Chapter 11 trustee in an investigation that led to bringing successful claims for breach of fiduciary duty and violations of bankruptcy disclosure requirements and confirming a plan that has generated a recovery to general unsecured creditors of 47 percent of their claims.
- Counsel on several different commercial fraud cases dealing with more than \$200 million in embezzled funds and Ponzi schemes.
- Counsel on two separate confidential internal investigations.
- Counsel for a major unsecured creditor on the resolution of its \$89 million claim and related issues in a large national bankruptcy case.
- Bankruptcy counsel to a purchaser on \$379 million portion of a consortium bid in the acquisition of a portion of the assets of a bankruptcy estate in a large national bankruptcy case.
- Debtor's counsel for a 400-store retail chain, which had over \$80 million in debt and operations in ten states. Successfully completed a sale of assets in less than two months under Section 363 of the Bankruptcy Code, with proceeds sufficient to pay the secured creditors in full. There have been cash distributions to unsecured creditors in excess of 45 cents on the dollar. Also handled the commercial real property lease assumption issues on over 400 leases and the claims resolution process in the case (addressing over 3500 claims) and preference litigation.
- Debtor's counsel for a national advertising company with over \$140 million in debt and over 7,000 nonresidential real property leases, which utilized



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Related Services

Litigation
Bankruptcy, Workouts & Reorganization
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Education

University of Georgia
(J.D., 1981)
Emory University
(B.B.A., 1978)

Admitted To Practice

Georgia

Chapter 11 to repay all secured creditors and convert public bond debt to equity in a reorganized company.

- Debtor's counsel in the Chapter 11 case of a manufacturer in which the debtor was sold as a going concern, with a complete return to secured creditors, with a plan subsequently being confirmed.
- Lead bankruptcy counsel on a \$9 billion private structured finance transaction.
- Counsel to national distributors in multimillion-dollar claims against, and settlements with, national retailers in their bankruptcy cases.
- Counsel in multimillion-dollar creditor collection cases.
- Appellate counsel in obtaining the reversal of an adverse preference judgment in a complex case before the United States Court of Appeals of the Eleventh Circuit and the reversal of an adverse injunction in a complex case before the United States Court of Appeals of the Sixth Circuit.
- Counsel with contract parties in airline bankruptcy cases.

News

144 Alston & Bird Attorneys Named 2014 *Best Lawyers*; 17 Named "Lawyer of the Year"

One hundred and forty-four Alston & Bird attorneys have been selected for inclusion in the 2014 edition of *The Best Lawyers in America*. In addition, 17 Alston & Bird attorneys were named "Lawyer of the Year" by the publication.
August 15, 2013 In the Press

Chambers USA 2013 Edition Lists 21 Alston & Bird Practices and 91 Firm Attorneys

Twenty-one Alston & Bird practices have been listed in the 2013 *Chambers USA: America's Leading Lawyers for Business*. These include Antitrust; Banking & Finance; Bankruptcy/Restructuring; Capital Markets: REITs; Construction; Corporate/M&A; Energy; Employee Benefits & Executive Compensation; Environment; ERISA Litigation; Government: Government Relations; Health Care; Immigration; Intellectual Property; International Trade; Labor & Employment; Litigation: General Commercial, including White-Collar and Securities Litigation; Outsourcing; Privacy & Data Security; Real Estate; Tax.

May 24, 2013 In the Press

147 Alston & Bird Attorneys Named 2013 *Best Lawyers*

One hundred and forty-seven Alston & Bird attorneys have been selected for inclusion in the 2013 edition of *The Best Lawyers in America*. The publication is universally regarded as among the few definitive guides to legal excellence, and its rankings are based on an exhaustive peer-review survey in which more than 36,000 leading attorneys cast almost 4.4 million votes on the legal abilities of other lawyers in their practice areas.

September 18, 2012 In the Press

Chambers USA 2012 Edition Lists 23 Alston & Bird Practices and 89 Firm Attorneys

June 7, 2012 In the Press

Publications

"The Intersection of Receiverships and Bankruptcy," *The Bankruptcy Strategist*, February 2010.

February 2010

***Business Valuation and Bankruptcy*, John Wiley & Sons, November 2009.**

November 2009

Events

Memberships and Affiliations

- Fellow of the American College of Bankruptcy, currently serves on its Board of Directors, and served on its Board of Regents (2007-2011)
- Director, former chair and president of the AIRA
- Director, former chair and president of the Southeastern Bankruptcy Law Institute

