

**MORTGAGE LOAN FINANCING IN 2009 AND BEYOND
LOAN NEGOTIATION ISSUES**

and

**ACQUIRING DISTRESSED DEBT-ANATOMY OF A
MORTGAGE ACQUISITION TRANSACTION**

By Russell Bershad

Two articles are included in these materials. The first article addresses mortgage loan negotiation issues in 2009 and beyond. The first section of the article focuses on closing prerequisites. Section II deals with loan terms and conditions that attorneys are likely to address when reviewing loan commitments and advising borrowers.

The second article is about acquiring distressed mortgage debt. It contains an anatomy of a mortgage acquisition transaction, including an outline of the loan purchase process, typical provisions in a Loan Purchase Agreement and negotiation suggestions, and, lastly, a discussion of the due diligence that is required in acquiring distressed mortgage debt.

MORTGAGE LOAN FINANCING IN 2009 AND BEYOND

LOAN NEGOTIATION ISSUES

By Russell Bershad

Rare though they may be, commercial mortgage loans are still being made, and there is anecdotal evidence that the lending freeze is thawing gradually. Attorneys representing borrowers receiving new mortgage loans, or refinancing existing loans, have to deal with some new realities.

One thing is certain: lending standards are tighter now than in the past, and will continue to be tighter in the foreseeable future. Lenders will have greater equity requirements, will be more likely to require personal guarantees, will scrutinize rent rolls more closely than ever and, generally, will loan only when totally satisfied with, and assured of, the present quality of the real estate asset as compared with its potential.

Nevertheless, there may be some room to negotiate commitments in the present environment. In addition, there are some commitment conditions that, because they cannot be complied with, or for other reasons, must be changed.

As always, borrowers are best served by having counsel involved before a loan commitment is accepted. This article highlights some of the issues facing counsel. In Section I we address loan closing prerequisites including various documents and other “deliverables” that must be provided to the lender before the lender will be required to close the loan. Section II focuses on the terms and conditions of the loan that are likely to involve input from legal counsel.

I. Closing Prerequisites

1. Tenant Estoppel Certificates. If the mortgaged property is leased for non-residential purposes, the lender will require estoppel certificates from most if not all tenants, and certainly from all key tenants. Most leases require tenants to provide estoppel certificates, but not necessarily on a form dictated by the lender, and some leases do not specify a deadline for the tenant to deliver an estoppel certificate. In the past, if there were many tenants, a lender whose commitment letter required all tenants to deliver estoppels might be willing to negotiate to limit the requirement to the key tenants, plus a percentage of other tenants, or might otherwise allow flexibility with regard to obtaining estoppels. Today, it can be expected that lenders will be less flexible because confirming the rent roll will be critically important.

2. Subordination Agreements. Most commitment letters for commercial property require tenant leases to be subordinate to the mortgage placed on the property by the landlord. Leases contain a variety of provisions related to subordination. Some provide that the lease is and will be automatically subordinate to all present and future mortgages. Others provide for the

tenant to subordinate on request. Some leases require the landlord to use reasonable or best efforts to obtain a non-disturbance agreement from the lender as a condition to tenant's subordination of its lease. (A non-disturbance agreement is an agreement by the lender not to terminate the tenant's lease or affect its tenancy as a result of foreclosure of a superior mortgage due to a landlord's mortgage default, so long as the tenant's lease is not in default.) Other leases mandate that non-disturbance be given in exchange for subordination, sometimes dictating acceptable non-disturbance terms or attaching an acceptable form. Unless all leases are automatically subordinate, lease subordination requirements in the commitment letter are critically important and all leases must be reviewed to determine whether subordinations can be obtained. If non-disturbance agreements are required, the commitment has to be negotiated to try to commit the lender to give a non-disturbance agreement to the tenants whose leases mandate non-disturbance in exchange for subordination, or to relieve the borrower of the obligation to obtain a subordination agreement from such tenants.

3. Title Insurance. Every mortgage loan commitment requires the borrower to obtain title insurance insuring the priority of the mortgage. Obtaining title insurance as required by the lender usually is not problematic, especially if title has been insured without material exceptions in connection with a prior transaction. If, however, the lender requires certain title insurance endorsements, such endorsements may impact timing and costs materially. For example, a Zoning 3.1 endorsement may be issued by a title company only upon receipt of satisfactory evidence of zoning compliance, such as confirmatory letters from the municipality (which, in turn, must then be evaluated from the perspective of whether such evidence can be obtained in time). Lenders' willingness to waive title endorsement requirements, regardless of the cost of the endorsements, will likely diminish in the current environment.

4. Survey. Most mortgage loan commitments require the borrower to provide an acceptable survey. Some require the borrower to obtain an American Land Title Association/American Congress on Surveying and Mapping ("ALTA/ACSM") survey, which provides substantially more detail than a typical title survey. Preparation of an ALTA/ACSM survey for a property not recently the subject of such a survey will be time consuming. It is therefore important to confirm with the surveyor that the survey can be completed by the commitment deadline. It may be possible to negotiate the level of detail with the lender, which will reduce the time and cost of an ALTA/ACSM survey. For example, topography may not be material. It is unlikely that a lender that requires an ALTA/ACSM survey in its commitment letter will waive the requirement altogether; however, a lender that requires a survey but not an ALTA/ACSM survey may be more flexible. Such a lender might waive the requirement entirely but usually only if the title insurer is willing to remove the survey exception from the title policy. This, in turn, will depend on the title insurer being provided a relatively recent survey and affidavit that there have been no changes at the property which would otherwise be reflected on a new survey, such as building additions. Counsel has to make sure that such an affidavit can be delivered before getting the lender to waive delivery of a survey based on a title insurer's willingness to omit the survey exception based on an acceptable affidavit.

5. Opinion Letters. Typically, commitment letters require that the borrower deliver an opinion of counsel at closing. At most, the commitment will only generally describe the opinion. Most opinions are fairly standard. Counsel can expect to be required to opine that a

borrowing entity has the requisite power and authority to carry on its business as it is being conducted at present, to execute and deliver the loan documents, and to perform all of its obligations under the loan documents; that execution and delivery by the borrower of the loan documents and the performance by the borrower of all of its obligations thereunder have been duly authorized by all necessary action on the part of the borrower, and will not conflict with or result in a breach of any of the terms, conditions, or provisions of the borrower's constituent documents, court orders, or third party agreements; that each of the loan documents has been duly authorized, executed, and delivered by the borrower, and constitutes the legal, valid, and binding agreement of the borrower enforceable in accordance with its terms, subject to bankruptcy, insolvency, and general equitable principles; that, at least to counsel's knowledge, there are no actions, suits, proceedings, or investigations pending or threatened, which, if adversely determined, might result in any material adverse affect upon the transactions contemplated in, or the validity or enforceability of, any of the loan documents; and no consent, approval, order, or authorization of, or registration, declaration, or filing with any governmental authority is required in connection with the valid execution and delivery of the loan documents or for the carrying out or performance of any of the transactions required or contemplated by the loan documents, other than the recording and/or filing of certain of the loan documents. Other opinions can be required.

It is essential that counsel be comfortable that the requested opinion can be delivered or, alternatively, to discuss and at least generally agree on the opinion which can be delivered. Failure to do so may result in being unable to close the loan, after substantial time and effort has been expended and fees have been paid. The standard opinions that lenders are likely to request in this environment are not likely to be materially more difficult for counsel to issue than in the past, but the opinions are likely to be closely scrutinized both in the closing process and should there be issues with the loan after closing.

6. Single Purpose Entity Requirements. Many lenders require that prospective borrowers create a single purpose entity ("SPE") that will become the borrower under the loan documents. As the name implies, SPEs have a single purpose, namely, to own and operate the property being mortgaged and engage in no other activities. By limiting borrower's range of activities, it is hoped that the risk of insolvency is lessened, and should the SPE nevertheless file for bankruptcy, the mortgage lender will be able to obtain relief in the bankruptcy proceedings to allow foreclosure to proceed.

The requirement for SPEs probably originated when lenders began making securitized loans, that is, loans packaged together and sold as credit-rated securities in commercial markets. However, other lenders frequently require creation of SPEs including life insurance companies and lenders that hold loans in their own portfolios. Accordingly, it is anticipated that many lenders will continue to insist that borrowers create SPEs regardless of the state of the commercial mortgaged back securities market.

An SPE will be an entity whose structure and organizational and governing documents are in form and substance acceptable the lender. The loan documents will contain extensive covenants regarding the activities of the SPE. Typical covenants include:

- The SPE will be prohibited from engaging in any business or activity, or owning any assets, other than the ownership/development of the mortgaged property;
- The SPE will be barred from merging into or consolidating with any other entity, or commingling its assets with the assets of any of its members, or other persons or parties;
- The entity will be prohibited from modifying its organizational documents;
- The SPE will be prohibited from guaranteeing the debts of another entity or person or making loans or advances to any third party;
- The SPE will be required to maintain its separate identity, including maintaining separate records, books and financial statements, filing its own tax returns and in all other regards holding itself out to the public as a legal entity separate and distinct from any other entity or person; and
- The SPE will be barred from dissolving or filing bankruptcy, or consenting to the filing of any involuntary bankruptcy petition.

Generally, SPE covenants and requirements are not too troublesome for most borrowers. Many borrowers create separate entities for development and ownership of each project anyway. However, in those cases where an existing borrower seeks to finance or refinance a project, the requirement to vest title to the property in a new entity will trigger transfer tax and, possibly, so called “mansion tax”.

There was little or no room for negotiation of SPE covenants and requirements in connection with commercial mortgaged backed securitized loans. Even loans not originated as part of a securitization were documented in form that would be acceptable to rating agencies such as Standard & Poors if a lender wanted to preserve the option to deposit loans into a pool of securitized mortgages in the future.

Lenders may be more flexible in negotiating SPE covenants and requirements if and to the extent securitization no longer is a consideration. The triggering of transfer tax and, possibly, mansion tax, when title to a property has to be conveyed to a bankruptcy remote entity to meet a lender’s SPE requirements, are significant considerations. A lender might be dissuaded from insisting that title be transferred based not only on the added transaction costs resulting from transfer and mansion taxes, but also considering the recourse provisions of the loan. Even loans that are non-recourse usually have carve out exceptions. Filing, or consenting to the filing, of bankruptcy or insolvency proceedings is always a carve out exception and commonly triggers recourse against the carve out guarantor for the full loan amount, not just the loss incurred by the lender. Because the carve out guarantor is often one or more of the key principals of the development or ownership entity applying for the loan, the specter of full recourse is a significant disincentive to a bankruptcy filing regardless of any SPE covenants and may persuade a lender to abandon its demand for title to be transferred to an SPE.

II. Loan Terms and Conditions

1. Due on Sale and Due on Encumbrance. Most commitment letters provide for the loan to become payable if the mortgaged property or ownership of the borrower is conveyed during the term of the loan without the lender's consent. Some lenders permit transfers but will require a fee, usually a small percentage of the loan amount.

Due on sale provisions wherein the loan becomes due when the property is conveyed have been enforceable (with certain exceptions for residential property, including property with up to five residential units) since the 1982 adoption of the Garn-St. Germain Depository Institutions Act, 12 U.S.C. § 1701j-3(b)(1), 12 C.F.R. §§ 591.1-591.6; *Columbia Savings and Loan v. Easterlin*, 191 N.J. Super. 327 (Ch. Div. 1983), *aff'd*, 198 N.J. Super. 174 (App. Div. 1985). Few lenders will agree to remove due on sale provisions, today or the past. This usually is true whether or not recourse for payment of the loan is limited to the mortgaged property, without personal liability of the borrower. Logic might dictate that a lender should not care who owns the property if the owner is not liable for the debt; however, few lenders agree, arguing that they rely on the abilities of the owner to manage and operate the property even if the owner is not personally liable for repayment.

Therefore, instead of arguing for removal of a due on sale clause, a better alternative for many borrowers is to negotiate leniency in the clause. A lender's risk in making a loan is not materially increased by allowing some limited flexibility in a due on sale provision. For example, if the borrower is a closely held entity, transfers of ownership in the borrower to other family members and trusts for their benefit for estate planning purposes may be very important and often will be permitted by the lender, without payment of any charge (other than, possibly, attorney review fees). Similarly, some lenders will allow transfers of the property or ownership of the borrower to other entities under common ownership and control with the borrower. Some lenders will allow transfers of ownership interests among owners, although many lenders will allow such transfers only so long as there is no change in management of the property. Also, mandatory fees to the lender for its consent to allow transfers can sometimes be negotiated with the lender. If a mortgagor is a public company, transfers of ownership as a result of trading stock of the entity should not trigger a due on sale provision.

Additionally, most commitments prohibit the borrower from placing subordinate mortgage liens on the mortgaged property. Although it might seem that the presence of a junior lienholder would provide additional security for repayment of the loan because the junior lienholder will have an incentive to pay the senior lien to avoid foreclosure of the junior lien, other problems associated with junior liens cause most lenders to insist on a due on encumbrance provision. In particular, junior liens take away flexibility the senior lienholder otherwise would have in a default situation to receive a deed in lieu of foreclosure and otherwise deal with the collateral without concern for a junior lienholder. It is unlikely, especially today, to expect most lenders to allow junior liens generally. However, if a borrower knows that it will have to give a limited, special purpose junior lien, by way of example in connection with installing machinery or equipment in the mortgaged premises, it must negotiate for the right to do so in the commitment. In general, if a borrower knows that a junior lien is essential, it must deal with the issue at the commitment stage.

2. Personal Guaranties. Tightened lending standards are likely to result in lenders requiring full personal guaranties where partial guaranties would be permitted in the past, and partial recourse personal guaranties where none were previously required. Care must be

exercised when a commitment letter calls for guaranties of a portion of the debt. A commitment letter might require the guarantor to guaranty repayment of fifty percent of the debt. This language is unacceptable, as it leaves unclear whether the guaranty expires when half of the debt has been paid or always remains in effect for half of the unpaid debt. For example, if the original debt is \$1 million, will the guaranty expire when the debt is reduced to \$500,000 or will the guaranty then remain in effect, with the guarantor's liability limited, at that point, to \$250,000?

3. Carve-Out Guaranties. Non-recourse loans are still being made. However, most non-recourse loans contain exceptions, commonly called "carve outs." Carve outs, as the name implies, describe events when the lender will not be limited to the mortgaged property and other collateral for repayment of the loan, and may impose personal liability on the borrower and, often, one or more individual guarantors.

Carve outs come in two forms, both being included in the loan documents: those resulting in complete loss of exculpation, and those for which the borrower (and any guarantors) will have personal liability for losses attributable to a breach of certain covenants. Lenders are less likely under current conditions to negotiate carve outs than they were in the past. However, carve outs sometimes can be negotiated, with the borrower's counsel attempting to limit the scope and number of carve outs generally, especially those that result in complete loss of exculpation.

Events leading to complete loss of exculpation usually are those for which it may be difficult to quantify the lender's losses and bad faith actions by the borrower. Filing of bankruptcy, assertion of a lender liability or other claim as a defense to foreclosure, and fraud are often included as full recourse carve outs. Most borrowers will resist full recourse due to the involuntary bankruptcy filing by a third party against the borrower. A compromise may be for the lender to agree to take full recourse action only in the event of the borrower's failure to use best or good faith efforts to obtain dismissal of an involuntary bankruptcy. Assertion of defenses as a full recourse trigger can lead to negotiations about bona fide defenses, such as payment. .

Carve outs resulting in recourse to the borrower for damages can take place upon the borrower's breach of environmental representations, warranties and covenants; misapplication or misappropriation of rents after an event of default; misapplication of security deposits and rents paid more than one month in advance; failure to apply insurance proceeds and condemnation awards for repair or reconstruction as required by the loan documents; waste (defined as physically changing real estate, whether negligently or intentionally, in a manner that reduces its value; or failing to maintain and repair the real estate in a reasonable manner, or materially failing to comply with covenants in a mortgage respecting the physical care, maintenance, construction, demolition, or insurance against casualty of the real estate or improvements on it; Restatement Third of Property, Mortgages, § 4.6); failure to insure; failure to comply with laws; breach of the due on sale and due on encumbrance provisions; and failure to pay taxes.

The foregoing list of carve outs is not exhaustive and it is possible to encounter commitments with more expansive categories, including breach of virtually any covenant and obligation of the borrower.

4. Leasing Restrictions. If the mortgaged premises is occupied by one or more commercial tenants, the loan commitment will provide for the lender's review and approval of all leases, and may provide for limitations on the borrower's freedom to act with regard to such tenants and future tenants.

Leases with certain key tenants may contain provisions imposing obligations on the borrower, as landlord, that will be inconsistent with the obligations imposed on the borrower under the loan documents. For example, a key tenant may have the right to self-insure or provide its own insurance coverage, whereas the lender will require the borrower to procure insurance or cause insurance to be procured. The tenant may have the right to receive insurance proceeds and condemnation awards for repair and reconstruction, but the loan documents will usually provide for the lender to receive such proceeds and decide whether to apply them to repay the loan or allow them to be applied for repairs or reconstruction. A key tenant, especially if the entire property is leased to the tenant, may have expansive assignment and subleasing rights, and, generally, significant control over the premises. In contrast, the loan documents may require the lender's consent for any further leasing of the premises or before the borrower/landlord can consent to any assignment or subleasing by a tenant.

Accordingly, it is very important for counsel to the borrower to be aware of any lease which grants the tenant rights that will conflict with the restrictions, terms, conditions, and limitations in the loan commitment or the loan documents. If counsel believes there may be a conflict, it is essential that the lender consent to the lease terms and agree that they will prevail and control; otherwise, the borrower may well find itself between a proverbial rock and a hard place, with nowhere to turn. An agreement sometimes can be simply achieved, especially when there is only one or a few key tenants, by getting the lender's consent, in the commitment, that the loan documents will conform to the lease requirements.

Aside from potential conflicts between existing leases and the loan documents, issues also can arise with respect to the oversight the lender may demand over the borrower's leasing activities, including those related to administering existing leases and those related to future leasing. A lender often will provide that all future leases are subject to its prior review and approval, in addition to requiring review and approval of many material actions which the borrower may want to take with regard to existing leases. This level of control may impose unreasonable or unworkable operational constraints on the borrower. In the past, it was often possible to get a lender to agree that it will not unreasonably withhold consent to future leases and actions by the borrower. Sometimes, a lender will permit leases without further review or approval if certain leasing criteria are met. The borrower's goal will be to obtain as much flexibility as possible. However, it will be more difficult to gain such freedom of action today than in the past.

5. Insurance Proceeds and Condemnation Awards. Most mortgages provide that the lender will be entitled to receive insurance proceeds for fire or other casualty as well as condemnation awards, and can elect whether to apply the proceeds in payment of the loan or allow the proceeds to be used by the borrower for repair or reconstruction. Of course, if all or substantially all the mortgaged property is taken by power of eminent domain, there is nothing to discuss: the lender must receive and apply the award in payment of the loan because the

mortgage premises no longer exists. This is distinguished from a road widening or other limited taking where the premises can be reconstructed.

Provisions whereby the lender can apply insurance proceeds or condemnation awards for a partial taking in payment of the loan can be highly problematic for the borrower, especially if the proceeds are insufficient to fully pay and discharge the loan. If the lender applies proceeds in partial payment of the debt and the loan documents prohibit further encumbrancing of the premises, the possibility of obtaining a second mortgage to provide a source of funds for reconstruction is foreclosed. The borrower will only be able to complete reconstruction if some other source of funds is available. To add injury to insult, the loan documents probably will provide that the borrower must repair the premises or be in default. The loan documents also may have a prepayment penalty and may not have an exception for prepayment resulting from application of insurance proceeds or condemnation awards.

Lenders have always been reluctant to allow unlimited leeway to borrowers to receive insurance proceeds and condemnation awards. They view themselves as being at a much increased risk when a substantial portion of the loan collateral has been damaged or destroyed, until reconstruction is completed. Lenders reason, correctly, that partially completed premises do not have a value proportional to the amount of insurance proceeds or condemnation award expended for reconstruction. Accordingly, at least in the past, a compromise has frequently been fashioned whereby the lender agrees to allow insurance proceeds or condemnation awards to be applied for repairs or reconstruction if the losses are below some specified threshold, while retaining flexibility to apply the proceeds in payment of the debt above the fixed threshold. Sometimes the threshold is set at fifty percent in area or value of the improvements, so that if the damaged area is less than half the building area or replacement cost — which should exclude footings, foundation, parking areas, and other portions not likely to be damaged — the proceeds will be released to the borrower for repairs or reconstruction. Except for very minor losses, the lender will be entitled to closely control the release of the proceeds, requiring plan review and approval, that all permits be issued, that existing tenants resume their occupancies, inspection of the work, and proof of adequate funds to complete the work. Then, the lender will usually release proceeds to pay for work that has been completed, on a periodic basis, with proof that all contractors and subcontractors have been paid and that there are no contractor liens filed. Again, expect lenders to be more resistant today than in the past to allowing borrowers to receive insurance proceeds under any circumstances.

Lastly, in the past almost all lenders would agree, but only if asked, to remove any prepayment penalties if insurance proceeds or condemnation awards are applied to pre-payment of the loan. This is unlikely to be too strenuously resisted today because it does not increase the risk to the lender.

6. Escrows. Some commitment letters require the borrower to escrow real estate taxes and, sometimes, insurance premiums, with the lender. Lenders will be less likely to be receptive to requests to waive escrows under current conditions than in the past.

7. Notice and Grace Periods. Many lenders' standard loan documents provide little or no notice or grace periods to cure defaults. In the past, some lenders agreed to provide notice

and allow a reasonable, although short, period to cure monetary defaults, such as five days, and a longer period to cure non-monetary defaults, such as 30 days. Lenders also agreed to extend the time to cure non-monetary defaults which are capable of being cured but not within 30 days, so long as the borrower has commenced and proceeds diligently to cure the default. Often, the lender insisted on an outside cure date, notwithstanding any argument that it is unreasonable to require that a cure be completed before the date it can reasonably be completed and that the lender is protected by the requirement that the borrower be proceeding diligently. Lenders are less likely than in the past to be receptive to notice and grace periods and, especially extended cure periods.

8. Fees. Many commitment letters will provide for a non-refundable upfront facility or commitment fee. Ideally, but unlikely today, any fees paid upon the signing of the commitment should be refundable if the loan does not close for any reason. Perhaps a more likely fall back position is that fees will be refundable if the loan does not close due to factors outside the control of the borrower. The lender may be more willing to accept language that refunds the commitment fees, less expenses actually incurred by the lender, if certain closing conditions set forth in the commitment are not met in good faith, for example a requirement for an appraisal value for the property being mortgaged. It also may be possible to defer paying some portion of the commitment fee until the loan closes.

The commitment letter should identify most of the significant fees the borrower will be required to pay, and may include an estimate of the fees that are not fixed. In the past, caps sometimes could be negotiated. Appraisal costs and environmental assessment costs will be charged to the borrower. Inspection costs may be charged. Lender must provide an estimate of its attorney's fees to be paid by the borrower.

9. Prepayment. Many fixed rate loans prohibit prepayment entirely or allow prepayment only with a premium or penalty. Some allow prepayment only in full and not partial prepayment.

The prepayment premium or penalty is usually determined by a formula. One formula is referred to as a "yield maintenance" formula. A typical yield maintenance formula imposes a premium for prepayment by identifying a treasury note or bill with a maturity comparable to the regularly scheduled maturity of the promissory note, and calculates the difference in yield to the maturity of the treasury note or bill, as compared with the interest rate on the promissory note, and requires the borrower to pay the present value of the amount by which the rate on the promissory note exceeds the rate on the treasury note or bill to maturity. Another, simpler formula imposes a premium upon any prepayment equal to a stated (and usually declining) percentage of the amount of principal prepaid. For example, a loan may be closed to prepayment in the first year of the loan, opened with a penalty equal to three percent of the amount prepaid in the second year, two percent in the third year, one percent in the fourth year, and without penalty thereafter.

The details regarding prepayment premiums or penalties, including partial prepayment, are usually set in place at the commitment stage. Aside from partial prepayment, negotiation at the commitment stage regarding prepayment may include other details; for example, the amount

of notice required to be given to the lender if the borrower intends to prepay or the amount of principal that can be prepaid when partial prepayment is permitted. The specifics of a yield maintenance formula or other formula are not likely to be negotiated at this stage in all but large deals, and in large deals often will have been addressed before the actual issuance of the commitment.

Summary

In summary, lenders are less likely today than in the past to be flexible with regard to closing conditions and loan terms. This is particularly true if the conditions or terms in question relate to actual or perceived risk factors. Nevertheless, loans are made on a case by case basis and it may be possible to get relief from a lender on some provisions. In the past, it has generally been true that throwing in the proverbial “kitchen sink” in terms of requests by borrowers for extensive commitment revisions would be met negatively, often by a lender refusing all but the most innocuous of requests. That is even more likely to be true in the current environment where the best approach may be to limit proposed revisions to a few key items.

ACQUIRING DISTRESSED DEBT-ANATOMY OF A MORTGAGE ACQUISITION TRANSACTION

By Russell Bershad

By all accounts, banks and other lenders are holding enormous amounts of commercial mortgages that are non-performing, under performing or approaching maturity with dim prospects for refinancing. Anecdotes suggest that there has not yet been a flood of such mortgages released into the marketplace. Numerous factors could account for the apparent reluctance of some lenders to unload their distressed commercial mortgages thus far. However, lenders have been selling distressed commercial mortgages and there are many reasons to believe that the gates will open wider in the not distant future.

There is no shortage of buyers anxious to buy distressed mortgages. The simple reason is that lenders generally offer to sell loans at substantial discounts from the outstanding indebtedness. At discounted prices, the loans can be highly profitable.

A purchaser of a distressed commercial mortgage loan can realize a substantial return on its investment as a result of the loan being repaid in full or for a small discount, or by the loan purchaser taking title to the property as a result of a work out with the borrower who conveys the property to the loan purchaser in lieu of foreclosure, or by bidding in at a foreclosure sale and taking title. Because the loan purchaser acquired the loan at a discount, the loan purchaser will realize substantial profits if the loan is repaid in full, especially if repaid with interest at a default rate (for example, five hundred basis points above the non-default interest rate) and late charges.

Alternatively, if the loan purchaser takes title to the property, it will be with the expectation that there is or can be substantial profit in the real estate which may be inherent in the improvements on the property, in its development potential, or otherwise. This is why many loan purchasers are real estate developers in their own right, and view the acquisition of a distressed loan at a deep discount as an attractive way to acquire valuable real estate that may already have gone through the onerous approvals process with the only real downside being the possibility that the loan will be repaid in full, yielding a significant return on investment. That is not much of a downside.

This article provides an overview of a distressed commercial mortgage loan acquisition transaction, based on New Jersey law and procedures. This article does not address acquisition of other kinds of distressed commercial debt, involving collateral other than real property or involving the acquisition of ownership interests in an entity owning real property through a sale under the Uniform Commercial Code.

Three broad topics follow: Section I provides an outline of the loan purchase process; Section II reviews the provisions of a typical Loan Purchase Agreement, and Section III discusses due diligence in connection with the acquisition of a distressed commercial mortgage loan.

I. Outline of Loan Purchase Process

The acquisition of a distressed commercial mortgage loan generally proceeds along the following lines:

1. Bank work out officers make known that they are interested in selling a loan or portfolio of loans. Interested, credible buyers are contacted;
2. Buyers who are interested in proceeding will be required to sign a confidentiality agreement. The confidentiality agreement will prevent the buyer and its representatives from contacting the borrower and may prevent contact with third parties such as governmental agencies (see the due diligence discussion in Section III below);
3. Buyers will be allowed to conduct a review of the loan files, and, possibly, contact lender's counsel if the matter is in foreclosure, in order to understand the status of the foreclosure proceeding;
4. Lenders may choose to sell to a selected buyer or may proceed by auction after soliciting bids from buyers after the buyers have had an opportunity to complete the loan file reviews. There is no set mechanism for bidding to proceed, although most lenders set a deadline for bids to be received. Some lenders may allow a second round of bidding;
5. The successful buyer or bidder will be required to enter into a letter of intent to acquire the loan or loans. The letter of intent is usually but not always non-binding on the buyer, and may require an initial deposit to be posted, which is usually (but not always) refundable.
6. Savvy buyers will seek to have the letter of intent be binding on the lender, at least in part. In particular, a buyer will want the lender to refrain from marketing or selling the loan to other parties so long as the transaction with the successful buyer is proceeding;
7. The letter of intent will require the buyer to enter into a Loan Purchase Agreement within a very short period. A week or two is not atypical;
8. The letter of intent often requires and allows buyer to proceed with due diligence immediately;
9. Unless a deposit was paid on signing a letter of intent, it will be required on signing the Loan Purchase Agreement. Most lenders will agree to allow the deposit to be held in escrow by a third party such as the lender's counsel or a title company. Unless due diligence was completed before the Loan Purchase

Agreement is signed, the deposit will be refundable if the buyer elects not to proceed as a result of its due diligence investigations;

10. Whether the due diligence period starts on signing the letter of intent or upon signing the Loan Purchase Agreement, it will be short, just a matter of days or a week or two at the outside. It certainly will not extend a month or more, unlike a commercial real estate purchase and sale agreement where at least a month, and often longer, is allowed for due diligence. Usually, the buyer can elect to proceed or not proceed for any or no reason, as a result of its due diligence investigations. In this regard a Loan Purchase Agreement is similar to most commercial real estate contracts with regard to buyers' due diligence cancellation rights;
11. Once due diligence is completed, the buyer will not have grounds to terminate the Loan Purchase Agreement, other than due to the lender's default. Except in those instances where the lender will agree to allow the buyer to assume the mortgage loan, which will be the exception, there will be no financing contingency for the buyer; and
12. The Loan Purchase Agreement will require buyer to close the loan acquisition very quickly after completing due diligence, possibly in a just a few days and usually within a week or two.

II. Loan Purchase Agreement

Loan Purchase Agreements come in all forms. There is no standard. Much depends on whether or not litigation or other foreclosure proceedings are pending. However, most cover the similar ground. Attached as Exhibit A is a sample form in which the loan has reached maturity but is not in foreclosure and no litigation is pending. Note, particularly, that there is no due diligence provision in this form, as it would be used in a case where due diligence was completed before the Loan Purchase Agreement was signed.

The following is a synopsis of the Loan Purchase Agreement and some possible negotiation points:

1. Section 1; Agreement to Purchase and Sell; Sale "As-Is".
 - This section specifies that seller will sell and purchaser will purchase the loan subject to the terms in the agreement and subject to satisfaction of the conditions precedent elsewhere set forth.
 - The sale is without recourse, which is intended to mean that seller will not become liable for payment of the debt. This is distinct from selling without representations or warranties, which would be objectionable.
 - The attached form specifies that closing will take place in seven days, which is fairly typical.

- It also provides that upon closing, purchaser shall assume the obligations of seller arising on and after the closing date. This is important to the purchaser so that the purchaser does not become liable for claims the borrower may be able to assert against the seller pertaining to periods before closing. Ideally, but not realistically, purchaser would want seller to indemnify purchaser against any such claims. More likely, especially if the seller and borrower are then in litigation, the seller would want purchaser to indemnify seller for any claims, including pre-closing claims, in which case the scope of the indemnification, including the mechanics of purchaser's obligation (e.g., choice of counsel, advance notice, etc.) must be considered with great care.
- The sale is "as-is", without warranties or representations, except as expressly set forth in the Agreement, and purchaser acknowledges that it is a sophisticated, capable party aware of the risks of the transaction. This is not objectionable.

2. Section 2; Purchase Price; Deposit; Liquidated Damages.

- The purchase price is fairly straightforward. However, the attached form does not account for any deposits made by the borrower for tax and insurance escrows, reserves for repairs and the like. The loan purchaser must receive such deposits or a credit against the purchase price for the amount of such deposits. After all, the borrower will claim a credit against the ultimate loan payoff for the unapplied amount of any deposits and the like held by the lender.
- The attached form also does not address the possibility of fire or other casualty, or condemnation of the mortgaged property, between execution of the agreement and closing. These are remote possibilities considering that closing will be held very soon after the agreement is signed. Nevertheless, almost all commercial mortgages allow the lender to receive insurance proceeds and condemnation awards, and regardless of the remoteness of these events during a very short executory period, the agreement should provide for such moneys to be paid over to the loan purchaser.
- The attached form also provides for a deposit to be paid by the loan purchaser, to be held in escrow. The amount will be negotiable but a ten percent or smaller deposit would be reasonable.
- Much as in a real estate purchase and sale agreement, the deposit will be paid to seller as and for liquidated damages if purchaser fails to close the loan purchase as and when required. This is fairly typical. However, there are no provisions in the attached form addressing default by seller, including any material misrepresentations. Termination or specific performance would be the typical remedies available to the purchaser for a default by seller. Damages will be resisted strenuously.

3. Section 3; Time of the Essence. Many sellers will insist on time of the essence. Unlike a real estate purchase and sale agreement, there will be no financing contingency and, once due diligence is completed, there will be little or no reason why purchaser should not close on time. Since loan sellers always want quick closings, there is little room or, typically, need to argue this point.
4. Section 4; Conditions Precedent to Closing and Closing Deliveries. In the attached agreement, there is no due diligence contingency because due diligence was completed under a letter of intent before the agreement was signed. Therefore, in the attached form, the only condition precedent to closing by purchaser, aside from closing deliveries, will be that seller's representations and warranties are not materially inaccurate when made and as of the closing. Closing deliveries will include: (a) a recordable assignment of mortgage and assignment of leases and rents; (b) UCC-3 assignments; (c) the original note or lost note affidavit, and an allonge transferring all rights to the loan purchaser; and (d) the original loan files.
5. Section 5; Seller's Representations and Warranties. Sellers will resist all but the most innocuous of representations and warranties about seller's due authorization and execution of documents and the like. There is little chance a seller will represent anything about the mortgaged real estate. However, it is fair to ask a loan seller to represent with particularity:
 - the amount due on the loan;
 - that seller owns the loan, free and clear and has not sold or conveyed any interest in it;
 - that there is no litigation pending regarding the loan or the real estate;
 - that no offsets, counterclaims or defenses to payment of the loan have been asserted by the borrower;
 - identifying all the material loan documents;
 - identifying the loan title insurance policy and certifying that it is in effect for its full amount (note that any prior payment on the policy by the title insurer would have the effect of reducing the coverage);
 - that the lender is not insolvent or in bankruptcy, and
 - importantly, that the seller has not entered into, and will not enter into, any settlement agreement, forbearance agreement, release agreement or similar agreement with the borrower or any guarantor pending closing.
6. Section 7; Interim Payments. The attached form provides that the seller retains any interim loan payments. This may be of little importance in a loan that is in foreclosure because it may be unlikely there will be any payments from the borrower. However, if the loan is not in foreclosure, interim payments may be received by the seller as a result of monthly loan payments by the borrower, or payments on account of unit or lot sales. Purchaser can make a fairly compelling argument that such payments should be credited to the purchaser. The logic for this position is that the purchaser bid to buy debt totaling \$x, and to the extent

interim payments have reduced the debt without a corresponding reduction in the purchase price, the purchaser is not receiving the amount of debt it offered to buy and seller agreed to sell, resulting in the seller being unfairly paid in full for a now-reduced amount of debt.

7. Other Provisions. Other provisions in the attached agreement require little comment and are not likely to require much negotiation, including a further assurances clause (which can become very important to a purchaser and should be included in any agreement). Many other provisions in the attached agreement are typical in any real estate purchase and sale agreement, including representations and indemnification regarding brokers (which should be mutual), notice and miscellaneous terms.

III. Due Diligence

Due diligence varies greatly depending on the nature of the underlying real estate asset and whether or not foreclosure or other proceedings are pending with the borrower.

If litigation is pending, a comprehensive review of pleadings, motion practice and discovery must be undertaken by a litigator. If the loan is being foreclosed, it will be important to know that a title insurer will be prepared to insure title following completion of foreclosure upon issuance of a sheriff's deed. The lender should allow counsel for the purchaser to discuss the litigation status with the lender's counsel. In most cases, the possibility of a bankruptcy filing by the borrower must be considered and the affect of such a filing should be reviewed with bankruptcy counsel, with an eye toward determining to the extent possible, whether or not, and how quickly, the lender will be able to get stay relief and proceed with a foreclosure sale.

With regard to the underlying real estate, the due diligence review is similar to what would be required if your client were making a loan in the first place or buying the real estate from the borrower, with the notable exception that there will be no cooperation from or information provided by the borrower. However, the loan files should include appraisals, environmental reports, copies of all permits and approvals, counsel opinions and other documents that were delivered to the lender when the loan was made and supported the decision to make the loan. To the extent possible within a short period of time and the constraints of a confidentiality agreement, the purchaser has to confirm that the status of the real estate has not changed in any adverse manner.

Due diligence is complicated and impeded if the confidentiality agreement bars contact with governmental agencies. It is logical that if you want to know if all required permits and approvals for development have been obtained and remain in full force and effect, you will want to contact the local and state development officials. For example, if the project is a residential condominium, you will want to find out if there are any problems with the project's filings with the Planned Real Estate Development section in the Department of Community Affairs and whether any complaints or enforcement actions are pending. For these reasons, it is important to try to carve out limited exceptions from a confidentiality agreement to allow such inquiries to be made.

It might also be viewed as desirable to be in contact with the borrower and ascertain the borrower's plans for the property and working out the loan, but most lenders consider such contacts to be unacceptable out of a concern that if the deal does not close, the lender's ability to deal with the borrower, now armed with the knowledge that the lender has been seeking to unload the loan, will be more difficult to deal with in the future.

Title issues and title insurance must be considered. You must confirm that a title policy has been issued and remains in force and effect. Note that construction loan policies have a three year sunset, and may have expired or be scheduled to expire in the near future after the loan is acquired. You may want to purchase a permanent policy. It is not essential that the existing policy be endorsed to cover the loan purchaser, since the loan policy will insure successors and assigns to the loan (which should be confirmed, in any event, by reviewing the policy). Notwithstanding that the existing policy may cover the purchaser of the loan as a successor, a title search will be required to confirm that the lender owns the policy and has not previously sold participations or encumbered its ownership interest. Also, you will probably want to know if there are junior liens on the property, the existence of which would impair your ability to take a deed in lieu of foreclosure. The existence of junior liens would also provide information regarding the borrower's financial status. For a small premium, title insurers will issue an endorsement down dating the loan policy and insuring that your client hold title to the loan.

To assist effectively in due diligence in a project of this nature requires a broad range of expertise in real estate lending, title, real estate development, condominium law, tax abatements and environmental law, in addition to analyzing foreclosure, other litigation and bankruptcy issues. Each matter is different in the specifics but most loan acquisition will require similar skill sets being focused in a short period of time to determine if material deficiencies exist that might derail the loan purchase.

Summary

In summary, the role of counsel representing a client acquiring a distressed commercial mortgage or portfolio of loans requires an intense, relatively short burst of efforts probably beginning when a confidentiality agreement is required, through a letter of intent, due diligence, negotiation and execution of a loan purchase agreement and closing. More than anything, counsel has to be able to bring to the deal legal expertise in a variety of practice areas while recognizing that clients are looking for common sense, practical assistance. The bottom line is getting a deal closed quickly and effectively while understanding the asset and risks as much as possible.

EXHIBIT 1

SPECIMEN LOAN PURCHASE AGREEMENT

THIS LOAN PURCHASE AGREEMENT (the “**Agreement**”) is made as of this _____ day of _____ by and between **FIRST BANK**, a _____, having an office at _____ (the “**Assignor**”) and _____, a _____ having an office at _____ (the “**Assignee**”).

BACKGROUND

Assignor is the owner and holder of a certain loan in the original principal amount of \$ _____ (the “**Loan**”) made to xxxxxxxxxxxxxxxx (the “**Borrower**”) evidenced by a Note, dated xxxxxxxxxxxxxxxx, made by Borrower in favor of Assignor (as amended or otherwise modified from time to time, the “**Note**”), and which Note is secured by a mortgage lien on certain premises located in xxxxxxxxxxxxxxxx (the “**Premises**”) pursuant to a Mortgage and Security Agreement, dated xxxxxxxxxxxxxxxx, made by Borrower in favor of Assignor, in the original principal amount of \$ _____, recorded on _____ in Mortgage Book xxxx, page xxx (as amended or otherwise modified from time to time, the “**Mortgage**”; together with the Note and the documents set forth on Exhibit A annexed hereto, the “**Loan Documents**”).

Assignee submitted a bid in the amount of \$ _____ to purchase the Loan. Assignor has accepted Assignee’s bid to purchase the Loan and Assignor is willing to sell the Loan, and assign the Mortgage, the Note and the Loan Documents to Assignee, and Assignee is willing to purchase the Loan and accept the assignment of the Mortgage, the Note and the Loan Documents from Assignor , on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the foregoing and of other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

Section 1. Agreement to Purchase and Sell; Sale “As Is”.

(a) Provided that the conditions precedent set forth in Section 4 shall have been complied with, and on the terms and subject to the conditions set forth herein, Assignor will sell, assign and transfer to Assignee, without recourse to Assignor, the Loan, the Note, the Mortgage and all rights and obligations of Assignor under the Loan Documents on or before xxxxxxxxxxxxxxx [date 7 days after date of the Agreement], (the “**Closing Date**”). Assignee shall purchase the Loan, the Note, the Mortgage and Loan Documents and assume all of the obligations of Assignor under the Loan Documents, in each case arising on and after the Closing Date, on such terms and subject to such conditions as are set forth in the Mortgage, the Note and the Loan Documents and this Agreement.

(b) Assignee acknowledges that, except for the representations and warranties of Assignor set forth in Section 5 of this Agreement, the Loan is sold “as-is”, without representations or warranties express or implied. Assignee further acknowledges that it is a sophisticated party experienced in transactions of this nature, has expertise to evaluate the Loan independently and to bear all risks associated with the acquisition of the Loan, including without limitation, the risk that the Loan will not be repaid in full.

Section 2. Purchase Price; Deposit; Liquidated Damages.

(a) Subject to the terms and conditions of this Agreement, not later than 3 p.m. (New York City time) on the Closing Date, Assignee shall pay to Assignor as payment for the assignment of the Loan, the Mortgage, the Note and the Loan Documents, the sum of \$ _____ (the “**Purchase Price**”) in cash or by bank wire transfer in immediately available funds to a bank account designated in writing by Assignor as hereinafter provided.

(b) Assignee has delivered to xxxxxxxxxxxx (the “**Escrow Agent**”) the sum of \$ _____ as a deposit (the “**Deposit**”), which Deposit shall be held in escrow pursuant to a certain Escrow Agreement by and among Assignor, Assignee and Escrow Agent, in the form annexed hereto as Exhibit B. On the Closing Date, Assignee shall pay Assignor the Purchase Price less the Deposit, and the Deposit shall be released to Assignor by Escrow Agent.

(c) If Assignee fails to complete the purchase of the Loan by the Closing Date, except for willful default by Assignor or Assignor’s inability to convey clear title to the Note, the Mortgage and the Loan Documents by the Closing Date, Assignor shall retain the Deposit as liquidated damages, this Agreement shall automatically terminate, and thereupon, neither party shall have any further rights against the other. The parties agree that it would be impossible to accurately calculate the damages to Assignor in the event Assignee refuses or is unable to close by the Closing Date, and that the Deposit reflects an accurate estimate of such damages.

(d) This Agreement does not imply nor is it meant to obligate Assignor to lend any portion of the Purchase Price to Assignee for the purchase of the Note, the Mortgage and the Loan Documents.

Section 3. Time of the Essence. TIME IS OF THE ESSENCE in the performance of this Agreement.

Section 4. Conditions Precedent and Closing Deliveries.

(a) The obligation of Assignor to sell the Loan, and assign the Mortgage, the Note and the Loan Documents to Assignee is subject to the following conditions precedent, any one or more of which may be waived by Assignor in its sole discretion:

(i) Assignee shall have paid the Purchase Price as provided in Section 2; and

(ii) Assignee’s warranties and representations set forth herein shall be true and accurate in all material respects when made and as of the Closing Date.

(b) The obligation of Assignee to acquire the Loan from Assignee is subject to the following conditions precedent, any one or more of which may be waived by Assignor in its sole discretion:

(i) Assignor shall have executed and delivered the Assignment of Mortgage without representation, warranty or recourse (except as specifically set forth therein), to Assignee, the form of which is attached hereto as Exhibit C;

(ii) Assignor shall have executed and delivered the Allonge, without representation, warranty or recourse (except as specifically set forth therein), to Assignee, the form of which is attached hereto as Exhibit D;

(iii) Assignor shall have executed and delivered the Assignment of Loan Documents, without representation, warranty or recourse (except as specifically set forth therein), to Assignee, the form of which is attached hereto as Exhibits E;

(iv) Assignor shall have executed and delivered the Assignment of Assignment of Leases and Rents without representation, warranty or recourse (except as specifically set forth therein), to Assignee, the form of which is attached hereto as Exhibit F;

(v) Assignor shall have delivered the original (if applicable and in the possession of Assignor) Loan Documents to Assignee, together with any other documents necessary in order to effectuate the assignment of the Loan, including any UCC-3 assignments; and

(vi) Assignor's warranties and representations set forth herein shall be true and accurate in all material respects when made and as of the Closing Date.

Section 5. Representations and Warranties of Assignor. Assignor represents and warrants as follows:

(a) Assignor (i) is duly organized and validly existing under the laws of its jurisdiction of organization or incorporation, (ii) is in good standing under such laws and (iii) has the full power and authority to execute, deliver and perform its obligations under, this Agreement.

(b) This Agreement has been duly and validly authorized, executed and delivered by Assignor and is the legal, valid and binding obligation of Assignor, enforceable against Assignor in accordance its terms, except that such enforceability may be limited by bankruptcy, insolvency, or other similar laws of general applicability affecting the enforcement of creditors' rights generally and by the court's discretion in relation to equitable remedies.

Section 6. Representations and Warranties of Assignee. Assignee represents and warrants as follows:

(a) Assignee (i) is duly organized and validly existing under the laws of its jurisdiction of organization or incorporation, (ii) is in good standing under such laws and (iii) has

the full power and authority to execute, deliver and perform its obligations under, this Agreement.

(b) This Agreement has been duly and validly authorized, executed and delivered by Assignee and is the legal, valid and binding obligation of Assignee, enforceable against Assignee in accordance its terms, except that such enforceability may be limited by bankruptcy, insolvency, or other similar laws of general applicability affecting the enforcement of creditors' rights generally and by the court's discretion in relation to equitable remedies.

Section 7. Interim Payments Received. Any payments received by Assignor with respect to the Loan prior to the Closing Date shall be the property of Assignor, and shall not affect the Purchase Price due by Assignee to Assignor.

Section 8. Brokers. No broker brought about this transaction. Assignee will defend and indemnify Assignor from any claims, suits, judgments, costs, expenses, including but not limited to reasonable attorneys fees, incurred in connection with any brokerage claims which might be made against Assignor .

Section 9. Miscellaneous.

(a) Notices. Any notices, communications or requests to be sent to either party hereto shall be personally delivered, transmitted by facsimile, or sent via overnight courier or by first class mail, postage prepaid, as follows: (i) in the case of Assignor, First Bank, _____ (ii) in the case of Assignee, to _____, with a copy to _____ or to such other address as such party may hereafter indicate by written notice to the other party and shall be effective if personally delivered, transmitted by facsimile, sent via overnight courier or mailed, upon receipt.

(b) Further Assurances. Assignor and Assignee hereby agree to execute and deliver such other instruments, and take such other action, as the parties may reasonably request in connection with the transactions contemplated by this Agreement.

(c) Headings. Headings are for reference only and are not to be given consideration in interpreting this Agreement.

(d) **WAIVER OF TRIAL BY JURY. EACH OF THE PARTIES HERETO IRREVOCABLY WAIVES TRIAL BY JURY IN ANY ACTION OR PROCEEDING WITH RESPECT TO THIS AGREEMENT OR ANY OTHER FORBEARANCE DOCUMENT.**

(e) **Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey without giving effect to principles of conflicts of law.**

(f) Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument.

(g) Amendment. This Agreement may not be modified or amended except upon execution of a written document signed by each of the parties hereto.

(h) Successors and Assigns. This Agreement and all its provisions shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns, and shall not benefit any person or entity other than those enumerated above.

(i) Entire Agreement. This Agreement constitutes the entire agreement between the parties, integrates all the terms and conditions mentioned herein or incidental hereto, and supersedes all oral negotiations and prior writings with respect to the subject matter hereof, including, without limitation, any summary of terms and conditions, information memorandum, presentation or any other communications.

(j) Severability. The provisions of this Agreement are intended to be severable. If any provision of this Agreement shall be held invalid or unenforceable in whole or in part in any jurisdiction, such provision shall, as to such jurisdiction, be ineffective to the extent of such invalidity or enforceability without in any manner affecting the validity or enforceability of such provision in any other jurisdiction or the remaining provisions of this Agreement in any jurisdiction.

SIGNATURE PAGE FOLLOWS

INTENDING TO BE LEGALLY BOUND, the parties hereto have caused this Agreement to be duly executed and delivered as of the date first above written.

ASSIGNOR:

FIRST BANK

By: _____

Name:

Title:

ASSIGNEE:

By: _____

Name:

Title: