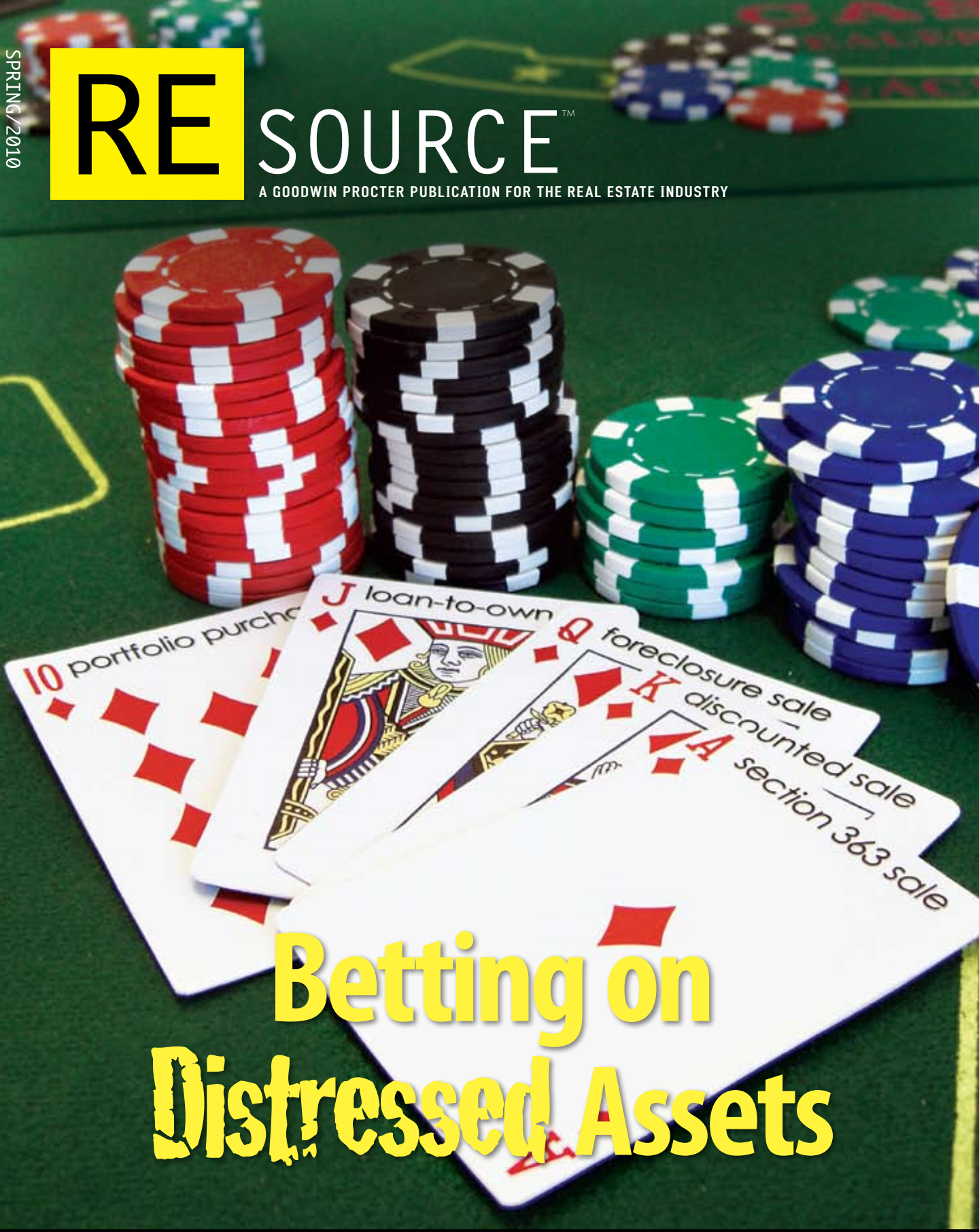
SPRING/2010

RE SOURCE™

A GOODWIN PROCTER PUBLICATION FOR THE REAL ESTATE INDUSTRY



Betting on Distressed Assets

- Has Credit Bidding Met Its Indubitable Equivalent?
- Acquiring Hotels: SNDAs Making It Harder
- Acquiring The Fulcrum Security
- Success Through Failure: Buying FDIC Loans

SPRING/2010

RESOURCE

A Goodwin Procter Publication
For The Real Estate Industry

Editor-in-Chief
Robert M. Haight, Jr.

Editors
Lewis G. Feldman
John M. Ferguson
Edward C. Hagerott
John T. Haggerty
Douglas A. Praw
Christopher B. Price
Andrew C. Sucoff

Production
Sarah E. Moore
Bridget C. Huffstutler
Nathan G. Leonard
Matthew Fetter
Jasmine Trillos-Decarie

Design
The Castle Press

www.goodwinprocter.com

GOODWIN
PROCTER

Betting on Distressed Assets

"In poker, as in business, the secret is knowing how to manage risk and capitalize on opportunity."

Lou Krieger, *More Hold'em Excellence*

Like poker, real estate is risky, competitive, and uncertain. But, real estate, like poker, can be very rewarding if the right hand is played.

The difficulty is determining what the right hand is, and when to play it. One need look no further than a slight revision of the quote above to find the answer: capitalize on opportunity and manage risk.

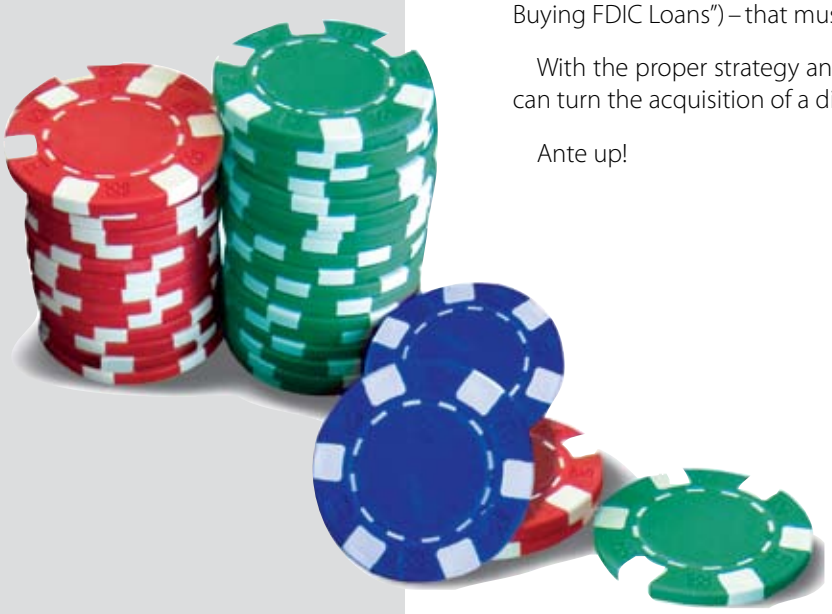
The decline in property values and the need for liquidity have combined to provide tremendous opportunities for investors to acquire distressed assets – both real property and real estate-secured loans. Capitalizing on those opportunities is the focus of this edition of REsource.

The articles that follow, however, do more than just identify methods for acquiring distressed assets. They also illustrate some of the risks that must be managed. Whether it is the courts undermining credit bidding in a bankruptcy restructuring plan, potentially changing section 363 sales strategies (see "Has Credit Bidding Met Its Indubitable Equivalent?"), or negotiating with operators and lenders in hotel acquisitions (see "Acquiring Hotels: SNDAs Making It Harder"), there are outside forces that increase risks. Likewise, there are hurdles inherent in the acquisition strategy itself – the application of intercreditor agreements in a loan-to-own transaction (see "Acquiring The Fulcrum Security") or FDIC regulations in a portfolio acquisition (see "Success Through Failure: Buying FDIC Loans") – that must be understood to achieve success.

With the proper strategy and a diligent analysis of the risks, investors can turn the acquisition of a distressed asset into a winning hand.

Ante up!

— Robert M. Haight, Jr.
Editor-in-Chief



Has Credit Bidding Met Its Indubitable Equivalent?

"…the [*Philadelphia Newspapers*] decision is likely to have game-changing implications in many cases."

by Daniel M. Glosband and Benjamin O. Looker

Investors seeking distressed real estate opportunities often purchase secured debt at a discount, intending to acquire the underlying property or to profit on their investment when the property is sold. The key to this strategy is the ability to "credit bid" the secured debt at the time of sale. Sales of assets in chapter 11 can be conducted either through a plan of reorganization ("Plan Sale") or under section 363 of the Bankruptcy Code ("363 Sale"). Under both a Plan Sale and a 363 Sale, credit bidding is specifically authorized, ensuring investors in secured debt that if the full amount owed is not recovered from a sale, then the underlying property may be acquired. Two recent bankruptcy court decisions, however, upheld sales of collateral assets that deprived the secured creditors of their right to credit bid.

Bankruptcy and Credit Bidding

At a sale that permits credit bidding, the secured creditor can bid up to the amount of its outstanding claim. If the secured creditor is the winning bidder, it receives the collateral property without proffering cash, but the credit bid amount is offset against the outstanding debt. If the secured creditor's bid is not the winning bid, then the creditor will be paid the lesser of the sales proceeds or its claim. If the secured debt is acquired at a sufficient discount, the credit bid makes the auction sale of the collateral a win-win situation for the creditor.

Credit bidding gave comfort to secured debt holders that, unless they consented, collateral could not be transferred free of their debt for less than payment in full regardless of whether the sale of the collateral was by a Plan Sale or at a 363 Sale.

All 363 Sales permit credit bidding. Until recently, it was generally accepted that Plan Sales must also permit credit bidding. Since secured creditors must ordinarily vote to accept a plan, they would reject a plan that contemplated sale of their collateral without either full payment or an opportunity to credit bid. However, for a bankruptcy court to confirm a plan where a class of claims does not accept the plan or is impaired under the plan, commonly known as a "cram down," the plan must satisfy Bankruptcy Code section 1129(b), which requires (among other things) that treatment of a creditor or class of creditors who opposes the plan is "fair and equitable."

Section 1129(b)(2)(A) lists three circumstances by which a plan may be fair and equitable to a secured creditor: (i) the creditor retains liens on the property, whether kept by the debtor or sold, and receives deferred cash payments equal to the allowed amount of its claim; (ii) property is sold free and clear of the creditor's liens in a process that gives the creditor the opportunity to bid on the property using his or her credit; or (iii) the creditor receives the "indubitable equivalent" of its claims. To be fair and equitable, must a plan of reorganization that provides for a sale of assets also permit credit bidding?

A Change on the Horizon?

Two recent cases – *In re Pacific Lumber* and *In re Philadelphia Newspapers, LLC* – cast doubt on the broad ability of secured creditors to credit bid for a chapter 11 debtor's undervalued assets. Both cases involved the sale of collateral assets. They prevented credit bidding by invoking the alternative cram-down provision that allows a fair and equitable finding if the secured creditor realizes the indubitable equivalent of its claims from the property sale.

In *Pacific Lumber*, affiliated timber companies in chapter 11 faced off against a group of secured noteholders. The timber companies proposed to cram down the plan of reorganization on the dissenting noteholders under the indubitable equivalent prong of the cram-down rules and deny them the right to credit bid. The court heard valuation testimony, determined the collateral value (which was several hundred million dollars less than the secured debt), and ruled that payment of that value would be the indubitable equivalent of the noteholders' secured claim. The plan was then confirmed and the collateral sold to a new company with the reduced collateral proceeds paid to the noteholders. The noteholders argued the plan was not fair and equitable because it did not pay their full debt or grant them the right to credit bid, but the court held otherwise. Having received proceeds equal to the court-determined value of their collateral, the noteholders received the indubitable equivalent of their claims.

In *Philadelphia Newspapers*, the court approved a plan of reorganization that provided for an auction sale at which only cash could be bid. The court approved a stalking horse bid which was some $250 million less than the secured lenders' debt and determined that the auction sale proceeds would be the indubitable equivalent of the secured lenders' claims. The secured lenders opposed the plan and argued that it was not fair and equitable since the requirement for cash bidding at the sale prevented the secured lenders from credit bidding. The bankruptcy court agreed with the secured lenders, but the U.S. District Court, on appeal, determined that the plan would be fair and equitable since

the auction proceeds would provide the indubitable equivalent of the secured lenders' claim.

Pacific Lumber was a decision of the Fifth Circuit Court of Appeals and is not subject to further appeal.

On March 22, 2010, a split three-judge panel of the Third Circuit upheld the decision affirming the auction sale "indubitable equivalent" approach of *Philadelphia Newspapers*. The majority held that the language of the statute allows debtors the option of selling their assets under any of the three prongs of section 1129(b)(2)(A), including sale free and clear of all liens under either subsection (ii), which mandates credit bidding, or subsection (iii), which doesn't mandate credit bidding. The majority reasoned that the plain meaning of section 1129(b)(2)(A), specifically the use of the word "or" separating the three prongs, clearly allows for any of the three prongs to satisfy the fair and equitable standard. Further, according to the court's analysis, subsection (ii), despite specifically referring to sales free and clear of all liens, was not the exclusive provision under which a plan premised upon asset sales could be confirmed.

The majority found that subsection (iii) was an unambiguous, intentionally broad catchall that allowed for a wide variety of debtor approaches to providing creditors with suitable return. Its analysis led it to conclude that "indubitable value" is equivalent to "unquestionable value of a lender's secured interest in the collateral." As this pertains to the acceptability of the plan, the creditors will have the opportunity at confirmation to show that the chosen mechanism for disposing of the assets failed to provide indubitable value. They could also argue that the failure to allow credit bidding at the asset auction failed to generate a fair market price for the assets. But the court refused to conclude that the means of providing indubitable value in an asset sale free and clear of liens necessarily included credit bidding as a matter of law, and noted that prior to the auction, it was premature to make any conclusions about what sort of value the bidding process will ultimately yield.

Since the Third Circuit includes Delaware, a leading venue for chapter 11 filings, the decision is likely to have game-changing implications in many cases.

"Denying a secured creditor the right to credit bid…tilts the balance of power to owners of leveraged real estate and to other creditors…."

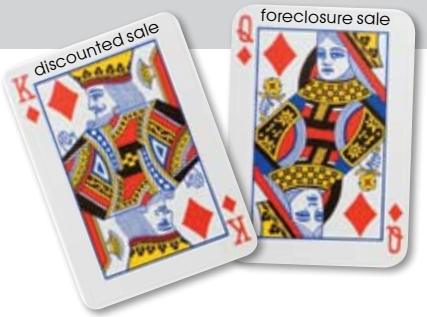
Impact on Real Estate Sales

While the *Pacific Lumber* and *Philadelphia Newspapers* cases involved timber and newspapers, the same statutory provisions, and therefore the same analysis, could apply in the context of real estate sales. The courts could determine the value of the real estate (or permit an auction), force the secured creditor to accept that value as the indubitable equivalent of its security, and prevent the creditor from credit bidding under the plan of reorganization.

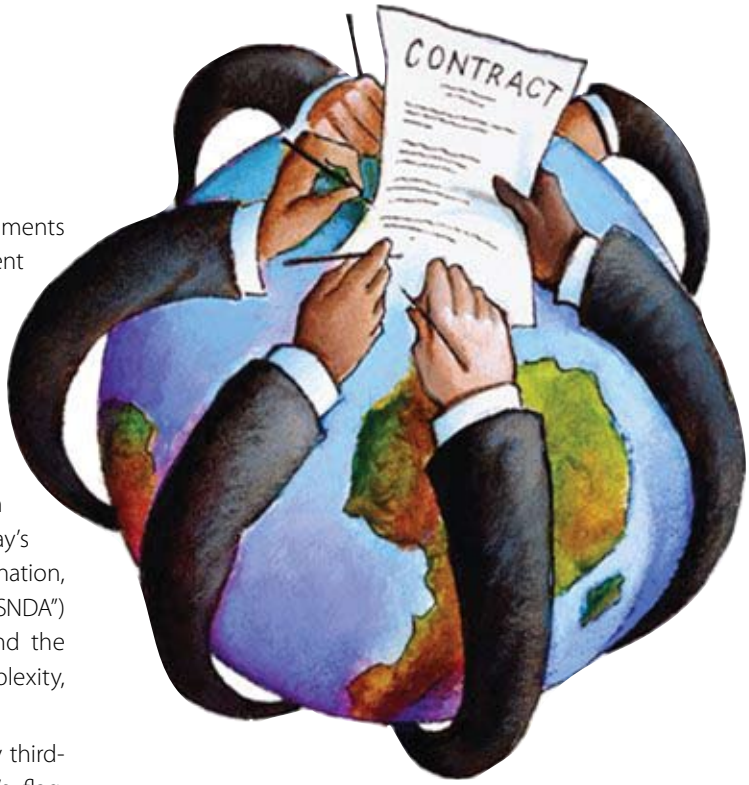
Credit bidding at a 363 Sale is unaffected by these two cases. However, as a result of these cases, investors must now be concerned that their real property collateral could be sold through a Plan Sale instead of a 363 Sale and their secured debt crammed down under the indubitable equivalent standard. Denying a secured creditor the right to credit bid through a plan of reorganization tilts the balance of power to owners of leveraged real estate and to other creditors, and puts at risk the secured debt purchase and ownership strategy. Secured creditors may be forced to alter their investment calculus and consider the time and cost of valuation litigation if the plan sponsor tries to prevent credit bidding. In the current environment, as more distressed debt matures, an analysis of the credit bid/indubitable equivalent issue will be critical. ■

Daniel M. Glosband is a partner in the Boston office of Goodwin Procter and can be reached at (617) 570-1930 or dglosband@goodwinprocter.com.

Benjamin O. Looker is an associate in the Boston office of Goodwin Procter and can be reached at (617) 570-1871 or blooker@goodwinprocter.com.



Acquiring Hotels:



by Teresa K. Goebel and Matthew G. Pohlman

Hotels have been among the hardest-hit segments of the real estate industry during the current economic downturn. Hotel foreclosures increased dramatically in 2009 and more are expected in 2010. This may offer attractive acquisition opportunities as lenders and special servicers seek purchasers for their reclaimed hotel assets. But, as complex operating businesses, hotels present many unique challenges, many of which must be overcome before closing escrow. In today's distressed environment, the negotiation of a subordination, non-disturbance and attornment agreement ("SNDA") between the third-party operator of the hotel and the prospective purchaser's lender has added complexity, time, and costs to the acquisition process.

Many upscale and luxury hotels are managed by third-party operators and branded with the operator's flag, and these hotels generally must be sold subject to the existing management agreements. The terms of the management agreements affect both the marketability and the financeability of hotels. These agreements provide operators with broad discretion over hotel operations and control of hotel cash, and likely require any new owner to deliver an SNDA meeting specified requirements. Thus, in addition to negotiating the acquisition with the seller and the debt financing with its lender, a purchaser also must juggle negotiation of an SNDA between its lender and the hotel operator.

SNDAs in Today's Market

Before the economic downturn, SNDAs for upscale and luxury hotels generally contained the following key terms: (i) the operator could control cash flow even if the owner/borrower defaulted on its loan; (ii) the management agreement was subordinate to the mortgage, but would survive a foreclosure; and (iii) the operator would continue to perform for the lender or other new owner after foreclosure. The wave of hotel loan defaults has forced owners, lenders, and operators to act under these agreements. The current realities of the debt market and the hotel operating environment, along with the anemic pace of hotel sales during these turbulent times, are causing potential purchasers, operators, and lenders to reconsider provisions that were customary in better economic times and to be strategic in their negotiations. Investors should consider the following:

Identify Potential Obstacles Early. At the beginning of its due diligence process, a potential purchaser should review the SNDA requirements in the management agreement to assess whether they could jeopardize or delay the financing. The SNDA requirements in the existing management agreement may be unacceptable to a lender in today's distressed environment. Therefore, a purchaser

SNDAs Making It Harder

should raise significant SNDA issues with the operator and/or the lender before its escrow deposit becomes non-refundable.

Proactive Purchaser. The lender and operator have competing demands. In particular, the operator wants security of tenure following a loan default and flexibility to operate the hotel in a distressed situation without undue lender interference, and the lender wants maximum flexibility to direct hotel cash flow and operations in a distressed or default scenario. These competing demands can spark heated debate on various issues. A purchaser should, therefore, discuss SNDA requirements with its lender during the term sheet stage for the financing and broach potential sticking points with the operator as early as possible. Ultimately, the purchaser is well advised to actually bring together the lender and hotel operator early in the transaction.

Control Over Cash. In the current cycle, many lenders have been frustrated by an inability to control hotel cash flow or even implement operating expense reductions in a default scenario. Accordingly, a lender making a new loan likely will seek control of the hotel's bank accounts following a loan default and demand greater control over capital and other expenditures. The operator probably will resist these demands as the current cycle has reinforced its need to control hotel cash to ensure continued operations that meet its brand standards. The purchaser also should resist these lender requests as they will limit the purchaser's rights vis-à-vis the operator and may reduce its ability to work out compromises with the operator when there are cash shortfalls.

Lender/Operator Relationship. Operators sometimes have found themselves without a line of communication to the lender and excluded from workout discussions between the lender and owner that resulted in deals affecting hotel operations. To address these concerns, an operator may seek a clear right to communicate directly with the lender and a reciprocal commitment from the lender to communicate with the operator in a default scenario. Similarly, the operator may require that the SNDA authorize it to follow the lender's instructions in the event of either an absentee owner or conflicting instructions from the owner and lender. A purchaser must carefully negotiate the scope of the operator's rights to communicate with the lender and to follow the lender's instructions because both may provide the lender with greater control at the expense of the purchaser.

Purchaser in the Middle

The ongoing stress in the hotel operating environment has resulted in renewed and intense interest in the terms of SNDAs for management agreements. This reality ensures that SNDAs will be hotly negotiated, and the various stakeholders should not rely on prior notions of "industry standard" terms. The potential purchaser of a distressed hotel – as the potential borrower under the loan and the potential owner under the hotel management agreement – must mediate the lender's and hotel operator's competing demands, ensure the SNDA negotiations commence early in the deal process, and remain actively involved the negotiations. ■

Teresa K. Goebel is counsel in the San Francisco office of Goodwin Procter and can be reached at (415) 733-6052 or tgoebel@goodwinprocter.com.

Matthew G. Pohlman is counsel in the London office of Goodwin Procter and can be reached at (+44) 20 7447 4212 or mpohlman@goodwinprocter.com.

Acquiring The Fulcrum Security

by Samuel L. Richardson and Eric D. Lemont

Many real estate investors are looking to acquire distressed debt with a view to ultimately own the underlying real property collateral through a "loan-to-own" strategy. In today's world, however, traditional first mortgage financing has evolved into two-tiered mortgage and mezzanine loan structures, and mezzanine loans often consist of multiple tiers of subordinated debt (sometimes further tranched into A/B notes and participation structures). With such a complex capital stack, how does an investor determine which debt to acquire? To maximize its foreclosure remedy, an investor should identify and acquire the so-called "Fulcrum Security."

The Fulcrum Security is the tranche of debt (or controlling interest in such tranche) that is immediately junior to all senior debt that could be fully satisfied if the real estate collateral were sold at current market prices. Historically, the Fulcrum Security has been the most junior piece of mezzanine financing encumbering a particular piece of real estate. But, given the recent dramatic decrease in property values, identifying the Fulcrum Security requires a careful analysis of property valuation, the amounts and priorities of tranches of senior and mezzanine debt, and the economic terms and priorities among lenders in the debt stack.

Identifying the Fulcrum Security

The road from loan to own can be rough and meandering. The best way to navigate this road is to take it one step at a time.

The first step is to identify the Fulcrum Security in the capital stack. Determining which security is junior to the last tranche of senior debt that would be paid in full based upon a sale of the asset requires an investor to determine both the value of the real property collateral and the balances of outstanding debt obligations encumbering the collateral.

Once the Fulcrum Security is identified, the second step is a thorough analysis of the operative agreements that delineate the rights and obligations of the various debt holders in the capital stack, including any applicable intercreditor, co-lender, servicing, and participation agreements. By its review of these agreements, the investor should be able to determine any conditions to acquisition of the Fulcrum Security, and what consent and control rights attach to it.

Conditions to Acquisition. The various agreements must be analyzed to determine if there are any conditions to the acquisition of the Fulcrum Security, or if it can be purchased at all. Often, the acquisition of the Fulcrum Security requires the consent of other lenders unless the investor is a "qualified transferee" by meeting relatively standard capitalization and structural requirements.

Consent and Control Rights. Because the ultimate goal of the investor is to own the real estate collateral, the prospective investor must confirm that the owner of the Fulcrum Security possesses the right to issue default notices, accelerate the applicable debt, appoint a special servicer, and, ultimately, control the foreclosure process. To preserve the investment in the Fulcrum Security, the investor must also determine that it will have consent rights over any recapitalization or enforcement plan by senior lenders.

If the Fulcrum Security is an entire mezzanine loan, making these determinations is straightforward. In many cases, however, the Fulcrum Security consists of a junior participation in a single mezzanine loan, and the servicing agreement grants a loan servicer authority to service and administer the loan on behalf of the participation holders. The owner of the Fulcrum Security must have approval rights over a broad range of major decisions, and that means it must be the "controlling holder" under the intercreditor agreement. The investor in a Fulcrum Security needs to be a controlling holder so that it has rights to approve such things as modification of monetary loan terms and release prices, waiver of defaults, exercise of remedies after an event of default, approval of extraordinary expenses, release of reserve funds, termination or replacement of the borrower's property manager, and approval of annual budgets.

Investors must pay careful attention to provisions in the intercreditor agreement regarding loss of controlling holder status. The loss of controlling holder status can be triggered by an automatic appraisal event, typically resulting from a borrower bankruptcy, uncured payment default, or other trigger events enumerated in the intercreditor agreement. Losing controlling holder status will greatly decrease a debt holder's ability to control its destiny since it will likely lose not only its authority to approve or direct major decisions by the servicer administering the loan but also its discretion to cure underlying loan defaults and its ability to approve decisions regarding senior loan workouts and foreclosures.

Foreclosing on the Fulcrum Security

Once the Fulcrum Security is acquired, and following a default, the investor may then seek to acquire the real property collateral through foreclosure. Such foreclosure will wipe out all junior tranches of debt, leaving the new equity holder subject only to those tranches of debt senior to the Fulcrum Security.

Typically, a junior lender has a right to foreclose without the consent of senior lenders if it meets certain objective conditions in the intercreditor agreement, including, as applicable, (i) that the investor is a qualified transferee, (ii) the execution of replacement guaranties on the senior loan, and (iii) the hiring of a qualified manager if the existing property manager is not retained.

If the Fulcrum Security consists of a participated mezzanine interest, the power to foreclose varies by agreement. In some instances, the holder of the Fulcrum Security, as the controlling holder, has the option following a default to approve the servicer's commencement of a foreclosure action or to exercise its rights under the intercreditor agreement to cure the underlying default. If multiple holders possess overlapping authority to approve a foreclosure, and the controlling holder cannot or does not want to exercise its cure rights, the intercreditor agreement may vest the servicer with the discretion to commence foreclosure proceedings.

Regardless of the type of loan, if foreclosure on the Fulcrum Security is successful, the investor will achieve its goal of being the owner of the real property collateral, subject to any remaining senior debt.

Take Care

There are many opportunities for investors willing to take the risks and understand the complications of executing a loan-to-own strategy on a highly leveraged asset. However, the complex structures and a turbulent market require great care and sophistication in evaluating these opportunities. ■

Samuel L. Richardson is a partner in the Boston office of Goodwin Procter and can be reached at (617) 570-1878 or srichardson@goodwinprocter.com.

Eric D. Lemont is an associate in the Boston office of Goodwin Procter and can be reached at (617) 570-1448 or elemont@goodwinprocter.com.

Success Through Failure: Buying FDIC Loans

by Lewis G. Feldman and Siobhan C. Murphy

Henry Ford once quipped: "Failure is simply the opportunity to begin again, this time more intelligently." When it comes to the unfortunate failures of banks in today's economy, the job of beginning again belongs to the Federal Deposit Insurance Corporation (FDIC). Created by Congress during the Great Depression by the Banking Act of 1933, the FDIC serves as the clean-up crew for failed banks. Through the end of the third quarter of 2009, the FDIC placed 552 institutions, with total assets of $345.9 billion, on its problem list, and by the end of the fourth quarter, 140 banks and thrifts had closed. The failures continue in 2010. These failures represent opportunities to real estate and finance industry participants thanks to a new program instituted by the FDIC whereby private investors, in partnership with the FDIC, acquire portfolios of performing and nonperforming loans at a discount. With billions of distressed real estate-secured loans available for purchase, these opportunities may provide an unexpected boost to the bottom line for investors.

An *Excursion* into the FDIC

Since its inception, the FDIC's charge as receiver or conservator often involves arranging the liquidation of loans originated by failed institutions in a manner that seeks to maximize asset sale prices to settle creditor claims, including moneys owed to the FDIC. The FDIC has traditionally favored whole-bank transactions, which can be complex in terms of regulatory requirements for non-bank investors.

The FDIC also sometimes engages in the outright sale of performing and nonperforming loans. In previous FDIC sales programs, such as 1984's Asset Marketing Program and 1989's RTC Bulk Sales Program, the FDIC pooled and valued loans based on asset type, size, and geography, set bidding rules and qualifications, mandated the execution of confidentiality agreements, and sold the loans through auction or sealed bid. As the volume of dispositions rose, the FDIC engaged third-party consultants over which the FDIC assumed a supervisory role. Today's direct loan sales programs work in much the same way, giving third- party consultants the primary responsibility for discharging the assets.

Recently, however, the FDIC has closed an increasing number of loan portfolio sales using its public/private partnership program, which offers private investors a joint venture or participation arrangement with the FDIC in owning and servicing the loans, favorable zero-coupon financing from the FDIC, and other benefits.

Public/Private *Fusion*

The FDIC's recent development of the public/private partnership transaction builds on the traditional direct loan sales program. In this structure, the FDIC as receiver of a failed bank contributes a loan portfolio to a single-purpose limited liability company ("SP LLC") formed by the FDIC as receiver. The FDIC then sells either a portion (generally 40%) of its membership interest in the SP LLC to a private investor or sells all of its membership interest in the SP LLC to the private investor but retains a participation interest in the cash flows from the loan portfolio. In either case, the FDIC receives cash and retains rights to some portion of future revenues from the loan portfolio.

The FDIC uses several investment advisory firms to market loan portfolios as public/private partnership opportunities to certain parties that have pre-qualified with the FDIC. The pre-qualification process involves demonstrating to the FDIC and its advisors that a private investor has the requisite expertise and experience to manage the proffered loan portfolios. As opportunities arise, pre-qualified parties are notified of the FDIC's proposed terms for the partnership or participation structure and are provided a limited opportunity to conduct due diligence. Interested parties then submit bids and the FDIC works with the investment advisor to select the winning bid.

The public/private partnership arrangement is generally structured with a seven-year term. The FDIC has the ability to call for liquidation at the end of the seven-year term or earlier if the unpaid principal balance of the pool of assets has been reduced to 10% of the original balance.

Key terms of these deals vary from transaction to transaction. In general, the FDIC has strong approval rights over bulk sales and transfers by the private investor, but the private investor (and any servicer selected by the private investor) has broad discretion over servicing decisions, including dispositions of individual loans or sale of collateral. The agreements with the private investor generally provide for *pari passu* distributions based on initial capital percentages (usually 60% FDIC/40% private investor), but are often subject to a reverse promote structure where the private owner's rights to distributions from the SP LLC decline after certain IRR hurdles are achieved (generally at or above 25%). In some cases, private owners have had substantial obligations to contribute additional capital to fund expenses and future advances under the loans, whereas in others the FDIC has agreed to provide advance facilities to fund future advances, especially in the context of construction loans on unfinished projects. In transactions with substantial additional capital obligations, guaranties from creditworthy entities have been required.

Focus on Benefits

In addition to the opportunity to acquire real estate-secured loans in volume at a discount with relatively low transaction costs (because diligence is streamlined and documentation is not highly negotiated), the FDIC has offered optional zero-coupon financing, with repayment generally being subordinate to all transaction costs but senior to distributions to the equity holders in the SP LLC.

Investors have broad discretion over servicing decisions, including terms of workouts and when to exercise remedies such as foreclosure. In general, the investor in a public/private partnership with the FDIC has three ways to receive a return on its investment and to cover its expenses:

- Due to the insolvency of the originating bank, there are many otherwise performing loans that failed to make payments while the originating bank was having its financial troubles. Once contacted by the servicer, many of these loans purchased at a discount return to performing status.
- Investors with real estate and workout experience can restructure loans so as to convert nonperforming loans purchased at a discount to performing loans.
- Investors have the ability to market and sell the loans and collateral assets, subject to limitations on bulk sales imposed by the FDIC. It should be noted, however, that the FDIC must approve of any sales transactions with affiliates of the private investor.

Flex Your Opportunity

The door is open for private investors to partner with the FDIC in a mutually beneficial relationship. For real estate and finance industry participants, acquiring distressed loans and sharing in the upside with the FDIC truly is a more intelligent way of doing things. ■

Lewis G. Feldman is a partner in the Century City office of Goodwin Procter and can be reached at (310) 788-5188 or lfeldman@goodwinprocter.com.

Siobhan C. Murphy is a partner in the Boston office of Goodwin Procter and can be reached at (617) 570-8242 or smurphy@goodwinprocter.com.

RE SOURCE™
A GOODWIN PROCTER PUBLICATION FOR THE REAL ESTATE INDUSTRY
10250 Constellation Boulevard, 21st Floor
Los Angeles, CA 90067

PRESORTED
STANDARD
U.S.POSTAGE
PAID
PASADENA, CA
PERMIT NO. 1132

RETURN SERVICE REQUESTED