



HERRICK

Partnering with Clients for 75 Years

THE HERRICK ADVANTAGE

Due to the overwhelming response to our seminar on “Acquiring and Profiting from Distressed Real Estate Loans,” Herrick will offer an encore presentation on June 25 at 5 p.m. in our New York office. Topics include: due diligence concerns for defaulted loan purchases; negotiating the distressed loan purchase agreement; inter-creditor issues; anticipating bankruptcy scenarios; and what happens when the borrower is in bankruptcy. For more information on this event, please visit <http://events.herrick.com>.

LENDING AND RESTRUCTURING ALERT

MAY 2008

Pre-Judgment Appointment of a Receiver for an Operating Company: Borrower’s Consent Makes a Difference

To preserve the value of its collateral, a lender may have to procure the appointment of a receiver upon the occurrence of an event of default. A receiver can prevent the disappearance of collateral while the lender pursues UCC remedies or as the lender’s lawsuit against the debtor winds its way through the judicial system.

Receivers are routinely appointed in real estate foreclosure actions. But courts are far more reluctant to install a receiver where the borrower is an operating company and the collateral consists of accounts receivable, inventory and equipment. Courts are concerned about whether a receiver will be able to continue the operation of the business. While it may be easy for a receiver to collect the rent and pay the utility bills for real property, a receiver may be less effective in dealing with the customers, salesmen, suppliers and employees of an operating company.

The case law makes it clear that a lender is more likely to obtain a receiver for an operating company where the borrower has given its written consent to such an appointment in the loan documents or a forbearance agreement. However, the appointment of a receiver is wholly within the discretion of a court and such a consent should not be thought of as “enforceable” per se (the way a lender might regard an acceleration clause or a governing law provision). Moreover, there are a number of other factors that courts will consider in ruling upon an application for a receiver,

such as whether the borrower engaged in fraudulent conduct; imminent danger of collateral being lost or devalued; inadequacy of other remedies; probability of success on the merits of the underlying claim; and the possibility of irreparable harm to the lender. Of course, the facts and circumstances, and available evidence, will vary in each case. These are things that a lender cannot usually control. However, the one important step a lender can take for itself, in most every instance, is to include a clause like the one below in its loan documentation with the borrower.

Rights of Lender to Appoint Receiver:

Without limiting, and in addition to, any other rights, options and remedies Lender has under the Loan Documents, the UCC, at law or in equity, or otherwise, upon the occurrence and continuation of an Event of Default, Lender shall have the right to apply for and have a receiver appointed by a court of competent jurisdiction. Borrower expressly agrees that such a receiver will be able to manage, protect and preserve the Collateral and continue the operation of the business of Borrower to the extent necessary to collect all revenues and profits thereof and to apply the same to the payment of all expenses and other charges of such receivership, including the compensation of the receiver, until a sale or other disposition of such Collateral shall be finally made and consummated. Borrower waives any right to require a bond to be posted by or on behalf of any such receiver.

For further information regarding these or other lending issues, you may **contact Stephen D. Brodie at 212-592-1452 or sbrodie@herrick.com, or Paul Rubin at 212-592-1448 or prubin@herrick.com.**

Herrick's Financial Restructuring, Bankruptcy and Creditors' Rights Practice Group represents debtors, creditors' committees, secured and unsecured creditors, trustees, financial institutions, investment banks, asset-based lenders, insurance companies, pension funds, purchasers of assets, landlords, claims traders, equipment lessors and licensors in workout, restructuring, bankruptcy, and reorganization matters. Our clients range from Fortune 500 corporations to small public and private companies. For more information on our practice, please visit www.herrick.com.

Copyright 2008 Herrick, Feinstein LLP. The Lending and Restructuring Alert is published by Herrick, Feinstein LLP for information purposes only. Nothing contained herein is intended to serve as legal advice or counsel or as an opinion of the firm.