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Return of the Credit Crunch



February 12th, 2009



Bankers' Responses to Problem Loans

- Loan file review
 - Legal review of loan documents
 - Identify any non-standard provisions
 - Review lien status and title searches



Bankers' Responses to Problem Loans

- Financial statements
 - Review borrower's cash flows
 - Review management compensation and fees



Bankers' Responses to Problem Loans

- Management and operations
 - Inspect property and collateral
 - Assess capabilities of management
 - Assess borrower's ability to compete
 - Identify additional sources of financing



Bankers' Responses to Problem Loans

- Workout plan
 - Review borrower's management plan
 - Borrower may need a turnaround consultant
 - Develop workout plan
 - Structure workout proposal and evaluate viability
 - Determine cost of workout to lender vs. probable loss assuming bankruptcy
 - Identify exit strategy



Lawyers' Responses to Problem Loans

- Reservation of Rights Letters
 - Early and often
 - Content
 - Borrower needs to borrow right away
 - Working capital facility
 - Acquisition facility
 - Construction loan
- Pre-Negotiation Agreements
 - Content/purpose



Lawyers' Responses to Problem Loans

- Forbearance Agreements
 - Opportunity for valuable estoppels and releases
 - Turnaround consultants
 - “Forbearance advances”
 - Consent to appointment of receiver
 - Compound interest
 - When do you compound default interest?
 - “Which bills do we pay?”



Lawyers' Responses to Problem Loans

- Standstill Agreements
 - Short-term stabilizers
- Reaffirmation of Guaranties
 - Waivers of suretyship defenses
 - Case law releasing guarantors is the problem
 - What is a novation?
 - Five guarantors, but only four agree to reaffirm.
Now what?



Lawyers' Responses to Problem Loans

- Problems with certain potential new collateral
 - Hidden “liens”
 - Lien Law
 - Problem with a contractor’s A/R
 - Arts and Cultural Affairs
 - Cemetery example
 - Economic interests in partnerships and LLC’s
 - UCC’s anti-antiassignment rules
 - The big Delaware exception



Lawyers' Responses to Problem Loans

- Federal tax liens
 - Not a superlien, but beware the 45-day rules
- Fraudulently filed UCC termination statements; “correction” statements
- CPLR§ 3213
 - For guarantors too
- 9-607 Letters



Bankruptcy Issues

- Automatic stay
 - What is stayed?
 - Legal actions to collect the loan
 - Actions to liquidate collateral
 - What is not stayed?
 - Enforcement of rights against guarantors and third party collateral



Bankruptcy Issues

- Cash collateral
 - What is cash collateral?
 - Under what circumstances can the debtor use cash collateral?
 - Adequate protection – what is it?
- DIP financing
 - How does DIP financing differ from use of cash collateral?



Bankruptcy Issues

- Avoidance actions
 - Preferences
 - Unsecured credit
 - Secured credit
 - Fraudulent conveyance
 - Intentional fraud
 - Constructive fraud



Bankruptcy Issues

- Plan process
 - Treatment of secured and unsecured lenders
 - Can your loan be modified by the Debtor?

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