

CMBS Lender Consents: Planning and Strategies for Proactive Borrower Representation

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One of the consequences of the commercial real estate downturn is the higher exposure of loan servicers to the broader real estate community. Buyers of distressed CMBS debt and their lawyers who have been previously unfamiliar with obtaining a lender consent from a CMBS servicer have become more accustomed to managing the consent process. This brief article provides an overview of particular points to consider in engaging a consent management team, including consultants and lawyers.

Most mortgage loan documents restrict transfers and encumbrances of interest in the mortgage borrower, including broad limitations on direct and indirect transfers. An example of a complex consent process would involve a request by the buyer requesting a waiver of a limitation on encumbrances to permit a pledge of direct or indirect ownership interests in the mortgage borrower to a new mezzanine lender.

Consent requests of these types will require the close attention of the applicable servicer's staff, credit committee and counsel, as well as a review of the requirements of the applicable loan documents. It may be self-evident to a client which is the borrower or proposed buyer of the property, who is proposing a transaction, that the transaction is a "slam dunk" or "winner" for the loan servicer and certificateholders. However, there may be competing interests among the different classes of the securitization that make such a seemingly straightforward transaction a much more complicated analysis.

Servicers considering these type of consent requests may require 120 days, but in cases involving more complex consent requests or related analysis, that period may be even longer. So, wise counsel will seek to simplify this process, and will want to avoid significant changes to its request as that could extend the processing period.

Reviewing the Pooling and Servicing Agreement applicable to the consent request process and to the substantive matters which the consent request

addresses will allow counsel to know what may be happening in the “black box” of the servicer’s consent process and to help counsel to advise its client regarding the plan for a consent request. The PSA: (i) will include servicing standards by which the master servicer and special servicer are required to perform their respective functions; (ii) governs the allocation and distribution of loan proceeds and losses to the certificateholders; (iii) identifies which class of certificateholders controls the approval process; and (iv) describes how loan is to be serviced and includes guidance so that the trust may maintain favorable tax treatment. Servicers are required to act in accordance with the “servicing standard” as defined in the applicable PSA.

We also recommend that counsel to the requesting party manage the number of parties on its side that are in contact with servicer and servicer’s counsel. To the extent that direct communication by someone on the client’s side with the servicer is required, care should be taken by the client to avoid having too many different parties speaking with the servicer.

While the various servicers and other parties to a CMBS securitization generally now have processes and procedures in place to address consent requests, it is important for the requesting party and its counsel to understanding the particular process required by the specific loan documents and CMBS securitization involved. ♦

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