

## ADDENDUM - LITIGATION

### Roy H. Owen

#### Primary Issues and Areas of Expertise –

Commercial mortgage loan origination, underwriting, servicing, and securitization; breaches of representations and warranties in the sale of commercial mortgage loans to commercial mortgage-backed securities (CMBS) trusts; franchise lending; breach of contract; standard of care (breach of fiduciary duty); customary real estate and financial services industry practices and procedures; lender liability; reporting; valuation; discounting of equities in closely-held companies; loan defaults; collection and foreclosure; resolution of defaulted loans; bankruptcy; damages; material and adverse effect; insurance claims resolution; borrower/guarantor recourse; CMBS non-recourse carve-outs; post-closing insolvency; commercial real estate markets and trends; qualified rehabilitation of historic properties; preservation and conservation easements; covenants, conditions, and restrictions (CCRs); 1-4 family residential development; residential and commercial condominium regimes; property owners' associations; architectural review boards; and real estate regulatory and public policy matters, including land use, zoning, entitlements, eminent domain, and tax-increment financing.

#### Cases

##### **Borrower Counterclaims in California Non-Judicial Foreclosure**

Retained in 2014 on behalf of defendant CMBS trust in response to borrower assertions of improper foreclosure, alleging, among other matters, that the trust's inclusion of a prepayment fee in the notice of sale was unlawful. Scope of testimony to include the rationale for inclusion of a yield maintenance provision in the loan documents at issue, the reasonableness of the yield maintenance provision at the time the loan documents were signed, and the obligations imposed on the trust to maximize recovery for certificateholders. Client prevailed on motion for summary judgment. *Figueroa Tower I, II, and III, California Limited Partnerships v. U.S. Bank, N.A., as trustee, by and through special servicer C-III Asset Management LLC for the registered holders of CD 2006-CD3 Commercial Mortgage Pass-Through Certificates, et al.* Case No.: BC506014 (Superior Court of the State of California for the County of Los Angeles).

### **Opinion Regarding Appropriate Date for Determination of Breaches of Representations and Warranties with Material and Adverse Effect in the Sale of a Loan to a CMBS Trust**

Retained in 2013 on behalf of a mortgage loan seller as defendant in an action brought by a Special Servicer on behalf of a CMBS trust, alleging breaches of representations and warranties in the mortgage loan purchase agreement governing the sale of the subject loan to the trust. The plaintiff alleged that the breaches arose and the material and adverse effect on the trust could only be determined at a point in time several years after the securitization closing date, with corresponding implications on the statute of limitations under New York law. Expert report submitted. Deposition taken. Court ruled granting plaintiff's motion for summary judgment. Ruling is under appeal. *U.S. Bank, N.A., as Trustee, v. Dexia Real Estate Capital Markets (U.S. District Court, S.D.N.Y.; Case 1:12-cv-09412-SAS)*

### **Assertion of Full Recourse under CMBS Non-Recourse Carve-Out for Alleged Post-Closing Insolvency**

Retained in 2013 on behalf of borrower defendant in a complaint for damages, foreclosure, and other relief brought by a special servicer on behalf of a CMBS trust, asserting, among other matters, that the borrower breached one of the "bad boy" carve-outs by virtue of the alleged failure to maintain borrower solvency and, therefore, special-purpose entity status post-closing. Prepared and exchanged expert report. Case settled immediately - prior to public disclosure of experts. Retention remains confidential.

### **Borrower Counterclaims in Florida Foreclosure**

Retained as a CMBS servicing expert in 2013 by plaintiff CMBS trust by and through its Special Servicer in response to a defaulted borrower's affirmative defenses and counterclaims in a foreclosure action brought by the trust. Borrower claimed that Special Servicer dealt in bad faith in its negotiations with borrower over borrower's proposed discounted payoff of the defaulted mortgage loan, and that the Special Servicer and the trust reneged after allegedly reaching a binding agreement with the borrower. Prepared an expert report rebutting reports put forward by two experts retained by the borrower. Testified in court in the ensuing bench trial. Court ruled in favor of the plaintiff trust. *U.S. Bank, National Association, as trustee for the registered certificate holders of Bank of America, National Association – First Union National Bank Commercial Mortgage Pass-Through Certificates, Series 2001-3, acting by and through C-III Asset Management LLC, as Special Servicer. Case No.: 01-12-CA-001252 DIV MG (Circuit Court of the Eighth Judicial District in and for Alachua County, Florida).*

### **Breach of Fiduciary Duty –**

Retained in 2013 as an expert on customary commercial real estate asset management industry practices, reporting, client communications, and standard of care in a case brought by an investor against an asset manager alleging breach of fiduciary duty, breach of contract, and conversion of funds in the management of multiple institutional grade properties owned by various limited liability corporations and limited partnerships. Case settled without disclosure of experts.

### **Loan Repurchase Demands -**

Retained in 2013 as a consulting expert on behalf of a Special Servicer and CMBS trust to investigate breaches of representations and warranties on multiple loans in the trust and to pursue repurchase demands against the mortgage loan seller, as warranted. Notice of breaches of representations and warranties and demand for repurchase delivered to seller, and complaint filed. Court granted defendant's motion for summary judgment. *Wells Fargo Bank, N.A v. Sovereign Bank, N.A.*, Case No. 13-CV-4313 (S.D.N.Y.).

### **Loan Repurchase Demand -**

Retained in 2012 as a consulting expert on behalf of a special servicer and CMBS trust regarding breaches of representations and warranties on a single loan in the trust and to pursue repurchase demands against the mortgage loan seller. Notice of breaches of representations and warranties and demand for repurchase delivered to seller, and complaint filed. Court granted defendant's motion for summary judgment. *Wells Fargo Bank, N.A v. Sovereign Bank, N.A.*, Case No. 13-CV-1222 (S.D.N.Y.).

### **Loan Repurchase Demand –**

Retained in 2012 as a commercial mortgage servicing expert and rebuttal witness on behalf of a rated CMBS Special Servicer in a demand for repurchase of a large commercial mortgage loan sold by a New York investment bank to a CMBS trust. The plaintiff alleged breaches of representations and warranties with material and adverse effect in the sale of the loan to the trust. The defendant responded with multiple defenses, including assertions that the trustee, master servicer, and special servicer inadequately managed the loan in accordance with customary industry standards and the Servicing Standard. Expert rebuttal report submitted. Deposition testimony submitted. Court granted defendant's motion for summary judgment. Ruling is under appeal. *Bank of New York Mellon Trust Co., N.A. v. MSMCI*, Case No.11 Civ. 0505 (S.D.N.Y.).

### **Non-recourse Carve-outs -**

Retained in 2012 by commercial mortgage borrower principals to advise on demands asserted by CMBS trust against guarantors under standard CMBS non-recourse loan documents for loans not in default and for which no apparent “bad boy” carve-out events had occurred.

### **SOVC 2007-C1 Repurchase Demand -**

Retained in 2012 as a consulting expert by a rated CMBS Special Servicer on the servicer’s demand for repurchase of a commercial mortgage loan sold by a New York commercial bank to a CMBS trust. The servicer alleged breaches of representations and warranties with material and adverse effect in the sale of the loan to the trust. Pre-litigation settlement discussions resulted in repurchase by the mortgage loan seller at full defined Purchase Price.

### **EMAC and FMAC Securitization Trust Insurance Claims**

As servicer on behalf of multiple franchise finance securitization trusts which had initiated arbitration against AIG and subsidiaries arising from a large number of unpaid environmental insurance claims, negotiated in 2011-12 an ultimately favorable settlement of those claims following litigation filed by AIG subsequent to the arbitration panel decision. *Commerce and Industry Insurance Company v. U.S. Bank National Association, as Indenture Trustee for the Registered Holders of FMAC Loan Receivables Trusts 1997-B, 1998-B, 1998-C, 1998-D and 2000-A*, Civil Action Number 1:07-CV-5731 (S.D.N.Y.); *Chartis Specialty Insurance Company v. LaSalle Bank, National Association, as Loan Pool Trustee to EMAC Owner Trusts 1998-1, 1999-1 and 2000-1*, Civil Action Number 6103-VCN (Del. Chancery Ct.).

### **Barclays Capital Real Estate, Inc. -**

Retained on behalf of Barclays Capital Real Estate (U.S.), as Mortgage Loan Seller, to evaluate and respond to a demand by the plaintiff CMBS trust to repurchase a commercial mortgage loan sold to the trust. Plaintiff alleged breaches of representations and warranties with material and adverse effect. Expert report submitted. Case settled before deposition. *U.S. Bank, N.A. v. Barclays Capital Real Estate (U.S.)*, Case No. 2:10-CV-06997 (C.D. Cal.).

**Trustees for Certificateholders of LaSalle Commercial Mortgage Pass-Through Certificates, Series 2006-MF2 and 2006-MF3 –**

Lead manager of plaintiff in lawsuits filed in multiple federal courts demanding repurchase of certain commercial mortgage loans by LaSalle Bank, N.A., as mortgage loan seller, for alleged breaches of representations and warranties with material and adverse effect in the sale of loans to the CMBS trusts, and, in the Ohio case, for fraud and fraudulent misrepresentation. Deposed as plaintiff's 30(b)(6) corporate representative in the Ohio case, and served as lead plaintiff witness and plaintiff corporate representative, testifying on the stand for two and a half days during three-week jury trial in Dayton in November 2009. In the Ohio case, jury found for the plaintiff and against LaSalle National Bank/Bank of America on all issues submitted. Also testified in December 2010 bench trial during damages phase. Deposed as fact witness in Oklahoma and Nevada cases. Testified as fact witness for the plaintiff in the May 2011 jury trial in the Oklahoma case. Jury found for the plaintiff on two of the three loans at issue. All pending litigation settled in early 2012. *Wells Fargo Bank, N.A. v. LaSalle Bank, N.A.*, Case No.3:07cv0449 (S.D. Ohio); *Wells Fargo Bank, N.A. v. LaSalle Bank, N.A.*, Case No. 2:08-cv-01448 (D. Nev.); *Wells Fargo Bank, N.A. v. LaSalle Bank, N.A.* Case No. 5:08-cv-01125 (W.D. Okla.).

**Merrill Lynch Mortgage Lending, Inc. –**

Expert retained in 2005 by counsel for Merrill Lynch Mortgage Lending, as defendant in lawsuit demanding repurchase of a loan for alleged breaches of representations and warranties with material and adverse effect in the sale of a loan to a CMBS securitization trust. Prepared expert report and was deposed. Case settled before going to trial. *LaSalle Bank, N.A. v Merrill Lynch Mortgage Lending*, Case No. 04-CIV-5452 (S.D.N.Y.).

**New York investment bank –**

Consulting expert retained in 2003-05 on behalf of a New York investment bank, as mortgage loan seller to three CMBS trusts, defending against demands for repurchase in three law suits brought on behalf of the trusts alleging over 700 breaches of representations and warranties with material and adverse effect on approximately 80 loans. Cases settled on eve of trial.

**Trammell Crow, et. al. -**

Expert retained by counsel for Trammell Crow, et. al. in breach of contract and breach of fiduciary duty litigation involving Joel Peterson, former Trammell Crow Company National Managing Partner and Chief Financial Officer. Managed team of real estate analysts, prepared expert report, was deposed, and testified in Texas state court jury trial

(1993) in three subject areas: real estate valuation procedures and results, national and local real estate markets and trends during the decade of the 1980's, and the discounting of equities in the transfer of closely-held real estate securities. Case settled prior to verdict. *Trammell Crow Company, et. al. v. Joel C. Peterson, et. al.*, Case No. 91-11784-B (Dallas Co. Dis. Ct).