



Counselors at Law

UNPARALLELED RESPONSE, UNPARALLELED SOLUTIONS

Cooley, Shrair P.C.

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I am writing this note to you after just completing my bi- annual SBA designated counsel reaccreditation. One of the "hot" topics in the discussion from lawyers around the country were the number of mistakes that we are all finding in loan documentation following the entry into the economic slow down. It is somewhat reminiscent of 1990. As such, I wanted to remind you of a couple of issues that do keep surprising us by their reappearance.

1. Verify ownership of collateral. If you are financing an acquisition of a business or even a refinance of a business where personal property is involved, you should look at a bill of sale at the closing or other evidence of ownership. If there are multiple entities involved, such as a passive entity owing real estate and an operating company, be sure that you have your security interest in the correct company's assets.

2. Connecticut Practice. In Connecticut, it is critical that your loan documents (not just the note) contain a pre-judgment waiver clause. With this, upon default and pre-suit, without notice, we can attach real estate owned by the debtor and guarantors. Without it, it is a lengthy hearing process (unlike the procedure used in Massachusetts), which is not only time consuming, but expensive. A sample note clause is as follows:

"THE UNDERSIGNED AND EACH MAKER, ENDORSER, GUARANTOR AND SURETY OF THIS NOTE AND EACH OTHER PERSON LIABLE OR WHO SHALL BECOME LIABLE FOR ALL OR ANY PART OF THE INDEBTEDNESS EVIDENCED BY THIS NOTE, HEREBY ACKNOWLEDGE THAT THE TRANSACTION OF WHICH THIS NOTE IS A PART IS A COMMERCIAL TRANSACTION, AND TO THE EXTENT ALLOWED UNDER CONNECTICUT GENERAL STATUTES 52 278(a) TO 52 278(n), INCLUSIVE, OR BY OTHER APPLICABLE LAW, HEREBY WAIVE ITS RIGHT TO NOTICE AND HEARING WITH RESPECT TO ANY PREJUDGMENT REMEDY WHICH THE LENDER OR ITS SUCCESSORS OR ASSIGNS MAY DESIRE TO USE."

Understandably, the clause must be modified to be applicable to the document in which it is inserted; however, this is simply an example of such a clause which we use in notes.

As always, should you have any questions, please feel free to contact any one

of us so we might assist you with trying to structure a transaction.

While you walk the fine line of marketing and protecting the bank's assets, we strongly recommend that you use confirmatory letters and reservations of rights in such circumstances as you may be able to avoid such suits. Even if you prevail, a "he said-she said" is costly battle.

Sincerely,

A handwritten signature in black ink, appearing to be 'P. Shrair', with a long horizontal line extending to the right.

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