

*Representation of Borrowers –
Hot Strategies, Options, Litigation
Solutions and Professional Concerns*

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General Market Conditions

Non Loss-Share Loans	Loss-Share Loans
<ul style="list-style-type: none">• Exhaustion setting in. For 2009 and earlier vintage, banks are becoming more proactive in finding solutions. Emotions are down.• “Sue first” strategy looks good on paper, but has not borne fruit; leaves borrowers with leverage.• Better RE market = increased collateral liquidity = better prospects for DIL• Most often, judgments sit; banks not excited to fight collection wars.• Don’t be afraid to make offers!	<ul style="list-style-type: none">• Workouts becoming more challenging.• Deals available in 2010 are not there today. Sunsets approaching.• FDIC less overwhelmed / more focused?• Watch out for “best efforts to maximize collection” dynamic.

The best advice can be boiled down to five words:

["Hot Strategy" alert]

“Things go better with cash.”

Todd Westfall

TGBWC

With the Bank:	With the Borrower:
<ul style="list-style-type: none">• Find a buyer.• Find a buyer.• Find a buyer.• “I understand that you think the bank hosed you, but let’s find a buyer.”	<ul style="list-style-type: none">• An offer makes most things better.• Once you have a buyer, make the banker’s job easier.• Put a cherry on top of the sundae.• Get past the gamesmanship.

Deed in Lieu – Common Issues

- Who am I negotiating with, anyway? Watch out for second-level negotiation with title company.
 - Define “cooperation” and limit to terms of deal.
 - In the agreement, tie lender to the documents that will be required. Watch out for “substantially the form.”
 - Have the legal description when the settlement agreement signed.
- Cross-check property taxes and funding. Don’t let affidavit tie client to taxes.
- Ask for the title commitment early.
- Beware of materialman liens and title company diligence.
- Get corporate diligence handled on the front end, especially in multiple member LLCs.
 - Know whether operating agreement exists.
 - Obtain most recent partnership tax return to confirm ownership.

Lawyer as Shrink

- *Listen* to the client.
- Show some heart; it gives you credibility.
- Try to think like the banker. It's very rarely personal.
- Why is a deal in *both* side's best interests?
- Reorient traditional litigation thinking; no fighting for the sake of fighting.

Know Thy Client's Financials and Collateral

- Intimate knowledge of the **PFS** is a must. Credibility is key.
- Absolute amount of deficiency usually unimportant. Client must be willing to put a cherry on the sundae.
- Any offer must be 100% vetted and defensible.
- Take the time to learn the **collateral**. Find nuances that give the borrower leverage.
- Help banker under a LSA understand what you are doing to help maximize the value.

Litigation “Solutions” – Big Picture

- Litigation strategy, standing alone, is almost never a workout solution.
- Value of time has changed.
 - Hope in early days was that asset values would recover.
 - Now, time is best to find buyer.
- Bankers always want consent judgments, but cost/benefit rarely weighs in favor.
- So, how to approach a difficult defense?

Litigation “Solutions” – The Trenches

- Find the credible defenses and ride them.
 - Fees; actual or statutory. Watch out for revisions to O.C.G.A. § 13-1-11 for notes after July 1, 2011.
 - Interest rate proof is a common defect, particularly where notes have variable rates.
 - Where bank exercises discretion, watch implied covenant of good faith and fair dealing.
- Keep the shotgun in the closet.
- Stay on top of discovery; it can make MSJ slow to come.
- Request the documents and compel production!
- Appearances matter.

Litigation – Professionalism Concerns

- “Clients come and go, but you only have one reputation.” Prof. Andi Curcio, GSU Law
- Make the client understand that, in most cases, no jury will ever decide whether he owes the money.
- Communicate the likely outcome of the litigation and time frames to the client at the outset of the representation, preferably in writing.
- When representing more than one borrower, get appropriate conflict waivers at the outset and deal with how confidential information will be shared within the group.
- Vetting defenses on the front end will help you explain why you asserted them on the back end. Beware the boilerplate.
 - Just because you do not get an abusive litigation letter does not mean you won’t see a motion for enhanced fees later.
 - See O.C.G.A. § 9-15-14. Note that fees can be awarded against attorneys.
 - Assume an impatient Judge, even when representing prominent locals.

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