



Chambers 2012

Our Real Estate lawyers were recognized among the top lawyers in their respective practice areas in both New York and Texas by *Chambers USA: America's Leading Lawyers for Business 2012*. Added to our previously recognized Real Estate and Tax practices in Texas, was the Texas Construction practice. Real Estate Construction attorney, Bruce Merwin was recognized for a fifth year. Additionally, our New York Real Estate (Mainly Dirt) leasing practice was recognized for a second year, this time with the addition of Noah Shapiro, who is noted as an "Up and Coming" lawyer in 2012.

Also, in September 2011, our Real Estate—Latin America Practice and Partner Luis Moreno were recognized for the third consecutive year for our high-end corporate work by *Chambers Latin America 2012*.

Welcome to the second issue of Think Real Estate, a resource for timely legal analysis of issues affecting the real estate industry and your business' bottom line. Our real estate lawyers represent clients in areas critical to the real estate industry and are engaged in every facet of buying, selling, developing, operating, leasing, capitalizing and financing real estate for operators, investors and users for both U.S. and foreign companies. For more information about our people and capabilities, visit our [Real Estate Practice Group](#) page.

[Matthew Schindel](#) and [Walter Schleimer](#)
Co-Chairs of the Real Estate Practice Group

[Gregg Miller](#)
Real Estate Partner, Editor of Think Real Estate Newsletter

The Fallout From Cherryland—Will The Non-Recourse Carve-Out Guaranty Ever Be The Same Again?

[Trevor Hoffmann](#) and [Larry Mittman](#)

The Issue

The issue is whether the insolvency of a borrower under a non-recourse loan can trigger recourse liability for itself and its "bad boy," non-recourse carve-out guarantors.

Modern secured commercial real estate lending in the United States is generally done on a non-recourse basis, meaning that in the event of a default, the secured lender can enforce on the collateral only (with no personal recourse against the borrower). As a result, to discourage borrowers from acting to stymie secured lenders' efforts to enforce on their collateral, secured lenders typically require a credit-worthy guarantor affiliated with the borrower to enter into non-recourse carve-out guaranties. [Read more.](#)

Supreme Court Decides Credit Bidding Issue

[Larry Mittman](#) and [John D. Penn](#)

In our last issue, we reported that the Supreme Court was poised to resolve a split between judicial circuits over the right of a secured creditor to credit bid in a Chapter 11 plan context. Specifically, the Third, Fifth and Seventh Circuits split on the issue of whether a Chapter 11 plan can be crammed down over the secured lender's objection, where the plan provides for the sale or transfer of the secured lender's collateral with the proceeds going to the secured lender without the secured lender having the right to credit bid for its collateral up to the full amount of its claim. On May 29, 2012, the Supreme Court's answer was a resounding "No" by a unanimous court.

Relying on rules of statutory construction, the Supreme Court ruled that a plan proposing to pay a secured claim using a sale of the collateral could not be confirmed over the secured creditor's objection by denying a right to credit bid and calling what the creditor received the "indubitable equivalent" of its collateral. In essence, the Court decided that a sale of collateral in a plan of reorganization remains

Please see below for a complete listing of recognized Real Estate related practices and lawyers.

Real Estate - Texas

Melvin Dow
Steve Jenkins
Ann Saegert
Rick Martin
Robert Wilson
Construction - Texas
Bruce Merwin
Tax - Texas
Scott Drablos

Real Estate - New York

(Mainly Dirt)
Stuart Mass
Noah Shapiro

Real Estate - Latin America

Luis Moreno

subject to the provisions of Sec. 363(k) of the Bankruptcy Code which recognizes the right of a secured creditor to credit bid its debt "unless the court for cause orders otherwise."

Having effectively enshrined Sec. 363(k)'s place in confirmation cramdown fights, expect future battles not to be over whether Sec. 363 applies (it does) but instead whether "cause" exists for the bankruptcy court to deny that right under the facts in any particular case. Given the broad discretion afforded to bankruptcy courts, this should be a battleground for years to come.

Recent Representative Experience

Represented Hyatt International Inc. in the acquisition of the 756-room Hotel Nikko Mexico for approximately \$190 million from Japan-Mexico Hotel Investment Co., Ltd.

Represented SL Green Realty Corp in a 1.6 million square-foot lease to Viacom International at 1515 Broadway. At the time of closing in April 2012, this constituted the largest-ever New York City office lease other than a few sale-leaseback arrangements, according to SL Green.

Represented Brookfield Office Properties in its lease for 1.2 million square feet at One New York Plaza in Lower Manhattan to Morgan Stanley.

Attorney Spotlight

Ralph E. Arpajian is a partner in the Real Estate Practice Group, resident in the New York office of Haynes and Boone, LLP. Ralph's real estate practice includes extensive work on construction loans, including 30 years of experience representing clients in large, complex construction financing projects. Throughout his career, he has represented some of the largest, most active construction lenders and some of the most sophisticated owners and developers of commercial real estate in the country. Ralph is recognized as a leading expert in New York building loans and is often called on to help his clients navigate the complex and confusing, requirements of the New York Lien Law.

Among his New York projects, Ralph has represented the lenders in the construction financing for the following:

- the Columbus Square project on the Upper West Side of Manhattan (at the time, the largest residential development being built in Manhattan)
- the renovation and reconstruction of an historic 1906 warehouse building, located in the Tribeca neighborhood of Manhattan, into luxury waterfront condominium residences
- the renovation of the legendary Chelsea Hotel

Projects on which he has advised his clients outside of New York have included:

- original construction loans for the Washington Harbour complex, the office, retail and luxury residential condominium project located on the Georgetown waterfront in Washington, D.C.
- Mall of America in Bloomington, Minnesota (at the time, the largest shopping mall in the U.S.)
- construction and expansion of The Plaza at King of Prussia Mall in suburban Philadelphia (now the largest shopping mall in the U.S.)

- construction of the Park Hyatt luxury hotel located near Georgetown in Washington, D.C.
- construction and securitized permanent loans for the Station Place complex located adjacent to Union Station in Washington, D.C. (the new United States Securities and Exchange Commission headquarters)

Ralph has also represented clients in mezzanine construction loans, in both the senior and mezzanine lender positions, including several large revolving mezzanine construction loans for the construction of multi-property residential projects located throughout Florida, including complex intercreditor negotiations.

[Ralph E. Arpajian](#)

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For more information please contact any [lawyer](#) in the [Real Estate Practice Group](#).