

9th Circuit Affirms 'Per Plan' Approach to Interpret 'Impaired Accepting Class' for Plan Confirmation Purposes Threatening Senior Mortgage Lender Protections in Common Real Estate Financing Structures: In re Transwest Resort Properties, Inc.

February 13, 2018 Lawrence Mittman

PRACTICES Commercial Real Estate Leasing, Distressed Real Estate, Real Estate, Restructuring

As described in our earlier [client alert](#), dated September 13, 2016, under certain specific circumstances, section 1129 of title 11 of the United States Code (the “Bankruptcy Code”) permits a bankruptcy court to confirm a Chapter 11 plan and rewrite the terms of a debt instrument (including mortgage debt or mezzanine debt), including the interest, amortization, and maturity. One of the principal statutory requirements to confirm such a plan requires the affirmative vote to the proposed plan by one class of creditors which is “impaired” by the plan – without including an acceptance of the plan by any “insider.” See 11 U.S.C. § 1129(a)(10). Confirmation of such a plan of reorganization is commonly referred to as a “cram down.”

“Cram down” plans were all the rage during the real estate downturn of 1988-1993. Typically during that period, debtors in single asset real estate Chapter 11 cases attempted to effect “cram downs” of their senior mortgage debt and prevent foreclosures, by aligning themselves with the holders of junior mortgages, which themselves would otherwise be wiped out if the senior debt were not fully satisfied. In the absence of any junior mortgage creditor, debtors would attempt to create an accepting impaired non-insider creditor class, consisting of ordinary trade vendors, including utilities, service providers, or mechanic lienors, that happened to be unpaid when the chapter 11 case was filed. Indeed, clever borrowers contemplating a chapter 11 filing, would not pay trade creditors for several months before a chapter 11 filing to ensure having potential impaired creditors available to cast an affirmative vote in favor of the plan which would then be “crammed down” against their senior mortgage creditor. While these vendor creditors easily could have been paid from the property’s cash-flow, instead, the debtors in chapter 11 would propose to pay only a fraction of the face of these claims under the plan in order to achieve the necessary statutory “impairment” of such claims.

To read the full alert, click on the PDF linked below.

[9th-Circuit-Affirms-“Per-Plan”-Approach.PDF](#)