

Richard Kanowitz, Mordechai Sutton, Lawrence Mittman and Ralph Arpajian in *National Real Estate Investor*: Inter-Creditor Agreements and Senior Real Estate Lenders in Bankruptcy

November 13, 2020 Richard Kanowitz, Mordechai Sutton, Lawrence Mittman

PRACTICES Chapter 11 Debtor, Commercial Real Estate Leasing, Distressed Real Estate, Real Estate, Restructuring

The COVID-19 pandemic has caused the filing of many Chapter 11 bankruptcy proceedings in industries such as consumer retail, restaurants and movie theaters. While the commercial real estate industry has been dramatically impacted by the pandemic, thus far, not many commercial single-asset real estate borrowers have filed for bankruptcy. If and when such borrowers start filing Chapter 11 bankruptcy, lenders will have to navigate the legal landscape that has developed over the past several years. This article addresses certain of the issues likely to be raised in the Chapter 11 proceedings.

A central tenet in the structure of senior real estate lending documentation is the prevention of the borrower, in the event it files for Chapter 11 bankruptcy, from re-writing the essential provisions of the secured loan, including term, interest rate and amortization, which is often attempted under a “cram-down.” Senior lenders have created devices to minimize such risk, including mezzanine financing coupled with non-substantively consolidate-able separate borrowers (for the senior and mezzanine loans, respectively), “golden shares,” non-recourse carve-outs, and “bad boy” guarantees. In inter-creditor agreements between a senior lender and a mezzanine lender, the senior lender typically negotiates for provisions that are intended to reduce the opportunity for a cram-down.

Recent cases suggest that senior lenders should reexamine the language in their form inter-creditor agreements and the non-recourse carve-out provisions in their form loan agreements to ensure that the provisions address certain issues and are specific enough to have the intended effect.

“Per Plan” vs. “Per Debtor” Approach

Section 1129(a)(10) of the Bankruptcy Code (the cram-down provision) provides that to cram down a Chapter 11 plan: “if a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.” If multiple debtors propose a joint plan on a non-substantively consolidated basis, may section 1129(a)(10) be satisfied if one impaired class of creditors with claims against only one of the debtors rejects the plan but another impaired class of creditors with claims against a different debtor accepts the plan?

Excerpted from *National Real Estate Investor*. To read the full article, click [here](#).