



# **Complex Loan Structures: Mixed Collateral, Multi- Jurisdiction, Choice of Law**

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*A Broader Perspective<sup>SM</sup>*



## Ren R Hayhurst, Bryan Cave LLP

- Managing Partner Irvine, California office (2001-2011)
- Real Estate Finance Team Leader (1998 – Present)
- Asia Coordinator (2009-2013)
- Bryan Cave International Trade Board Director (2009 – Present)
- Focuses on all aspects of lender representation, including real estate and commercial loan documentation, real estate loan workouts and foreclosure, receivership and loan/guaranty enforcement litigation.
- 9 years as a banking trial lawyer



## What's Ahead for 2013 and Beyond?

- Multiple Property/Multiple Jurisdiction Transactions
- Mixed Collateral Situations
- More Flexibility in Subordinate Debt and Alternatives to Structured Lending
- Protecting remedies when dealing with multi-jurisdictional issues
- You Can Have Your Cake And Eat It Too!

# Multiple Collateral Situations



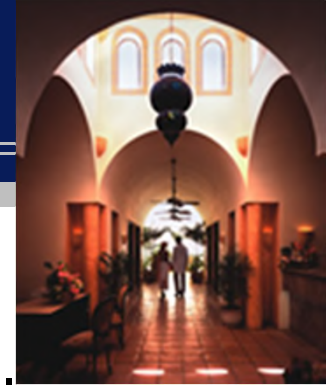
- Enforcement of remedies with multiple security instruments on separate properties.
  - Single note secured by multiple deeds of trust
    - If properties are in different jurisdictions, best course is to make a single choice of law for all loan documents
    - Design security instruments to permit serial foreclosures or combined foreclosure to yield best recovery results
  - A/B note structures with subordinated lien structure
    - Beware of multiple notes secured by separate properties which are cross-defaulted and cross-collateralized
    - Options to placing first and second liens on multiple properties
      - “Structural subordination” within multiple security instruments

## Multiple Collateral Situations (pt. 2a)



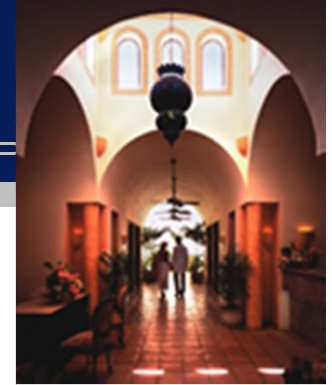
- Enforcement of remedies with multiple security instruments on a single property
  - A/B note structures with subordinated lien structure
    - Advantages of using a single security instrument with structured subordination vs. taking a first and second lien on one property to secure separate debts)
    - Purposes of taking multiple liens on a single property
- Mixed collateral with real and personal property liens
  - Strategies involve combined sales vs. separate enforcement of real property and personal property remedies
    - Beware of one-action rule states and the need to tread carefully

## Multiple Collateral Situations (pt. 2b)



- Mixed collateral with real and personal property liens
  - All States separate real property lien enforcement from personal property lien enforcement
    - This permits separate exercise of remedies against different types of collateral, so strategy should be aimed at maximizing recovery and taking advantage of expedited personal property remedies
  - Key Distinction in “One-Action Rule” States (CA, WA, NV, UT) = Despite UCC rules, a “real property secured loan” must be foreclosed under the real property rules, even if there is separate personal property collateral (i.e., letters of credit, pledge of cash and/or security accounts)
    - Look for statutory exemptions or limitations which provide express protections for lenders or borrowers

# Multiple Collateral Situations (pt. 3)



- Complexities with cross-default and cross-collateral issues
  - Always review consideration issues between cross-defaulted/cross-collateralized loans if different parties involved
    - Different issues if the same parties involved in multiple loans
  - Key to these provisions = Be specific in describing the loans which are cross-defaulted and the rights granted by cross-collateralization
    - “Catch-all” cross-default provisions not favored by courts
    - Consider the need for “third-accommodator” provisions in cross-defaulted/cross-collateralized security instruments
    - Beware of “conversion” of UCC-secured loans which are cross-defaulted with real property loans
      - Similar to risk with “abundance of caution” DOT or Mortgage



# Multi-Jurisdictional/Choice of Law

- Options with Collateral in Various Jurisdictions
  - Look for “reasonable nexus” between the transaction and the choice of law (includes location of collateral, residence of borrower, principal place of business/administration for lender)
  - Balancing requirements of procedural lien requirements and legal contract enforcement options
- Choice of Law Issues
  - Again, specificity solidifies the enforcement of choices
  - Use of legal opinions (local law vs. choice of law opinions)
  - Limitations on Liabilities or Choice of Remedies
  - Forum non conveniens issues



# Final Thoughts



- Ask The Right Questions Up Front When Exploring These Structural Options
- Build as Much as You Can into LOIs, Term Sheets, Loan Applications
- Call us if you have a question – It is Fun and Free!



For further questions, please contact:

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