

FORBEARANCE & WORKOUT STRATEGIES

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TRADITIONAL LENDER OPTIONS

- Foreclosure
- Action for Deficiency
- Action on the Guaranty
- Deed in Lieu of Foreclosure

SAMPLE LENDER WORKOUT CONCESSIONS

- Extension of Maturity Dates
- Interest Rate Reductions
- Interest/Payment Deferrals or Extensions
- Expansion/Alteration of Credit Limits
- Reduction in Lot Release Prices
- Additional Security/Collateral
- New Money
- Conversion of Debt to Equity

TRADITIONAL LENDER CONSIDERATIONS

- Financial Condition of the Borrower/Guarantor?
- True Market Value of the Property?
- Past Performance of the Borrower?
- Costs/Delay Associated With Foreclose?
- Costs to Carry & Sell the Property?
- Projected Direction of Market Trends?
- Is the Borrower/Guarantor Collectible?

CURRENT LENDER STRATEGIES?

- Surplus Inventory
- Decreased Ability to Market & Sell Property
- Tremendously Depressed Property Values
 - No Short or Mid-Term Improvement Expected?
- Continuing Credit Crisis
- Truly Insolvent Borrowers & Guarantors
- Lenders Will Go To Great Lengths To Avoid Taking Title/Obligation to Carry More Property

CURRENT LENDER STRATEGIES (CONT.)

- Borrowers More Likely to “Walk Away” Without Additional Consequences?
 - No Liquid Assets
 - No Collectible Assets
 - Can’t Afford to Carry/Maintain Property
 - No Further Expectation of Profit If Successful
- Lenders Don’t Want The Property Back
 - Deeds In Lieu of Foreclosure Not As Attractive
 - Workouts/Negotiated Deficiency Notes More Readily Available

BORROWER/GUARANTOR CONSIDERATIONS

- Is There Any Equity/Profit Expected If Successful Turnaround of Property?
- What Is The Cost To Carry The Project/Property In The Meantime?
- Is There Reason To Believe The Property Will Become Marketable?
- Is Financing Available to Complete/Carry The Project or Construct New Inventory?
- Is There Available Inventory to Sell Now?
- Condition of Other Owned Projects/Properties?
- Does the Guarantor Have Non-Exempt Assets Available to Pay A Deficiency Judgment?

POTENTIAL BORROWER WORKOUT STRATEGIES

- Offer to Maintain/Carry the Property, i.e. Pay Property Taxes, Maintenance, Sales & Marketing, Etc.
- Demonstrate That Guarantor/Borrower Has No Liquid Assets:
 - Assets Have Been Depleted Carrying/Developing This & Other Properties
 - Ownership Interests in Other Developments Are Restricted or Lack Value
 - Provide Adequate, Believable Information Regarding Assets
 - The Lender Has Your Previous Financial Reports – Don't Ignore What You've Already Disclosed

POTENTIAL BORROWER STRATEGIES

- If Guarantor/Borrower Has Assets, They Are Exempt or Not Available to Lender
 - Michigan Exemptions
 - Federal Bankruptcy Exemptions
- Property/Collateral Cannot Be Readily Liquidated, Even If It Does Have Value
- Negotiate A Reduced Deficiency Note to Bridge the Gap Between Ability to Pay And The Lender's Minimum Required Recovery on its Collateral
- Provide Access to Additional Assets, But Only to Secure A Negotiated Deficiency Note
- Dispute Amount of Deficiency Claim in Action by Lender

SAMPLE CASE:

- \$4,525,000 Construction Loan & Mortgage
- Unconditional Personal Guaranty
- July 11, 2007 Payment & Covenant Default Notice
- Foreclosure by Advertisement And Sherriff's Sale on January 18, 2008, for \$3,000,000.00
- Lender Filed An Action on The Guaranty For The Deficiency For \$1,601,260.06

THE PROBLEM:

- Guarantor Had Significant Liquid Assets
- Several Categories of Guarantor's Assets Were Arguably Non-Exempt
- Guarantor Did Not, However, Hold Liquid Assets Sufficient to Pay The Deficiency And Support His Projected Cash Needs During Retirement
- Guarantor Had Few Viable Defenses To Liability

THE STRATEGY:

- Demonstrate That The Majority of Guarantor's Assets Were Exempt or *Arguably* Exempt
- Demonstrate That Any Non-Exempt Assets Would Not Be Easily Liquidated
- Defend The Liability Claim And Avoid Early Summary Disposition By Attacking The *Amount* of The Deficiency Claim Under M.C.L.A. 600.3280
- Provide Sufficient Disclosure Of Guarantor's Assets to Demonstrate Good Faith Negotiation With The Lender

GUARANTOR'S ASSETS

–	Joint Checking Account:	\$	66,908.00
–	Individual Checking:	\$	1,734.00
–	Individual Savings:	\$	7,219.00
–	Ind. Securities Accounts:	\$	66,995.00
–	Joint Securities Accounts:	\$	200,000.00
–	6 I.R.A. Accounts:	\$	1,600,000.00
–	Principal Residence: (Transferred to Living Trust)	\$	768,200.00
–	Pension Income: (Non-Qualified)	\$	156,850.00
–	Deferred Comp.: (Through 2011)	\$	73,677.00
–	TOTAL ASSETS:		<u>\$2,941,583.00</u>

EXEMPTION ISSUES:

- The Michigan IRA Exemption Arguably Applies Only to "An" IRA – Not Multiple IRA's
- The Guarantor's Residence Was Not Titled as "Entireties" Property; Instead, It Had Been Transferred To The Guarantor's Living Trust By Quitclaim Deed Prior To The Action
- The Guarantor's Securities Accounts Were Titled As "Entireties" Property, But They Were Not Certificated Securities
- The Guarantor Had Significant Annual Distributions From Non-Qualified, and Arguably Non-Exempt, Pension & Deferred Compensation Plans

THE RESULT...?

- Settled For \$300,000 Prior to Trial