



Hotel Lawyers

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Alternate Strategies for Troubled Hotel Loans: Lender and Borrower Considerations for Choosing Workout, Receiver, Deed in Lieu, Foreclosure and Bankruptcy

	Lender Consideration	Borrower Consideration
Workout	<p>Lender lacks the expertise, personnel and other resources to manage the asset.</p> <p>Lender believes borrower has such expertise, personnel and other resources.</p> <p>Lender has a philosophy favoring workouts.</p> <p>Workout is not discouraged by applicable regulatory considerations or issues.</p> <p>Borrower has adequate integrity, financial resources, expertise which will enhance the value of the asset.</p> <p>Borrower's track record is satisfactory (within the industry, in living up to commitments, and in meeting terms of any previous workout).</p> <p>Value of the collateral is inadequate for the credit but there may be additional collateral or guaranties that can be obtained.</p> <p>Lender needs to perfect problems with loan documentation or security instruments and arrangements.</p> <p>Lender wants to restructure the entire transaction to enhance its position in a possible subsequent bankruptcy.</p> <p>Lender may obtain concessions from the hotel management company or wishes to keep a good manager in place.</p> <p>Lender may obtain concessions from hotel franchisor or wishes to keep a good franchise.</p> <p>Credit is in trouble because of a weak market (and not some fault of the borrower or the manager or others). In other words, the lender could not do any better with the asset under its</p>	<p>"Hope springs eternal in the debtor's breast..." (i.e., more capital, increased business, a market turnaround, a better purchase price, or some other major improvement is just moments away if only the lender will defer action now.)</p> <p>Forbearance and time to find new money, buyers, better markets, partners, etc.</p> <p>Extension of maturity.</p> <p>Reduction of interest rate.</p> <p>Reduction of principal.</p> <p>Advance of new money.</p> <p>Subordination to new money.</p> <p>Deferred fees.</p> <p>Borrower believes it can realize greatest value by a voluntary sale of the asset as a going concern.</p> <p>Borrower does not wish to give up control of the asset.</p> <p>Borrower believes that appointment of a receiver will destroy borrower's ability to voluntarily sell the asset.</p> <p>Borrower is concerned that receiver will discover the "skeletons in the closet" that borrower has successfully hidden from lender for years.</p> <p>Borrower hopes the lender's appointment of a receiver will improve relations with the lender and potentially may lead to a consensual resolution of its dispute with the lender.</p>

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	<p>control and the borrower and other parties are cooperating to do everything that the lender would like to see done.</p> <p>Lender wants to obtain a waiver of credible and sufficiently worrisome lender liability claims.</p> <p>Lender seeks to avoid liability for environmental hazard.</p> <p>Lender wants to avoid the delay, expense and risks of bankruptcy under acceptable guidelines (conformance with a business plan, operating plan, plan of asset disposition, etc.).</p>	
Receiver	<p>Lender lacks confidence in the management skills of the borrower.</p> <p>Lender does not have the expertise to work with the borrower to try to turn around its operations.</p> <p>Lender believes the borrower has committed financial defalcations and needs a thorough review of the borrower's operations and financial record keeping.</p> <p>Receiver can maximize cash because not liable for pre-appointment obligations, and does not make regular mortgage payments to lender.</p> <p>Receiver brings new "neutral" professionalism to often tense situation.</p> <p>Government officials and others may be more amenable to receiver's requests.</p> <p>Receiver awaits lender taking control or possession with possible attendant liability—particularly when issues of waste, deterioration, health and safety, and environmental.</p> <p>Receiver can provide accurate operating financial and other information.</p> <p>Will appointment of receiver breach existing management or franchise agreements?</p> <p>Receiver may be able to raise cash with receiver's certificates-superpriority lien against collateral.</p> <p>Lender is concerned about the expenses of a receiver, his attorney and the lender's own attorneys.</p> <p>Lender wants to take advantage of powers given to the receiver to reject burdensome contracts of the borrower and sell property free and clear of junior liens as ongoing business without using the traditional foreclosure process</p>	<p>Borrower is concerned that appointment of a receiver will destroy its relationship with its suppliers and may adversely affect borrower's other assets.</p> <p>Borrower may use its relationships with parties who hold contracts that are critical to the operation of the asset to attempt to subvert the receiver's ability to operate.</p> <p>Receiver may harm image of the operating business with the public and business community.</p> <p>Borrower may file Chapter 11 to avoid a receivership.</p>

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	<p>which will give the lender title to the property and potentially depress the value of the asset.</p> <p>Lender is concerned that the receiver will be too independent, will not carry out the wishes of lender and will be an adversary in addition to the borrower.</p> <p>Can the receiver gain approval to assume contracts that are critical to the operation of the asset to operate it profitably (i.e., liquor licenses, franchise agreements, management agreements).</p> <p>Can the borrower turn its operations around through a non-litigation workout, to avoid the risks associated with a receiver.</p> <p>Will the appointment of a receiver be the “last straw” that drives the borrower into bankruptcy.</p>	
Deed-in-Lieu	<p>Faster and cheaper than foreclosure or bankruptcy. Avoid delays, costs and cram down risks of bankruptcy.</p> <p>Obtain release of claims to avoid lender liability.</p> <p>Obtain assets or rights which lender might not otherwise be entitled to (because of defective security arrangements or intentionally not included as part of original security).</p> <p>Consider initiating foreclosure to keep pressure on to conclude deed in lieu so lender will be further advanced if the deed-in-lieu falls apart.</p> <p>Negotiate for cooperation of borrower on matters such as representations and warranties (at least “to best knowledge”), transfer of easements, rights of way, use agreements and liquor licenses, warranties and other permits or licenses.</p> <p>Acquire assignments of all tangible and intangible personal property (including plans and specifications, license and permits, trade names, trademarks, etc.).</p> <p>May provide basis for renegotiation or termination of management or franchise agreements.</p> <p>Individual partner or guarantor liability may be resurrected if borrower files for bankruptcy or if there is a fraudulent transfer or preference claim, environmental liability, breach of representations and warranties or other points negotiated in connection with the deed-in-lieu.</p>	<p>Avoid foreclosure on record.</p> <p>Preserve best possible relationship with lender.</p> <p>Obtain concession from lender such as release or partial release from personal guarantees, retention of smaller or subordinated interest in the asset, or payment by lender of “walk away” money.</p> <p>See value of collateral maximized.</p> <p>Obtain cooperation of lender to minimize borrower’s adverse tax consequences (i.e., Recapture of depreciation, interest or other deductions).</p> <p>Avoid tax on forgiveness of debt income.</p>

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	<p>Deed-in-lieu is really like a purchase by the lender (or successor) of the property and involves all the issues that would be considered in a normal buy-sell—use JMBM’s HIT List® or similar complete buy-sell checklist.</p> <p>Cooperative approach may minimize damage to operating business and value of collateral.</p>	
Foreclosure	<p>Start the “inevitable process” (i.e., start the clock running on initial time periods in case a workout or deed-in-lieu fails).</p> <p>Keeps the pressure on the borrower if working on other alternatives such as a workout or a deed-in-lieu.</p> <p>Provide the basis for a receivership action.</p> <p>Cut off junior lien holders.</p> <p>Terminate management agreement and franchise agreements (unless through SNDA or otherwise, the management agreement is senior to the lender’s lien or the lender has agreed to reinstate).</p> <p>Avoid assuming labor liabilities.</p> <p>Avoid other burdensome contracts and liabilities.</p> <p>Put control of the property in the hands of someone other than the borrower-potentially someone knowledgeable about the property and inclined to work with the lender.</p> <p>Look to successor issues.</p> <p>Look to lender liability.</p>	<p>Not a borrower option, but borrower may initiate bankruptcy to stop foreclosure.</p> <p>Generally means loss of investment and future potential.</p> <p>May trigger adverse tax consequences including significant recapture of interest, depreciation and other deductions and credits.</p> <p>Black mark on credit record.</p> <p>Look to lender liability.</p>
Bankruptcy	<p>Often not a favored lender choice because of delay, expense and risks.</p> <p>May offer means for borrower to reject or renegotiate burdensome management and franchise agreements or other executory contracts—thereby enhancing value.</p> <p>Bankruptcy can have an adverse effect on an operating business and its image and value.</p> <p>Pre-packaged bankruptcy may offer relatively fast way to clean up asset and wipe out burdensome contracts and junior liens.</p> <p>Lender faces risk that bankruptcy code can be used to strip down lender’s secured claim if value of asset is worth less than debt.</p>	<p>May preserve borrower’s equity and provide time for borrower to sell or refinance the property or rehabilitate the project through new investor, improved conditions or otherwise.</p> <p>Extension of maturity.</p> <p>Reduction of interest rate.</p> <p>Reduction of principal.</p> <p>Upon cure, elimination of default interest, penalties and late charges.</p> <p>Subordination to new money.</p> <p>May shred burdensome contracts.</p> <p>Provides negotiating card with lender and other parties.</p>

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	<p>Lender can use its right to approve of cash collateral budgets prepared by borrower to exercise control of borrower's business operations and business decisions without facing lender liability "control" claims that would exist outside of a bankruptcy.</p> <p>If lender forces borrower into bankruptcy, lender needs to be sure that its liens are properly perfected to avoid the possibility of lien avoidance actions and lender having its claim being treated as an unsecured claim.</p> <p>Lender needs to be prepared to deal not only with borrower as an adversary, but also the committee of unsecured creditors (if one is appointed), thereby making consensual restructure of loan more difficult.</p> <p>Lender can attempt to shorten 120 day plan exclusivity period or wait until exclusivity period expires, to file and attempt to confirm its own creditors plan of reorganization, whereby lender can control the future operations of the borrower, arrange for a sale of the asset and place a management company of its choice in control of the asset.</p> <p>Value of lender's collateral may decline through borrower's use of cash collateral if borrower obtains sympathetic bankruptcy judge that permits the use of lender's cash collateral without a sufficient showing that lender is adequately protected.</p>	<p>Absent unusual circumstances, will permit the borrower to control asset at least for the first 120 days (and often longer) as a debtor in possession.</p> <p>If value of asset is less than debt, borrower can restructure lender's loan by paying 100 cents on the dollar (over time) only as to the secured portion of lender's loan.</p> <p>Borrower faces a loss of its ability to run its business as it did prior to its bankruptcy filing, as bankruptcy court and/or lender must approve of borrower's expenditures of lender's cash collateral for virtually every post-petition expenditure.</p> <p>Borrower can use provisions of bankruptcy code to avoid lender's liens if they are not properly perfected, thereby potentially leaving lender with an unsecured claim which can be paid at less than 100 cents on the dollar.</p> <p>Unless borrower is prepared to pay unsecured creditors 100 cents on the dollar or unsecured creditors agree to accept less, borrower must invest new money in the project in order to retain its equity interest - actual amount to be determined by the bankruptcy court and the realizable value of the interest being retained.</p> <p>Borrower can use committee of unsecured creditors to assist in forcing concessions from lender.</p> <p>Borrower may wish to negotiate with lender to avoid filing bankruptcy, where borrower faces the risk that lender will file and confirm a creditors plan of reorganization which will effectively cause borrower to lose control of its asset and destroy interests of borrower's equity holders in asset.</p>