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BY ERIK NORTH

THE LANGUAGE OF LOANS

Distilling real estate financing jargon into everyday plain English is the true sign of expert conversance, i.e., "know your audience"

PERHAPS the most challenging aspect of starting as a junior associate in a real estate finance practice is just figuring out what coworkers are saying, as demonstrated in the following mock directive:

> E-mail Bernie at RLF and tell him we need the Delaware opinions, a non-con and a UCC perfection opinion for the Westwood deal. Make sure you send him the searches, pairings, good standings and a recycled SPE certificate. After that, call Chatham and tell them we have a Fannie defeasance and our client wants to take the Successor Borrower residual up-front.

Law schools do not teach real estate finance speak, and it is far from intuitive. Much like the "alphabet soup" of federal government agencies, the practice of real estate finance law comes with its own nomenclature of slang and abbreviations. Many lawyers with years of real estate experience still come across unrecognizable terms. This highly specialized, ever-changing vocabulary can leave the unindoctrinated feeling as if they just stepped off a plane in a foreign land and not understanding a word of the local tongue.

Many anachronistic words still remain in today's form loan documents, despite a total lack of contemporary applicability. For example, two old-school terms still seen in deeds of trust from time to time are "enfeoff," and "dower and curtsey."[1] "Enfeoff" is a term dating back to feudal England meaning to give someone—perhaps a fortunate serf on the estate of the local nobleman—land in exchange for pledged service. "Dower and curtsey" also date back to old England, pertaining to the right of a surviving spouse to an interest in real property upon the death of his or her wife or husband. "Dower" generally refers to a widow's right to property, while "curtsey" refers to a widower's right to property. A few states and commonwealths, e.g., Arkansas and Kentucky, still have dower laws on the books. California does not (nor does it have serfs or noblemen). Nonetheless, these terms continue to appear in loan documents and thus are worth knowing.

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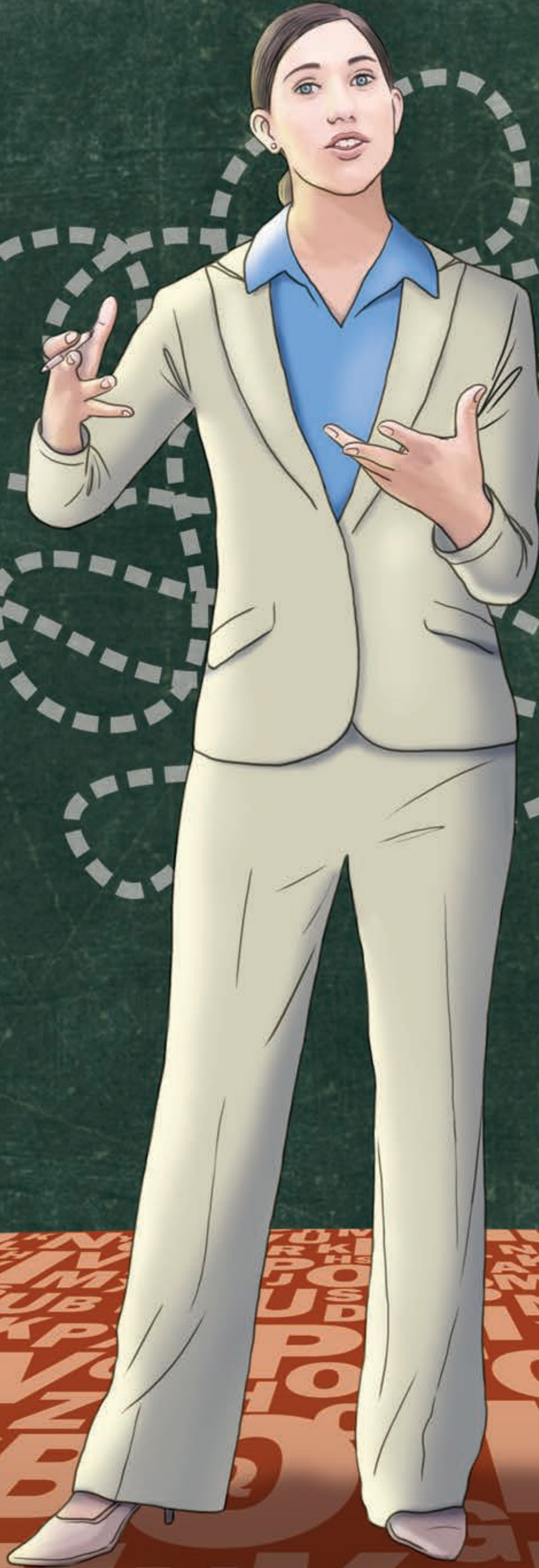
Special thanks to Chelsea Medwin and Ira Waldman for their invaluable help.



There are a variety of real property financing options commonly identified by terms that are not as high concept as "acquisition loan" and "construction loan." One example is a "wraparound mortgage" or "all-inclusive deed of trust," which is basically the equivalent of subleasing a mortgage loan. Generally appearing in connection with a sale of real property, the buyer/borrower under a wraparound loan agrees to make payments to the seller/original borrower of an underlying conventional loan secured by real property and to abide by the terms of the original borrower's loan documents. Unlike a "loan assumption," where upon purchasing the mortgaged property the new borrower steps into the shoes of the original borrower and assumes the original borrower's obligations pursuant to an agreement with the lender, in a wraparound loan, the agreement is between only the new borrower and original borrower, and may exist without the secured lender's knowledge. If asked to document a wraparound loan, the first question should be, "Is this being done to circumvent the due on sale clause in the underlying deed of trust?" If the answer is yes, it is best to pass on the opportunity.

Another creative form of real property financing is a "shared appreciation loan," often evidenced by a "contingent interest promissory note." Under the terms of a shared appreciation loan the lender agrees to accept as part of its payment for making the loan a portion of the appreciated value of the mortgaged property realized upon its sale or other transfer. Typically, a shared appreciation loan is evidenced by a contingent interest note in a nominal amount (e.g., $5,000) secured by a contingent interest deed of trust. In most cases, a traditional promissory note in the full principal amount of the loan and an accompanying deed of trust are also included among the loan documents, although in many transactions the promissory notes may be combined.

"Hard money" loans may sound like something from the film *Goodfellas*, but in fact such loans fill an important niche in the world of real estate finance.[2] Often, a hard money loan is a "bridge loan," the function of which is just like it sounds: It is a bridge, and the span being bridged is time. Bridge loans and hard money loans can be a useful form of short-term financing, providing a source of acquisition funds while entitlements are being processed and construction or permanent financing is being arranged. This is also particularly helpful if the closing timeframe under a purchase agreement is shorter than the anticipated due diligence and documentation period for a bank loan that will ultimately finance the property. Hard money loans also provide a source of financing for borrowers who may not be considered sufficiently creditworthy to obtain a traditional loan. Hard money lenders tend to focus on the value of the collateral relative to the loan amount. These lenders are able to move quickly and require less in the way of due diligence and underwriting than traditional lenders. However, convenience has its cost. Hard money loans usually come with interest rates greater than those of traditional alternatives. Additionally, when obtaining financing of this nature, a borrower should always be wary of a "loan to own" play, in which a lender makes or buys a loan with the intention of foreclosing on a distressed property as a means of acquiring it below market value.

Two types of loans commonly referred to interchangeably but actually having distinct characteristics are "syndicated loans" and "loan participations." Documents for a syndicated loan create a one-to-many relationship among the borrower and multiple lenders. An "administrative agent" or similar lead lender will oversee and manage the loan under the terms of a single loan agreement, but each syndicated lender will likely hold its own promissory note evidencing its portion of the loan. By contrast, a loan participation is a one-to-one-to-many relationship evidenced by loan documents between the borrower and a single lender on the "front end" and on the "back end" by a participation or similar agreement between the originating lender and each of the participating lenders purchasing an interest in the loan. The terms of a syndicated loan governing the relationship among the lenders are included in the loan agreement to which the borrower is a party. The terms of a participated loan governing the relationship among the participating lenders are set forth in a separate agreement to which the borrower is not a party and will likely never see.

Mezzanine Loans

A form of real property financing not actually secured by real property is a "mezzanine loan." To secure a mezzanine loan, the mezzanine lender takes a pledge and grant of security interest in the limited liability company or partnership interests in an entity that owns real property (often called "pledged interests"). This pledge is made by the owner or owners of an entity owning real property, which is usually a mortgage borrower under a separate loan. If a default should occur under the "mezz" loan, the mezz lender forecloses on the pledged interests pursuant to Article 9 (Secured Transactions) of the Uniform Commercial Code (UCC) of the state set forth in the governing law provisions of the pledge agreement.[3] Following the UCC foreclosure, assuming the mezzanine lender is the successful bidder, the mezzanine lender steps into the shoes of the former owner or owners of the mortgage borrower, becomes the owner of the mortgage borrower, and as such takes control of the subject real property. However, the real property encumbered by the mortgage loan remains subject to the mortgage loan, which continues in effect after the mezzanine foreclosure. With the mortgage borrower now under the mezzanine lender's control, the mortgage borrower must continue to pay debt service on the mortgage loan in order to avoid a real property foreclosure like any other mortgage borrower. The interest rate on a mezzanine loan is higher than that of its mortgage loan counterpart because a mezzanine loan is structurally subordinate to a real property mortgage loan; however, as secured financing, it is still superior to equity investments.

For a mental image, one can imagine a Broadway theater in which the orchestra seating is the mortgage loan. The mezzanine loan is the mezzanine level above the orchestra seating but below the balcony where equity investors are seated. This layering of funding sources is called the "capital stack." Some capital stacks include a "junior mezzanine loan" and "senior mezzanine loan." Continuing with the analogy, the junior mezzanine loan is the lower balcony, situated above the mezzanine tier and below the upper balcony where the equity investors sit. In order to manage the rights of each of the lenders in the capital stack relative to each other, the mortgage lender and each of the mezzanine lenders enter into an "inter-creditor agreement." Mortgage and mezzanine borrowers are not parties to the intercreditor agreement and are usually not provided with a copy of the document.

Although a security interest in pledged interests may be perfected through the filing of a Form UCC1 with the office of the secretary of state for the state in which the property-owning entity is organized (most frequently Delaware), it is now common practice for mezzanine lenders also to require perfection through possession. To achieve this form of perfection of the mezzanine lender's security interest in pledged interests, the pledged interests must be "certificated" and evidenced by a physical certificate similar to a traditional stock certificate for a corporation. In order to accomplish this, the operating agreement or partnership agreement of the property owner entity whose interests are being pledged must state that it has elected to "opt in" to Article 8 of the UCC, which governs investment securities. A security interest in pledged

interests certificated under Article 8 is perfected by the mezzanine lender taking physical possession of the original certificates evidencing the pledged interests.

Commercial Mortgage-Backed Securities

A practice area practically requiring its own dictionary is that of "Commercial Mortgage-Backed Securities" (CMBS), which covers "Real Estate Mortgage Investment Conduit" (REMIC) or "Conduit" lending. Mortgage-back securities are bonds for which the payment of principal and interests is secured by a pool of commercial real estate loans. This method of raising capital allows investors to participate in the real estate loan market without having to invest in the overhead required to become an originating lender. It also infuses liquidity into the mortgage loan market, which allows originating lenders to offer lower interest rates. The approach of using a pool of many loans to secure bond payments creates a diversification of risk and guards against the economic failure of any single property securing the bonds.

The process of creating the pool of loans and issuing the mortgage-backed securities is called "securitization," and the "special purpose vehicle" (entity) formed to hold the pool of loans and issue the securities is called a REMIC. This is why loans destined for securitization are often referred to as "conduit loans." Residential mortgage loans are similarly securitized through a variety of quasi-government agencies known as government-sponsored enterprises (GSE), including the Federal National Mortgage Association (FNMA or "Fannie Mae") and the Federal Home Loan Mortgage Corporation (FHLMC or "Freddie Mac").

Loans bound for securitization include certain characteristics designed to protect the holders of the mortgage-backed securities secured by such loans. One such characteristic is the requirement that each borrower in the pool with a loan amount above a certain dollar threshold engage one or two "independent managers" or "independent directors" per the terms of such borrower's operating or partnership agreement. To the lender, the sole purpose of an independent manager is to vote "no" on any proposal to file for bankruptcy or to seek similar protections under insolvency laws if such filing is contemplated by the borrower's members or partners. The borrower's operating agreement or partnership agreement must include a requirement that any bankruptcy filing or similar action on the part of the borrower be approved by an affirmative vote of the independent party. Despite the use of the terms "manager" and "director," independent managers and independent directors have no economic interest in the borrower and have no rights or authority other than to vote on insolvency matters. In practice, the members or partners of the borrower never meet their independent counterparts as most are professionals engaged through service providers for an annual fee.

An independent manager in some cases may also serve as a "springing member" and under certain conditions a "special member" of the borrower entity. A springing or special member of a limited liability company exists, e.g., solely for the purpose of satisfying the requirement that a limited liability company always have at least one member. If for some reason all members of the borrower limited liability company withdraw, die, or otherwise cannot serve as members, this member "springs" into place and becomes the special member of the limited liability company, serving as a legal place holder until the real-world people controlling the limited liability company document a new member's admission. Like an independent manager, a springing member or special member has no economic interest in the borrower entity and no rights or authority under the borrower's operating agreement.

Another common characteristic of CMBS loans is "cash management." Since the CMBS bond holders' goal is to minimize their investment risk to the greatest extent possible, one method of limiting default risk is to have the lender control the revenue generated by the properties securing the loan pool. This prevents the borrower from absconding with property funds and also allows the lender to take an active role in ensuring property revenues are being allocated in a manner that maintains the value of the property. Cash management is implemented through the use of a "lockbox." For typical bank loans not requiring cash management, the borrower receives income from the property in the form of tenant rent payments and can spend it as it wishes, provided it remains current on loan payments and does not otherwise violate the terms of the loan documents. However, if cash management is in place, all revenue from the property securing the loan must be deposited into a designated "lockbox account" with a bank approved by the lender (sometimes called a "cash trap"). If a "soft lockbox" is in place, property revenue is deposited into a lockbox account or "clearing account," and the borrower may withdraw funds from the account at its discretion until an event of default or other "trigger event" occurs. If a trigger event occurs, e.g., a borrower's failure to satisfy a periodic financial success test, the borrower's access to the lockbox account is blocked by the bank holding the account and the lender takes control of the deposited funds. If a "hard lockbox" is in place, upon closing of the loan, tenants of the property are sent a "tenant direction letter" instructing them to make all rent payments directly to the lockbox account and not to the borrower or property manager. Periodically, funds in the lockbox account are "swept" from the lockbox account and transferred to a lender controlled "cash management account."

Once in the cash management account, property revenue is held until disbursed to the borrower per the terms of a "cash flow waterfall." Funds from the waterfall are disbursed into "buckets," each of which corresponds to a category of property costs (e.g., property taxes, insurance, debt service, required reserves, operating expenses, and mezzanine loan debt service, if applicable). Each bucket represents a deposit into an account or a payment to a party entitled to property revenue, such as a mezzanine lender. Any cash left over is either given back to the borrower or held in an "excess cash flow account" as additional collateral for the loan or for future use with the lender's approval. Sometimes a "springing lockbox" is established, in which case the borrower has the right to receive and use revenue from the property until a trigger event occurs, at which time a lockbox account "springs" into place and cash management is implemented.

In addition to knowing default risk is being managed, CMBS bond holders also want their expected return on investment to continue for the bond's entire term. This presents a problem for commercial real estate owners needing the flexibility to sell or refinance properties before the terms of the loans encumbering such properties have matured. The issue is addressed with the financial devices of "minimum interest," "yield maintenance," and "defeasance." In each case, if the borrower elects to prepay the loan prior to an established date, the borrower must compensate the lender (and therefor the bond holders) for its lost return on investment. Under the minimum interest approach, the lender calculates the amount of interest it would have earned had the loan not been prepaid prior to the permitted prepayment date, and that is the amount the borrower must pay to the lender when the principal amount of the loan is prepaid. "Yield maintenance" is similar to minimum interest; however, instead of using a set dollar amount, the principal and interest that would have been paid if the loan had remained in place until the permitted prepayment date is calculated based on a discounted cash flow formula set forth in the loan agreement.

A "defeasance" is an alternative to yield maintenance that allows a securitized loan to remain in place even after the real property collateral securing the loan has been sold or refinanced. To "defease" a loan is to exchange a portfolio of government bonds as substitute collateral for the real property collateral securing a securitized loan. A loan is defeased when the borrower wants to sell or refinance the property securing a mortgage loan but under the loan documents is not allowed to pay off the loan until a prepayment date, or at least cannot do so without paying yield maintenance. Working with a defeasance consultant, the borrower and loan servicer enter into a transaction pursuant to which the liens and security interests encumbering the property securing the loan are released, and in exchange the loan becomes secured by a portfolio of low risk bonds, T-bills and Treasury notes. Essentially, the parties swap out the type of collateral securing the loan. The borrower usually buys the securities portfolio with the proceeds from the sale or refinance of the property. The securities portfolio is structured (using a computer model) such that each month the income from the bonds in the portfolio is equal to the amount necessary to pay the monthly debt service on the loan. Upon maturity of the loan, the value of the securities remaining in the portfolio is sufficient to pay off the final balloon payment of outstanding principal. A defeasance allows a loan to continue to exist until maturity, which in turn allows the "trustee" responsible for the loan pool to continue to make payments to the holders of the bonds for the entire anticipated term of their investment. Any funds remaining after the pay-off of the loan is called the "residual" value of the securities portfolio. The residual is usually shared by the original borrower and the defeasance consultant.

Other CMBS Considerations

In order for the defeased loan to remain in place, a "successor borrower" takes the place of the original borrower that owns or owned the real property being released from the lien of the mortgage or deed of trust. The successor borrower assumes the original borrower's obligations to make payments under the loan documents, thereby allowing for the release of the original borrower from such obligations. The successor borrower is usually formed by the defeasance consultant or loan servicer and serves no purpose other than that of obligor under the defeased loan documents and owner of the securities portfolio purchased at the defeasance closing. A third-party "securities intermediary" holds the bonds in the defeasance portfolio and ensures debt service on the loan is paid from portfolio income.

Unlike a traditional bank loan, the borrower and lender parties to a securitized loan part ways shortly after closing and do not maintain an ongoing relationship through the term of the loan. Responsibility for the day-to-day management and collecting debt service under a securitized loan is that of the "master servicer." While master servicers handle routine approvals and other ministerial functions under the loan documents, if any material decisions regarding the loan are to be made, the loan will be transferred to a "special servicer." Special servicers commonly become involved in loan assumptions, loan modifications, and any restructuring of the loan that is done in an attempt to avoid foreclosure, commonly referred to as a "workout." However, the regulations governing REMIC loans serve to limit the flexibility of the special servicer in any workout negotiations.

When structuring the content of loan documents, one of the primary goals of a CMBS lender is to include effective protections and disincentives against the borrower filing or becoming involved in a bankruptcy proceeding. This is in part because the "single asset real estate" (SARE) rules in the U.S. Bankruptcy Code favor mortgage lenders[4] and in part because fighting it out in bankruptcy court with other secured and unsecured creditors is costly and time-consuming with uncertain results. In the event that a mortgage lender finds itself in bankruptcy court, despite its best efforts to avoid it, the ruling a lender really wants to avoid is "substantive consolidation," in which the assets and liabilities of the mortgage borrower are pooled with those of one or more of its parent companies or affiliates to create a single bankruptcy case in which the SARE rules may no longer apply.

One way CMBS lenders try to avoid substantive consolidation is to require that the mortgage borrower satisfy the requirements of a "single purpose bankruptcy remote entity." Such an entity is more commonly known as a "single purpose entity" or "special purpose entity" (SPE). The theory is that a mortgage borrower entity satisfying certain SPE covenants will not be substantively consolidated with an affiliated entity in a bankruptcy proceeding. Typical "SPE covenants" require that the SPE own only one real estate asset and no assets unrelated to that asset, engage in no business unrelated to its one real estate asset, and generally keep its books, records, funds, and business activities separate and distinct from the activities of its parent entities and other affiliates. In some cases, the breach of an SPE covenant by a borrower triggers recourse under a carveout guaranty. If an SPE entity has a business history and is not newly formed immediately prior to the closing of a loan, it is called a "recycled SPE" and must reform its entity operations, certify to certain facts, and make the SPE representations in order to provide comfort to the lender that substantive consolidation based on the borrower's history would be unlikely.

To create a significant disincentive for mortgage borrowers to file for bankruptcy, CMBS lenders generally require a person or entity with substantial net worth, liquidity, and a direct or indirect ownership interest in the borrower to execute a "non-recourse carveout guaranty" or "carveout guaranty." For those familiar with CMBS speak, the title is self-evident. It is a guaranty of the financial consequences arising from the exceptions (carveouts) to the non-recourse provisions in the loan documents. Per the terms of a "non-recourse" loan, the lender agrees to look only to the loan collateral for compensation in the event of a loan default and agrees not to pursue any causes of action against the borrower for personal liability. However, in order to place some good faith restrictions on the borrower's behavior, CMBS loan documents include exceptions to the non-recourse provisions that are triggered if the borrower engages in certain prohibited acts. The most egregious of these borrower transgressions are those that could deprive the lender of its collateral, including the sale of the collateral property without repayment of the loan, a voluntary bankruptcy filing by the borrower, aand a variety of other insolvency actions.

Given the risk that any of these events could prevent the lender from foreclosing on its collateral, a violation of any one of these triggers results in the loan's becoming "full recourse" to the borrower, at which time the borrower becomes personally liable for the entire amount of the loan and all other amounts due under the loan documents. However, since the borrower has no assets other than the property securing the loan, the guarantor parties to the non-recourse carveout guaranty also become liable for such amounts. Trigger events resulting in full recourse to the borrower and guarantor are said to be "below the line." Due to the negative nature of the acts that trigger borrower recourse, traditionally, non-recourse carveout guaranties have been referred to as "bad boy" guaranties. In these more enlightened times, many in the lending community are now calling them "bad act" guaranties.

Although the origin of the term "the line" may be lost in history, given that there are below the line non-recourse carveouts, logic would dictate there must also be "above the line" non-recourse

carveouts. "Above the line" non-recourse carveouts are acts of the borrower that are clearly in violation of the borrower's expected behavior under the loan documents but are nonetheless acts that, while they would likely not result in a complete wipe-out or loss of the lender's collateral, nevertheless have a negative impact on the real property collateral. If any of these above-the-line acts are committed by the borrower, the borrower and guarantor are only liable for any losses the lender may incur as a result of such actions but not the entire amount of the loan. Above the line recourse triggers are also referred to as "losses carveouts."

In some cases a lender will include non-recourse carveouts that are not at all tied to an illegal, immoral, unethical, or ill-behaved act of the borrower, which may nonetheless result in recourse for events outside of borrower's control. This approach is called "allocation of risk" and does not necessitate the commission of a bad act to trigger recourse. Thus, it should always be made clear in the term sheet as to whether the recourse triggers in the loan documents will be tied to bad acts or are simply a method of allocating the risk of loss between the borrower and lender.

Legal Opinions Practice

Another area of real estate finance law that comes with its own unique subset of words and phrases is the legal opinions practice. Most legal opinions issued in connection with a mortgage or mezzanine loan are fairly straightforward opinions regarding the enforceability of the loan documents and/or the power and authority of the borrower parties to enter into the loan documents. Subject to some assumptions and qualifications set forth in the opinion letter, the law firm issuing the opinions states that the subject upon which it is opining is in compliance with applicable law and that the loan documents are enforceable in accordance with their terms. However, in some cases the law is sufficiently vague or untested that a solid legal opinion cannot be issued. In these cases, law firms issue "reasoned opinions," which typically cite innumerable cases and statutes and eventually arrive at a conclusion as to what a court "should" rule if a case is properly presented and competently argued.

The most commonly reasoned opinions in real estate finance law are "substantive non-consolidation" or "non-con" opinions. A non-con opinion is a reasoned opinion concluding that a bankruptcy court would not substantively consolidate the borrower and certain affiliates of the borrower identified in the non-con opinion letter, such as parent entities and guarantors, if the various assumptions set forth in the opinion letter are correct. The matching of the various entities whose assets and liabilities may be consolidated in a bankruptcy proceeding for purposes of a non-con opinion letter is called the "pairings," which must be provided to the author of the opinion letter before it can be drafted. A non-con opinion letter is intended to provide comfort to the "rating agencies" (e.g., Standard & Poor's, Moody's, Fitch, and others) when they are evaluating loans to be included in a CMBS pool.

Additional opinion letters that rating agencies often require as part of a loan evaluation package are the "Delaware opinions." Because Delaware corporate, limited liability company, partnership, and bankruptcy law is well established and well known, most CMBS lenders require that mortgage and mezzanine borrowers be formed under Delaware law. The two commonly required Delaware opinion letters are the "Delaware law opinion" and the "authority to file opinion." Under a Delaware law opinion, the law firm issuing the opinion letter opines that under Delaware law the borrower is a separate legal entity and that such entity is not permitted to file for bankruptcy without the affirmative vote of the independent manager(s). A Delaware authority to file opinion is a reasoned opinion under which the law firm issuing the opinion letter opines that Delaware law, and not federal law, would govern the determination of which persons or entities have the authority to file a voluntary bankruptcy petition on behalf of the borrower entity.

"Non-contravention opinions" are statements contained in an opinion letter that are generally grouped with the opinions but in truth are not legal opinions at all. They are factual confirmations made by the law firm issuing the opinion letter. Typical non-contravention opinions state that the execution and delivery of the loan documents will not violate any laws of a specified state, any contracts to which the borrower parties executing the loan documents are a party, or any existing court orders applicable to the borrower parties.

California Law

Whether working on CMBS loans, hard money loans, or typical bank loans, all California real estate finance lawyers should be familiar with the interpretations of a few key statutes that govern the exercise of a lender's remedies for loans secured by real property. These include the "one-action rule," the "security first rule" and California's "anti-deficiency" statutes. The one-action rule is rooted in California Code of Civil Procedures Section 726(a), which states: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage [deed of trust] upon real property." Basically, a mortgage lender is allowed one opportunity to exercise its remedies against a mortgage borrower and its collateral property, and that one action under the security first rule must be foreclosure. A violation results in the loss of the lender's deed of trust on the real estate collateral. This law is intended to prevent a lender from hammering away on a borrower with multiple lawsuits over one loan. Generally speaking, an "action" under the one-action rule means a judgment or judicial action, but may include other actions by a lender that can result in limiting a borrower's rights with respect to assets not securing the loan, such as obtaining a prejudgment attachment of assets. For this reason, California lenders tend to be very careful when exercising mortgage loan remedies so as to avoid inadvertently exhausting their one permitted action.

An action does not include a non-judicial or "power of sale" foreclosure under a deed of trust, commonly known as a "trustee's sale." However, under the "anti-deficiency laws," a trustee's sale precludes the exercise of certain other lender remedies (such as suing for a deficiency following the foreclosure sale). The "security first rule" comes from the judicial interpretation of Section 726, pursuant to which creditors with debts secured by real property must exhaust their security for the loan before otherwise proceeding against their debtors for a monetary judgment.[5]

In addition to Section 726(a), the California Code of Civil Procedure also provides protection to mortgage borrowers through a series of statutes known as the anti-deficiency laws,[6] which prevent or limit a lender's ability to seek a "deficiency" judgment against a mortgage borrower. Under the circumstances set forth in these statutes, a lender cannot seek a monetary judgment against a borrower for the difference between the amount due to the lender under the loan documents and the value realized by the lender through the exercise of its foreclosure remedies. In the context of commercial real estate lending, Section 580d prevents a lender from seeking a deficiency judgment against a borrower if the lender foreclosed on the real property collateral pursuant to a trustee's sale. Section 580c protects borrowers against unreasonable costs and fees associated with a judicial foreclosure. Section 580b prevents a lender from seeking a deficiency judgment against a borrower after foreclosure under a real property "pur-

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chase-money" loan (commonly known as seller-financing or an initial residential loan obtained in connection with the acquisition of the residence). Finally, Section 580a, often superseded by Section 580d, prevents a lender from seeking a deficiency judgment against a borrower in excess of the difference between the total debt owed and the fair market value of the foreclosed upon property at the time of the sale. This is intended to prevent lenders from selling a property at foreclosure for pennies on the dollar and then suing the borrower for a deficiency greater than that which a fair market sale would have produced. Among the anti-deficiency laws, Section 580d is the most relevant to typical loans secured by nonresidential real property.

Despite the variety of terms used in the legal practice of real estate financing, there are also a few definitions in California law that every real estate lawyer should know. Per Code of Civil Procedure Section 1933, "execution of an instrument" means "subscribing and delivering it, with or without affixing a seal"; therefore, writing "execution and delivery" is redundant. Per Section 9 of the California Civil Code, "[a]ll other days than those mentioned in Section 7 are business days for all purposes." Section 7 reads: "Holidays within the meaning of this code are every Sunday and such other days as are specified or provided for as holidays in the Government Code of the State of California." Thus, under California's Civil Code, Saturday is a "business day." Per Section 7.1(a), every Saturday is an "optional bank holiday," but not every lender is a bank. This is why "Business Day" should always be defined in loan documents.

As in any highly specialized profession, mastering the jargon of real estate finance law takes time and a career-long attentiveness to the new lingo of the day. However, even once mastered, one must always keep in mind that effective communication requires an understanding of the language by all parties to a conversation. Accordingly, no matter how familiar one becomes with the language of loans, it is always important to adhere to the "know your audience" rule and be ready to offer a plain-speaking explanation of any terms and phrases that might be unknown or confusing to a client, junior associate, or any other party to a discussion. ■

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[1] *See, e.g.*, Black's Law Dictionary (10th ed. 2014).
[2] Goodfellas (Warner Bros. 1990).
[3] Article 9 of the UCC is designated Division 9 under the California Commercial Code.
[4] *See* 11 U.S.C. §101 (51B).
[5] *See* Walker v. Community Bank, 10 Cal. 3d 729 (1974).
[6] *See* Civ. Proc. Code §§580a-d.