

**OUTLINE OF LENDER LIABILITY ISSUES IN
COMMERCIAL REAL ESTATE LOAN
WORKOUTS
Part II**

**Gregory Gosfield, Esquire
Jon S. Robins, Esquire
Jessica Kovack, Esquire**
Klehr Harrison Harvey Branzburg & Ellers

**THE MATERIAL USED IN THIS MANUAL IS FOR TEACHING
OF THE PHILADELPHIA CLE SEMINAR.**

May 20, 2009

TABLE OF CONTENTS

I.	ANALYSIS OF WORKOUT AND LITIGATION RISKS	1
A.	Complete a Review of the Loan Documents.....	1
B.	Pre-Negotiation Agreement.....	1
C.	Value the Collateral Securing the Loan	1
D.	Identify Goals, Restrictions and Concerns	1
E.	Assess Risks of Lender Liability	2
1.	Breach of contract.	2
2.	Duty of Good Faith and Fair Dealing	2
3.	Breach of Duty to Act Reasonably.....	4
4.	Fraud.....	5
5.	Duress	5
6.	Breach of Fiduciary Duty	5
7.	Interference and Control	6
8.	Defamation.....	8
9.	Breach of Confidentiality	9
F.	Mortgagee in Possession.	9
G.	Risks Associated with Exercising certain Contract Rights	9
1.	Replacing the Property Manager.....	9
2.	Exercising Cash Management.....	9
H.	CERCLA Liability	10
1.	The federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq.,	10
I.	Minimize Risks of Lender Liability.....	12
1.	Institute Communication Controls	12
2.	Be Cautious of Oral and Written Communications	12
3.	Pre-Negotiation Agreement	12
4.	Be Cautious of Expressions of Intent	12
5.	Involve Counsel Early in the Process.....	12
6.	Laws Vary By State.....	12
7.	Set Objectives	12
II.	Multi-lender transactions	13
A.	Allocation of Control Between Lenders.	13
1.	Participation Agreements.....	14
2.	Syndication Agreements.....	14
B.	Lender Liability Claims Among Lenders.	14
1.	Breach of Contract.....	14
2.	Breach of the Required Standard of Care	16
3.	Failure to Disclose and Misrepresentation	16
4.	Breach of Implied Covenant of Good Faith.....	17
5.	Breach of Fiduciary Duty.	18
6.	Lead Lender as Borrower or Guarantor.....	19
7.	Co-lenders as Joint Venturers	20
8.	Mortgage Remedies Under Participation.....	21
9.	Senior/Subordinate Lien Impairment Liabilities.....	21

C.	Borrower's Concerns:	21
1.	D'Oench, Duhme Doctrine.	21
2.	Lender Default	22
III.	CONCLUSION	22
A.	Current Trends.	22
B.	Summary.	23

**FOR COMPLETE CONTENT PLEASE CONTACT
GREGORY G. GOSFIELD
215-569-4164 GGOSFIELD@KLEHR.COM**