

Anderson Kill regularly represents banks and other financial institutions engaged in commercial lending and leasing transactions. The front-end transactions, debt restructurings, and litigation matters we chronicle in this issue of our Banking and Lending Update open a window on financial activity in the region and the nation, as well as on our own practice.

By Inez M. Markovich and Frank G. Murphy

A Deed in Lieu That Didn't Fly

Anderson Kill represented a national bank in a novel dispute under Pennsylvania law arising from a mortgagor's unilateral attempt to record a deed in lieu of foreclosure without the bank's agreement.

In 2004 the bank made a commercial loan in the approximate amount of \$1.5 million, which was secured in part by a mortgage and security agreement on a certain commercial property. The loan went into default, and the bank filed a foreclosure action. At the close of discovery, the bank filed a motion for summary judgment that was not opposed. The borrower tried to negotiate a settlement of the case involving a deed in lieu of foreclosure, but no agreement was reached, and there was no writing of any kind suggesting that a settlement had occurred. While the motion was pending, counsel for the mortgagor mailed a purported deed in lieu of foreclosure to counsel for the bank. Shortly thereafter, the court granted the motion for summary judgment, the order and the purported deed in lieu arriving only several days apart.

The bank filed a motion to reassess damages and proceeded to schedule a sheriff's sale on the mortgaged property. As the sale date approached, the bank was advised by the sheriff that no sheriff's sale could occur since the purported deed in lieu had actually been submitted for recording by the mortgagor and recorded by the recorder of deeds. The bank then demanded that the mortgagor have the deed stricken, and after that demand was rejected, the bank filed a petition to strike the deed in lieu, a form of petition that seems not to have been utilized previously.

The case raised an issue that has not been frequently addressed in Pennsylvania, or in many other jurisdictions for that matter. Typically, a deed in lieu of foreclosure is delivered as part of a carefully negotiated agreement between the obligors and the lenders and addresses, among other things, the borrower and/or mortgagor's obligation for any remaining deficiency. Otherwise, under the application of the so-called "merger" doctrine, acceptance of a deed in lieu may result in the discharge of the underlying mortgage obligation. In a departure from this common practice, this case asked the court to consider whether a mortgagor could require the mortgagee to accept a deed in lieu of foreclosure.

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who's who

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The information appearing in this newsletter does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.

We invite you to contact Inez M. Markovich, editor, and chair of the Banking and Lending Practice Group, at imarkovich@andersonkill.com and (267) 216-8216 with your questions and/or concerns.

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A hearing was held on the petition. The court ruled that no evidence was presented that demonstrated any agreement to accept the deed in lieu had been made and, further, that no single document or combination of documents was introduced into evidence that satisfied the statute of frauds. Thus, no meeting of the minds occurred, no settlement had been reached, and no agreement made. The court ordered the purported deed in lieu stricken from the record. ▲

Year in Review

2014 was a very busy year for our group. We negotiated and documented multiple loan transactions, sales and financings of equipment lease portfolios, and various debt restructuring agreements. Our lawyers also represented many banking clients in a variety of litigation and bankruptcy matters arising out of borrowers' defaults on their loan obligations, ranging from commercial mortgage foreclosures in Pennsylvania and New Jersey, to adversary proceedings and cash collateral and stay relief proceedings in bankruptcy courts.

Represented a national bank participant in connection with the extension of several revolving credit facilities, term loans and letters of credit (in the total amount of \$38,000,000) to a multi-concept restaurant company operating 19 restaurants in various cities across the United States. In addition to the negotiations and documentation of the credit facilities, the firm's banking and lending attorneys conducted due diligence on more than 70 borrowers and guarantors organized in various jurisdictions.

Represented a national bank in connection with the negotiation and documentation of a secured loan, funded in British pounds, to a British corporation to finance a stock acquisition of another British company. As part of this representation, the firm's banking and lending group conducted due diligence on the British borrower as well as its U.S. subsidiaries and guarantors.

Represented an equipment leasing and finance company in the negotiations and documentation of a sale of a \$13,000,000 equipment lease portfolio to a leasing subsidiary of a national bank.

Represented an equipment leasing and finance company in the negotiations and documentation of a sale and leaseback of a \$10,000,000 equipment lease portfolio originated by the client and financed by a Japanese bank.

Represented a regional bank in the negotiations and documentation of an \$8,000,000 revolving line of credit secured by business assets and commercial real estate to a non-profit corporation. As part of the representation, the firm's banking and lending group



performed due diligence on the borrower and its affiliates and business assets, including municipal contracts, and title insurance.

Represented a regional bank in the restructuring of a \$2,500,000 loan secured by the pledge of marketable securities to a non-profit corporation. The representation included the negotiations and documentation of a control agreement with national securities brokerage firms and all related due diligence.

Represented a national bank in connection with the negotiations and documentation of a \$2,000,000 loan to a prominent chemical company to finance the acquisition of a commercial real property in California. The representation involved due diligence in connection with the documentation of a title-insured deed of trust on the California property.

Prepared a non-consolidation opinion on behalf of a special purpose entity in connection with a \$52,000,000 loan secured by a commercial real property owned by the SPE. The opinion was based on corporate due diligence on the formation and operation of the SPE and its managing member and an in-depth analysis and application of the substantive consolidation doctrine.

Anderson Kill was pleased to present two important seminars to our clients and friends:

June 18, 2014: Attorneys Inez M. Markovich, Frank G. Murphy and Darin J. McMullen of Anderson Kill, and Zoya Faynleyb of AML / Sanctions presented a luncheon seminar covering various hot topics in risk management, fraud prevention and compliance, to help banking professionals stay ahead of the curve on the current industry trends.

October 16, 2014: Attorneys Inez M. Markovich, Frank G. Murphy and Dennis Nolan of Anderson Kill, and Howard Brod Brownstein of Brownstein Corp. presented the seminar, "Alternatives to Bankruptcy." With the high costs and time delays characteristic of a bankruptcy case, we discussed non-bankruptcy alternatives that lenders should be aware of that may be designed to maximize the return on their investment in an expeditious and cost-efficient manner. The seminar covered essential alternatives to bankruptcy and the advantages and disadvantages of each in comparison with Chapter 11 or Chapter 7 bankruptcy. ▲

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