

# Buchalter

---

## AVOIDING *LENDER LIABILITY*

John L. Hosack, Esq., Jason E. Goldstein, Esq., and Mr. Rick Rodriguez

12:00 Noon

February 21, 2017

Webinar

Buchalter

1000 Wilshire Boulevard, Suite 1500

Los Angeles, California 90017

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## I. INTRODUCTION

Taking steps to “**avoid lender liability**” **now** may prevent the filing of a lawsuit against you in the **future** or improve your case dramatically.

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## II. PRINCIPAL PLACES WHERE LENDER LIABILITY MAY ARISE (1 of 2)

1. **Advertising**
2. **Standards of Conduct/Code of Ethics**
3. **Underwriting**
  - A. **Predatory Lending And Loan-To-Own**
  - B. **Conflicts of Interest**
4. **Loan Origination**
  - A. **Documentation**
  - B. **Payment Structure Practices**
  - C. **Know Your Customer (Is Your Customer Using You)?**
5. **Syndication/Participation**
6. **Loan Administration**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## II. PRINCIPAL PLACES WHERE LENDER LIABILITY MAY ARISE (2 of 2)

7. **Restructuring of defaulted loans**
8. **Foreclosure**
9. **Bankruptcy**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# Buchalter

---

*Save The Date!*

## LOAN DOCUMENTS: REDUCING RISK BEFORE PROBLEMS OCCUR

John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Rick Rodriguez and Mr. Joffrey Long

12:00 Noon PST

March 14, 2017

Webinar

Buchalter Nemer

1000 Wilshire Boulevard, Suite 1500

Los Angeles, California 90017

### **III. TRADITIONAL THEORIES OF LENDER LIABILITY**

- 1. Breach of contract**
- 2. Fraud, duress and misrepresentation**
- 3. Negligence**
- 4. Infliction of emotional distress (on an individual borrower)**
- 5. Violation of Statutory duties**
- 6. Breach of fiduciary duty**
- 7. Improper control of the borrower**
- 8. Breach of the covenant of good faith and fair dealing**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **IV. BREACH OF CONTRACT IS THE PRINCIPAL THEORY OF LENDER LIABILITY**

- 1. Breach of the loan commitment (whether written or oral).**
- 2. Failure to make obligatory advances on the loan.**
- 3. Failure to make discretionary advances.**
- 4. Improper declaration of a default by the borrower.**
- 5. Failure of the Lender to provide adequate notice to the Borrower.**
- 6. Failure of the Lender to provide additional financing to the Borrower.**
- 7. Failure of the Lender to renegotiate the Borrower's loan.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **V. FRAUD AND MISREPRESENTATION ARE SECONDARY GROUNDS FOR LENDER LIABILITY**

- 1. Different perceptions of the same set of facts lead to Borrower claims of Fraud.**
- 2. Statements made by the Lender, *without a reasonable good faith basis for believing it to be true*, even if unintentional, leads to Negligent Misrepresentation claims.**
- 3. Documenting all verbal communications with a Borrower or Guarantor is critical to defeating Fraud and Misrepresentation claims.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **VI. BREACH OF FIDUCIARY DUTY IS FREQUENTLY AND EASILY ALLEGED**

- 1. The “arms length” relationship between a Lender and its Borrower.**
- 2. The Lender’s “safe harbor” – when it stays within the role of the “conventional lender of money.”**
- 3. Do not be an “advisor” or “partner!”**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **VII. THE LENDER'S IMPROPER CONTROL OVER THE BORROWER MAY LEAD TO LENDER LIABILITY**

1. **The Lender's and Borrower's shared interest:**
  - A. **The success of the borrower's business.**
  - B. **The repayment of the loan.**
2. **The distinctions between the Lender and the Borrower which must be respected.**
  - A. **Borrower is trying to improve its financial condition.**
  - B. **Lender is trying to get repaid on money it believes was prudently lent.**
3. **The Lender should not give opinions on a decision which the Borrower is making, except in the rare case where it relates to a term in the loan documents.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **VIII. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING MAY LEAD TO A FINDING OF LENDER LIABILITY**

- 1. Breach of the Implied Covenant of Good Faith and Fair Dealing exists in every contract.**
- 2. The Lender's decisions must be reasonable because every juror is a borrower, but not all jurors are a lenders.**
- 3. The reasonableness of the lender's decisions must be documented in writing, meaning the Lender's "intent" and the "meaning behind it."**
- 4. The Lender must avoid the appearance that it is using its "superior bargaining position" to have the Borrower do things which are not in its best interests.**
- 5. The Lender should avoid pressuring the Borrower to buy capital market swaps and/or cross-selling of products to the Borrower as conditions of obtaining the loan.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **IX. THE LENDER'S SOFTWARE IS A FREQUENT FACTOR IN LENDER LIABILITY**

- 1. The benefit of standardized loan documents and loan software packages:**
  - A. Cost savings;**
  - B. Consistency.**
- 2. The burden of standardized loan documents:**
  - A. One size does not always fit all.**
  - B. Standardized documents are not designed to resist lender liability claims.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## X. POTENTIAL LOAN ORIGINATION ISSUES (1 OF 2)

1. Borrowers who have not previously dealt with the Lender.
2. The loan officer's motivation to make a deal and “over promise” to “make a deal.”
3. The Borrower “puffing up” its financial condition.
4. The loan officer's responses to the Borrower's questions about the Lender's future ability to increase the amount of the loan should be “measured” responses.

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **X. POTENTIAL LOAN ORIGINATION ISSUES AND BEST PRACTICES TO AVOID THEM (2 OF 2)**

- 1. The Borrower must confirm, in writing, its understanding of the specific loan terms and that it is not relying on any other representations of the Lender (express, oral or implied).**
- 2. Document the Borrower's time constraints.**
- 3. Document the limits to the loan officer's ability to make underwriting decisions, e.g., if a loan committee makes the ultimate determination, disclose that in writing.**
- 4. Explain, in writing, the requirements for the Lender's consideration of extending the loan term (labor and material bond, etc.) and time-frames for considering such requests. Confirm that applying for an extension is not a guarantee that it will be granted.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **XI. PRELIMINARY LOAN DOCUMENTATION ISSUES**

- 1. Circulate a “discussion draft” of the loan documents.**
- 2. Inform the Borrower that the “discussion draft” should be looked over carefully and require the Borrower to confirm, in writing, that it sent, or had the opportunity to send, the “discussion draft” to the Borrower’s accountant, attorney, or other trusted advisor and to confirm that the documents are approved.**
- 3. Document the persons with whom the Borrower reviewed the “discussion draft.”**
- 4. Consider “initials” on critical provisions.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# Buchalter

---

*Save The Date!*

## LOAN DOCUMENTS: REDUCING RISK BEFORE PROBLEMS OCCUR

John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Rick Rodriguez and Mr. Joffrey Long

12:00 Noon PST

March 14, 2017

Webinar

Buchalter Nemer

1000 Wilshire Boulevard, Suite 1500

Los Angeles, California 90017

## **XII. WAIVER OF LENDER'S KNOWLEDGE, INFORMATION AND OPINIONS**

- 1. Require that the Lender's knowledge, information and/or opinions only be provided upon written request.**
- 2. Require the Borrowers and Guarantors to release all claims based on or arising out of the Lender's disclosure of any of its knowledge, information and opinions.**
- 3. Require that the Borrowers and Guarantors indemnify and hold the Lender harmless from any and all claims based on the Lender's disclosure of its knowledge, information or opinions.**
- 4. Have the initial loan documents acknowledge that the Lender has no obligation (express or implied) to disclose its knowledge, information and/or opinions, as well as provide the conditions for modification of this provision.**
- 5. Be very careful, and consider the practical realities, of what the Lender knows and whether that information should be disclosed.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

### **XIII. WAIVER OF DISCLOSURE OF INFORMATION KNOWN TO THE LENDER TO THIRD PARTIES**

- 1. The loan documents should contain an **express waiver** by the Borrower and all Guarantors of any purported obligation by the Lender to provide any documents or information to a **third party**.**
- 2. If the Borrower requests the Lender to disclose information to a third party, it should be on **specific terms and conditions**.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **XIV. LENDER LIABILITY ISSUES WITH RESPECT TO LOAN ADMINISTRATION**

- 1. All communications (written or oral) with the Borrower and the Guarantors should be in “plain language” which is easy for a Borrower, Guarantor or Juror to understand. Technical terms should be defined.**
- 2. Avoid compromising the “arms-length” relationship between the Lender and the Borrower/Guarantors. Keep all communications factual and formal.**
- 3. If there is a change in administration of the loan (i.e., the loan officer is promoted and/or the loan is sold) provide advance notice, in writing, for a seamless transition, and provide an opportunity for the Borrowers and Guarantors to meet with the current and prospective loan officer.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# **XV. DOES THE PAROL EVIDENCE RULE PROTECT LENDERS FROM BORROWER'S CLAIMS REGARDING ORAL AGREEMENTS THAT CONTRADICT THE LOAN DOCUMENTS?**

- 1. What is the parol evidence rule?**
- 2. Does the parol evidence rule still exist?**
  - A. Hope for the best.**
  - B. Prepare for the worst.**
- 3. Best practice: confirm all oral communications in writing!**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# **XVI. “DEMAND” PROVISIONS IN LOAN DOCUMENTS SHOULD BE USED WITH CAUTION**

1. **Types of “demand” provisions.**
2. **Viewing “demand” provisions through the eyes of a Borrower, Guarantor or Juror.**
3. **Document the basis for invoking the “demand” provision and take reasonable steps to avoid invoking the “demand” provision before doing so.**
4. **Loan officers should consult with their credit committee, special assets group and/or lawyer before invoking a “demand” provision.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# **XVII. ANY DEVIATION FROM THE EXPRESS TERMS OF THE LOAN DOCUMENTS SHOULD BE VIEWED WITH CAUTION**

- 1. Are deviations from the express terms of the loan documents normal?**
- 2. Should the Borrower and Guarantors be informed of each deviation from the express terms of the loan documents?**
- 3. Beware of automatic notices/computer notices.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **XVIII. THE “BEST DEFENSE” AGAINST “LENDER LIABILITY” CLAIMS ARE LOAN DOCUMENTS DRAFTED IN ANTICIPATION OF LENDER LIABILITY CLAIMS**

- 1. Protocol Agreement (Pre-Negotiation Agreement)**
- 2. Jury Waiver.**
- 3. Mediation.**
- 4. Judicial Reference.**
- 5. Arbitration.**
- 6. Standard of Proof.**
- 7. Statute of limitations.**
- 8. Limits on damages (waive right to punitive damages, incidental damages, consequential damages, and “amount”).**
- 9. Eliminate the right to recover attorneys’ fees?**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# **XIX. WELL TRAINED EMPLOYEES ARE ESSENTIAL TO AVOIDING LENDER LIABILITY CLAIMS**

- 1. The Lender's employees must recognize that they are not the Borrowers and Guarantors advisor, partner or confidant.**
- 2. The Lender's employee's must deal with Borrowers and Guarantors in a very professional manner and not write, say or think anything which they would not want the Jury to consider.**
- 3. All communications must be documented – a short confirmatory email may be the key to victory in a lawsuit!**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# **XX. A WELL DOCUMENTED LOAN FILE IS ESSENTIAL TO AVOIDING LENDER LIABILITY CLAIMS**

- 1. The Lender's loan file should “tell the story” of the life of the loan – because years later memories fade and Borrowers' imaginations “run wild.”**
- 2. Not only should oral communications with the Borrower and/or the Guarantors be confirmed in writing by email or letter, a written memorandum should also be included in the Lender's loan file with a copy of the email or letter which explains the context of the communication.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# **XXI. INSECURITY CLAUSES AND OTHER NON-MONETARY DEFAULTS SHOULD BE EXERCISED SPARINGLY**

- 1. What is an “insecurity” clause?**
- 2. Upon what grounds should an “insecurity clause” be invoked?**
- 3. How would an expert witness opine on the “reasonableness” or “unreasonableness” of the Lender’s invocation of an “insecurity” clause?**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# Buchalter

---

*Save The Date!*

## LOAN DOCUMENTS: REDUCING RISK BEFORE PROBLEMS OCCUR

John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Rick Rodriguez and Mr. Joffrey Long

12:00 Noon PST

March 14, 2017

Webinar

Buchalter Nemer

1000 Wilshire Boulevard, Suite 1500

Los Angeles, California 90017

## **XXII. AVOID BECOMING A “MORTGAGEE IN POSSESSION” BY HAVING A COURT APPOINT A RECEIVER**

- 1. Is it uncommon for Borrowers to get into situations which the Lender must “step in” to fix the problem?**
- 2. What types of situations do Borrower’s get into where the Lender must “step in” to fix the problem?**
- 3. Why should a Lender utilize a Receiver to “fix” Borrower problems?**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

### **XXIII. REVIEW THE BORROWERS AND GUARANTORS' CONDITIONS ON A REGULAR BASIS**

- 1. Require the Borrowers and Guarantors to regularly provide financial statements, state and federal tax returns, etc.**
- 2. Regularly review the status of the collateral by conducting appraisals and field examinations.**
- 3. Consider periodic Uniform Commercial Code, Litigation, Lien and Bankruptcy searches relative to the Borrowers and Guarantors.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **XXIV. DEALING WITH A DEFAULTED LOAN**

- 1. Only have restructure discussions after the Borrower and all Guarantors have executed a bilateral protocol agreement with the advice of counsel.**
- 2. As partial consideration for a loan restructuring agreement (not before), have the Borrower and Guarantors release the Lender from all claims which may have existed before execution of the agreement.**
- 3. Commence foreclosure actions (non-judicial or judicial) and any other actions which require time.**
- 4. Consider ramifications of a potential Bankruptcy.**
- 5. Partial payments – should you accept them?**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

# **XXV. RECOMMENDATIONS FOR THE LENDER DURING THE BORROWER'S BANKRUPTCY**

- 1. “Strategic alliances” with the trustee, creditors’ committee, or third party creditors.**
- 2. Bankruptcy court is a court of “equity” which generally favors the debtor, but also has protections for secured lenders.**
- 3. Preferential transfers, fraudulent transfers and equitable subordination.**
- 4. The need for qualified Bankruptcy counsel.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **XXVI. AVOIDING LENDER LIABILITY CLAIMS IN A FORECLOSURE**

- 1. Carefully review the file before commencing foreclosure proceedings and “clean up” the file if need be.**
- 2. Do not provide information to third parties about the Borrower, Guarantor or the secured property.**
- 3. The Borrower’s application for a Temporary Restraining Order/Preliminary Injunction to stop the foreclosure sale.**
- 4. Defending the Wrongful Foreclosure and Lender Liability lawsuit.**
- 5. No “full credit bids” and obtaining an “Owner’s Policy of Title Insurance.”**
- 6. Obtain a Receiver to collect the rents during the litigation.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **XXVII. AVOIDING LENDER LIABILITY CLAIMS** **BASED UPON A SALE OF THE LOAN** (1 of 2)

### **1. The loan documents should provide that:**

- A. Borrowers/Guarantors expressly agree that the Lender may sell, or participate, in whole or in part, the loan.**
- B. The Lender has no obligation, whether express or implied, to notify the Borrower or Guarantors that it is considering a sale of the loan.**
- C. The Lender has no obligation, express or implied, to sell the loan to them or to a nominee which they have selected.**
- D. The Borrowers and Guarantors agree to indemnify and hold the Lender harmless, including paying for a lawyer selected by the Lender, in the event that there are any claims that the Lender inappropriately sold the loan.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

## **XXVII. AVOIDING LENDER LIABILITY CLAIMS** **BASED UPON A SALE OF THE LOAN** (2 of 2)

### **2. If the loan is to be sold:**

- A. It should be sold without “representation or warranty.”**
- B. The Buyer should represent and warrant that it is not relying, whether expressly or impliedly, upon anything that the Lender and/or its representatives may have communicated about the Loan, but it is solely relying upon its own independent investigation and the advice of its own counsel in making its decision.**
- C. The Lender should consider the liability associated with participant or syndicate banks.**

This webinar and the statements of the speakers and the materials presented here are for your general consideration and for you to discuss with your qualified attorney or other advisor. Nothing said or written in this webinar should be considered by you to be legal advice. In addition, the practices discussed herein may not be applicable to your situation and should not be followed until after you have received independent legal advice from a qualified attorney or other advisor. For legal advice on any matters, views or opinions expressed by the speakers or in the written materials, you should consult with a qualified attorney, specifically retained to represent and advise you, and knowledgeable of the specific facts upon which advice is sought. Nothing presented here is meant as, or may be considered as a standard of care or as an indication of the correct or recommended practices in any area of real estate lending or in any of the related fields.

---

**XVIII. CONCLUSION**

# Presenters

---

## John L. Hosack—*Presenter*

John L. Hosack is a Shareholder in the firm's Litigation Practice Group in Los Angeles and a member of the firm's Mortgage Banking Group. Mr. Hosack represents mortgage brokers, secured lenders and property owners at trial and on appeal in real property disputes including, broker liability, lender liability, fraud, breaches of contract, mechanic's liens, stop notices, judicial foreclosures, receiverships, escrow claims and title insurance claims. His transactional practice includes commercial real property loan documentation, loan workouts, REO sales and foreclosures. He is an Affiliate Member of the California Mortgage Association and a member of the Los Angeles Mortgage Association, a Fellow of the American College of Real Estate Lawyers and a Fellow of the American College of Mortgage Attorneys. He is the author of "California Title Insurance Practice (First Ed., Calif. Cont. Ed. Bar), the first book on title insurance, and is a past Chair of the ABA's Title Insurance Litigation Committee.



**John L. Hosack**  
Shareholder  
Buchalter Los Angeles Office

---

## Jason E. Goldstein—*Presenter*

Jason Goldstein is a Shareholder in the Firm's Litigation Practice Group in Irvine and Chairman of the Firm's Mortgage Banking Group. Mr. Goldstein specializes in prosecuting title insurance and escrow claims and defending lenders and brokers in court (negligence, fraud, TILA, RESPA, HBOR, wrongful foreclosure, lender liability) and before government agencies. Mr. Goldstein also regularly prosecutes misappropriation of trade secret claims, judicial foreclosures and conducts general civil litigation. He is an affiliate member of the California Mortgage Association.



**Jason E. Goldstein**  
Shareholder  
Buchalter Irvine Office

---

## Rick Rodriguez—*Presenter*

Mr. Rodriguez is the founder and principal of Rodriguez and Associates Advisory Group ("R&A"), a Los Angeles based consultancy firm that has provided a unique array of services to its clients since 1992. For the past 24 years, R&A has successfully formulated creative workout and loan restructure resolutions to complex multi-party debtor-creditor transactions in judicial and non-judicial settings.



**Rick Rodriguez**  
Founder and Principal  
Rodriguez & Associates  
Advisory Group

John L. Hosack Esq.

Buchalter

1000 Wilshire Blvd., Suite 1500

Los Angeles, California 90017

(213) 891-0700

[jhosack@buchalter.com](mailto:jhosack@buchalter.com)

Jason E. Goldstein, Esq.

Buchalter

18400 Von Karman Ave., Suite 800

Irvine, California 92612

(949) 760-1121

[jgoldstein@buchalter.com](mailto:jgoldstein@buchalter.com)

Mr. Rick Rodriguez

Rodriguez & Associates

333 S. Grand Ave., Suite 1790

Los Angeles, California 90071

(213) 617-1163

[rick@rodriguezadvisory.com](mailto:rick@rodriguezadvisory.com)