

# Buchalter

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## **TAKEOUT LOANS: *CONSIDERATIONS FOR CONSTRUCTION AND PERMANENT LENDERS***

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

Buchalter  
12:00 Noon PST  
March 20, 2018  
Los Angeles, California

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# Presenters

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## 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  
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 real property related claims, litigation and private money, including defending lenders, brokers and servicers in court (negligence, fraud, TILA, RESPA, HBOR, wrongful foreclosure, lender/servicer liability, etc.) and before government agencies. Mr. Goldstein also regularly prosecutes misappropriation of trade secret claims, judicial foreclosures and conducts general civil litigation. He is a fellow of the American College of Mortgage Attorneys, an affiliate member of the California Mortgage Association and a member of the California MBA.



**Jason E. Goldstein**  
Shareholder  
Irvine Office

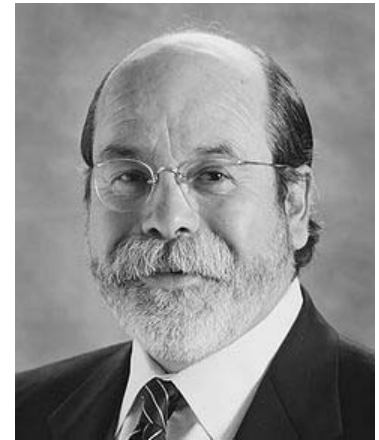
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# Presenters

## Rick Rodriguez

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.

Having spent approximately 20 years as a banker, primarily with Security Pacific National Bank, Mr. Rodriguez has personal experience in due diligence, loan administration and workout of all types of loans, from consumer credit to large commercial complex syndicated credits. Mr. Rodriguez is a seasoned expert witness in banking, finance and real estate matters who testifies at jury trials, bench trials, arbitration proceedings, and mediation sessions; both by deposition and declaration. Mr. Rodriguez has testified equally for plaintiffs and defendants.



**Rick Rodriguez**  
Principal  
Rodriguez Associates  
Advisory Group

# I. INTRODUCTION

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## II. FACTUAL SCENARIO (1 of 2)

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### Developer

- **Wants to construct a retail shopping center.**

### Anchor Tenant

- **High End Retail Store.**

### Construction Bank

- **Will make construction loan – if Developer arranges for a take-out loan.**

### Permanent Lender

- **Will make takeout loan subject to conditions.**

## II. FACTUAL SCENARIO (2 of 2)

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### Issues:

- **Delay in opening the center.**
- **Missed holiday season.**
- **High End Retail Store refuses to pay Developer and instead escrows the rents.**
- **Permanent Lender's conditions not satisfied.**

### III. PURPOSE OF A TAKEOUT LOAN

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**Assurance that the construction lender will be *promptly and fully repaid.***

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*Save The Date!*

## CONSTRUCTION LENDER'S *NIGHTMARE*: LOAN DISBURSEMENTS WHICH MAY CAUSE *LOSS OF LIEN PRIORITY AND TITLE COVERAGE*

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

12:00 Noon PST

May 8, 2018

Webinar

Buchalter

1000 Wilshire Boulevard, Suite 1500

Los Angeles, California 90017

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## IV. STANDARD TERMS AND CONDITIONS FOR A TAKEOUT LOAN

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1. Construction finished by a specified date.
2. Construction completed “lien free” and in accordance with plans and specs.
3. Acceptable title insurance available.
4. Project generates sufficient income from tenants to meet debt service and LTV requirements.
5. Acceptable appraisal of completed project.
6. Acceptable leases.
7. No “MAC” in the development, project or anchor tenant.
8. Substantial liquidated damages deposit in case there is a “MAC.”

## V. THE TRI-PARTY AGREEMENT

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### 1. What is a tri-party agreement?

- Agreement whereby takeout lender purchases the construction loan.

### 2. How is a tri-party agreement accomplished?

- Assignment of existing construction loan documents; or,
- New loan documents.

## VI. GAP FINANCING

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### 1. What is gap financing?

- **Secondary financing.**

### 2. When is gap financing required?

- **When a “gap” needs to be bridged between the amount of the actual costs of construction and the takeout loan.**

### 3. Difficult to obtain?

- **Can be when interest rates are volatile.**

## VII. ALTERNATIVES TO TAKEOUT COMMITMENTS

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- 1. Borrower's guaranty.**
- 2. A "mini-perm" by the construction lender.**
- 3. Sale of the project.**
- 4. Bridge financing.**
- 5. Participating mortgage.**
- 6. Litigation.**
- 7. Bankruptcy.**

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## VIII. REMEDIES AVAILABLE WHERE THE TAKEOUT LENDER REFUSES TO FUND

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- 1. The borrower's ability to recover damages from the takeout lender.**
- 2. Specific performance of the takeout loan is generally not available, except in exceptional circumstances.**
- 3. Complaint for anticipatory breach.**
  - Penthouse International, Ltd. v. Dominion Federal Savings Ass'n.* (2<sup>nd</sup> Cir. 1988) 855 F.2d 963; cited with approval in *Boise Tower Assocs., LLC v. Wash. Capital Joint Master Trust* (D. Idaho 2007) 2007 U.S. Dist. LEXIS 24963

## IX. THE TAKEOUT LENDER'S RIGHTS AGAINST THE BORROWER

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1. Collected fees and deposits sufficient to protect the takeout lender.
2. Complaint for specific performance of the commitment.
  - *Teacher's Insurance & Annuity Association of America v. Butler* (S.D.N.Y. 1986) 626 F.Supp. 1229.

## X. TECHNIQUES TO REDUCE THE RISK OF PROBLEMS WITH TAKEOUT LOANS

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### 1. The “Beginning Phase”:

- **Get to know the other parties and the project before you commit and discuss the potential for:**
  - *cost-overruns.*
  - *delays in completion*
  - *changes in plans*
  - *changes in tenants*
  - *reduction in rental income*
- **Obtain and review all critical and final executed documents.**
- **Obtain the takeout lender’s commitment agreement vs. the “comfort letter.”**



## X. TECHNIQUES TO REDUCE THE RISK OF PROBLEMS WITH TAKEOUT LOANS

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### 2. The “Construction Phase”:

- Regularly communicate in writing with all other parties.
- Regularly inspect and photograph the project.
- Regularly monitor title to the project and the borrower’s other properties.
- Monitor interests rates and tenant rates and know where the “break even” place is.
- Remember “Murphy’s Law” (“anything that can go wrong will go wrong”).

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## X. TECHNIQUES TO REDUCE THE RISK OF PROBLEMS WITH TAKEOUT LOANS

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### 3. The “Completion & Stabilization Phase”:

- **Actively scrutinize the project for potential problems.**
- **Regularly communicate in writing with all of the other parties.**
- **Remind all of the other parties of critical information and dates at least two (2) months before the scheduled date of completion of construction.**
- **Conduct at least two meetings at the project with all of the other parties approximately sixty (60) days and thirty (30) days before the scheduled completion date.**

## ***CONCLUDING THOUGHTS***

## XI. MANAGING THE INTEREST RATE RISK

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# Takeout Lender's View

**VS.**

# Construction Lender's View

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## XII. DISPUTE RESOLUTION

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**1. Default (no pun intended) position**

**2. Jury waiver**

**3. Alternative means of dispute resolution:**

- **Mandatory Mediation**
- **Arbitration**
- **Judicial Reference**

## ***CONCLUDING THOUGHTS***

## XIII. CONCLUSION

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