

By Adam B. Weissburg and John Matthew Trott

# Special Purpose Bankruptcy Remote Entities

## Commercial real estate lenders seek to reduce the risks of a borrower's bankruptcy

In response to increasing pressure for a lower cost of capital, securitized lending is becoming a more common feature in commercial real estate financing transactions.<sup>1</sup> As a result, real estate attorneys find themselves dealing with an array of lender requirements relating to borrower structure and organization. For example, in securitized financing transactions, lenders often require that the borrower be a “special purpose bankruptcy remote entity.” Further, lenders dictate most aspects of the borrower’s form, structure, and organization in an attempt to be consistent with the prevailing standards of rating agencies.<sup>2</sup> Understandably, borrowers want to know what these new terms and requirements mean, why lenders need them, and how they will affect their businesses.

The phrase “special purpose bankruptcy remote entity” comprises two terms, “special purpose” and “bankruptcy remote,” that are distinct concepts. In practice the concepts collectively address certain credit and under-

writing concerns that lenders have regarding a borrower and entities that are related to that borrower. In the context of a real estate finance transaction, a special purpose entity is an independent legal entity formed for the sole purpose of owning and managing the real estate that serves as collateral for the lender’s loan. A special purpose entity becomes bankruptcy remote when its assets are sufficiently insulated from the effects of a bankruptcy of a related entity so that the special purpose entity itself is not likely to become a debtor as a result of the related entity’s bankruptcy.<sup>3</sup>

Regardless of whether the loan is intended to be securitized, lenders generally require the borrower to be a special purpose entity in order to isolate credit and underwriting risks, as well as to ensure that the activities of the borrower do not stray into areas that would adversely affect either the borrower’s ability to

repay the loan or the value of the collateral securing the loan. While these considerations remain important in the context of securitized loans, lenders require special purpose entities to be bankruptcy remote in order to deal with

two bankruptcy-related risks that arise in all commercial real estate financings: the risk associated with a bankruptcy by the borrower, and the risk associated with the assets of the borrower being substantively con-

solidated into a related entity’s bankruptcy.<sup>4</sup>

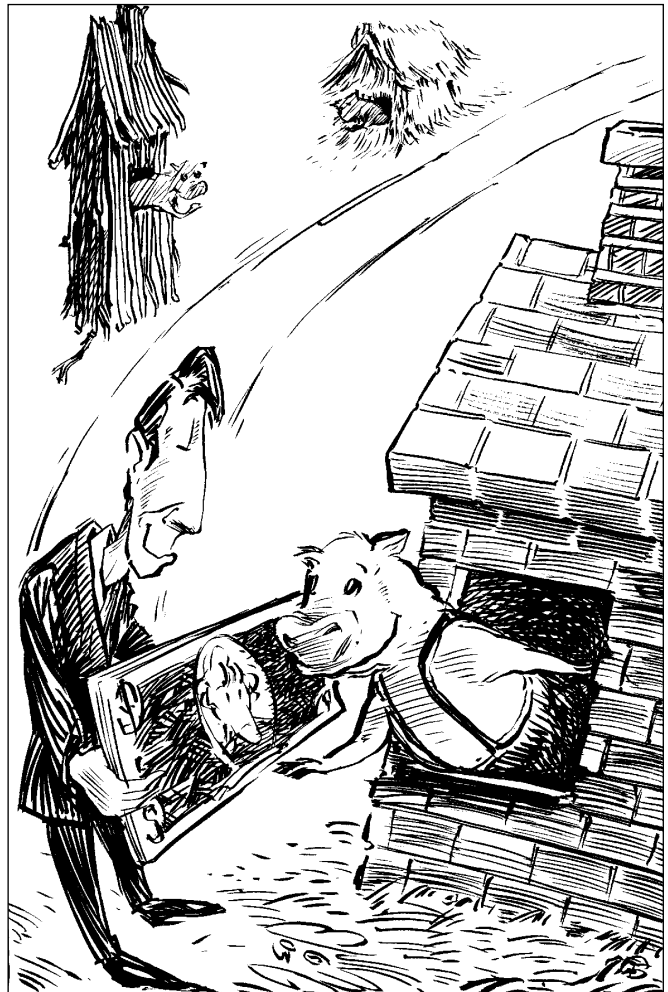
In any securitized financing, the driving force that requires parties to address these bankruptcy-related risks is the rating agencies’ evaluation of the borrower and the debt to be securitized. In larger securitized loan transactions, lenders also will require that the borrower’s counsel provide a legal opinion (a so-called nonconsolidation opinion) that, subject to certain qualifications, a bankruptcy by an entity

related to the borrower will not cause the substantive consolidation of the borrower (and its assets) with the bankrupt entity.<sup>5</sup>

### Lenders’ Concerns

For lenders, the threshold concern is the severe implications of the effect of a borrower’s bankruptcy.<sup>6</sup> The real estate securing the securitized mortgage would become part of the bankruptcy estate, leaving the mortgage vulnerable to the automatic stay provisions under the

*Adam B. Weissburg is a partner and John Matthew Trott is an associate in the Los Angeles office of Cox, Castle & Nicholson LLP, where they represent parties in real estate secured transactions.*



Bankruptcy Code.<sup>7</sup> The automatic stay is an injunction that arises by operation of law immediately upon the filing of a bankruptcy petition. It bars creditors from initiating or continuing with efforts to collect secured or unsecured debts, or to enforce claims against estate property.<sup>8</sup> From the lender's perspective, this result would present a veritable parade of horrors.

For example, absent relief from the court, the automatic stay would prevent the lender from taking action to obtain possession of or exercise control over its collateral,<sup>9</sup> while the borrower might be entitled to continue to use, lease, or sell the real property collateral in the ordinary course of its business.<sup>10</sup> Further, notwithstanding the opposition of creditors, the confirmation of a plan of reorganization by a bankruptcy court could allow the borrower to force these creditors to accept less than the amount of the borrower's indebtedness. In the jargon of bankruptcy attorneys, this process is aptly referred to as a cram down.<sup>11</sup>

Certainly, taking structural steps to reduce the chances that a borrower can or will file a bankruptcy addresses some of the lender's concerns. However, substantive consolidation is a powerful weapon that can undermine even the most thoughtful efforts to insulate the borrower. Substantive consolidation is an equitable doctrine used by bankruptcy courts if it appears that two related entities are perceived by creditors as a single entity and the equities of the creditors' interests are best served by treating those entities as if they were a single entity.<sup>12</sup> In evaluating whether to order a substantive consolidation, courts look for evidence of a "substantial identity" between the entities and whether substantive consolidation will avoid some harm or promote some benefit to the party seeking the substantive consolidation order.<sup>13</sup>

In the case of a substantive consolidation of a borrower following a bankruptcy by an entity related to the borrower, the borrower's assets and liabilities are merged with the assets and liabilities of the bankrupt related entity to create a single fund and single body of creditors. In a sense, the related party bankruptcy creates the same disastrous prospects that lenders face in the case of their borrower's bankruptcy, but with substantive consolidation the source of the lender's grief comes from outside of the lender/borrower relationship.

The growth and development of the securitized real estate financing market is directly attributable to the ability of the lending and rating agency communities to adequately address the risks of borrower bankruptcy and substantive consolidation.<sup>14</sup> Managing

these bankruptcy risks is a matter of 1) limiting the borrower's ability to file a voluntary bankruptcy petition, 2) restricting the borrower from engaging in activities that might lead to additional indebtedness or other liabilities, 3) requiring the borrower to conduct its business in a way that reduces the risk of substantive consolidation, and 4) assuring that entities related to the borrower do not have a property interest in the collateral for the loan.<sup>15</sup> While it will never be possible to bankruptcy-proof a borrower,<sup>16</sup> the use of special purpose bankruptcy remote entities in secured financings has become the method of choice for attempting to achieve these four goals.

### Entity Requirements

To avoid the risk that preexisting liabilities could cause the bankruptcy of the borrower, in most cases the lender will require that the borrower be a newly formed entity. This newly formed entity may be a corporation, limited liability company, or limited partnership, although for loans secured by real estate, limited liability companies formed in Delaware are the most common organizational form. In part the choice to form in Delaware is a result of lenders' greater familiarity with Delaware corporate law and the extensive Delaware case law adjudicating corporate disputes. Additionally, certain provisions of the Delaware Limited Liability Company Act provide a borrower with great flexibility as to its management structure<sup>17</sup> while also providing some assurance to the lender that a borrower that is a limited liability company will not dissolve upon the dissolution or bankruptcy of its sole member.<sup>18</sup> The organizational documents for the newly formed entity will need to include special purpose bankruptcy remote provisions. (In some limited circumstances a new entity will not need to be formed, but in those cases the organizational documents for the existing entity will still need to be modified to incorporate the special purpose bankruptcy remote provisions.)

If the borrower is a limited partnership or a limited liability company, its general partner or managing member also must be a special purpose entity. Its special (that is, sole) purpose is to serve as the general partner or managing member of the borrower.

Once formed, the new entity will take title to the real property that serves as collateral for the loan. Transferring the real property collateral to the newly formed entity accomplishes the goal of separating the real property collateral from the bankruptcy risks of its prior owner. In cases in which the original owner has significant control over the newly formed entity (and as a result the degree of

separateness between these entities is determined to be inadequate), or when mezzanine financing is contemplated in addition to mortgage financing, the transfer of the real property should be undertaken in multiple steps. That is, the original owner transfers the real property to a first-tier special purpose bankruptcy remote entity that in turn transfers the real property to a second-tier special purpose bankruptcy remote entity. Such a multi-tier transfer not only provides greater protection from the bankruptcy risks of the original owner but also allows the first-tier special purpose bankruptcy entity to obtain mezzanine financing or to provide credit enhancement to the second-tier special purpose bankruptcy remote entity.<sup>19</sup>

Organizational issues are only part of the process of structuring a bankruptcy remote entity. While an absolute prohibition on the borrower's ability to file a voluntary bankruptcy petition is impermissible,<sup>20</sup> commentators generally agree that the risk of a voluntary petition can be reduced if there is a requirement that the borrower have at least one independent director (or independent managing member if the borrower is a limited liability company) and that any such voluntary petition be approved by the unanimous consent of the directors of the borrower.<sup>21</sup> The requirement that the borrower have one or more independent directors or managers also may bolster the separateness argument and avoid substantive consolidation by preventing the borrower from having identical directors or managers with its related entities.<sup>22</sup>

To be considered an independent director or manager, rating agencies typically require that the director or manager must not 1) have a direct or indirect legal or beneficial interest in the borrower or any of its related entities, 2) be a substantial creditor, customer, supplier, employee, or other person that derives any of its purchases or revenues from the borrower or its related entities, 3) be a member of the immediate family of any member, manager, creditor, customer, supplier, employee or other person that derives any of its purchases or revenues from the borrower or its related entities, or 4) be a person or entity controlling or under common control of anyone referred to in items 1 through 3.<sup>23</sup> A cottage industry now exists comprising companies offering to provide "professional" independent directors for a fee.<sup>24</sup>

The role of independent directors in the future management of the borrower's business and the fiduciary duties of these independent directors are important for the borrower to understand. Independent directors are not involved in the day-to-day operations of the borrower's business. Their involvement is required only for a decision by the

*Call in the*  
**EXPERTS.**

Bringing quality experts into the 21st Century.

## Pro/Consul, Inc.

Technical & Medical Experts

**12,000 DISTINGUISHED EXPERTS  
IN MULTIPLE DISCIPLINES.**

"Pro/Consul's ability to locate appropriate expert witnesses is unsurpassed."

**1-(800) 392-1119**

Listed and recommended by the A.M. Best Company

- Rigorous standards
- Tailored service
- Prompt turnaround
- Free initial consultations
- Free resume book
- Reasonable rates

### LOCAL OFFICE

Pro/Consul Inc.

1945 Palo Verde Avenue, Suite 200

Long Beach, CA 90815-3443

(562) 799-0116 • Fax (562) 799-8821

eexperts@msn.com • ExpertInfo.com



A.D.R. Division  
**1-877-ARBITER**

Retired Judges • Attorneys  
Medical Doctors • Technical Experts

borrower to file for bankruptcy or for other major decisions that could implicate the other bankruptcy remote provisions of the borrower's organizational documents. Directors, whether independent or not, normally owe the borrower and its interest holders fiduciary duties of care<sup>25</sup> and undivided loyalty,<sup>26</sup> but prior to insolvency, the directors owe only a contractual duty to the creditors.<sup>27</sup>

Once the borrower is in the "vicinity of insolvency," however, or after the borrower is actually insolvent, the independent director also owes a fiduciary duty to the creditors of the borrower.<sup>28</sup> This potential for conflict between the competing fiduciary duties of directors (including independent directors) has been a topic of numerous commentators.<sup>29</sup> It is important to note that an independent director may or may not vote in favor of the filing of a voluntary petition, and that as a result the borrower's ability to file a voluntary petition may be restricted by the independent director.

### Impact on the Borrower's Structure and Business

A lender's requirement that a borrower must be a special purpose bankruptcy remote entity not only affects the organizational structure of the borrower but also places limitations on how the borrower can operate its business. The special purpose bankruptcy remote requirements will appear as provisions in the borrower's organizational documents and in the loan documents to which the borrower is subject. It is critical for the borrower to understand the effects of various categories of provisions.

**Special purpose requirements.** The borrower, whether newly formed or not, will need to limit its business purpose and activities to owning and managing the mortgaged property, borrowing the subject loan, performing its obligations under the loan, and activities that are incidental to accomplish these and only these purposes. The special purpose requirements, by narrowing the purpose and activities of the borrower, limit the universe of creditors that could have claims against the borrower and thereby reduce the potential for an involuntary petition to be filed against the borrower. If the borrower engages in other activities, they cannot be performed by the special purpose bankruptcy remote entity.

**Separateness covenants.** To reduce the risk that the bankruptcy remote structure is defeated by substantive consolidation, the borrower will need to maintain "separateness" from related entities.<sup>30</sup> There is a laundry list of provisions designed to achieve this goal,<sup>31</sup> but typically they require the borrower to maintain its own separate accounts, books,

## Asset Protection Planning Now Can Insulate Your Clients' Assets From Future Judgments

Yes, it's true. By properly restructuring your clients' estate plan, their assets and the assets they leave to their family will be protected from judgment creditors. Here are some of the situations in which our plan can help protect your clients' assets:



- Judgments exceeding policy limits or exclusions from policy coverage.
- Judgments not covered by insurance.
- Children suing each other over your client's estate.
- A current spouse and children from a prior marriage suing each other over your client's estate.
- A child's inheritance or the income from that inheritance being awarded to the child's former spouse.

**STEVEN L. GLEITMAN, ESQ.**  
310-553-5080

Biography available at [lawyers.com](http://lawyers.com) or by request.

Mr. Gleitman has practiced sophisticated estate planning for 25 years, specializing for more than 13 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

### Complex problems...

A multi-billion dollar corporation contacted CSC affiliate, Entity Services (SPV) LLC, in the midst of a complex debt restructuring with an immediate need for over 35 Independent Directors.

— We delivered!

### Creative solutions...

We provide experienced, competent, truly Independent Directors for both simple and complex transactions. To learn more, contact



### Entity Services

Entity Services (SPV), LLC  
Damon T. Gray, V.P.  
or Robert W. Grier, E.V.P.  
302-984-2963 ext 268  
[SPV@entityservices.com](mailto:SPV@entityservices.com)  
[www.entityservices.com](http://www.entityservices.com)

## REAL ESTATE, BANKING, MALPRACTICE

EXPERT WITNESS – SAMUEL K. FRESHMAN, B.A., J.D.

Attorney and Real Estate Broker since 1956 • Banker • Professor • Legal Malpractice • Arbitration • Brokerage • Malpractice • Leases • Syndication • Construction • Property Management • Finance • Due Diligence • Conflict of Interest • Title Insurance • Banking • Escrow • Expert Witness • 20+ years State & Federal Courts • 21 articles • Arbitrator • Mediator • \$300,000,000+ Property

6151 W. Century Blvd., Suite 300, Los Angeles, CA 90045  
Tel (310) 410-2300 ext. 306 ■ Fax (310) 410-2919

# got ebriefs?

**15,000+ Los Angeles County Bar Association members receive free online case summaries each day—Are you one of them?**

THE DAILY EBRIEFS—the Association's online summaries of published appellate court decisions issued over the previous 24 hours—are emailed each weekday afternoon **exclusively to Association members**. What's more, the Daily EBriefs, which include links to the full text of each opinion (posted on the Internet as a PDF file), are FREE!



Do we have your current email address? To receive the Daily EBriefs, Association members can send their name and current email address to ebriefs@lacba.org or call the LACBA Member Service Department at 213/896-6560.

→ **get the competitive edge—get ebriefs**

LOS ANGELES COUNTY BAR ASSOCIATION  
**daily ebriefs**

records, resolutions, and agreements and file its own separate tax returns. The borrower also will need to pay its own liabilities and expenses, including the salaries of its own employees, out of its own funds and assets. The borrower's assets must be held in its own name, and the borrower's funds must not be commingled with the funds of any other entity. To the extent any overhead costs are shared with related entities (for example, if there is shared office space with related entities or there are services performed by those entities), the costs must be allocated fairly and reasonably. The borrower also will need to have separate letterhead and often a separate telephone number, and otherwise make clear in all communications its separate identity. In fact, the borrower typically must include in its documents a covenant to correct any known misunderstandings regarding its separate identity. A guaranty of the borrower's obligations to the lender and others by entities related to the borrower can pose a threat to the separateness of the borrower, and any such guaranty will be carefully considered by the lender in light of the risks of substantive consolidation.<sup>32</sup>

### Restricting the debt of the borrower.

By restricting the debt of the borrower to debt related to the subject loan and to the ongoing business operations of the borrower, the risk that an involuntary bankruptcy petition will be filed against the borrower can be reduced. Such provisions are often coupled with a covenant that the borrower will maintain adequate capital for the normal obligations of a business of its type. The purpose of requiring that adequate capital be maintained reduces the risk that an involuntary petition will be filed against the borrower and may also reaffirm the separateness of the borrower. By analogy to the corporate law of alter ego and piercing the corporate veil, if the borrower was inadequately capitalized, it may be more likely to be viewed as a shell of a related entity rather than a true separate entity.<sup>33</sup>

**Restricting additional liens on the collateral.** As is the case with restricting the debt of the borrower, by limiting the ability of the borrower to subject the collateral to additional voluntary liens, the risk that an involuntary bankruptcy petition will be filed against the borrower can be reduced.

**Prohibiting the borrower from becoming a guarantor or surety.** Under this common requirement in securitized loans, the borrower cannot assume or become obligated for the debts of another person or entity, or hold out its credit as being available to satisfy the debts of another person or entity. This provision accomplishes the goals of limiting the future liabilities of the borrower (and thereby reducing the likelihood that an

involuntary petition will be filed against the borrower) as well as helping to ensure the separateness of the borrower and related entities for which it might otherwise provide such guaranties.

By offering the advantage of relatively inexpensive capital, securitized lending will continue as a prevalent form of commercial real estate financing. Real estate practitioners should therefore be familiar with lenders' requirements for securitized lending, in particular the required use of special purpose bankruptcy remote entities and the impact this particular requirement will have on a borrower's business. ■

<sup>1</sup> Securitization is "the structured process whereby interests in loans and other receivables are packaged, underwritten and sold in the form of 'asset-backed' securities." COMPTROLLER OF THE CURRENCY ADMINISTRATION OF NATIONAL BANKS, ASSET SECURITIZATION: COMPTROLLER'S HANDBOOK 2 (Nov. 1997).

<sup>2</sup> Ratings of the assessment of credit risk by one or more of the nationally recognized rating agencies are invariably required in connection with securitized loans. One of the fundamental requirements of such rating agencies is that the borrower must be a special purpose bankruptcy remote entity. See Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York, *Structured Financing Techniques*, 50 BUS. LAW. 527, 535 (1995) [hereinafter *Structured Financing Techniques*]. The four major ratings agencies are Duff & Phelps Credit Rating Co., Fitch Investor Service, Moody's Investor Service, and Standard & Poor's Rating Group. For a comprehensive discussion of the criteria used by Standard & Poor's in evaluating securitized loans, see STANDARD & POOR'S, U.S. CMBS LEGAL AND STRUCTURED FINANCE CRITERIA (2003).

<sup>3</sup> See BAXTER DUNAWAY, LAW OF DISTRESSED REAL ESTATE ch. 56, at 44 (2002) [hereinafter DUNAWAY].

<sup>4</sup> Sarah Robinson Borders, *Hot Topics with Respect to Real Estate Bankruptcy Issues*, in DOING DEALS 2003: UNDERSTANDING THE NUTS & BOLTS OF TRANSACTIONAL PRACTICE IN AN UNCERTAIN MARKET 489 (2003).

<sup>5</sup> Each lender will establish its own criteria of when nonconsolidation opinions will be required. Typically, nonconsolidation opinions are required for transactions ranging from \$20 million to \$25 million or more. Certain lenders will require the opinions for smaller transactions.

<sup>6</sup> 11 U.S.C. §§101 et seq.

<sup>7</sup> 11 U.S.C. §362.

<sup>8</sup> *Id.*

<sup>9</sup> 11 U.S.C. §362(a)(3).

<sup>10</sup> 11 U.S.C. §363.

<sup>11</sup> 11 U.S.C. §§1129(b), 1325.

<sup>12</sup> See J. Richard White, *Substantive Consolidation, Bankruptcy Remote Vehicles, and Structuring Issues*, in AMERICAN BAR ASSOCIATION, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, 9TH ANNUAL SPRING CLE AND COMMITTEE MEETING, COURSE MATERIALS, vol. 2, at AA-19 (1998) [hereinafter White].

<sup>13</sup> See *In re Auto-Train Corp.*, 810 F. 2d 270, 276 (D.C. Cir. 1987). See also *In re Eastgroup Props.*, 935 F. 2d 245, 249 (11th Cir. 1991).

<sup>14</sup> See Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 30 (1996).

<sup>15</sup> Harold S. Novikoff & Barbara Kohl Gerschwer, *Bankruptcy Remote Special Purpose Entities*, in AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION, COURSE OF STUDY—CHAPTER 11 BUSINESS REORGANIZATIONS 83

# Independent Director / Member Services

## Advantages:



- Simplified requirements for indemnification
- Expedited turn-around time
- Competitively priced



NATIONAL REGISTERED  
AGENTS, INC.

contact us at: **800.550.6724** / [info@nrai.com](mailto:info@nrai.com)

the **best** choice  
FOR INDEPENDENT DIRECTOR / MEMBER SERVICES

## REAL ESTATE/REAL PROPERTY MATTERS

**Specializations:**  
*Customs & Standards of Practice, Agency Relationships  
Material Disclosure in Residential Real Estate Sales*



**TEMMY WALKER, REALTOR®**  
*Real Estate Consulting Expert Witnessing*

### SERVICES RENDERED:

Litigation Consulting, Expert Testimony, Broker Practice,  
Liability Audit, Educational Services, Industry Mediator

*Certified Residential Broker Graduate Realtors Institute, Certified Residential Specialist,  
California Association of Realtors® Director Since 1981, National Association of  
Realtors® Director, State Faculty Master Instructor, Member, Real Estate Education  
Association, Past President, San Fernando Valley Board of Realtors*

5026 Veloz Avenue, Tarzana, California 91356  
Telephone (818) 760-3355 • Pager (818) 318-2594  
e-mail: [temmyw@aol.com](mailto:temmyw@aol.com)

CALIFORNIA BROKER LICENSE NO. 00469980

## Complex problems...

Just how "bankruptcy remote" is your Special Purpose Vehicle?

If put to the test, would your SPV withstand substantive consolidation?

If not, the consequences could be far-reaching and costly.

## Creative solutions...

In addition to traditional Independent Director Services, Entity Services is uniquely qualified to provide the office and administrative services necessary to substantiate an SPV's separate corporate identity. To learn more, contact



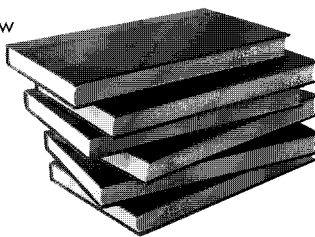
### Entity Services

Entity Services (SPV), LLC  
Damon T. Gray, V.P.  
or Robert W. Grier, E.V.P.  
302-984-2963 ext 268  
SPV@entityservices.com  
www.entityservices.com

# Results!

Defining the firm of **Cohen, Miskei & Mowrey.**

- Economic Damages
- Fraud Investigations
- Bankruptcy and Reorganization Services
- Business and Professional Practice Valuations
- Expert Witness Services
- Family Law including:  
Asset Tracing, Cash Flow  
Available for Support,  
Lifestyle Analysis and  
Post-Separation  
Accounting



## COHEN, MISKEI & MOWREY LLP.

Certified Public Accountants and  
Consultants to Counsel and Management

15303 VENTURA BOULEVARD, SUITE 1150, SHERMAN OAKS, CA 91403  
TEL: 818.986.5070 FAX: 818.986.5034

(2003).

<sup>16</sup> "Advance restrictions against the filing of a voluntary bankruptcy case pursuant to an agreement between a debtor and a creditor have been held to be void against public policy." See *Structured Financing Techniques*, *supra* note 2, at 556.

<sup>17</sup> See, e.g., DEL. CODE ANN. tit. 6, §18-402 (2000).

<sup>18</sup> DEL. CODE ANN. tit. 6, §18-304 (2000). While this section provides that the bankruptcy of a borrower's sole member would cause the dissolution of the borrower, by its terms the section can be superceded by the terms of the borrower's operating agreement.

<sup>19</sup> See Peter J. Lahny, *Asset Securitization: A Discussion of the Traditional Bankruptcy Attacks and an Analysis of the Next Potential Attack, Substantive Consolidation*, 9 AM. BANKR. INST. L. REV. 815, 831-32 (2001) [hereinafter Lahny]. See also DUNAWAY, *supra* note 3.

<sup>20</sup> See *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983).

<sup>21</sup> See, e.g., White, *supra* note 12, at AA-23, and Lahny, *supra* note 19, at 836.

<sup>22</sup> See White, *supra* note 12, at AA-23.

<sup>23</sup> *Id.* at AA-22-23.

<sup>24</sup> Two such companies are CT Corporate Staffing, Inc. and Entity Services, L.L.P.

<sup>25</sup> See CIV. CODE §309(a). See also *Aronson v. Lewis*, 473 A. 2d 805, 812 (Del. 1984).

<sup>26</sup> See Joel Seligman, *The New Corporate Law*, 59 BROOK. L. REV. 1, 3 (1993).

<sup>27</sup> See *Geyer v. Ingersoll Publ'ns Co.*, 21 A. 2d 784, 777 (Del. Ch. 1992). See also STEPHEN H. CASE, I THOUGHT I PUT IT WHERE YOU COULDN'T REACH IT: BANKRUPTCY REMOTE ENTITIES, SPECIAL PURPOSE VEHICLES AND OTHER SECURITIZATION ISSUES 67 (2002).

<sup>28</sup> See *In re Kingstone Square Assocs.*, 214 B.R. 713, 735 (Bankr. S.D. N.Y. 1997).

<sup>29</sup> See, e.g., Andrew D. Shafer, *Corporate Fiduciary Involvement: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About*, 8 AM. BANKR. INST. L. REV. 479 (2000). See also White, *supra* note 12, at AA-23.

<sup>30</sup> Although substantive consolidation in bankruptcy law is a different concept than piercing the corporate veil in corporate law, many of the separateness covenants required in connection with a securitized loan are exactly the sort of corporate formalities that a court will investigate in determining whether a corporation is an alter ego of its shareholders.

<sup>31</sup> The items on this laundry list have evolved over time to address concerns that bankruptcy courts have had in determining whether to apply the remedy of substantive consolidation in particular cases. See *In re Augie/Restivo Baking Co., Ltd.*, 860 F. 2d 515, 518 (2d Cir. 1988). See also *In re Auto-Train Corp.*, 810 F. 2d 270, 276 (D.C. Cir. 1987) and *In re Eastgroup Prods.*, 935 F. 2d 245, 249 (11th Cir. 1991). Because substantive consolidation is an equitable remedy that is applied at a court's discretion, no list should be considered all-inclusive, and lenders may expand the list to address specific concerns raised by a particular transaction.

<sup>32</sup> *In re Vecco Constr.*, 4 B.R. 407, 410 (1980) (describing the existence of parent and intercompany guaranties as one of the criteria to be evaluated in determining whether substantive consolidation is appropriate). See also *In re Eastgroup Properties*, 935 F. 2d at 249.

<sup>33</sup> For a discussion of inadequate capital as a basis for piercing the corporate veil, see *Automotriz del Golfo de Calif. v. Resnick*, 47 Cal. 2d 792 (1957) ("It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate identity privilege.").