

Special Presentation – CREF10

February 3, 2010

“Options for the Stressed & Distressed
CMBS in the Current Market”

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Meet the Moderator / Panelists

Moderator

- **William M. O'Connor**, Crowell & Moring LLP

Panel

- **John Bricker**, Crowell & Moring LLP
- **Kevin C. Donahue**, Midland Loan Services / PNC Real Estate Finance
- **Mike Lesser**, Eastdil Secured, LLC
- **Bruce Nelson**, The Situs Companies
- **Mark Weibel**, Fulbright & Jaworski L.L.P.

Topics

- State of the Market
- Special Servicing, 2009 Totals
- Issues in Transitioning CMBS from Master Servicer to Special Servicer
- Modification and Restructuring CMBS / Loans/Rev. Proc 2009-45/ “REMIC BUSTERS”
- EXIT STRATEGIES: Maximizing Asset Value
- Recent Concerns in Financial Services Litigations: Mistakes to Avoid

State of the Market

MIDLAND LOAN SERVICES, INC.



Special Servicing, 2009 Totals

Kevin C. Donahue, Midland Loan Services /
PNC Real Estate Finance

Special Servicing Portfolio

	YE 2007	YE 2008	YE 2009	Change 2008-09
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Special Serviced Assets

• \$940.0 mil.	• \$2.9 bil.	• \$12.1 bil.	+ 317%
• 222 assets	• 455 assets	• 766 assets	+ 68%
• \$4.2 mil. avg.	• \$6.4 mil. avg.	• \$15.8 mil. avg.	+ 147%

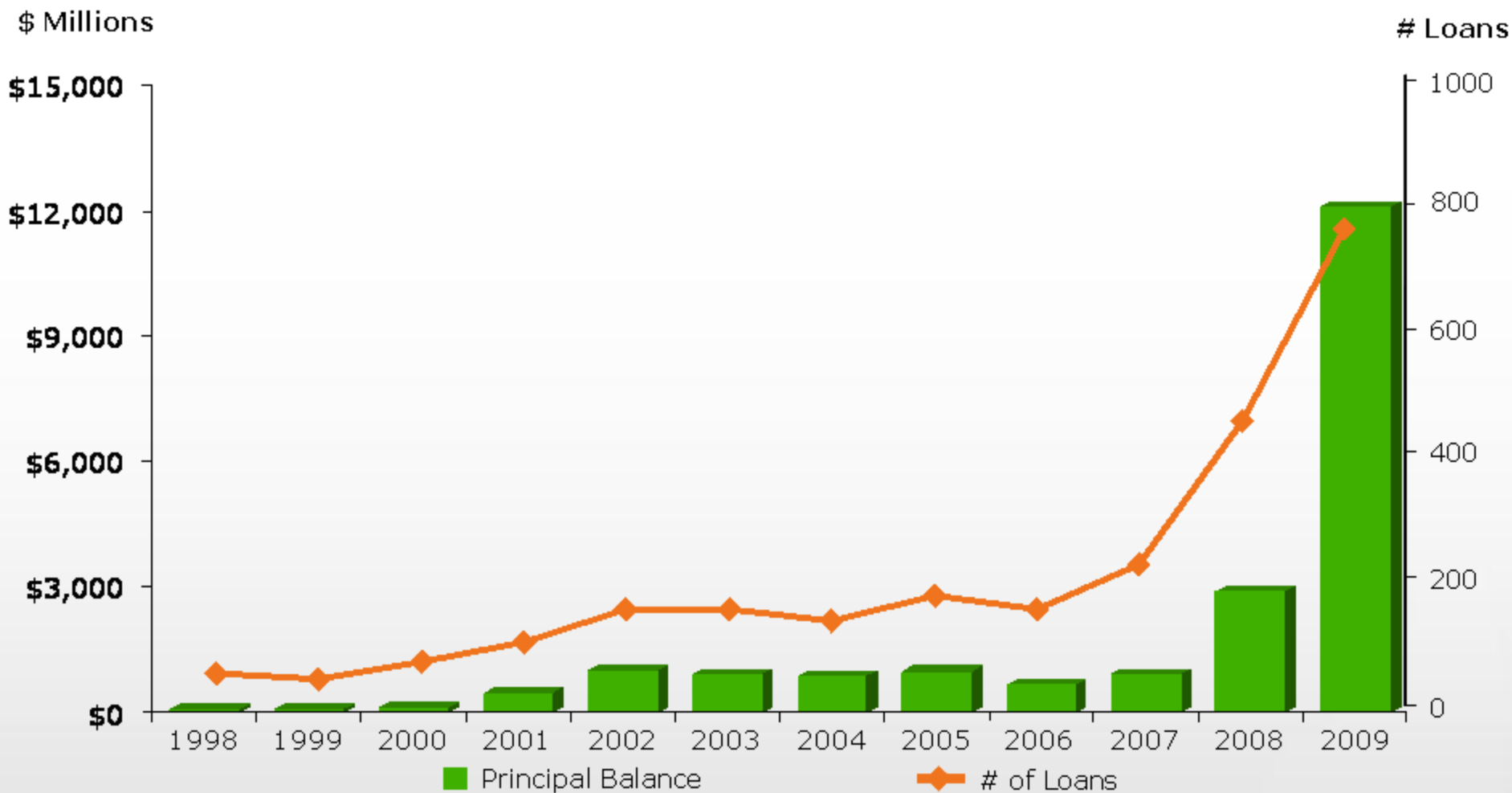
Percentage by Balance

• 0.91 %	• 2.8%	• 11.3%	+ 304%
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Transfers In

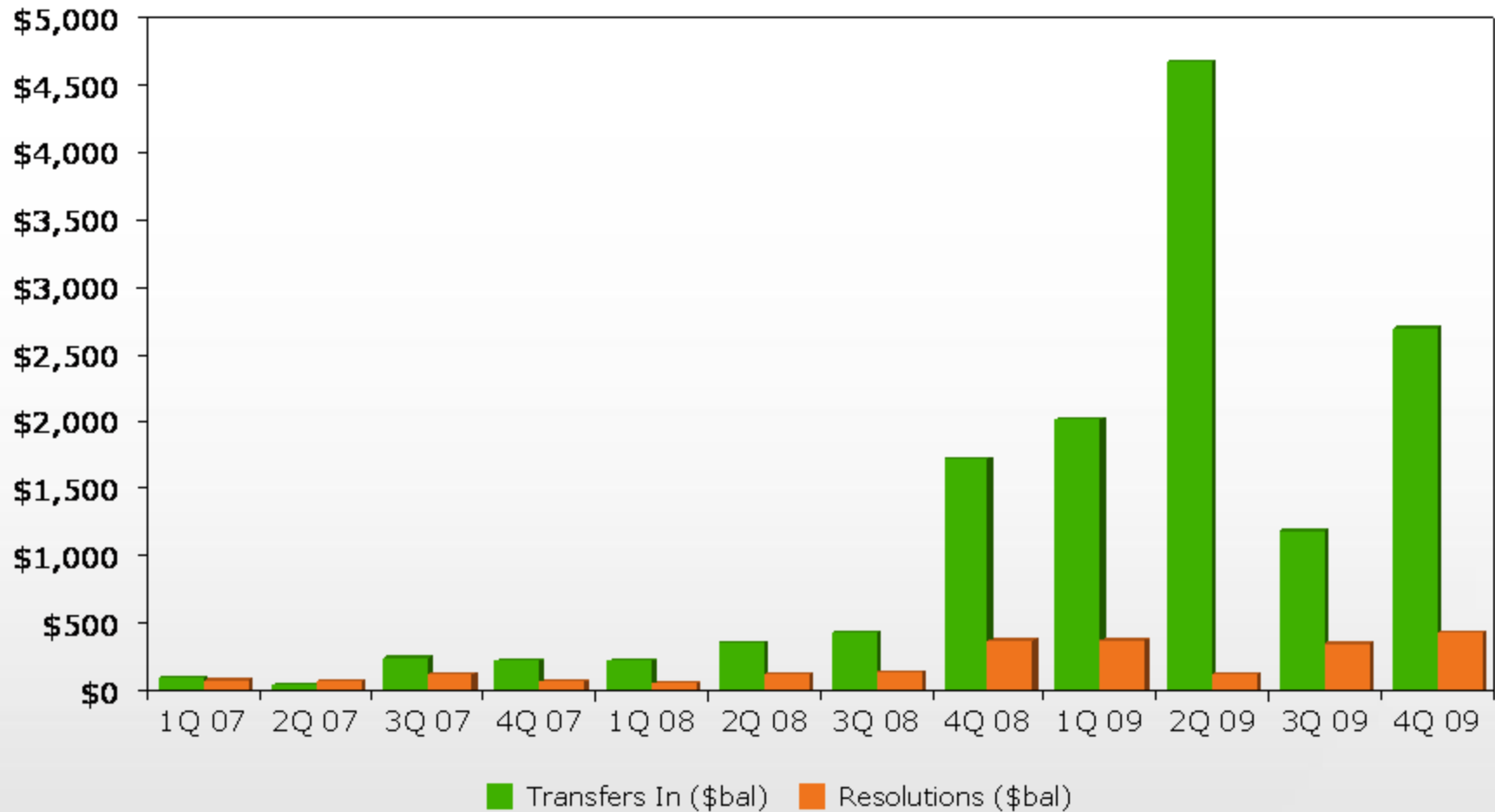
• \$527.0 mil.	• \$2.6 bil.	• \$9.8 bil.	+ 277 %
• 196 assets	• 443 assets	• 581 assets	+ 31 %

Active Special Servicing Portfolio



Transfer and Resolution Activity

\$ millions

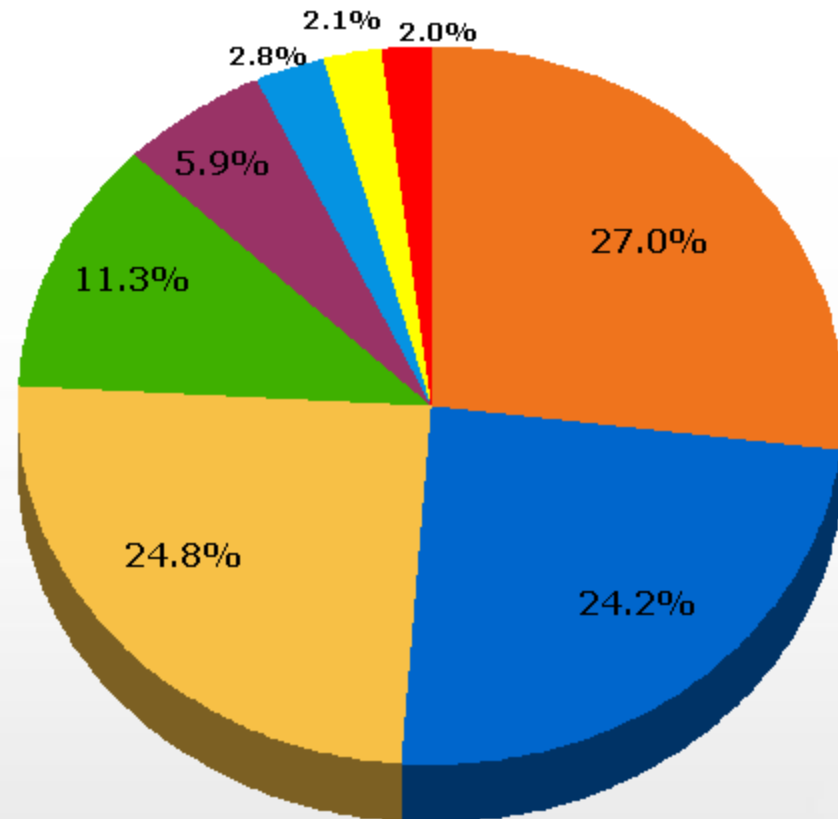


Transfer Events 2007-09

Servicer Determination of Imminent Default	\$6.6 billion / 47.4%
Bankruptcy	\$2.8 billion / 20.2%
Payment Default	\$2.0 billion / 14.2%
Written Notice of Inability to Pay	\$1.4 billion / 10.3%
Maturity Default	\$791.0 million / 5.7%
Other	\$321.0 million / 2.2%

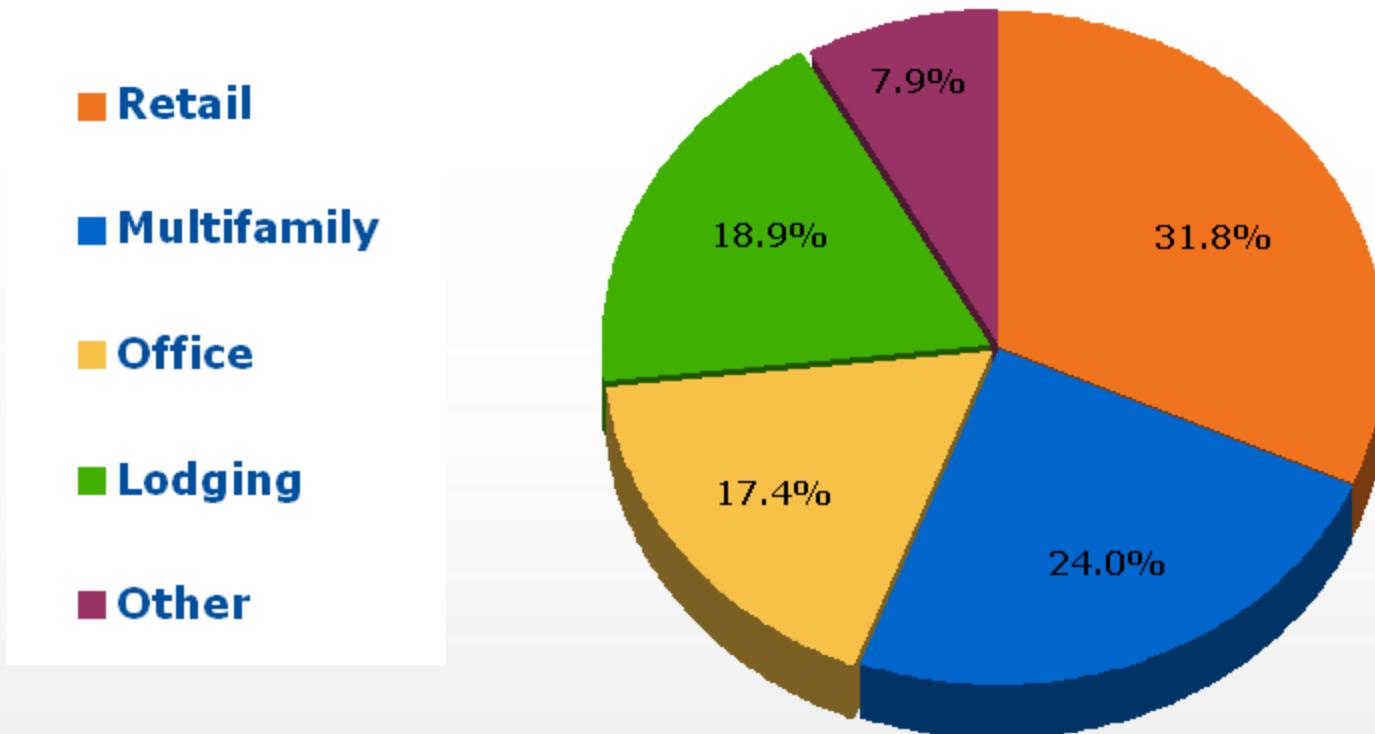
Current Asset Status

- **Bankruptcy**
- **Modification**
- **Business Plan Pending**
- **Foreclosure & REO**
- **Other**
- **Pending Return to Master**
- **Non-Monetary Default**
- **Discounted Payoff**



Property Types

Retail and Multifamily property types comprise 56% of the total



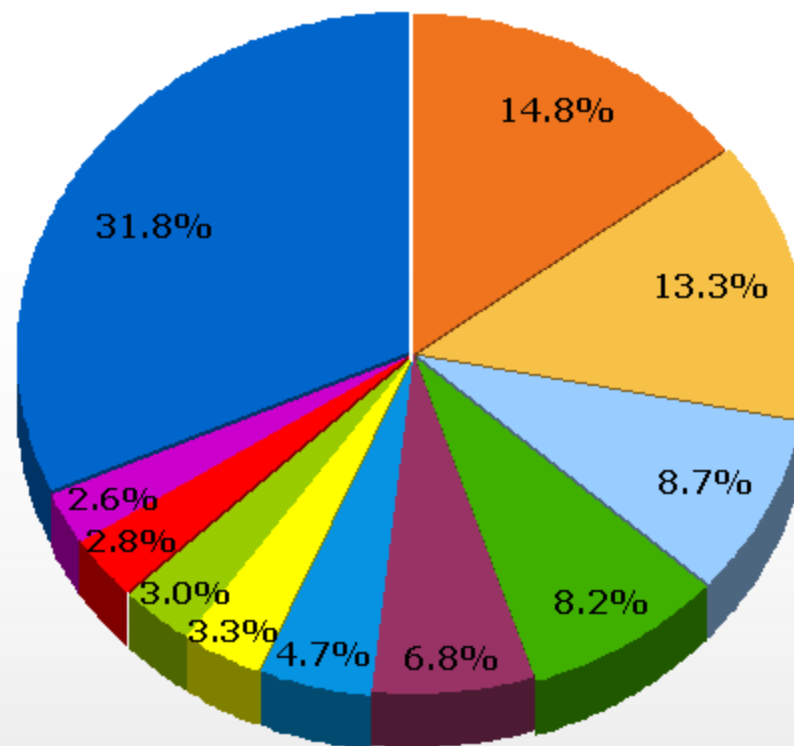
Stratification based on 968 properties securing 766 assets

* Based on balances as of December 31, 2009

Geographic Distribution

Stratification based on 968 properties securing 766 assets

- **Hawaii**
- **California**
- **Texas**
- **Florida**
- **Arizona**
- **Maryland**
- **Nevada**
- **Georgia**
- **New Jersey**
- **Ohio**
- **Other**



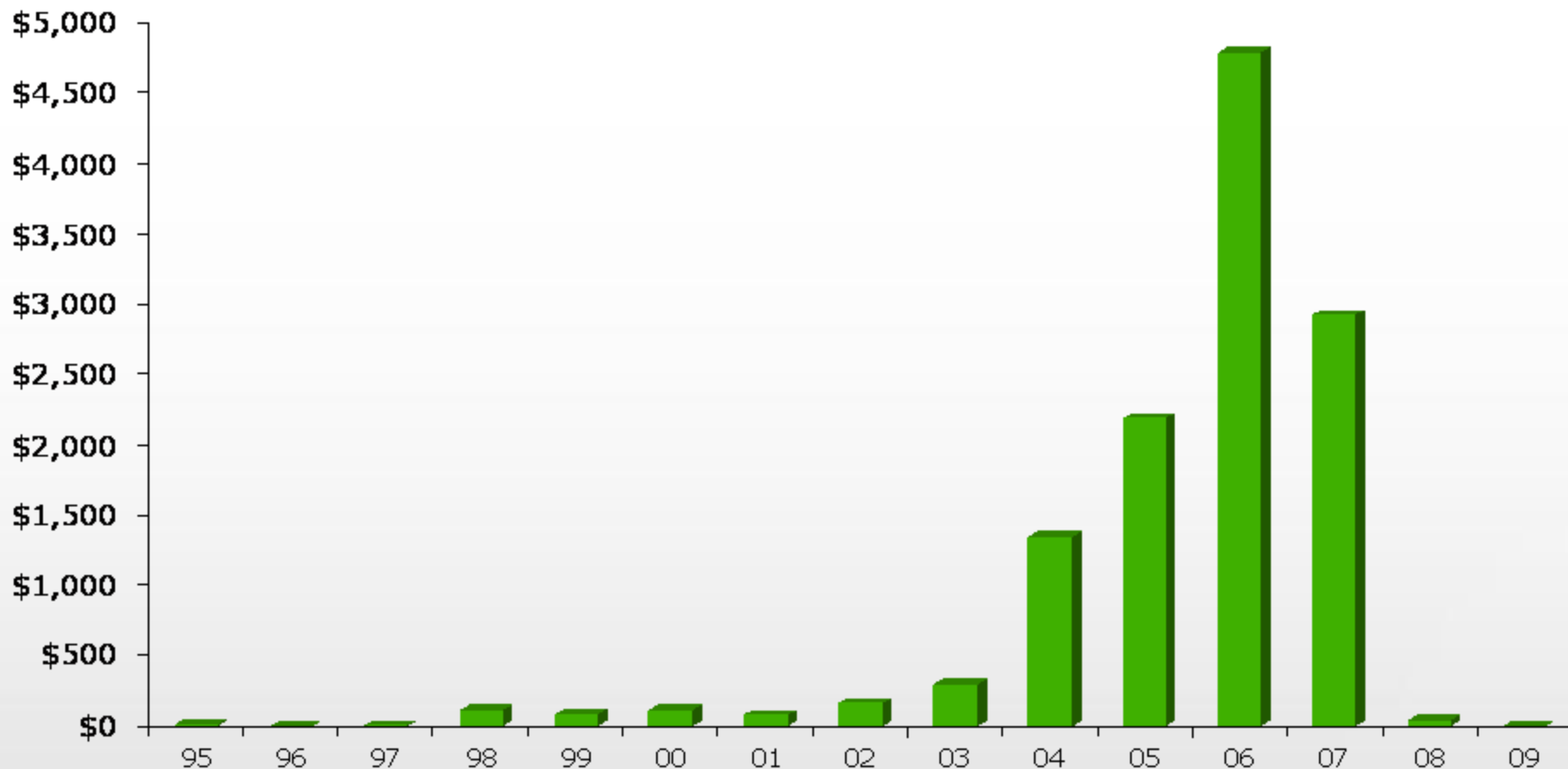
* Based on balances as of December 31, 2009
The \$1.5 billion Ala Moana loan comprises the HI portion

REO Inventory Increases & Sales

	2006	2007	2008	2009
New REO	• 25 Assets	• 28 Assets	• 26 Assets	• 32 Assets
Balance at Transfer	• \$131.8 mil.	• \$95.9 mil.	• \$45.1 mil.	• \$48.6 mil.
REO Sales	• 29 Assets	• 25 Assets	• 25 Assets	• 30 Assets
Balance at Resolution	• \$166.5 mil.	• \$70.4 mil.	• \$68.6 mil.	• \$53.6 mil.
Net Sale Proceeds/ Percentage Collected	• \$148.0 mil. • 89%	• \$64.9 mil. • 92%	• \$31.1 mil. • 45%	• \$23.6 mil. • 44%

Special Serviced Assets by Vintage

\$ millions

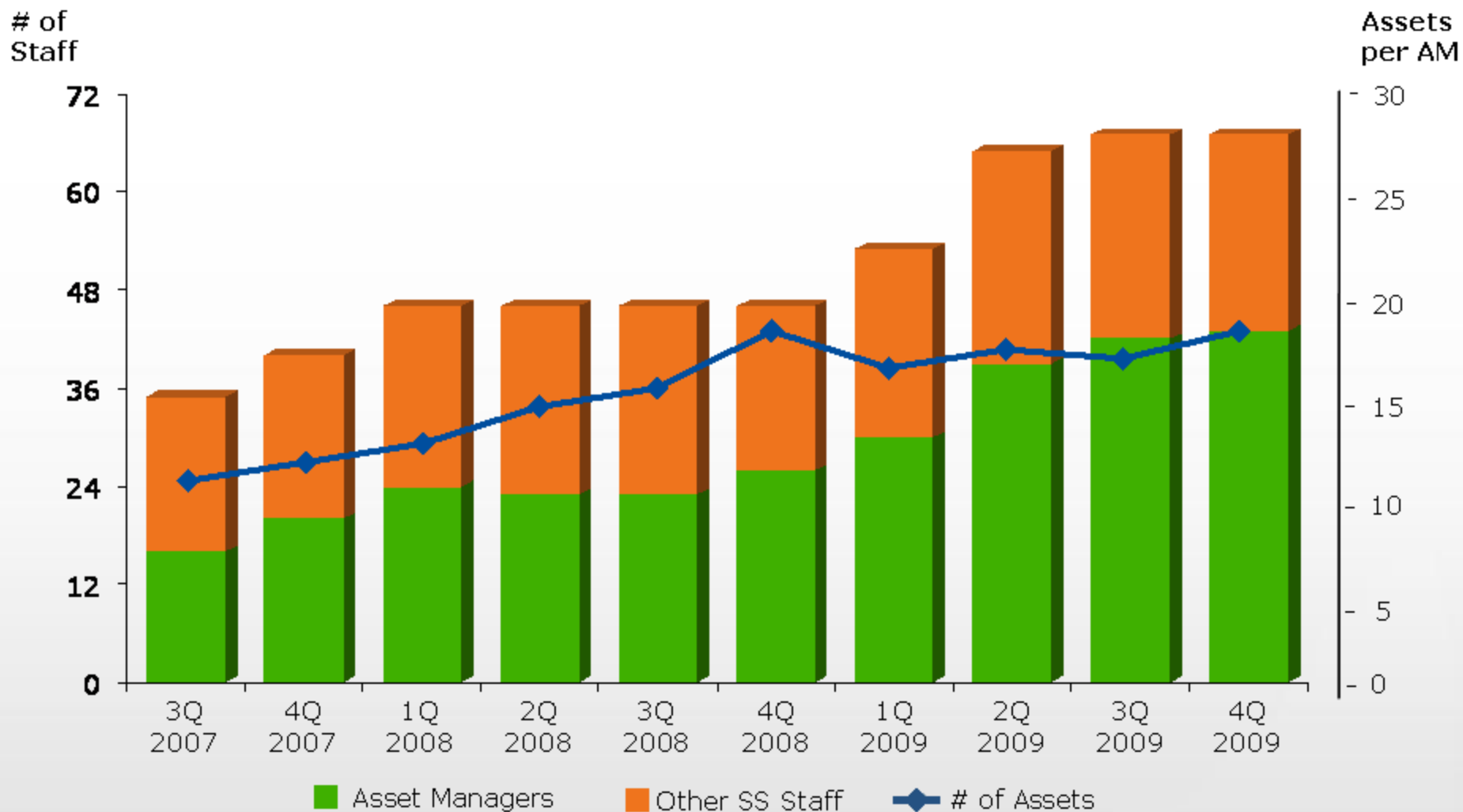


Matured Loans / Pending Maturities

Loans Currently Past Maturity	• \$1.2 billion
Loans Maturing 1-3 Months	• \$1.3 billion
Loans Maturing 4-6 Months	• \$2.9 billion
Loans Maturing 7-12 Months	• \$5.4 billion
Total Maturity Exposure Through 2010	• \$10.8 billion

* Includes all special servicing and special credits portfolios.

Staffing / Workload



Issues in Transitioning CMBS from Master Servicer to Special Servicer

Kevin C. Donahue, Midland Loan
Services / PNC Real Estate Finance

Bruce Nelson, The Situs Companies

Issues in Transitioning CMBS from Master Servicer to Special Servicer

- A. Master Servicer Responsibilities and Limitations**
- B. Special Servicer Responsibilities**
- C. Borrower Requests and Communications**
- D. Providing Information to Support Request**
- E. Timing, Fees and Expenses**

Modification and Restructuring CMBS Loans/Rev. Proc 2009-45/ “REMIC BUSTERS”

John Bricker, Crowell & Moring LLP

Mark Weibel, Fulbright & Jaworski L.L.P.

Introduction

- A. Loan Level Issues vs. Trust Level Issues**
- B. 1980s Trap Door**
- C. REMIC Tax Counsel**
- D. Not Addressing CDOs**

Issues

A. Owner of the Loan

1. REMIC
2. Grantor Trust
3. Whole Loan

B. Statutory Restrictions

1. REMIC rules
 - a. prohibited transactions tax
 - b. loss of tax transparency

C. Contractual Restrictions

1. Pooling and Servicing Agreement
 - a. servicing standard

D. Credit Restrictions

Analysis

A. Current Status of Loan

1. Master serviced loan
 - a. no new loans ninety (90) days after start-up date
 - b. "material" modification
 - c. same collateral

2. Specially-serviced loan
 - a. more flexibility, but not unfettered discretion

Analysis (Cont.)

B. Acceptable Modifications / Restructures

1. Master serviced loan
 - a. assumptions
2. Specially-serviced loan
 - a. contact REMIC tax counsel
 - b. pooling and servicing agreement
 - c. servicing standard
 - maximize recovery for certificateholders on net present value basis

Analysis (Cont.)

d. examples:

- i. waiver of due on encumbrance
- ii. waiver of due on sale
- iii. waiver of yield maintenance
- iv. forgiveness of default interest
- v. forgiveness of collection costs
- vi. reduce payment
- vii. accept principal payments during lockout period
- viii. forbearance
- ix. extension of maturity date
 - safe harbors

Analysis (Cont.)

C. Unacceptable Modifications / Restructures

1. Master serviced loan

a. examples:

- i. forgiveness of principal
- ii. forgiveness of accrued contract interest
- iii. forgiveness of prepayment premiums

2. Specially-serviced loan

a. example:

- i. assumption of a-note after foreclosure of b-note
 - intercreditor agreement
 - benefits and burdens of ownership
- ii. Net profits interest
- iii. Exchange of real property for personal property and/or general intangible.

Analysis (Cont.)

D. Prohibited Transactions Tax

1. 100% Tax in Net Income:

- Examples: _____
 - a. Net Income from foreclosure property – 3 year period to dispose
 - b. Non-permitted substantial loan modifications - deemed “taxable” exchange
 - c. REMIC receives fees or other compensation
 - d. Violation of REMIC “Asset Test”
 - e. Disposition of a “qualified mortgage” other than:

Analysis (Cont.)

- i. replacing one mortgage with another more than three (3) months the start-up date,
- ii. replacing a defective mortgage with another eligible mortgage more than two (2) years of the start-up date,
- iii. selling a defective mortgage back to the seller,
- iv. disposing of a mortgage incidental to the foreclosure, default, or imminent default of the mortgage, or
- v. disposing of a mortgage incidental to the bankruptcy, insolvency, or qualified liquidation of a REMIC.

Current Strategies

- A. Alter "Pay" and "Accrual" Rate**
- B. Lockbox**
- C. Loan Sale to B-Piece Holder**
- D. Changes to REMIC Rules**
- E. Rev. Proc. 2009-45**

EXIT STRATEGIES: Maximizing Asset Value

Mike Lesser, Eastdil Secured
Bruce Nelson, The Situs Companies

First Steps

- » Identify an exit strategy for each asset assigned
- » Identify at least two alternative exit strategies for each asset
- » “Parallel” exit strategy (pursue remedies at same time)
- » Strategies differ based on the assumptions, collateral, borrower cooperation and market

Traditional Routes

- » Refinancing after workout
- » Auction sales through foreclosure
- » Taking the keys
 - Carry property while marketing
- » CMBS
 - Look to rights under Intercreditor Agreement

Present Environment

» Challenges:

- Certain asset classes disfavored
- Liquidity
- Valuation (net present value)
- Conservative loan-to-value standards

Summary: Cooperation With Borrower – Exit Options

- » Modifications
- » Assumptions
- » Bankruptcy (consensual plan)
- » Deeds in lieu of foreclosure
- » Discounted payoffs
- » Forbearances
- » Consensual foreclosure
- » Guaranty settlements
- » Stipulation (receiver and judgments)
- » Collateral sale or assumption through receivership

Exit Options Where Cooperation is “Lacking”

- » Note sale
- » Foreclosure
- » Receiverships
- » Collateral sale through receivership
- » Bankruptcy options
- » REO sale (as-is and stabilized)
- » Judgments and guarantor/borrower pursuit



Distressed Note Sales

» Portfolio sales:

- Whole loans
- Due diligence: timing necessary

» One-offs:

- Often more suitable for CMBS asset

Distressed Note Sales

» Pros:

- Quick disposition when market is active
- Allows re-leveraging or de-leveraging which can help stabilize local market
- Sophisticated buyers exist
- Less legal costs
 - Simple documentation
- No “buy in” required from borrower

Distressed Note Sales

» Cons:

- Little activity in current market
- Valuation of asset(s) differ widely
- CMBS
 - Reasonable servicer standard
- Unsophisticated buyers; time wasted
- May be less advantageous from a net value recovery standpoint

REO Sales

- » Costs: “keys” vs. foreclosure
- » Importance of marketing
- » Selecting right broker for asset
 - National vs. local firm
 - Asset class specialization
- » Portfolio sales
 - More suitable for certain asset classes
- » Canvassing large tenants as possible buyers
- » Option: Assignment of bid

Recent Concerns in Financial Services Litigations: **Mistakes to Avoid**

John Bricker, Crowell & Moring LLP

Kevin Donahue, Midland Loan Services/PNC Real Estate Finance

Mike Lesser, Eastdil Secured

Bruce Nelson, The Situs Companies

William M. O'Connor, Crowell & Moring LLP

Mark Weibel, Fulright & Jaworski L.L.P.

CMBS Structure being tested on all fronts

- A. Borrowers are better educated on structure**
- B. Servicers are being sued**
- C. Capital Stack disputes are increasing**

Mistakes to Avoid

A. Mistake:

“_____ as Servicer of _____, N.A., as Trustee”

Under New York law, who may represent CMBS trust as a party in litigation:

NY CPLR 1004 establishes limited circumstances in which one person may sue or be sued on behalf of another, without joining that other person as a party to the action.

Mistakes to Avoid (Cont.)

Those circumstances are restricted to:

- an ***executor, administrator*** or guardian of the property of an infant;
- the ***committee*** of the property of a judicially declared incompetent;
- the ***conservator*** of the property of a conservatee;
- the ***trustee*** of an express trust;

Mistakes to Avoid (Cont.)

- an insured person who has provided a loan, **subrogation** receipt, trust agreement or other similar agreement to his insurer; and
- a person who made a contract for the benefit of a third-party.

A servicer for the holder of the mortgage does not fall within any of these categories. It is not entitled to maintain a foreclosure or other action in the absence of the mortgage holder trust.

Mistakes to Avoid (Cont.)

Servicer may not sue based upon Pooling and Servicing Agreement:

- a. Borrower is not a party to PSA; and
- b. Any agency authority in the PSA is subject to NY CPLR 1001, 1003 and New York case law – all prohibit the maintenance of a mortgage foreclosure action by party that does not have title to the note and mortgage.

Mistakes to Avoid (Cont.)

Consequences:

- a. Dismissal of case for lack of standing;
- b. Affects future attempts (action in Equity);
- c. Inability to transfer deed following foreclosure; and
- d. Exception to title insurance.

Mistakes to Avoid (Cont.)

B. Mistake: Filing suit before assignments recorded.

Most courts refuse to permit foreclosure actions to proceed where a plaintiff that claims to be the mortgage holder did not have title to the mortgage prior to commencement of action.

See, e.g., Wells Fargo Bank, NA v. Marchione, 2009 NY Slip Op 07624 (2d Dep't, October 20, 2009) ("**A foreclosure of a mortgage may not be brought by one who has no title to it**").

Consequences:

Dismissal; expungement of mortgage.

In re Paredes, No. 09-22261 (Bankr., S.D.N.Y., September 29, 2009).

Mistakes to Avoid (Cont.)

C. Mistake:

Telling Borrower about directive from Certificateholder: “Unfortunately, our directing Certificateholder has instructed us not to take less than _____.”

Consequences:

- a. Violation of Servicer Standard; and
- b. Liability to remaining members of capital stack.

Recent Case Law Developments

» CSBF 2001 CP 4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC.

- Loan Documents prohibit additional lien or mortgage without Lender consent
- Borrower obtained second mortgage without consent
- Second Mortgage was paid
- Special Servicer commenced foreclosure on Senior Loan, seeking deficiency from Guarantors
- Guarantors argued no harm to Lender, no liability
- Court holds Guarantor liable

Recent Case Law Developments

» Abu Dhabi v. Morgan Stanley, Moody's, et al

- Rating agencies seek dismissal of claims relating to underwriting of SIV continuing MBS and ABS
- Court denies motion by rating agencies, pointing to allegations of improper conduct and targeted investor group (no public distribution)
- Chink in armor of rating agencies' usual "Publisher"/First Amendment defense
- Possible future claims by Special Servicer on behalf of certificate holders

Recent Case Law Developments

» Capmark vs. Net1 (unreported)

- Master Servicer errs in administration of waterfall - fails to fund rollover reserves
- Loan otherwise exceeding Debt Service
- Master demands payment (\$6 million) and declares default
- Master fails to transfer to Special Servicer despite requests
- Master brings "declaratory judgment" action to compel payment by Borrower
- Borrower cross claims for equitable relief

Court:

1. Grants Preliminary Injunction against Servicer
2. Finds likelihood of "Gross Negligence" by Master

Biographies

**In alphabetical order*

John F. Bricker



John F. Bricker is a counsel in Crowell & Moring's New York Office and is member of the Financial Services Group.

In addition to representing borrowers and lenders in workouts and restructurings, John has represented borrowers and institutional lenders in the origination of mortgage loans and mezzanine loans, for both securitization and balance sheet purposes. His lender representation has included loans secured by fee interests and loans secured by leasehold interests in both single-property and multi-property, multi-state transactions, involving numerous property types.

John also represents investment banks, opportunity funds, servicers and hedge funds in the administration, purchase, sale and restructuring of whole loans, participation interests, equity interests, CMBS and mezzanine loans. In addition, John represents purchasers and sellers of real estate properties. John speaks frequently on numerous topics relating to commercial real estate issues.

John graduated with a B.S. degree in accounting from Manhattan College and earned his J.D. from the University of Detroit School of Law where he was a member of the Law Review.

John is admitted to practice in New York.

Kevin C. Donahue



Kevin C. Donahue joined Midland Loan Services / PNC Real Estate Finance in 2001 as Senior Vice President of Special Servicing and has responsibility for directing all special servicing and asset management activities of the group. In addition, Mr. Donahue leads the firms efforts in the area's of due diligence, contract underwriting, asset valuation, risk analysis and all real estate advisory services offered to third party clients. During the past 25 years, Mr. Donahue has been actively involved in real estate acquisition, finance, contract underwriting, mortgage banking, portfolio analysis, loan workouts, asset management and property development. Prior to joining Midland in 2001, Mr. Donahue held senior management positions with Crown NorthCorp, Columbus Ohio, J.E. Robert Companies, McLean Virginia, DRS Realty Services, Chantilly Virginia, Jones & Company, Overland Park Kansas and SSRC Realty Corporation, New York New York. Clients have included major Wall Street investment banks, insurance companies, commercial banks, pension funds and various government agencies. Mr. Donahue holds a BS in Political Science/Urban Studies from Columbia University and has held real estate brokers licenses in New York, Georgia, Kansas and Missouri.

During his career Mr. Donahue has also been involved in commercial financing and credit analysis including corporate restructuring, inventory liquidation and bankruptcy reorganization. Specialty real estate experience has included land acquisition and disposition as well as rezoning and entitlement activities. He has overseen extensive construction activities, development completion and value added opportunities in all residential and commercial product types including single family, condominium, timeshare, hospitality, retail, office, industrial, healthcare and multi family.

Michael J. Lesser



Michael J. Lesser, Managing Director, is responsible for marketing and valuation of commercial mortgage loan portfolios. Mike has overseen a significant portion of the firm's more than \$32 billion in commercial mortgage loan transactions.

Mike's most recent assignments include managing the sale of over \$2 billion of performing and nonperforming commercial loans. These loans are being sold to numerous institutional and regional/local "loan to own" investors. Mike has sold over \$3.5 billion of commercial and residential mortgage loans for Bank of America, Wachovia, RBC Centura, Indymac, CIBC, Citicorp, and Sanwa Bank. In addition, Mike lead the sales of over \$320 million for the FDIC and worked on the team that sold over \$2 billion of loans for the RTC.

Prior to joining Eastdil Secured, Mike was a Manager at KPMG Peat Marwick. As a Manager in their Real Estate Consulting Group, Mike completed single property valuations, as well as portfolio reviews and acquisition due diligence. Mike received his M.B.A. from Harvard Business School and a B.S. from University of Massachusetts, Amherst. Mike is a Licensed Securities Representative (Series 7 & 63) and a Licensed Real Estate Broker in the State of California.

Bruce Nelson



Bruce Nelson is a Principal of The Situs Companies and is actively involved in many aspects of the company's asset management, due diligence, loan underwriting and consulting services in North America. He has direct responsibility for all Situs Asset Management activities with particular focus on all special servicing. Additionally, Bruce has credit oversight related to highly structured loans, preferred equity investments, B-piece analysis and loans involving repurchase lines of credit. Bruce has extensive experience in special servicing, including specialty property types such as restaurants, convenience stores and gas stations, residential subdivisions and golf courses. Prior to joining Situs, Bruce worked as a regional manager for Parallel Capital where he was responsible for all underwriting, due diligence and loan originations and closings in the southern United States.

Bruce also worked previously as the president of Ranger Realty Group, a diversified real estate company that offered a complete spectrum of workout and lending services to the Resolution Trust Corporation (RTC), Federal Deposit Insurance Corporation (FDIC) and other investors handling troubled portfolios. Such services included asset management, property management, property analysis, leasing, brokerage, construction and development services. Bruce has also served as an advisor to water districts, housing agencies and the Department of Housing and Urban Development. He earned a B.S. in finance from the University of Houston and passed the CPA exam in 1993.

William M. O'Connor



William M. O'Connor is a partner and management board member of Crowell & Moring LLP and chairs the firm's Financial Services group. Bill leads a New York-based creditor's rights team that represents leading financial institutions, special servicers, hedge funds and real estate opportunity funds. Bill is a nationally recognized leader known for his expertise in CMBS special servicing and related aspects of loan workouts, frequently speaking on such issues throughout the country.

He concentrates his practice on creditor's rights litigation, loan workouts, loan portfolio sales and acquisitions, rescue financing, bankruptcies, restructurings, ICC arbitrations, international documentary credits, multinational insolvencies and restructurings, and Foreign Sovereign Immunity Act cases. Bill also has an active international practice involving infrastructure and project finance.

Bill obtained his law degree in 1980 from Fordham University, where he was articles editor of the Fordham International Law Journal and a member of the Jessup International Moot Court Team. He received his bachelor of science degree in 1977 from Fordham. Bill is admitted to practice in New York and New Jersey.

Mark Weibel



Mark Weibel leads the Commercial Real Estate Practice Group in the Dallas location, and he leads Fulbright & Jaworski L.L.P.'s firm-wide Securitization Practice Group. As a partner in the Dallas location, Mark focuses on all phases of commercial real estate and business transactions.

Specifically, Mark represents financial institutions and private-equity groups, with a focus on special servicers in the CMBS market and other related loan workout environments. He also provides transactional support when defaulted commercial real estate projects transition into bankruptcy and litigation.

Mark also routinely counsels Fortune 100 companies with their commercial real estate needs (e.g. financing, acquisition, disposition, development and leasing). Finally, in collaboration with Fulbright's Public Law Section, Mark represents various cities throughout Texas with their public/private partnership commercial real estate developments.

Mark's clients benefit from his years of experience counseling clients on a variety of real estate finance matters. Having prior experience with a major Wall Street investment firm, his experience in the capital markets provides a unique benefit to his clients and their real estate and real estate finance transactions.

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About Crowell & Moring

Crowell & Moring LLP is an international law firm with more than 500 lawyers practicing in litigation, antitrust, financial services, government contracts, health care, corporate, intellectual property and a variety of other practice areas. More than two-thirds of the firm's attorneys regularly litigate disputes on behalf of domestic and international corporations, start-up businesses, and individuals. Crowell & Moring's extensive client work ranges from advising on one of the world's largest telecommunications mergers to representing governments and corporations on international arbitration matters. Based in Washington, D.C., the firm also has offices in New York, London, Brussels, Anchorage, Los Angeles, San Francisco and Orange County, CA.

www.crowell.com

About Midland Loan Services / PNC Real Estate Finance

PNC Real Estate | Midland Loan Services, Inc. is a leading third-party provider of servicing, asset management and technology solutions for the commercial real estate finance industry. One of the largest commercial loan servicers, Midland's portfolio totaled \$295 billion at Dec. 31, 2009. Midland is the special servicer for 181 CMBS transactions with balances of \$107 billion. Midland is the only company with the highest U.S. primary, master and special servicer ratings from both Fitch Ratings and Standard & Poor's.

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