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Commercial Real Estate Loan Guaranty Enforcement

Maximizing Lender Recovery Upon Borrower Default

THURSDAY, APRIL 14, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Henry P. Lorber, Managing Director, **Hays Financial Consulting**, Atlanta

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Real Estate Finance:

**“It’s Not Over Till It’s
Over”** - Yogi Berra 1973

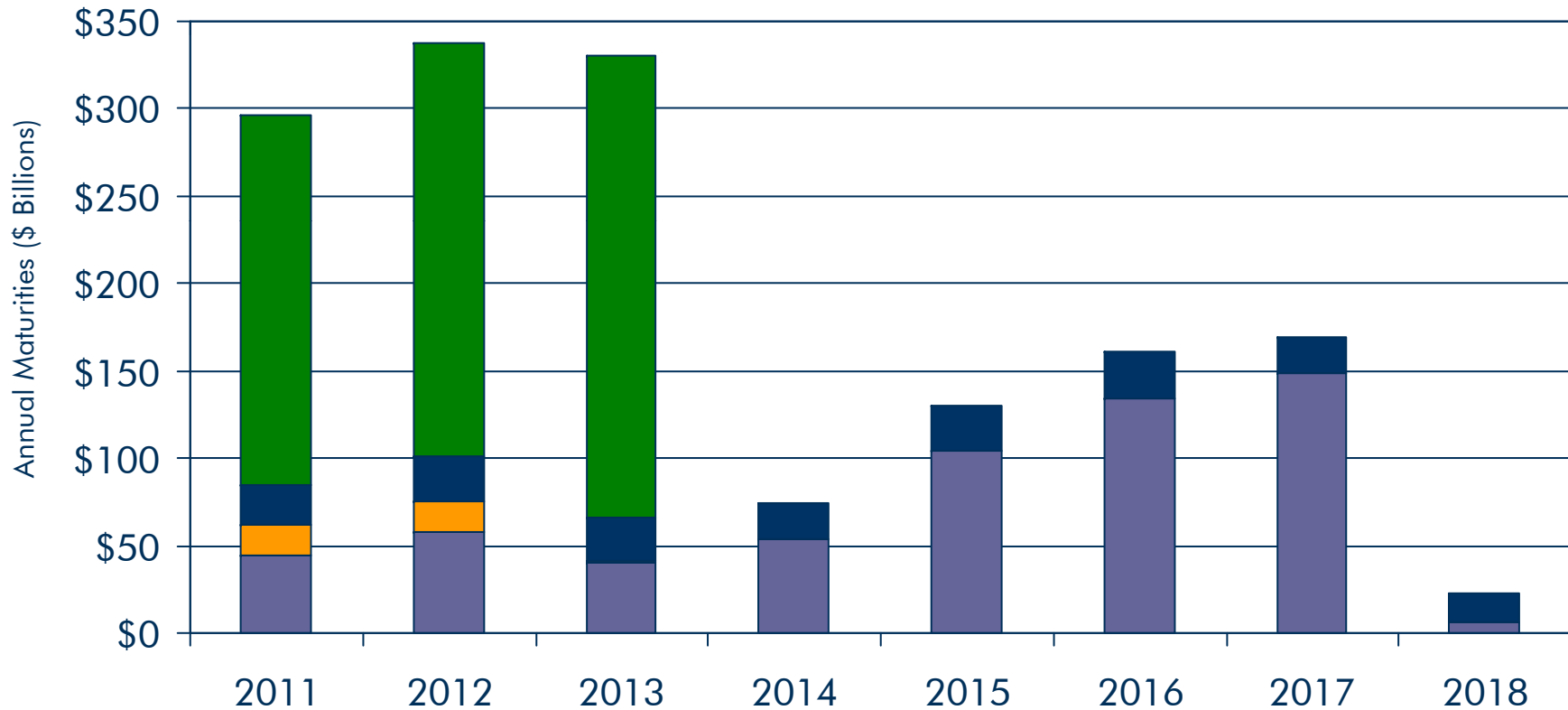
Henry P. Lorber

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Mortgage Backed Securities (CMBS)

Estimated maturity profile of commercial mortgages in CMBS, Banks and Life Companies

■ CMBS - Fixed Rate
 ■ CMBS - Floating Rate
 ■ Insurance Company
 ■ Bank/Thrift



Source: Deutsche Bank, Intex, Trepp Mortgage Bankers Association, Federal Reserve

Annual maturities (\$billion) in CMBS, banks and life companies

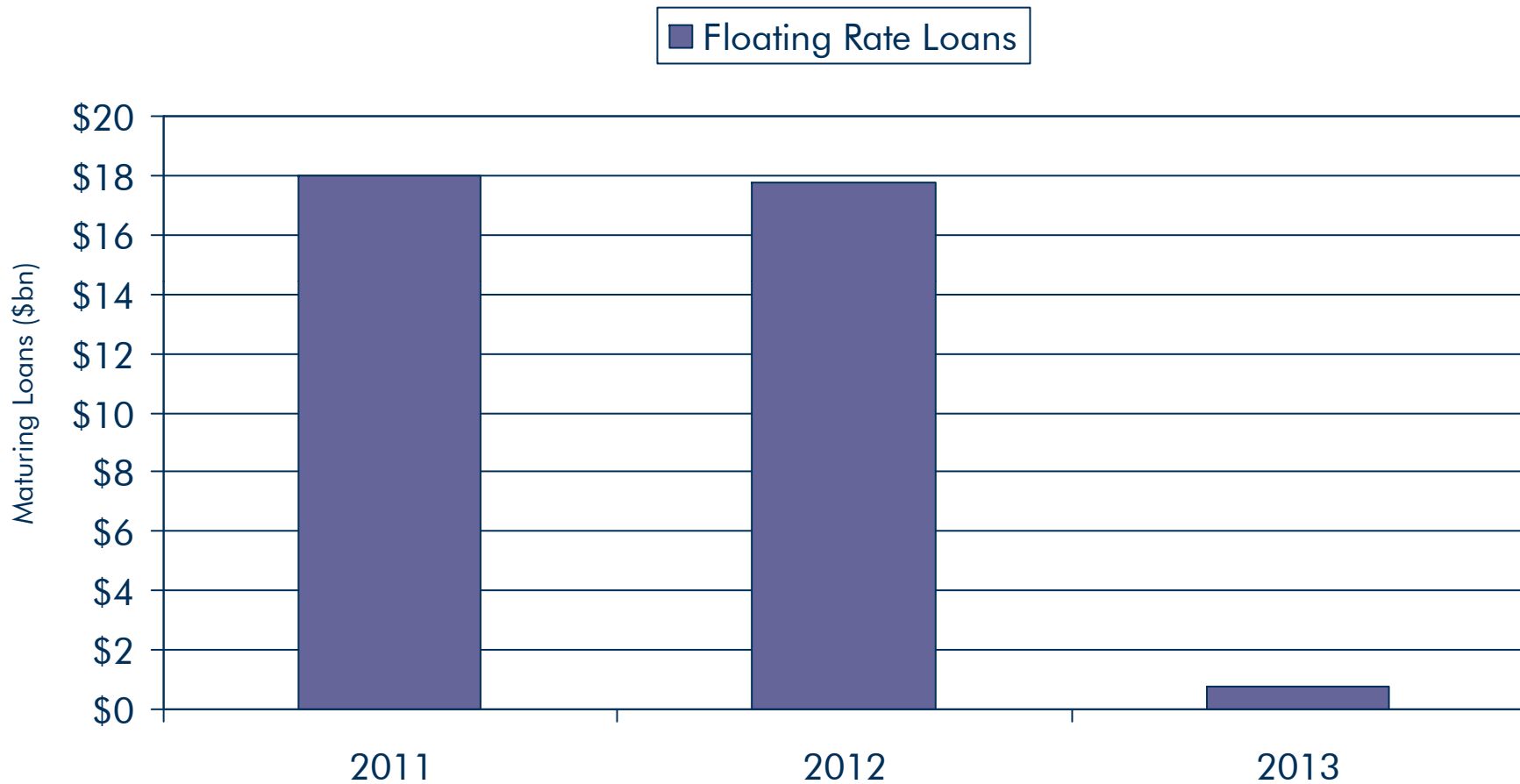
Year	CMBS – Fixed Rate	CMBS Floating Rate	Insurance Company	Bank/Thrift *	Annual Totals
2011	44.1	17.8	23.1	210.9	295.9
2012	57.6	17.7	26.1	236.2	337.6
2013	40.9	0.7	24.8	264.6	331
2014	54.2		20.6		74.8
2015	104.5		25.7		130.2
2016	133.9		27.3		161.2
2017	148.2		21.4		169.6
2018	6.1		16.3		22.4
Total (\$bn)	639.3	43.9	221.9	1068.2	1973.3

65% Interest Only

* Maturity timing is estimated

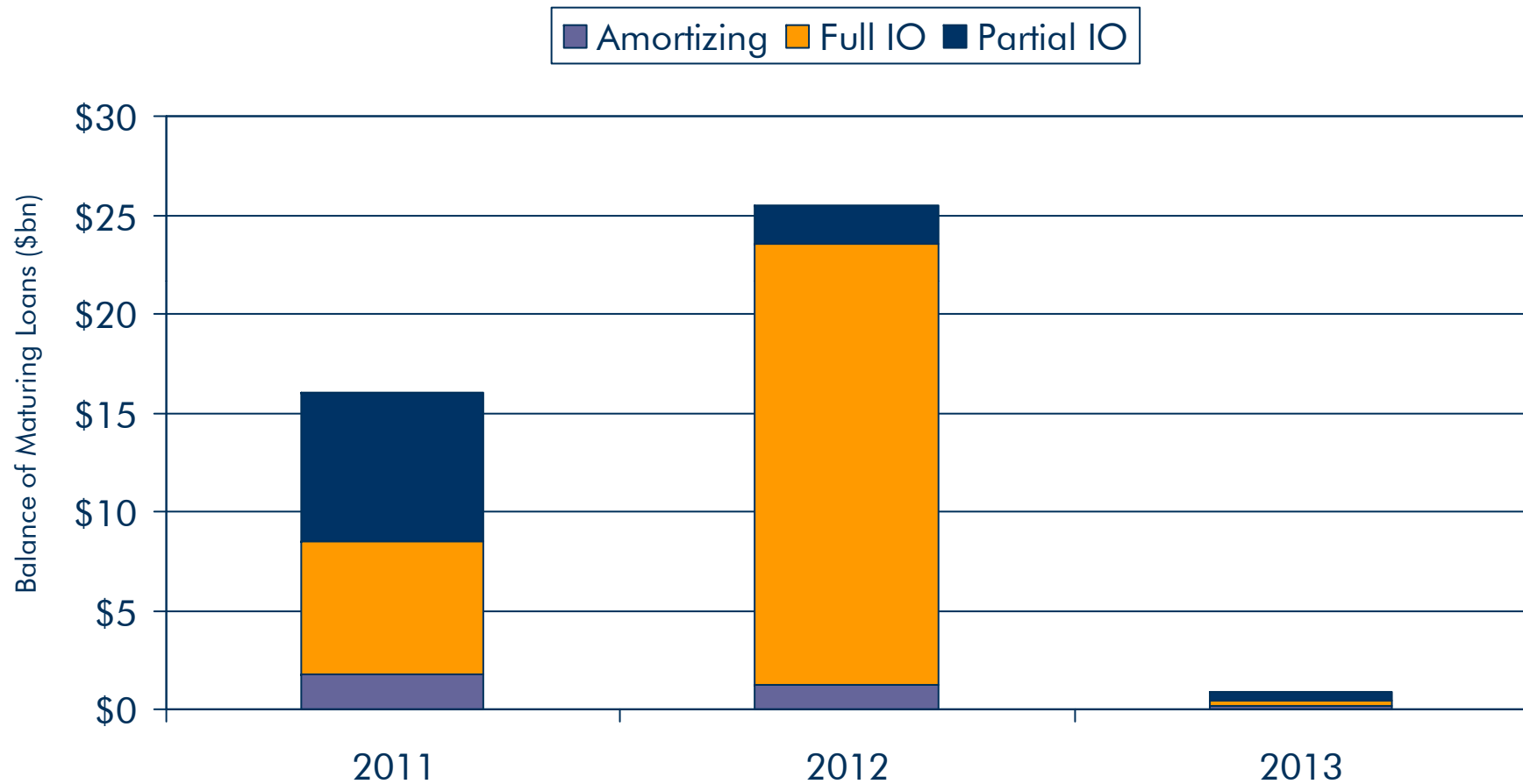
Source: Deutsche Bank, Intex, Trepp Mortgage Bankers Association, Federal Reserve

Maturity profile of floating rate CMBS loans



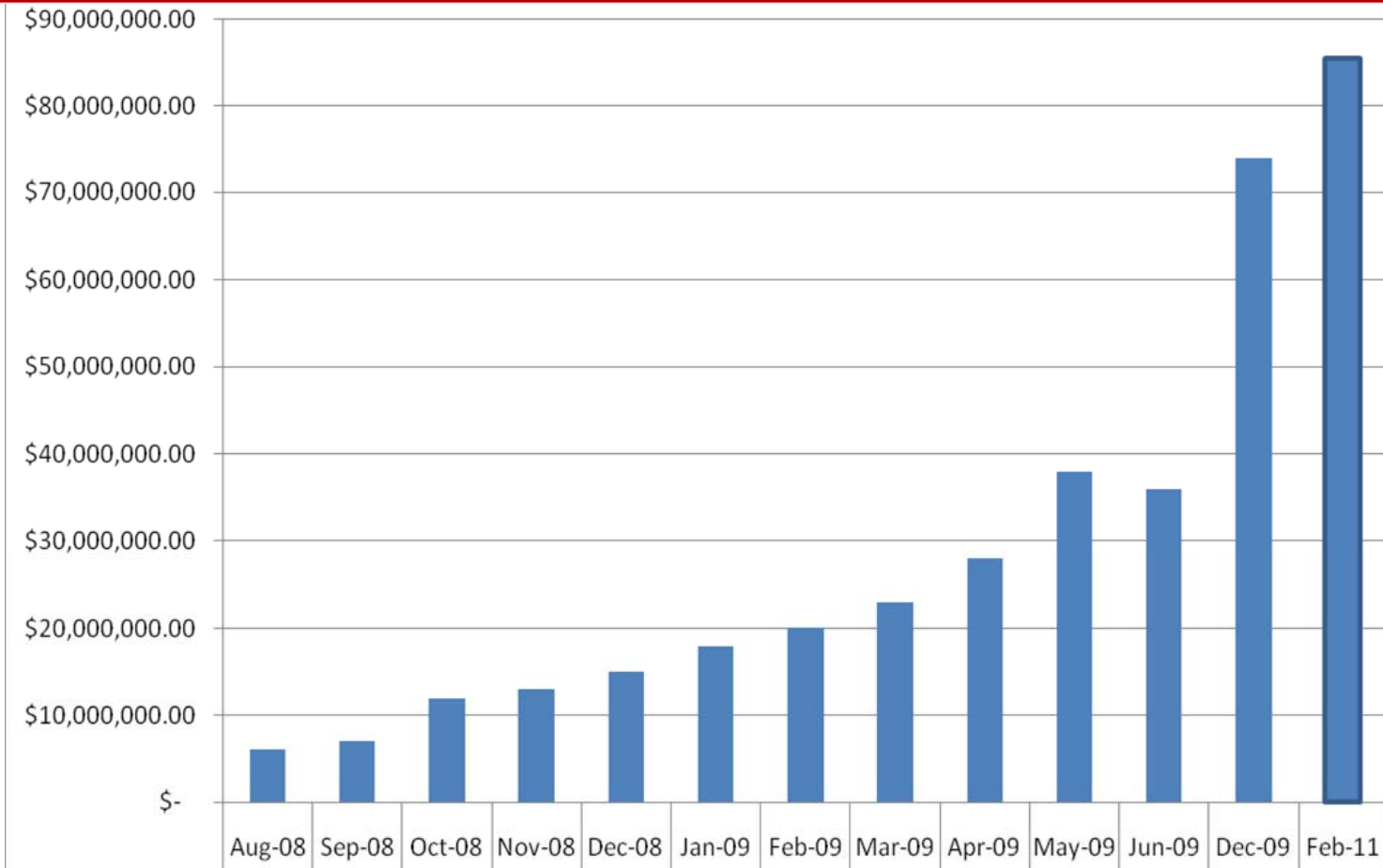
Source: Deutsche Bank, Intex, Trepp

Short term fixed rate CMBS loans maturing through 2013



Source: Deutsche Bank, Intex, Trepp

Why Special Servicers Look so Tired?

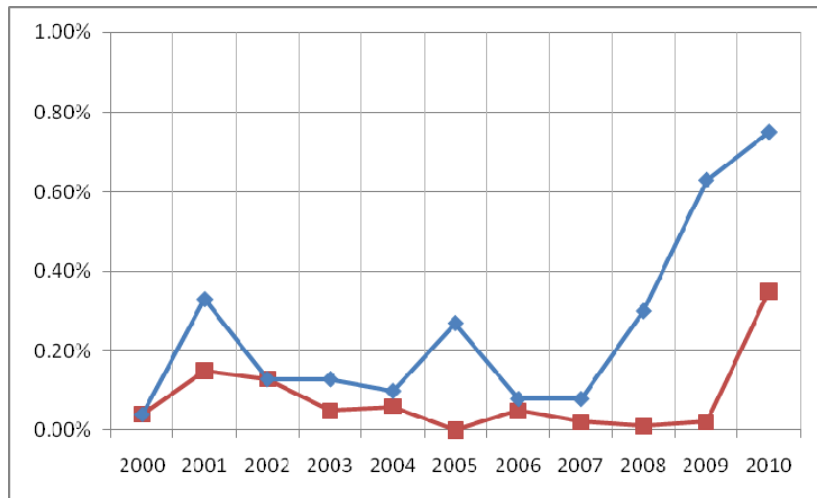


Source: Trepp LLC

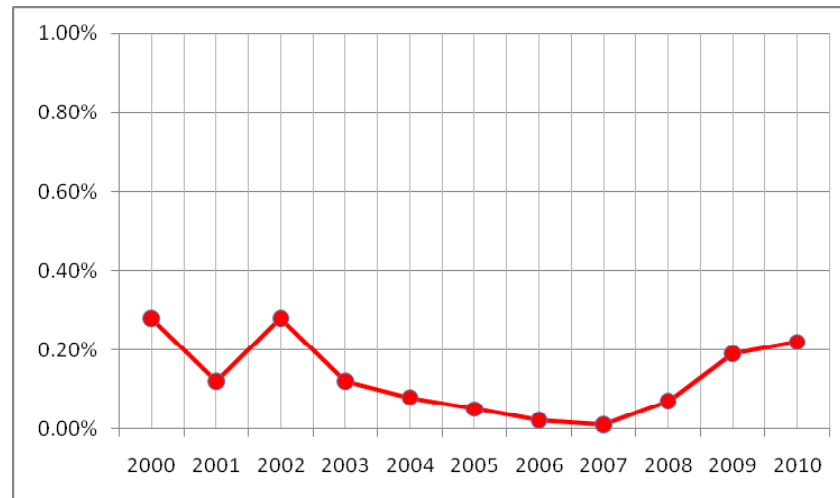
The number of loans in special servicing for February 2011 totals 4,783.

The Truth about the GSEs?

Fannie Mae & Freddie Mac (60+ days)

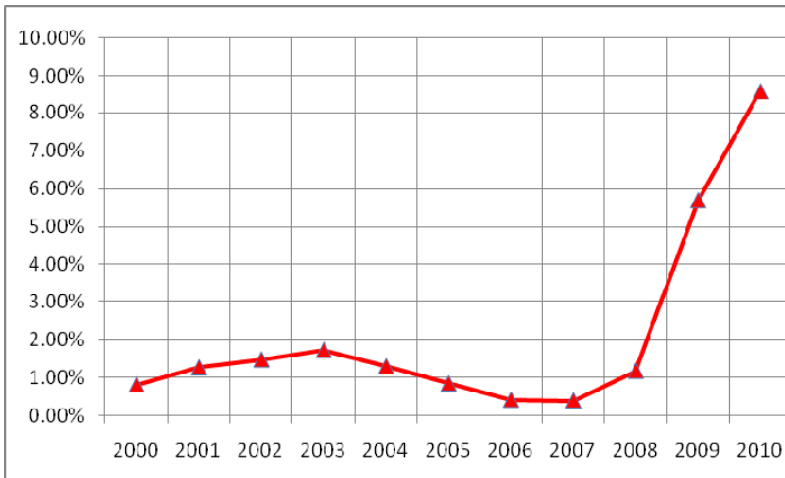


Life Companies (60+ days)

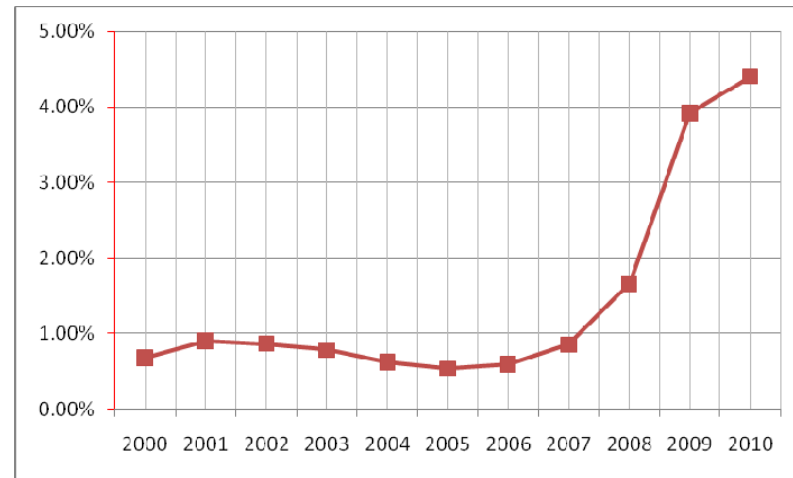


CMBS + BANKS

CMBS (30 days+ and REO)



Banks & Thrifts (90+ days)



Money Center Banks Concentration Ratios 8-26-09

**Over 300%
is a problem**

	Tot Lns & Lses (Incl Lns HFS) (\$000)	Dom RE: Constr & Land Dev (\$000)	Dom RE: Other Property Loans (\$000)	Total Capital (\$000)	Const + Non- Owner CRE / Total R-B Cap
	2009 Q2	2009 Q2	2009 Q2	2009 Q2	2009 Q2
Bank of America Corp.	1,001,372,926	40,918,699	38,552,463	255,779,033	31%
BB&T Corp.	100,334,283	15,914,446	6,759,472	17,360,547	131%
Bank of New York Mellon	39,936,000	455,000	1,025,000	19,273,000	8%
Citigroup, Inc.	672,440,000	2,645,000	10,439,000	165,424,000	8%
Comerica Incorporated	46,589,042	4,692,910	2,919,877	10,722,202	71%
Capital One Financial Corp.	101,956,314	3,368,326	8,873,781	17,375,486	70%
JPMorgan Chase & Co.	694,045,000	8,977,000	13,422,000	167,767,000	13%
KeyCorp.	71,711,747	6,265,411	5,452,572	16,001,840	73%
Marshall & Ilsley Corp	48,183,144	6,847,780	5,765,560	7,306,555	173%
M&T Bank Corp.	52,714,644	5,558,833	8,235,801	7,742,110	178%
PNC Financial Services Group	169,708,016	11,459,795	14,029,527	33,381,626	76%
Regions Financial Corp	98,138,538	11,033,366	9,708,173	17,894,467	116%
Synovus Financial Corp.	27,933,298	7,960,546	4,252,753	3,836,405	318%
US Bancorp	189,368,000	10,067,000	12,464,000	30,039,000	75%
Wells Fargo & Company	869,018,000	38,221,000	42,682,000	144,984,000	56%
				Average	93%

Concentration Ratios by Banks over \$1 Billion

Over 300% is a problem

Above \$1 Billion Assets

Average:

435.00%*

Median:

371.00%*

Bank Charter	City	TOTAL ASSETS (\$000)	2Q-2009 CRE Concentration as a % of capital
SunTrust Bank	Atlanta	170,139,951	87.31%
United Community Bank	Blairsville	8,493,727	326.30%
Columbus Bank & Trust Co. (Synovus)	Columbus	6,595,714	281.51%
Bank of North Georgia (Synovus)	Alpharetta	5,627,046	437.29%
Ameris Bank	Moultrie	2,279,505	325.04%
AFB&T (Synovus)	Athens	1,621,664	350.40%
Georgia Bank & Trust of Augusta	Augusta	1,305,259	346.88%
Community Bank & Trust	Cornelia	1,302,529	491.88%
Colony Bank	Fitzgerald	1,291,183	333.13%
Park Avenue Bank	Valdosta	1,275,495	433.67%
Atlantic Southern Bank	Macon	1,102,097	610.09%
Brand Banking Co.	Lawrenceville	1,098,426	370.81%

* Without SunTrust

Concentration Ratios by Asset Size - Continued

Over 300% is a problem

Above \$500 Million Assets

Average:

429.58%

Median:

370.81%

Bank Charter	City	Total Assets (\$000)	2Q-2009 CRE Concentration as a % of capital
Heritage Bank	Hinesville	996,506	349.79%
Darby Bank & Trust Co.	Vidalia	904,690	368.99%
Queensborough Nat'l Bank & Trust Co.	Louisville	874,362	323.06%
First National Bank of Georgia	Carrollton	848,293	805.05%
First Georgia Banking Co.	Franklin	794,800	380.87%
Sea Island Bank (Synovus)	Statesboro	766,923	397.44%
First State Bank	Stockbridge	679,700	467.18%
Savannah Bank, NA	Savannah	676,852	319.70%
SB&T Bank (Synovus)	Albany	640,427	293.49%
Farmers & Merchants Bank	Lakeland	638,841	394.13%
Coastal Bank of Georgia (Synovus)	Brunswick	614,438	425.08%
CB&T Bank of Middle Georgia (Synovus)	Warner Robins	585,471	364.30%
First Chatham Bank	Savannah	580,673	372.30%
Northwest Georgia Bank	Ringgold	577,898	328.49%
First State Bank & Trust of Valdosta (Synovus)	Valdosta	563,352	295.37%
Commercial Bank (Synovus)	Thomasville	562,805	326.35%

Concentration Ratios by Asset Size - Continued

Over 300% is a problem

Below \$500 Million Assets

Average:

425.48%

Median:

408.50%

Bank Charter	City	TOTAL ASSETS (\$000)	2Q-2009 CRE Concentration as a % of capital
Gwinnett Community Bank	Duluth	499,621	426.10%
Georgia Bank & Trust (Synovus)	Calhoun	488,528	351.15%
First Bank of Georgia	Augusta	488,179	386.66%
Heritage Bank	Jonesboro	461,380	421.63%
Coastal Bank	Savannah	457,747	440.85%
Bank of Georgia	Peachtree City	447,560	527.84%
PrimeSouth Bank	Blackshear	438,323	303.86%
Bartow Co. Bank	Cartersville	434,629	318.30%
McIntosh State Bank	Jackson	426,231	386.31%
Peoples Bank & Trust	Buford	423,955	376.35%
Bank of Hiawassee	Hiawassee	422,232	587.83%
Southeastern Bank	Darien	406,007	310.70%
Community Bank of the South	Smyrna	390,038	457.68%
Douglas Co. Bank	Douglasville	389,413	535.90%
McIntosh Commercial Bank	Carrollton	389,001	581.20%

Estimated percentage of loans that do not qualify for refinancing: NOI Scenario 1

Loans Maturing 2009-2012

Refinancing Requirement: LTV < 70 & DCSR > 1.3

Property Type	# Loans	Balance (\$BB)	Loans Not Qualifying (#)	Loans Not Qualifying (\$BB)	% Not Qualifying (Loan Count)	% Not Qualifying (Balance)
Hotel	475	7.3	182	4.1	38.3	55.5
Industrial	1,189	5.8	330	2.2	27.8	37.9
Multi-family	3,793	24.4	2,220	18.9	58.5	77.3
Office	2,629	40.9	1,433	30.8	54.5	75.3
Retail	4,156	44.6	1,727	24.6	41.6	55.1
Multi Property	672	29.6	339	21.1	50.4	71.3
Other	1,545	12.0	639	8.7	41.4	71.9
Aggregate	14,459	164.7	6,870	110.3	47.5	66.9

* Maturity timing is estimated

Source: Deutsche Bank, Intex, Trepp Mortgage Bankers Association, Federal Reserve

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NON-RECOURSE CARVE OUT GUARANTIES

Presented by:
Stephen D. Peterson, Partner
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Types of Loans in Which Non-Recourse Carve Outs Appear

- CMBS Loans
- Life Company Loans
- Any Non-Recourse Loan

CMBS Separateness Covenants

- Separate borrower from other related party activities
- Entity subject to separateness covenants is called an “SPE”

Separateness Covenants Prohibit SPE Borrowers from:

- Engaging in business other than ownership, operation and maintenance of collateral property;
- Acquiring assets other than the collateral property;
- Merging with another entity;
- Incurring debt other than the subject loan; and
- Commingling borrower's assets with assets of any other person

Theoretical Benefit of Separateness

- Isolates both the lender's collateral and makes the SPE “bankrupt remote”

Recourse Triggers

- Partial Recourse Triggers
- Full Recourse Triggers

Partial Recourse Triggers

- Misapplication of insurance proceeds, condemnation proceeds or security deposits
- Waste
- Failure to pay taxes or assessments
- Environmental liability
- Fraud or failure to disclose a material fact

Full Recourse Triggers

- Violation of the Separateness Covenants
- Breach of Due-on-Sale or Due-on-Transfer clause
- Filing of voluntary or involuntary bankruptcy

Separateness and Non-Recourse Guaranties Put to the Test - GGP

- Bankruptcy filed April 16, 2009
- Approximately 80 SPE entities included in bankruptcy
- Non-Recourse Guarantors Filed for Bankruptcy
- Bad faith arguments rejected

Outcome

- Bankruptcy Court asserted jurisdiction to modify loans
- Plan confirmed December 15, 2009
- Maturity Dates Extended
- Interest Rates Adjusted

GGP Issues for Practitioners

- New tools for distressed borrowers
- Consider whether to issue non-consolidation or REMIC opinions

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Review of Examples of Commercial Loan Guarantees

Please print and follow the PDF handout, “Tarnower – Guaranty Enforcement,” during this portion of the presentation. The handout is accessible under the “Handouts” tab in the “Conference Materials” section on the left panel of your screen and also at the following link: <http://www.straffordpub.com/products/commercial-real-estate-loan-guaranty-enforcement-2011-04-14>

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Payment Guaranty

- New Fannie Mae form See efanniemae.com.
- Obligations
- Community Property
- Cross Default
- Waivers

New Fannie Mae Form

- Changes have no effect on Obligations
- Joint and Several Liability
- Credit Report/Credit Score
- Jurisdiction

Schedule 1

State-Specific Provisions

- Waiver provisions – various states
- Commercial Transaction - Connecticut
- No Oral Agreements – Iowa, Oregon, Washington
- Indebtedness - Kentucky

Limited Guaranty

- Cap or percent of principal
- Limit to specific agreements
- Limit to largest amount outstanding starting with signature
- See if spouse included

Limited Guaranty

- Revocation of future transactions
- Limit liability of estate
- Reasonable costs and expenses
- Arbitration

Limited Guaranty

- Limit collateral
- Limit reps and warranties
- Limit time frame
- Remember to ask!

Applicable State Laws

- Suretyship
- Waiver of jury trial
- Notice
- Dispute resolution methods

Remember:

- Try to negotiate.
- Read every word.
- Explain liabilities to guarantor.
- Explain time frame to guarantor.
- Explain collateral affected to guarantor.



EMERGING TRENDS AND RECENT LEGAL DEVELOPMENTS

Presented by:

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Non-Recourse Guaranties

Two recent decisions may indicate the future direction of the enforcement of non-recourse carve-out provisions

CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC –980 A.2d 1 (N.J. Super. 2009).

- Loan documents and guaranties contained carve out provision requiring lender approval of subordinate financing
- Borrower secured subordinate financing without lender approval
- Borrower paid off subordinate financing, but defaulted on primary loan 18 months later

CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC –980 A.2d 1 (N.J. Super. 2009).

- Borrower triggered non-recourse carve out provision by failing to obtain Lender approval of subordinate financing
- Did not matter that the Lender did not suffer damages as a result of the subordinate debt

CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC –980 A.2d 1 (N.J. Super. 2009).

“Having freely and knowingly negotiated for the benefit of avoiding recourse liability generally, and agreeing to the burden of full recourse liability in certain specified circumstances, defendants may not now escape the consequences of their bargain.”

111 Debt Acquisition LLC v. Six Ventures, LTD, 2009 U.S. Dist. LEXIS 11851 (S.D. OH 2009)

- Borrower filed bankruptcy in violation of non-recourse carve out clause
- Bankruptcy filing was subsequently dismissed
- Court found filing constituted violation of “Springing Recourse Event”

111 Debt Acquisition LLC v. Six Ventures, LTD, 2009 U.S. Dist. LEXIS 11851 (S.D. OH 2009)

- One of the owner-guarantors argued he did not violate the carve-out provision, since he did not consent to the bankruptcy filing
- Court found guarantor could be held liable even though he did not approve of bankruptcy filing which triggered the springing recourse event

111 Debt Acquisition LLC v. Six Ventures, LTD,
2011 U.S. App. LEXIS 2464, 2011 FED App. 83N
(6th Cir., Feb. 7, 2011)

- Sixth Circuit upholds District Court ruling.

Other Decisions Finding Non-Recourse Carve-Out Provisions Enforceable

- *Blue Hills Office Park, LLC v. JP Morgan*, 477 F. Supp. 2d 366 (D. Mass. 2007) (transfer of mortgaged property without lender approval)
- *LaSalle v. Mobile*, 367 F. Supp. 2d 1022 (E.D. La. 2004) (amendment of articles of organization)

Other Decisions Finding Non-Recourse Carve-Out Provisions Enforceable

- *Heller Financial v. Lee*, 2002 U.S. Dist. LEXIS 15183 (N.D. Ill. August 12, 2002.) (filing of liens on property)
- *First Nationwide Bank v. Brookhaven Realty Assocs.*, 223 A.D.2d 618 (N.Y. App. Div. 1996) (filing of bankruptcy petition)

Other Decisions Finding Non-Recourse Carve-Out Provisions Enforceable

- *FDIC v. Prince George Corp.*, 58 F.3d 1041 (4th Cir. 1995) (filing of bankruptcy petition)

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Defenses

- Impairment of collateral
 - Material alteration of indebtedness
 - Release of co-guarantors
 - Revocation of continuing guaranty
-

Defenses

- Absence of default
 - Statute of frauds/limitations
 - Borrower defenses on underlying indebtedness
 - Lack of consideration/enforceability
-

Defenses

- Failure to hold commercially reasonable foreclosure sale
 - Negligent administration of loan
 - Fraudulent conveyance - bankruptcy
-