Workouts of financially distressed LLCs and partnerships is a complex process of accommodating the interest and rights of many competing stakeholders – financial and trade creditors, investors, LLC members or partners. Formulating feasible workout strategies depends on understanding the types of lenders involved, the residual value of the LLC’s assets and operations, the structure of underlying debts and obligations, and the practical tax and financial consequences to each stakeholder under various workout strategies. This program will provide you with a practical guide to formulating a range of feasible workout outcomes for LLCs and partnerships, understanding the tax and non-tax consequences of each, and preparing the underlying documents.

Day 1: September 11, 2012:

- Workout strategies for distressed partnerships and LLCs
- Evaluating an LLC’s assets and operations, business opportunities and industry position
- Identifying special debt issues – personal guarantees, performance bonds, priorities, and subordination
- Financial and non-tax impact of workouts on both LLC members/partners and the entity itself
- Tax issues, including recourse v. non-recourse considerations
- Special issues for attorneys – identifying your client and sources of payment

Day 2: September 12, 2012:

- Workout strategies for different types stakeholders – financial v. trade creditors, and equity holders
- Modifying liabilities – term, accrual v. payment, equity-for-debt, non-recourse carve-outs
- Using extension, forbearance and standstill agreements
- Obtaining additional credit for operating capital during the workout process
- Modifying equity rights – capital calls, priority returns, new capital from third party sources
- Planning for bankruptcy when voluntary workouts fail

Speaker:

Rob Charles is a partner in the Las Vegas and Tucson offices of Lewis and Roca, LLP, where he represents clients in business bankruptcy cases, commercial lawsuits and business transactions. He represents both secured and unsecured creditors, as well as debtors, in all aspects of Chapter 11 business bankruptcy cases before the bankruptcy courts and on appeal. Mr. Charles is a contributor to the Norton Bankruptcy Law
Adviser and is an adjunct professor of law at the University of Arizona College of Law. He is a member of the American Bankruptcy Institute. Mr. Charles received his B.A. and his J.D. from the University of Arizona.
PROFESSIONAL EDUCATION BROADCAST NETWORK

Speaker Contact Information

Workouts of Troubled LLCs and Partnerships,
Part 1 & Part 2

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VT Bar Association Continuing Legal Education Registration Form

Please complete all of the requested information, print this application, and fax with credit info or mail it with payment to: Vermont Bar Association, PO Box 100, Montpelier, VT 05601-0100. Fax: (802) 223-1573

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I will be attending:

**Workouts of Troubled LLCs & Partnerships, Part 1**
**Teleseminar**
**September 11, 2012**

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Date: September 11, 2012

Seminar Title: Workouts of Troubled LLCs & Partnerships, Part 1

Location: Teleseminar

Credits: 1.0 General MCLE

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E-Mail Address: _________________________________________________________________

I will be attending:

Workouts of Troubled LLCs & Partnerships, Part 2
Teleseminar
September 12, 2012

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Seminar Title: Workouts of Troubled LLCs & Partnerships, Part 2
Location: Teleseminar
Credits: 1.0 General MCLE

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LLC and Partnership Workouts

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3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
(702) 949-8320
Typical Scenarios – Underwater Versus Cash Flow Issues

• Meeting the Client – Triage
Identifying the Parties

- Client or prospective client(s)
- Owners
- Creditors
- Managers
- Affiliates or related parties
Operational Evaluation

• Is the business cash flowing
• Can the business be restructured into operational profitability
• Business opportunities
• Business hurdles
• If not, does the business have intrinsic value despite operational losses?
• Cash management and financial integration
• Integrity
Asset Evaluation

- Identify core assets
- Valuation
- Secondary or burdensome assets
- Insider related obligations, intercompany receivables, insider debt
Debt Service

• Identify debt
  – Secured
  – Unsecured
  – Interest rate
  – Prepayment premium and other returns
  – Other terms

• Identify liens and perfection

• Search for agreements on priority, subordination, distribution

• Insider related obligations, intercompany
Secondary Issues

- Insider guarantees and other obligations
- Performance bonds or similar obligations and associated indemnity
- Related parties, projects, synergies or liabilities
- Litigation
  - Pending
  - Threatened
  - Potential
- Hidden liabilities
  - Environmental
  - Speculative builder tax
  - Development agreement burdens
Management Evaluation

• Who is in charge

• Can the management restructure the business

• Credibility, Integrity
Restructuring Strategies

• Cash flow

• Assets
  – Disposition
  – Acquisition

• Sources of fresh debt

• Sources of fresh equity
• Modifying liabilities
  – Term
  – Interest rate
  – Amortization
  – Payment vs. accrual
  – Undisbursed loan funds or unfunded commitments; letters of credit
  – Tax, insurance and other escrows, impounds
  – Non-recourse carve outs and liability limitations
  – PIK
  – Conversion of debt to equity
  – Equity kicker
Restructuring Strategies

• Modifying equity or ownership rights
  – Capital call
  – Priority return
  – New capital
  – Voting and non-voting
  – Control
  – Default and consequences
  – Dilution, buy back and right of first refusal
• Out of the ordinary course transfers (acquisitions, dispositions, debt)
  – How did we get here
  – What did we get for the debt / obligation?
  – What did we give for the debt / obligation?
Loan Enforcement Timing Concerns

- Placing loan in default or not
- Why securitized loans may not want the loan in default
- Why the borrower may not want the loan in default
- Receiverships
Bankruptcy Related Timing Concerns

• Pre-foreclosure sale or eve of foreclosure?

• Transfers and bankruptcy timing
  – Preference
  – Fraudulent transfer
  – Lender liability or leverage buyout litigation

• Risk of involuntary bankruptcy petition

• Will a bankruptcy court need to see pre-bankruptcy efforts to
  – Sell assets
  – Resolve disputes
Retention of Counsel (Not The Last Question)

- Who is my client
- Sources of payment
- Anticipating bankruptcy and disinterestedness
Restructuring Issues – Creditors And Debtors

• Opening the Toolbag
Buying time

- Pre-negotiation agreement
- Extension agreement
- Forbearance or standstill agreement
- Modification agreement
• What do I get
  – How much time
  – Loan reinstatement or non-default
  – Waiver of late charges or penalties
  – Any more money
  – Any relief on terms, particularly current payment obligations
Issues

• What does it cost me
  – Cash
  – Collateral
  – Lockbox
  – Release / waiver
  – Acknowledgment of default
  – Guarantors
Debt Restructuring

• Focus on the needs of the parties
  – Lender
    ▪ Senior
    ▪ Junior
    ▪ Unsecured
  – Owner / Borrower
  – Insiders / Affiliates / Third parties
  – Related parties
Debt Restructuring

• With the existing lender
  – Capital constraints
  – Regulatory constraints

“The Federal Deposit Insurance Corp., the Federal Reserve, the Office of Thrift Supervision and the Office of the Comptroller of the Currency issued guidance stating that “prudent” workouts of commercial real estate loans are in the best interest of both banks and borrowers.” (Atlanta Business Chronicle, October 30, 2009)

– Borrower integrity / credibility
Debt Restructuring

- Are there sources of
  - Payment to lender
  - Additional collateral for lender
  - Third party assurances
• If a friendly party purchases the debt
  – Purchasing the debt at a discount
  – Implications of reworking debt before or after the debt is purchased
  – Representations to the selling lender

• After the debt is sold by the lender’s successor (e.g. FDIC receiver)
Raising capital

- New debt
- Subordinate liens
- New equity
Sale of assets

- Sale in lieu of foreclosure
- Auction and court order to provide clear title
- Rights of junior lienholders in bankruptcy sales
• Receivership basics
• Means of taking control without a change of ownership
• Sale out of receivership
What Can Bankruptcy Do For The Real Estate Investor

• Delay foreclosure and timing of transfer
• Recover possession of property from receiver
• Change the forum of collection litigation to bankruptcy court
Bankruptcy options - Facilitate sale of over-leveraged asset

- Impact on rights of redemption
- Preservation of going concern value
- Sale in lieu of foreclosure
Bankruptcy options - Modify secured loan terms

- Interest rate
- Term
- Amortization
- Collateral
- “Indubitable equivalent”
Other Bankruptcy Options

- Modify unsecured claims
- Assume or reject contracts and leases
- Convert debt to equity
- Restructure equity and protect new investment
- Liquidating plan may time disposition, allow secured creditor foreclosure, and provide one last test of market value
Bankruptcy options - Litigation

- Equitable subordination
- Bankruptcy actions (preference, fraudulent transfer)
Bankruptcy Hurdles
For The Real Estate Investor

• Cost
• Delay
• Impact on non-recourse loan provisions
Bankruptcy issues - Potential loss of control over the asset

• Appointment of a bankruptcy trustee
• Competing plan of reorganization
Bankruptcy issues - Feasibility

- Valuation
- Cash flow
- Speculative market appreciation
- Recapitalization
Bankruptcy issues - Contracts

- Rejection of a lease by a debtor landlord does not deprive the tenant of right of possession

- Limited ability to prevent termination of government entitlements
No third party (i.e. guarantor) discharge in bankruptcy

- Temporary injunction against collection from guarantor that makes a contribution
- Some courts require that the plan provide the creditor is paid in full
Bankruptcy issues – Secured creditors

- Single asset real estate rules
- Controlling vote of the secured creditor
- Prepayment premiums in bankruptcy court
- Secured creditor purchase of unsecured claims for voting power
• Absolute priority rule - no property received or retained by equity if claims are not paid in full (present value)

• New value exception to absolute priority rule
  – Uncertain
  – Fresh capital
  – Substantial
  – Necessary for the reorganization
Robert M. Charles, Jr. is a partner with Lewis and Roca LLP, where he represents clients in business bankruptcy cases, commercial lawsuits and business transactions. He primarily represents both secured and unsecured creditors, as well as debtors, in all aspects of Chapter 11 business bankruptcy cases before the bankruptcy courts of Arizona and Nevada and on appeal.

Mr. Charles is a fellow in the American College of Bankruptcy and is an adjunct professor of law at the University of Arizona College of Law.