

Table of Contents

CHAPTER 1 INDUSTRY BACKGROUND

I. LOAN ORIGINATION AND SECURITIZATION

§ 1:1	Introduction
§ 1:2	Historical perspective
§ 1:3	The participants
§ 1:4	—Loan originator/loan seller
§ 1:5	—The sponsors/guarantors
§ 1:6	—Certificate holders
§ 1:7	—The investment bankers
§ 1:8	—The servicers
§ 1:9	—The rating agencies
§ 1:10	—Trustee and fiscal agent
§ 1:11	The loan origination process
§ 1:12	Key securitization documents

II. LOAN SERVICING

§ 1:13	Introduction
§ 1:14	Servicer agreements
§ 1:15	Types of servicers: master and primary
§ 1:16	CMBS bifurcated servicing
§ 1:17	Servicing the credit-enhanced or guaranteed MBS
§ 1:18	Servicing conflicts among certificate-holders
§ 1:19	The administration of mortgage loans and roles of servicers generally
§ 1:20	Residential MBS servicing
§ 1:21	—Primary servicer responsibilities
§ 1:22	—Master servicer responsibilities
§ 1:23	Commercial MBS servicing
§ 1:24	—Primary servicer responsibilities
§ 1:25	—Master servicer responsibilities
§ 1:26	—Special servicer responsibilities
§ 1:27	Conclusion

III. DEAL DOCUMENTS

§ 1:28	Introduction
§ 1:29	Disclosure materials and underwriting agreements
§ 1:30	—Public v. Private
§ 1:31	Sale or pooling agreements
§ 1:32	Servicing agreements
§ 1:33	Security and custodial agreements

§	1:34	Credit enhancement
§	1:35	Organizational documents
§	1:36	Special purpose entities
	A.	RMBS TRANSACTIONS
§	1:37	Introduction
§	1:38	Equity—offering document
§	1:39	—Underwriting agreement of placement agency agreement
§	1:40	—Mortgage loan purchase agreement
§	1:41	—Pooling and servicing agreement
§	1:42	—Servicing agreement; assignment, assumption and recognition agreement
§	1:43	—Custodial agreement
§	1:44	Debt
§	1:45	—Indenture
§	1:46	—Servicing agreement
§	1:47	—Trust agreement
	B.	CMBS DOCUMENTS
§	1:48	Offering documents
§	1:50	—Collateral
§	1:51	——Mortgage pool disclosure
§	1:52	——Loan and property specific disclosure
§	1:53	——Appendices
§	1:54	—Mortgage loan seller underwriting guidelines
§	1:55	—Transaction parties and operative documents
§	1:56	—Securities structure
§	1:57	—Risk factors
§	1:58	—Yield and maturity considerations
§	1:59	—Miscellaneous provisions
§	1:60	Pooling and servicing agreement
§	1:61	—Mortgage loan servicing
§	1:62	——Master servicer
§	1:63	——Special servicer
§	1:64	——Servicer interaction
§	1:65	—Controlling class and directing holders
§	1:66	—Distributions on certificates
§	1:67	—Trustee
§	1:68	—Certificates
§	1:69	—Indemnification
§	1:70	—Servicer defaults
§	1:71	—Miscellaneous
§	1:72	Mortgage purchase agreement
§	1:73	—Conveyance of the mortgage loans

- § 1:74 —Representations, warranties, and covenants of the seller and depositor
- § 1:75 —Notice of breach; cure, repurchase, and substitution
- § 1:76 —Closing requirements

CHAPTER 2 TRUST REPRESENTATION

- § 2:1 Introduction
- § 2:2 Real party in interest
- § 2:3 Suit by a servicer
- § 2:4 Diversity jurisdiction
- § 2:5 Trustee delegation and limitation of power
- § 2:6 Privilege
- § 2:7 Conflicts of interest

CHAPTER 3 PRE-SECURITIZATION AND SECURITIZATION CLAIMS

I. INTRODUCTION

- § 3:1 Background

II. CLAIMS AGAINST SELLERS AND DEPOSITORS

A. POTENTIAL CLAIMS

- § 3:2 Contractual claims
- § 3:3 —Breach of contract
- § 3:4 —Breach of warranty
- § 3:5 ———Types of warranties
- § 3:6 ———The depositor and originator
- § 3:7 ———The loans
- § 3:8 ———Document defects
- § 3:9 ———Early payment defaults
- § 3:10 —Declaratory Judgment
- § 3:11 —Attorney’s fees
- § 3:12 —Indemnity
- § 3:13 Equitable claims—specific performance
- § 3:14 —Implied contracts and covenants
- § 3:15 —Unjust enrichment
- § 3:16 Tort claims—negligence
- § 3:17 —Negligent misrepresentation
- § 3:18 —Fraud
- § 3:19 —Breach of fiduciary duty
- § 3:20 —Securities fraud claims—the Securities Exchange Act
- § 3:21 ———The Securities Act

- § 3:22 —State Blue Sky laws
- § 3:23 —Class certification
- § 3:24 —Loans as securities

B. POTENTIAL RESPONSES

- § 3:25 Procedural issues—standing
- § 3:26 —Subject matter jurisdiction
- § 3:27 —Motion to dismiss for failure to state a claim
- § 3:28 Specific denials and defenses—no breach
- § 3:29 —Immaterial breach
- § 3:30 —Known breach
- § 3:31 —Proximate cause
- § 3:32 —Prompt notice
- § 3:33 —Mitigation
- § 3:34 —Full credit bid rule
- § 3:35 —Impossibility and sole remedy
- § 3:36 —Purchaser caused the breach
- § 3:37 —Breach of purchaser’s duty
- § 3:38 —Cure
- § 3:39 —Breach of good faith and fair dealing
- § 3:40 —Limitations and laches
- § 3:41 —Champerty
- § 3:42 —Res judicata

III. LITIGATION OF SPECIFIC LPA AND PSA PROVISIONS

- § 3:43 Specific representations and warranties
- § 3:44 —Default
- § 3:45 —Defense
- § 3:46 —Environmental
- § 3:47 —Escrow deposits
- § 3:48 —Financing statements
- § 3:49 —Fraud or untrue information
- § 3:50 —Origination, underwriting, and/or servicing
- § 3:51 —Terms
- § 3:52 —Proceeds
- § 3:53 —Qualified mortgage
- § 3:54 —Waivers
- § 3:55 Litigation involving other LPA and PSA provisions—documents
- § 3:56 —Modification
- § 3:57 —Notice and repurchase
- § 3:58 —Trustee obligation

CHAPTER 4 POST SECURITIZATION CLAIMS

§ 4:1 Introduction

§ 4:2 Potential claims—contractual claims

§ 4:3 —Breach of contract—trustee

§ 4:4 —Duty to monitor

§ 4:5 —Document duties

§ 4:6 —Event of default

§ 4:7 —Payment

§ 4:8 —Servicer

§ 4:9 —Servicing standard

§ 4:10 —Documents

§ 4:11 —Breach of Warranty

§ 4:12 —Trustee

§ 4:13 —Servicer

§ 4:14 —Declaratory judgment

§ 4:15 —Trustee

§ 4:16 —Servicer

§ 4:17 —Attorney’s Fees—trustee

§ 4:18 —Servicer

§ 4:19 —Indemnification

§ 4:20 —Trustee

§ 4:21 —Servicer

§ 4:22 —Tort claims

§ 4:23 —Negligence

§ 4:24 —Trustee

§ 4:25 —Servicer

§ 4:26 —Negligent Misrepresentation

§ 4:27 —Fraud

§ 4:28 —Trustee

§ 4:29 —Servicer

§ 4:30 —Securities laws

§ 4:31 —Trustee

§ 4:32 —Servicer

§ 4:33 —Breach of fiduciary duty

§ 4:34 —Trustee

§ 4:35 —Servicer

§ 4:36 Potential responses

§ 4:37 —Procedural—standing—third party beneficiaries

§ 4:38 —No action clause

§ 4:39 —Applied

§ 4:40 —Did not apply—futility

§ 4:41 —Did not apply—exempt

§ 4:42 —Subject matter jurisdiction

§ 4:43 —Motion to dismiss

§ 4:44 —Specific denials and defenses—damages

- § 4:45 —Limits on liability
- § 4:46 —Certificates of opinions
- § 4:47 —Ripeness

CHAPTER 5 BORROWER LITIGATION

I. BORROWER V. TRUST

A. ORIGINATION BASED CLAIMS

- § 5:1 Introduction
- § 5:2 Traditional financial markets and originator/lender liability
- § 5:3 Federal legislation
- § 5:4 —Truth in Lending Act
- § 5:5 —Home Ownership and Equity Protection Act
- § 5:6 The interplay between federal, state, and local legislation relating to predatory lending
- § 5:7 —Federal and regulatory levels
- § 5:8 —State and local levels
- § 5:9 —Practical implications
- § 5:10 —Pending legislation and regulation
- § 5:11 Standing and assignee claims and defenses
- § 5:12 —Assignee claims and defenses
- § 5:13 Potential common law theories of assignee liability for securitized loans
- § 5:14 —Aiding and abetting
- § 5:15 —Civil conspiracy
- § 5:16 —Joint Venture
- § 5:17 Conclusion

B. SERVICING BASED CLAIMS

- § 5:18 Introduction
- § 5:19 Borrower claims arising from matters requiring lender consent
- § 5:20 “Due on Sale” provisions
- § 5:21 Due on encumbrance clauses and restrictions against subordinated debt and mezzanine debt
- § 5:22 Loan assumptions
- § 5:23 Prepayment lockouts and prepayment premiums
- § 5:24 Release of funds held in reserve accounts
- § 5:25 Approvals of leases and lease terminations
- § 5:26 Breach of contract claims
- § 5:27 —Breach of oral agreements
- § 5:28 —Breach of express agreements
- § 5:29 —Breach of good faith and fair dealing

§	5:30	Tort claims
§	5:31	—Fraud and misrepresentation in connection with workouts
§	5:32	—Breach of fiduciary duty
§	5:33	—Negligent loan administration
§	5:34	—Interference with contracts
§	5:35	Statutory claims—Real Estate Settlement Procedures Act
§	5:36	—Fair Debt Collection Practices Act
§	5:37	—Fair Credit Reporting Act
§	5:38	—Gramm Leach Bliley Act
§	5:39	—Unfair trade practices
§	5:40	Differences, pitfalls and practical considerations of litigating issues in a securitization context as opposed to a traditional lending transaction

II. TRUST V. BORROWER

A. FRAUD AND WASTE

§	5:41	Introduction
§	5:42	The origin and evolution of waste doctrine
§	5:43	—Definition of waste
§	5:44	—Tort claims for waste
§	5:45	—Contract claims for waste
§	5:46	—Statutory claims for waste
§	5:47	—Overlapping claims for waste
§	5:48	Strategic considerations in pursuing waste claims—forum considerations
§	5:49	—Persons liable
§	5:50	—Evidence of conduct constituting waste
§	5:51	——Damage or removal of fixtures and improvements
§	5:52	——Negligence in failing to maintain a premises
§	5:53	——Failure to pay taxes or requirements as waste
§	5:54	——Diversion of rents as waste
§	5:55	——Other conduct constituting waste
§	5:56	—Timing of filing waste claims
§	5:57	—Expert proof considerations
§	5:58	—Affirmative defenses
§	5:59	Remedies
§	5:60	—Limitations on recovery
§	5:61	——The debt ceiling
§	5:62	——Impairment of collateral ceilings
§	5:63	—Breach of contract damages v. tort damages
§	5:64	——Loss in value of collateral/security
§	5:65	——Difference in market value and cost to repair
§	5:66	—Lost rents
§	5:67	—Punitive damages

- § 5:68 —Injunctive relief
- § 5:69 —Appointment of receiver
- § 5:70 —Continuing mortgagor/mortgagee relationship considerations

B. GUARANTEES AND “BAD BOY” CARVE OUTS

- § 5:71 Introduction
- § 5:72 Nonrecourse loans and nonrecourse carve outs to nonrecourse liability
- § 5:73 Nonrecourse carve outs involving nonsecuritized loans
- § 5:74 Limited resource carve outs in nonsecuritized loans—impairing lender’s access to the collateral
 - § 5:75 —Transferring money to borrower’s affiliates without consent
 - § 5:76 —Failing to pay property taxes
 - § 5:77 —Committing waste by failing to pay property taxes
- § 5:78 Full recourse carve outs enforced in nonsecuritized loans
 - § 5:79 —Permitting liens on the mortgaged property
 - § 5:80 —Commencing bankruptcy proceedings not resolved within 90 days
- § 5:81 Nonrecourse carve out litigation involving securitized loans
 - § 5:82 —Violating single purpose entity covenants: LaSalle Bank N.A. v. Mobile Hotel Properties, LLC
 - § 5:83 —Transferring a portion of the mortgaged property: Blue Hills Office Park, LLC v. JP Morgan Chase Bank and CFSB 1999-C1 Royal Street, LLC
 - § 5:84 —Facts of the case—the loan
 - § 5:85 —The zoning appeal
 - § 5:86 —The zoning appeal settlement
 - § 5:87 —Default and foreclosure
 - § 5:88 —Events subsequent to foreclosure
 - § 5:89 —The court’s decision—the borrower had no right to access reserves and the lender had no duty to work out the loan
 - § 5:90 —The zoning appeal and \$2 million settlement payment were mortgaged property
 - § 5:91 —The transfer of mortgaged property made the borrower fully liable
 - § 5:92 —The transfer of mortgaged property made the guarantors fully liable
 - § 5:93 —The borrower’s violation of single purpose entity covenants was an independent ground for full recourse liability
 - § 5:94 —Prejudgment interest and attorneys’ fees increased the full recourse judgment to \$17.5 million

§ 5:95	—————The role of counsel for the borrowers and guarantors
§ 5:96	———Lessons of the case
§ 5:97	—Obtaining subordinate financing without consent: CFSB. 2001-CP4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, et al.
§ 5:98	Conclusion
	C. FORECLOSURE
§ 5:99	Introduction
	1. LOAN ENFORCEMENT ISSUES SPECIFIC TO SECURITIZATION TRUSTS
§ 5:100	Overview
§ 5:101	—Comparison of RMBS and CMBS loans
§ 5:102	—The servicing of defaulted securitized mortgage loans
§ 5:103	—The servicing of defaulted RMBS loans
§ 5:104	—The servicing of defaulted CMBS loans
§ 5:105	Potential difficulties in establishing a securitization trust’s standing in a foreclosure action
§ 5:106	—General overview of standing
§ 5:107	—Establishing ownership of the loan
§ 5:108	——By possession of the note
§ 5:109	——By assignment of the mortgage
§ 5:110	—Establishing ownership of an RMBS loan
§ 5:111	—Establishing ownership of a CMBS loan
§ 5:112	—The consequences of failing to establish standing
§ 5:113	——Judicial foreclosure
§ 5:114	——Non-judicial foreclosure
§ 5:115	———Void vs. voidable foreclosure sales
§ 5:116	Conflicts of interest which may arise in connection with a foreclosure
§ 5:117	—Foreclosure of a RMBS loan
§ 5:118	—Foreclosure of a CMBS loan
§ 5:119	Factors which may impact a “work out” or modification of a securitized mortgage loan
§ 5:120	—General issues which may impact a RMBS loan
§ 5:121	—General issues which may impact a CMBS loan
§ 5:122	—Disincentives for RMBS servicers to “work out” or modify a defaulted loan
§ 5:123	—Incentives for CMBS servicers to “work out” or modify a defaulted loan
§ 5:124	The dilemma of investor tranches
§ 5:125	Contractual limitations on a “work out” or modification

- § 5:126 —Organizational obstacles to a “work out” of a RMBS loan
- § 5:127 —Organizational obstacles to a “work out” of a CMBS loan
- 2. SUBPRIME MORTGAGE INITIATIVES
- § 5:128 Generally
- § 5:129 Industry proposals
- 3. SPECIAL CONSIDERATIONS CONCERNING
CMBS LOANS AND OTHER LOANS MADE TO
OWNERS OF INCOME PRODUCING
PROPERTIES
- § 5:130 Generally
- § 5:131 Controlling cash flow from income producing properties
- § 5:132 Cash management
- § 5:133 Assignments of leases and rents
- § 5:134 Lender’s direct exercise of rights under an assignment of
leases and rents
- § 5:135 Receiver of rents
- § 5:136 Deficiency actions in connection with a CMBS loan
- § 5:137 —Anti-deficiency statutes
- § 5:138 —One-action rules

CHAPTER 6 RATING AGENCY CLAIMS

- § 6:1 Introduction
- § 6:2 Rating agency roles
- § 6:3 —Rating process
- § 6:4 —Use of ratings
- § 6:5 —NRSO status
- § 6:6 Potential claims—Securities Act 12(a)(2)
- § 6:7 —Securities Exchange Act §10(b)
- § 6:8 —Omission
- § 6:9 —Reliance on the “Bespeaks caution” doctrine
- § 6:10 —Scienter
- § 6:11 —Negligent misrepresentation and fraud
- § 6:12 —Breach of contract
- § 6:13 —Third party beneficiary claims
- § 6:14 —Adoption and entanglement
- § 6:15 Potential responses
- § 6:16 —First Amendment
- § 6:17 —Opinions
- § 6:18 —Actual malice
- § 6:19 —Pleading
- § 6:20 —Protection affirmed
- § 6:21 —Protection denied

- § 6:22 —Securities Act §11 exemption
- § 6:23 —Regulation FD exemption
- § 6:24 —Investors Advisers Act of 1940 exemption
- § 6:25 —Public policy
- § 6:26 —Credit Rating Agency Reform Act

CHAPTER 7 SECURITIZED LOANS IN BANKRUPTCY

- § 7:1 Introduction
- § 7:2 Cash collateral
- § 7:3 Bankruptcy remote entities—purpose and characteristics
- § 7:4 —Independent director litigation issues
- § 7:5 —Substantive consolidation litigation
- § 7:6 —“Creeping” substantive consolidation
- § 7:7 Automatic stay
- § 7:8 —Scope
- § 7:9 —Relief
- § 7:10 Dismissal
- § 7:11 —Inability to confirm plan
- § 7:12 —Bad faith filings
- § 7:13 —Procedure
- § 7:14 —Treatment of nonrecourse claims under §1111(b)
- § 7:15 —Secured and unsecured claims section 506
- § 7:16 —Applicable interest rate and default interest
- § 7:17 —Prepayment premiums (yield maintenance)
- § 7:18 Contract/lease rejection issues
- § 7:19 —Standing of securitization trust
- § 7:20 —Rejection claims
- § 7:21 —REMIC issues
- § 7:22 Bankruptcy sales
- § 7:23 Remedies against non-debtor guarantors—recourse carve-out guarantees
- § 7:24 —Stay of litigation against guarantor
- § 7:25 Chapter 11 plain issues—disclosure statement/solicitation process
- § 7:26 —Exclusivity
- § 7:27 —Potential treatment of the trust’s claims
- § 7:28 —Strategies and tactics
- § 7:29 The securitization trust and the roles of the master servicer, special servicer, and trustee in bankruptcy—the securitization trust as lender
- § 7:30 —Servicer standing
- § 7:31 —Transfer of securitized loan to SPE
- § 7:32 Before bankruptcy occurs: workouts and forbearance agreements in anticipation of bankruptcy

- § 7:33 Servicer bankruptcy issues—termination of servicing rights
- § 7:34 —Property of the estate

CHAPTER 8 OTHER CONSIDERATIONS

I. PERSONAL JURISDICTION AND VENUE

- § 8:1 Personal jurisdiction
- § 8:2 —Standards generally
- § 8:3 —Applying standards to securitized trusts
- § 8:4 ——Courts lacking jurisdiction
- § 8:5 ——Courts exercising jurisdiction
- § 8:6 —Practical considerations
- § 8:7 Venue
- § 8:8 —No forum selection clause—standards generally
- § 8:9 ——Applying standards to securitized trusts
- § 8:10 ———Improper venue
- § 8:11 ———Proper venue
- § 8:12 —Forum selection clause—standards
- § 8:13 ———Mandatory
- § 8:14 ———Permissive
- § 8:15 ——Applying standards to securitized trusts—improper venue
- § 8:16 ———Proper venue

II. COMPLEX LOAN STRUCTURES

A. OVERVIEW OF COMPLEX SECURITIZED REAL ESTATE FINANCINGS

- § 8:17 Introduction

B. SINGLE LOAN STRUCTURES

- § 8:18 Overview of single loan structures
- § 8:19 Co-lending and syndication agreements
- § 8:20 —A comparison of *pari passu* and senior/subordinate note structures
- § 8:21 —The parties involved
- § 8:22 —Servicing standard
- § 8:23 —Note holder consent and/or consultation rights; controlling holder
- § 8:24 —The documents involved
- § 8:25 Participations
- § 8:26 —The parties involved
- § 8:27 —The documents involved

- § 8:28 Securitizations of single loans
- § 8:29 —The parties involved
- § 8:30 —The documents involved

C. MULTIPLE LOAN STRUCTURES

- § 8:31 Overview of multiple loan structures
- § 8:32 Senior/subordinate mortgage loan structures
- § 8:33 —The parties involved
- § 8:34 —The documents involved
- § 8:35 Mortgage/mezzanine loan structures
- § 8:36 —The parties involved
- § 8:37 —The documents involved
- § 8:38 Mortgage/loan preferred equity investment structures
- § 8:39 —The parties involved
- § 8:40 —The documents involved

D. POTENTIAL LITIGATION ARISING FROM COMPLEX LOAN STRUCTURES

- § 8:41 Overview
- § 8:42 Administrative issues
- § 8:43 —Proving ownership of a complex loan in connection with the exercise of remedies against the applicable borrower
- § 8:44 —Giving notice to the parties that own the applicable loan (or interests therein) in connection with the exercise of rights under an intercreditor, participation or other similar agreement
- § 8:45 Litigation issues
- § 8:46 —Determining which entity in a single loan structure is entitled to enforce the loan
- § 8:47 —Determining what duties, if any, are owed to the other lenders or interest holders in a single loan structure
- § 8:48 —Conflicts of interest which may arise in connection with the enforcement of a complex loan structure
- § 8:49 —Disputes among note holders or participants in connection with consent rights in single loan structures
- § 8:50 —Protection of a subordinate lender’s or interest holder’s interest in a complex loan structure
- § 8:51 —Legal and practical restraints on the ability to modify a loan which is part of a multiple loan structure
- § 8:52 —Rights against prior owners of the loan or interests therein
- § 8:53 Issues which arise in connection with a bankruptcy of a borrower, lender, or interest holder
- § 8:54 —”Cram down” risk associated with complex loans

- § 8:55 —Risks associated with a subordinate mortgage lenders' bankruptcy
- § 8:56 —Risks created by the bankruptcy of an interest holder in a single loan structure

E. COMPLEX COLLATERAL

- § 8:57 The effect of complex collateral on loan enforcement
- § 8:58 —Resort properties
- § 8:59 ——Operating businesses
- § 8:60 ——Bankruptcy lien issues
- § 8:61 —Casino properties
- § 8:62 —Foreign properties
- § 8:63 ——Limitations on ownership of foreign properties
- § 8:64 ——Currency risk issues
- § 8:65 ——Sovereign or political issues
- § 8:66 —Nursing home properties
- § 8:67 ——Nursing home expenses
- § 8:68 ——Nursing home revenue
- § 8:69 ——Nursing home regulatory issues
- § 8:70 —Opco/propco structuring
- § 8:71 ——Opco/propco bankruptcy risks

III. COLLECTION OF LIQUIDATED AMOUNTS COMMONLY PAYABLE UNDER SECURITIZED LOANS

- § 8:72 Introduction

A. PREPAYMENT PREMIUMS

- § 8:73 Payment in the absence of a contractual or statutory provision
- § 8:74 Contractual provisions prohibiting prepayment
- § 8:75 Statutory provisions prohibiting prepayment
- § 8:76 Bankruptcy considerations regarding the right to prepay

B. ENFORCEABILITY OF PREPAYMENT PREMIUMS

- § 8:77 Lender's right to be compensated for the privilege of prepayment
- § 8:78 Borrower's objections to prepayment premiums
- § 8:79 —Unlawful penalty
- § 8:80 —Unlawful restraint on alienation
- § 8:81 —Involuntary prepayment upon acceleration
- § 8:82 —Involuntary prepayment by reason of a due-on-sale clause
- § 8:83 —Involuntary prepayment caused by circumstances beyond the borrower's control

- § 8:84 —Excessive fee
- § 8:85 Statutory provisions regarding prepayment premiums
- § 8:86 Bankruptcy considerations regarding prepayment premiums

C. LATE PAYMENT CHARGES

- § 8:87 Generally
- § 8:88 Application of late payment charges to escrow amounts and the unpaid principal balance
- § 8:89 Late payment charges after acceleration and/or commencement of suit
- § 8:90 Approaches to enforceability—the liquidated damages approach
- § 8:91 —The usury approach
- § 8:92 Late payment charges in bankruptcy
- § 8:93 State and federal regulation

D. DEFAULT INTEREST

- § 8:94 Generally
- § 8:95 Usury analysis
- § 8:96 The MetLife approach
- § 8:97 Default interest in bankruptcy

E. ATTORNEY’S FEES

- § 8:98 The need for a contractual provision
- § 8:99 State regulation
- § 8:100 The amounts recoverable
- § 8:101 Who is liable

PART IV ENVIRONMENTAL ISSUES

A. ENVIRONMENTAL RISKS IN MORTGAGE LENDING

- § 8:102 Background
- § 8:103 The Fleet Factors decision
- § 8:104 Brownfield laws
- § 8:105 The rise of state environmental laws
- § 8:106 A practical view of environmental risks for lenders

B. ENVIRONMENTAL ISSUES IN LOAN ORIGINATION

- § 8:107 Environmental underwriting
- § 8:108 Divergence of interests in environmental due diligence

- C. ENVIRONMENTAL ISSUES AT POOLING AND SECURITIZATION
- § 8:109 Generally
- D. ENVIRONMENTAL ISSUES IN SERVICING PERFORMING CMBS LOANS
- § 8:110 The servicing standard
- E. ENVIRONMENTAL ISSUES IN NON-PERFORMING CMBS ASSETS
- § 8:111 Typical environmental standards in pooling and servicing agreements
- § 8:112 Pre-foreclosure environmental due diligence
- § 8:113 Breach claims
- § 8:114 Other means to realize on environmentally challenged collateral

PART V INSURANCE

- § 8:115 Generally
- § 8:116 Potential liabilities insured under D&O policies
- § 8:117 Potential liabilities covered under E&O policies and BPL policies
- § 8:118 Insurance coverage for D&O, E&O, and BPL liabilities
- § 8:119 —Current claims concerns under D&O policies—basic description of D&O coverage
- § 8:120 ——Timeliness of coverage
- § 8:121 ——Need for insurer’s consent
- § 8:122 ——Panel counsel
- § 8:123 ——Multiple counsel
- § 8:124 ——Need to keep insurers informed
- § 8:125 ——Potential insurer defenses
- § 8:126 —Current claims concerns under E&O and BPL insurance policies—description of E&O and BPL insurance policies
- § 8:127 ——Typical coverage issues arising under E&O and BPL policies
- § 8:128 Commercial general liability policies
- § 8:129 Credit risk insurance
- § 8:130 Conclusion

CHAPTER 9 TRENDS AND PRACTICAL CONSIDERATIONS

PART I SUBPRIME LEGISLATION

§ 9:1	Introduction
§ 9:2	The Mortgage reform and Anti-Predatory Lending Act of 2007
§ 9:3	The Home Ownership Preservation and Protection Act of 2007
§ 9:4	Bush administration proposal
§ 9:5	Congressional bankruptcy proposals—the Senate
§ 9:6	—The House
§ 9:7	FHA Modernization Act of 2007
§ 9:8	Additional legislation
§ 9:9	Conclusion

PART II INDUSTRY

§ 9:10	Growth and disruption in mortgage backed securities
§ 9:11	—Historical—1980’s
§ 9:12	—1998
§ 9:13	—2001
§ 9:14	—Subprime growth
§ 9:15	—Subprime crisis
§ 9:16	—Suggested causes
§ 9:17	—CMBS crisis
§ 9:18	Trends and research—governmental action
§ 9:19	—Bankruptcy
§ 9:20	—Foreclosure
§ 9:21	—Origination
§ 9:22	—Servicing
§ 9:23	—Rating
§ 9:24	Investor trends and research

PART III JUDICIAL ASPECTS OF THE SECURITIZATION CASE

§ 9:25	Introduction
§ 9:26	Standing
§ 9:27	Use of a discovery master
§ 9:28	Presentations to the court
§ 9:29	Trial considerations