PUTTING THE FEES IN DEFEASANCE

By David J. Jacob and Adam Jahnke***

I. Introduction

In the late 1980s and early 1990s, banks and other traditional providers of debt capital for commercial real estate reduced their participation in commercial mortgage lending. This reduction created a void in the commercial mortgage lending markets, which was filled by the capital markets by the issuance to investors of bonds called Commercial Mortgage Backed Securities ("CMBS"). In a CMBS transaction, single mortgage loans of varying type, size, and location were pooled into a trust called a Real Estate Mortgage Investment Conduit ("REMIC"), which in turn issued a series of bonds to investors. Thus, in essence, the investors provided the funding for the loans.

While this influx of cash into the commercial lending markets provided many benefits for borrowers and investors, the combination was not necessarily a perfect match. In many areas, investor requirements did not match the traditional borrower's expectations. An example of a mismatch was the issue of a borrower being able to prepay a loan. Because they did not want to hold the interest rate risk associated with the loan, CMBS investors desired to receive a steady, fixed cash flow for the entire term of the loan that would not be interrupted even if a borrower desired to sell or refinance the mortgaged property during the term of the loan. The concern of the CMBS investors was as follows: (1) if interest rates rose, the borrower would not be interested in refinancing its loan as its existing loan would be at below-market interest rates and (2) if interest rates fell, the borrower would be more likely to pay off the loan, which would then leave the lender and investors with cash that they could only invest at interest rates that were lower than those that they were previously earning, resulting in investors not realizing their original projected rate of return on their original investment. As a result, CMBS lenders prohibited the prepayment of the loan under the loan documents. However, borrowers found this too restrictive, as they did not want to be prohibited from having the right to sell or refinance their property during the term of the loan. The solution to this mismatch was defeasance, a concept previously employed in the municipal bond market that was adapted for use in the pay-off of real estate loans.

This article will begin by describing the concept of defeasance and its application. While the concept of defeasance is not that difficult to comprehend, the devil is in the details. Accordingly, this article will also examine Internal Revenue Service ("IRS") and United States Treasury limitations on defeasing a mortgage. It will then provide practice tips for preparing for a defeasance, including things to look for in the borrower's underlying loan documents, costs and expenses associated with defeasance to be aware of, and tips for structuring the underlying sale or refinancing. Finally, it will describe and explain the required documentation (including specific concerns that borrowers should address within such

* David J. Jacob is a partner in the Real Estate Department in the Oakland County office of Honigman Miller Schwartz and Cohn LLP. Mr. Jacob can be contacted at djacob@honigman.com

** Adam Jahnke is an associate in the Real Estate Department in the Detroit office of Honigman Miller Schwartz and Cohn LLP. Mr. Jahnke can be contacted at ajahnke@honigman.com

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documentation) and the closing process for defeasing a mortgage.

II. Defeasance Basics

As discussed above, defeasance protects investors' desire for steady cash flow, while providing a means for a borrower to sell or refinance its property during the term of the loan. This is accomplished by a substitution of collateral. In lieu of prepaying their loans, borrowers use the proceeds from the sale or refinancing to purchase government securities (usually U.S. Treasury obligations), which are in turn pledged to the existing lender as substitute collateral.[1] The original collateral (i.e., the real property) is released and the existing mortgage or deed of trust is discharged by the existing lender, while the existing loan is kept intact by creating a portfolio of bonds that generates cash flows (coupon payments and maturing bonds) that match the loan obligations for the remaining term of the loan as closely as possible. In addition to the release of the original collateral, the original borrower assigns its rights and obligations under the loan to a newly formed entity (usually a Delaware limited liability company that is a bankruptcy remote special purpose entity), referred to as the successor borrower. Lenders are happy to accommodate the defeasance (including the release of the original borrower) because the substitute collateral is much safer and easier to liquidate than the real property collateral, which fluctuate in value or give rise to expensive and time-consuming foreclosure proceedings.[2] Furthermore, there is not the risk of mismanagement, tenants going bankrupt, and other related concerns associated with owning income-producing property.

The underlying loan documents usually require that, in order to begin the defeasance process, the borrower must provide the lender with written notice of the borrower's intention to defease. In connection with providing notice to the lender, the borrower typically hires a defeasance consultant. The defeasance consultant helps manage the defeasance process on the borrower's behalf, thereby permitting the borrower to focus its attention on the underlying sale or refinancing.

While the defeasance consultant will be responsible for handling certain specific aspects of the defeasance process, such as forming the successor borrower entity, the most important role of the defeasance consultant is to negotiate with, and coordinate the interaction between, the parties to the defeasance transaction. The parties to a defeasance are numerous and include: (1) the original borrower and its counsel, (2) the successor borrower entity, (3) the lender and its counsel, (4) the brokers and dealers who will actually purchase the substitute collateral, (5) the securities intermediary who will make the regular loan payments (out of the proceeds from the substitute collateral) to the lender on behalf of the successor borrower post-closing, (6) the accountant who will deliver a report (the "Accountant's Report") confirming that the proceeds of the substitute collateral will sufficiently cover all future loan payments, and (7) rating agencies, if applicable,[3] who will approve the defeasance and confirm that the defeasance will not result in a downgrade to the rating of the bonds issued to investors.

III. Preparing to Defease

There are four important things that a borrower needs to do, or at the very least be cognizant of, before determining whether to go forward with a defeasance: (1) confirm with the lender that the proposed defeasance follows United States Treasury regulations regarding REMICs, (2) review the underlying loan documents to determine whether the defeasance is permissible and can be accomplished at such time, (3) determine the cost feasibility of the defeasance, and (4) structure the underlying transaction (i.e., the sale or refinancing that is the impetus for seeking to defease in the first place) to accommodate the defeasance and condition the consummation of the underlying transaction upon the successful completion of the defeasance.

A. REMIC

The first step that the borrower must take in preparation for a defeasance is to confirm with the lender that the defeasance will be permissible under the United States Treasury regulations. Securitized loans are typically held in REMICs.[4] A REMIC is an investment vehicle that holds commercial and/or residential mortgages in trusts and issues securities composed of undivided interests in such mortgages. A REMIC is a tax-exempt entity (although income earned by investors is fully taxable), but the pass-through tax treatment of a REMIC results in certain restrictions in its application and use. One major restriction of a REMIC is that it generally may only invest in "qualified mortgages."[5] A significant modification of a qualified mortgage can result in it losing its status as a qualified mortgage, which in turn will cause the REMIC holding the qualified mortgage to lose its tax-free status.[6] Accordingly, the borrower needs to be aware that the lender will not permit the defeasance to close if the defeasance will result in the REMIC losing its tax-free status as a result of the mortgage no longer being qualified. Therefore, before the borrower spends too much time and money, it should confirm with the lender that the proposed defeasance will not affect the qualification of the mortgage.

Treasury Regulation 1.860G-2(a)(8) provides that if a REMIC releases a lien on real property that secures a qualified mortgage, then such mortgage will cease to be a qualified mortgage on the date that the lien is released unless:

> (i) The mortgagor pledges substitute collateral that consists solely of government securities (as defined in section 2(a)(16) of the Investment Company Act of 1940 as amended [15 U.S.C. 80a-1]);
>
> (ii) The mortgage documents allow such a substitution;
>
> (iii) The lien is released to facilitate the disposition of the property or any other customary commercial transaction, and not as part of an arrangement to collateralize a REMIC offering with obligations that are not real estate mortgages; and
>
> (iv) The release is not within 2 years of the startup day.

The first requirement that needs to be satisfied in order for a defeased loan to maintain its status as a qualified mortgage is that the collateral replacing the real estate must be a "government security." A government security is defined by the Investment Company Act of 1940 as:

> Any security issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing.[7]

While this definition permits the purchase of a broad range of securities, lenders will often require a more limited, risk-free security (e.g., treasury bonds) as a substitute collateral.[8]

Second, the mortgage documents must permit a defeasance. Over the years, commentators have, however, requested that this requirement be removed to allow a defeasance even if the original loan documents did not expressly permit the same. Those commentators submitted that expanding the borrower's ability to defease would not violate the policy against replacing real property with other collateral, so long as the other Treasury requirements were met.[9]

The IRS and Treasury Department disagreed with the commentators as they believed that the intent of Congress was that REMICs consist of a substantially fixed pool of real estate mortgages and other related assets.[10] The IRS and Treasury Department believed that the current regulations permitting defeasance provided more than enough leeway to accommodate the borrower's legitimate business needs while at the same time maintaining the intent of Congress in permitting the formation of REMICs.[11]

The third and fourth requirements noted above limit the circumstances and timing of a defeasance by only permitting a defeasance that occurs (1) in connection with a sale or "other customary commercial transaction" and (2) more than two years after the REMIC's startup day. While the term "other customary commercial transaction" is not defined, it is well established that a typical refinancing fits within the definition. With respect to the requirement that the defeasance occur more than two years after the REMIC's startup day, it is important for borrowers to understand that the REMIC's startup day is defined as "the day on which the REMIC issues all of its regular and residual interests,"[12] and it is not necessarily the day on which the borrower executes the Promissory Note for the original loan and the original loan closes. Accordingly, the borrower should seek to obtain information about the startup day of the REMIC from the lender as one of the initial steps because otherwise the borrower will not know when it is allowed to defease.

B. Review of the Underlying Loan Documents to Determine the Permissibility and Timing of Defeasance

Once the borrower is satisfied that the proposed defeasance will satisfy the REMIC requirements, the borrower must review the underlying loan documents to determine whether the proposed defeasance is permissible and the timing for completing the same. The most important question to ask in reviewing the underlying loan documents in connection with a defeasance is also the most obvious one: Do the loan documents provide for defeasance? If the loan documents do not permit a defeasance (most loans originated after 1998 have defeasance provisions; however, before 1998, defeasance provisions were not nearly as universal),[13] the borrower likely has few, if any, options. Lenders have little to no flexibility in modifying loan documents once the loan is securitized.

If a borrower is permitted to defease under the original loan documents, the next issue is to determine whether the defeasance can occur in the time frames needed by the borrower to close its sale or refinance. As discussed above, the Treasury regulations require the defeasance to occur more than two years after the startup day of the REMIC; however, loan documents often have even more stringent timing requirements.[14] Loan documents often provide for a lockout period that prevents a borrower from defeasing the existing loan until the later of (a) two years after the REMIC startup day and (b) three or four years after the date of the promissory note. Accordingly, the borrower must determine whether any lockout period imposed by the Treasury requirements or under the loan documents has expired in order to determine whether it can move forward with the defeasance.

A borrower should review the underlying loan documents in advance of entering into an agreement to sell or refinance its property to ensure that the time frames for closing the sale or refinancing coincide with the required time frames provided in the underlying loan documents. The loan documents will almost always require a borrower to provide at least thirty days' prior written notice to the lender specifying the regular payment date under the note on which the borrower will elect to close the defeasance. While a lender may often waive both the notice and scheduled payment date requirement, a borrower must not take this for granted.

C. Analyzing the Costs of the Defeasance

If the borrower determines that any lockout period has expired and the borrower can comply with the timing requirements set forth in the underlying loan documents in order to complete its sale or refinance of its property, the borrower must then turn its attention to analyzing the costs and expenses of the defeasance. These costs and expenses consist of the cost of the purchase of the securities for the substitute collateral and the transaction costs relating to consummating the defeasance transaction.

The cost of the securities depends mainly on the market at that time and results from the spread between the interest rate of the loan being defeased and the current yields on the securities being purchased. The price and interest rates of a bond have an inverse relationship. Therefore, when the interest rates of the replacement securities are lower than the interest rate of the existing loan (which will almost always be the case due to the lower risk of government securities), the cost of the replacement securities will exceed the existing balance of the loan and borrowers are responsible for paying this difference, often referred to as the defeasance premium.[15]

In addition to the cost of the securities, borrowers need to factor in the third party transaction costs. The transaction costs consist of: (1) defeasance consultant fees, (2) lender processing fees, (3) various parties' counsel fees, (4) successor borrower fees, (5) broker and dealer fees, (6) securities intermediary fees, (7) accountant fees, and (8) rating agency costs (if applicable). These transaction costs generally range from $50,000 to $100,000.

While the cost of the securities and transaction costs described above are market-driven and generally out of the borrower's hands, the borrower can look to the loan documents for some potential cost savings. Generally, a borrower is required to purchase the substitute collateral so that the proceeds from the substitute collateral will pay the debt service on the existing loan through its full maturity date.[16] However, lenders often permit prepayment of loans (outside of the defeasance context) up to six months before the maturity date of the loan without the payment of any prepayment penalty, premium or fee.[17] As such, savvy borrowers will often negotiate provisions in the original loan documents that will allow the substitute collateral to be purchased for a period through the earlier prepayment date, instead of the final maturity date of the loan.[18] Accordingly, the borrower will potentially be able to realize cost savings in purchasing the securities portfolio by eliminating months' worth of interest payments that would be incurred if the securities portfolio was purchased through the maturity date of the loan.[19]

Additional money can be saved based on the type of securities that serve as defeasance collateral. Most commonly, loan documents require that treasury bonds replace the real property collateral. The obvious reasoning is that treasury bonds are considered the safest investment, which protects the investors' desired steady cash flow. However, treasury bonds correspondingly pay out low yields and are more expensive.[20] Consequently, borrowers should check their loan documents to determine if the purchase of other governmental securities is permitted. Agencies such as Fannie Mae and Freddie Mac issue fixed-rate bonds at higher yields, which result in a reduced defeasance premium and, accordingly, a significant cost savings to the borrower.[21]

D. Structuring the Background Transaction

As discussed above, a defeasance will typically occur in connection with a sale or refinancing of the mortgaged property. When negotiating such underlying sale or refinancing, borrowers need to account for the fact that the defeasance may not occur, and, accordingly, borrowers should condition such sale or refinance upon the consummation of the defeasance, so they are not at risk of suffering any damages or liability to the purchaser or lender who is refinancing the property if the defeasance fails to close.

Moreover, as discussed above, lenders may require that they are notified before they will complete the defeasance of the loan. In addition, it takes time to structure the securities portfolio and draft the defeasance documents. In general, the entire defeasance process takes between thirty and forty-five days (although it can be completed quicker if rating agency approval is not required). Therefore, the closing of the underlying sale or refinancing transaction needs to take the notice requirements and defeasance timeline into consideration, so that the funds from the sale or refinancing transaction will enter escrow in time to purchase the substitute collateral.

Moreover, the buyer's or new lender's cooperation is often necessary in connection with the defeasance. Accordingly, the purchase agreement or the commitment letter for the refinancing should include a provision requiring the buyer or new lender to cooperate with any reasonable requirements of the defeasance, including, but not limited to, making all closing deliveries into escrow (including all necessary purchase or refinancing proceeds and the approval to release such funds) at least one day prior to the closing date.

IV. Documenting the Defeasance

In negotiating and documenting the defeasance, borrowers should be cognizant of and concerned with certain issues in order to limit their potential liability after the completion of the defeasance. As discussed throughout this article, a loan is not paid off in connection with a defeasance. While the successor borrower assumes most of the liabilities, responsibilities, and obligations following the defeasance, the borrower is not fully released from all such liabilities, responsibilities, and obligations as certain liabilities, responsibilities and obligations may continue on the part of the original borrower after the defeasance (e.g., carve-outs for fraud, misrepresentation, and surviving hazardous material indemnification obligations). Additionally, the borrower is often expected to make additional representations and warranties regarding certain aspects of the defeasance transaction. Consequently, it is important that the borrower seek to obtain the appropriate releases in the defeasance documentation in order to limit its liability to the greatest extent possible.

Lenders will initially attempt to obtain a representation from the borrower that the pledged securities are sufficient to make all of the future payments.[22] However, borrowers can make a compelling argument that this representation should be limited or that the successor borrower should make this representation as borrowers are not in the business of purchasing and valuing securities portfolios. Accordingly, borrowers should attempt to limit this representation to be based solely upon borrower's reliance on the Accountant's Report that it delivers in connection with the defeasance or require the successor borrower to make the representation.[23]

Borrowers should also try to limit their liability (to the greatest extent possible) with respect to the new collateral. While it is typical for a borrower to be liable for claims relating to the acquisition and initial perfection of the pledged securities, any other responsibility and liability relating to the pledged securities should lie solely with the successor borrower.[24]

In addition to understanding what a borrower needs to account for in drafting and negotiating the defeasance documentation, it is important to understand what specific documents are typically required in order to complete a defeasance. Generally, the following documents are required.

A. Defeasance Pledge and Security Agreement

The Defeasance Pledge and Security Agreement is entered into among the borrower, the securities intermediary, the trustee of the REMIC, and the servicer.[25] Under such agreement, the borrower pledges the defeasance securities portfolio (and the proceeds from said portfolio) as collateral to secure the loan. In addition to pledging the securities portfolio, the borrower also makes certain detailed representations and warranties regarding the substitute collateral.[26] The following are some general examples of the borrower's representations and warranties that are typically found in the Defeasance Pledge and Security Agreement: (1) it owns the collateral and is authorized and has the legal right to pledge the collateral, (2) no consents are required, (3) it shall not execute or authorize any other liens or financing statements pertaining to the substitute collateral, and (4) the execution and delivery of the pledge agreement will not result in a breach of any other contract or violate any law. Additionally, the securities intermediary makes certain representations and warranties with respect to the pledged securities. Finally, the servicer is typically granted a power of attorney to act on behalf of the borrower with respect to the pledged securities.

B. Defeasance Account Agreement

The Defeasance Account Agreement is also entered into among the borrower, the securities intermediary, the trustee of the REMIC, and the servicer.[27] The Defeasance Account Agreement sets forth the terms pursuant to which the securities intermediary will hold the pledged collateral and apply the proceeds thereof to the payment of the debt as and when payments are due. The duties of the securities intermediary under the Defeasance Account Agreement include holding the securities, investing the account cash balance, collecting proceeds from the defeasance securities portfolio and paying the monthly loan payments and the final balloon payment at maturity (or the first prepayment date if the loan documents permit). Furthermore, pursuant to the terms and provisions of the Defeasance Account Agreement, the lender has the right to direct all further transfers and sales of the pledged securities and neither the borrower nor the successor borrower has the right to cause or request the purchased securities to be sold while the loan is outstanding.[28]

C. Defeasance Assignment, Assumption and Release Agreement

The Defeasance Assignment, Assumption and Release Agreement is entered into among the borrower, the successor borrower, the securities intermediary, the trustee of the REMIC, and the servicer.[29] Under the Defeasance Assignment, Assumption and Release Agreement: (1) the borrower assigns and transfers the securities to the successor borrower, (2) the successor borrower assumes all of the borrower's obligations under the existing promissory note, (3) the servicer releases its interest in the mortgaged real property, and (4) the borrower is released from any further liability under the existing loan (except for the carve-outs for fraud, misrepresentation, and surviving hazardous material indemnification obligations as described above).[30]

D. Certificate of Borrower

The Certificate of Borrower is entered into between the borrower and the servicer.[31] Under the Certificate of Borrower, the borrower confirms that all of the conditions to defeasance set forth in the loan documents have been met.[32]

E. Waiver and Consent

The Waiver and Consent Agreement is also entered into by and between the borrower and the trustee of the REMIC.[33] Pursuant to the Waiver and Consent Agreement, the trustee typically agrees to waive certain impractical, technical defeasance requirements in the borrower's original loan documents.[34] Typical provisions that are waived by the trustee include: (1) the requirement that the defeasance date be on a regularly scheduled payment date, (2) notice requirements to lender (e.g., 30 days' notice), and (3) rating agency confirmation (particularly for non-top ten loans).[35]

F. Written Confirmation from Rating Agency (if applicable)

As discussed above, depending on the size of the mortgage being defeased, the size of the pool of loans, and other factors, a borrower may need one or more rating agencies to review the defeasance transaction.[36] If the release of the original collateral will not adversely affect the credit quality of the pool of bonds (which it usually does not; in fact, the risk-free nature of treasury bonds usually increases the credit quality), then the rating agency will issue a rating confirmation letter stating that the defeasance will not result in a suspension, qualification, withdrawal, or downgrade of current ratings assigned to the bonds.

G. Legal Opinions[37]

1. *Nonconsolidation opinion*

The borrower's counsel may be required by the lender to give a non-consolidation opinion, affirming that the assets of the successor borrower will not be substantially consolidated with those of the borrower by the bankruptcy court.[38]

2. *Security Interest Opinion*

The lender's counsel may require a security interest opinion letter from the borrower's counsel, confirming that the trust has a legal and valid first-priority perfected security interest in the substitute collateral and the proceeds therefrom.[39]

3. *Enforceability and Authority Opinion*

The borrower must provide an enforceability and authority opinion, confirming the enforceability of the defeasance documents against the borrower as well as the authority of the borrower to execute the documents.[40]

4. *REMIC Opinion*

The borrower or successor borrower must provide a REMIC opinion, which confirms that the defeasance, as structured and documented, will not cause the REMIC to lose its status or impose any tax on the trust.[41]

H. Accountant's Report

Another standard document for all defeasances is the Accountant's Report. The Accountant's Report confirms that the accountant agrees, after reviewing the amortization schedule, securities portfolio, and the promissory note that there will be sufficient cash from the government securities to pay the remaining payments due on the defeased loan.[42]

V. Closing

Finally, we arrive at the closing. The defeasance process generally requires a three day closing period because the purchase of securities takes time to settle. The standard defeasance closing period breaks down as follows:

Day One

On day one, following confirmation from borrower that funds from the underlying sale or refinance will be delivered into escrow the following day and servicer's counsel that it has received and approved all due diligence items from the defeasance closing checklist, the purchase of the securities is initiated to settle on day three.[43] The defeasance consultant then circulates the securities portfolio and distributes the final closing statement. Servicer's counsel, on behalf of the servicer, then sends the signed mortgage release and assignment documents to the title company.

Day Two

Day two is the buildup date. Funds from the sale or refinance go into escrow with the title company.[44] The title company confirms that it has received all funds necessary to close the defeasance and underlying sale or refinance as well as the signed mortgage release and assignment documents from the servicer or the servicer's counsel, on behalf of the servicer. Finally, the title company confirms that there are no other issues that will prevent the defeasance from closing on day three.

Day Three

On day three, the magic happens. The securities are transferred from the broker/dealer to the securities intermediary for settlement. Upon notification and confirmation of such transfer, the servicer's counsel authorizes disbursement of funds to the securities intermediary. Once the servicer's counsel confirms that the funds have reached the securities intermediary, the servicer's counsel instructs the title company to finalize the closing. The lien on the real property is then released and the securities are transferred to the successor borrower's defeasance account. The defeasance is then closed.

VI. Conclusion

As one can see, the process of defeasance is complicated, time-consuming, and costly. Professional fees (including, but not limited to, attorneys, accountants, and defeasance consultants) can reach upwards of $100,000 to properly execute a defeasance and this does not take into account the defeasance premium. Accordingly, defeasance is not for everyone. While defeasance can work for loans as low as $2,000,000, borrowers and their counsel should understand that defeasance should generally be reserved for sophisticated borrowers who have the expertise (or advice of counsel with such expertise) and financial capability to properly accomplish it.

Endnotes

1. Goodman & Buchinsky, *Refinancing a Securitized Mortgage*, NY Law Journal (Sept 20, 2004).

2. Murray, *Defeasance Provisions in Securitized Loan Documents* (2003), at <http://www.acrel.org/Documents/Seminars/2004%20Murray%20-%20Defeasance%20provisions.pdf> (accessed March 21, 2008).

3. Previously, rating agencies would review every defeasance transaction. However, this review became overly burdensome and unnecessary due to the safety of treasury bonds as collateral. Consequently, rating agencies generally now only review the top ten remaining loans in a pool.

4. Boyce, *So long, mortgage: a primer on loan defeasance*, 16 Business Law Today 57 (Sept/Oct 2006).

5. Kilpatrick Stockton LLP, Defeasance – A Practical Guide (Jan 2005).

6. *Id.*

7. 15 USC 80a-1 *et seq*.

8. This is discussed in further detail in Section V with respect to a borrower's review of loan documents in preparation for defeasance.

9. *Modifications of Commercial Mortgage Loans Held by a Real Estate Mortgage Investment Conduit* (REMIC), 72 Fed Reg 63523 (proposed Nov 9, 2007).

10. *Id*.

11. *Id*.

12. 26 USC 860G(a)(9).

13. Hosmer, *What is Defeasance?*, 52 Real Estate Weekly 13S (2006).

14. Henner, *Negotiating defeasance provisions at origination can materially impact the bottom line*, 32 Real Estate Issues 29 (2007).

15. Boyce, *supra* note 4.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. MacCary, *How to Defease a Loan on Schedule and Avoid Future Liability*, Cal Real Estate Journal (June 4, 2007), at <http://www.nossaman.com/showarticle.aspx?show=3852> (accessed August 1, 2008).

23. *Id.*

24. *Id.*

25. Kilpatrick Stockton LLP, *supra* note 5.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* Top ten loans are described in footnote 3 *supra*.

36. Fox & MacNeill, *Defeasance deconstructed*, at <http://mortgagebankers.org/files/conferences/2006/assetadmin/defeasancedeconstructed.pdf> (accessed March 21, 2008).

37. Lender's counsel will often be responsible for some or all of these opinions.

38. Fox & MacNeill, *supra* note 36.

39. *Id.*

40. *Id.*

41. *Id.*

42. Kilpatrick Stockton LLP, *supra* note 5.

43. All securities will need to be purchased on day 3 to avoid breakage costs, which will be the borrower's responsibility.

44. When timing the defeasance closing, the parties should be careful to make sure that day 2 does not fall on a Friday. Otherwise, the money funded from the sale/refinancing will sit in escrow over the weekend. Depending on the size of the transaction, a substantial amount of interest on the new loan can accumulate over that time.