Guaranteed Cooperation: Recourse Liability for Hindering a Lender's Exercise of Remedies

Mar 09, 2026

Categories:

Finance Industry Blogs
Publications
The Carveout

Authors:

Colin C. Stouffer

In our continuing examination of common non-recourse carveout provisions in commercial real estate loan documents, today we discuss provisions that attempt to impose recourse liability if a borrower, guarantor or their affiliates hinder, challenge or delay the lender's exercise of its rights or remedies under the loan documents. Phrasing varies by lender, but a typical version of this carveout provision might read as follows:

Borrower, Guarantor or any Affiliate of any of them shall contest the validity or enforceability of the Loan Documents and/or shall contest, impede, delay or oppose the exercise by Lender of any enforcement actions, remedies or other rights it has under or in connection with the Loan Documents.

This provision will typically be included as a "full recourse" carveout, triggering liability to the borrower and (more importantly) the guarantor for the full amount of the debt if breached. Why do lenders want this concept to carry such a harsh penalty? What concerns does it raise for borrowers? Is there a middle ground? We will cover each of these questions in turn.

Lender's Perspective

Non-recourse transactions carry increased risk to lenders. If a borrower defaults (absent the breach of a non-recourse carveout), the lender can look only to the collateral securing the loan for repayment. The corollary of this bargain, at least from the lender's perspective, is that the borrower should not fight the lender's exercise of its remedies. If the borrower defaults and the lender appropriately enforces its foreclosure rights, the borrower should cooperate and willingly "hand over the keys." Otherwise, the lender is not getting the full benefit of its deal with the borrower. To that end, non-recourse loan documents typically contain provisions

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

requiring the borrower to waive the right to assert a counterclaim in any action brought by the lender, as well as a full-recourse carveout similar to that set forth in the example above. The inclusion of this provision in the full-recourse section indicates how strongly most non-recourse lenders feel about this concept.

Borrower's Perspective

It may be difficult for some borrowers to accept that any action that the lender might interpret as contesting or opposing its enforcement of remedies will trigger full-recourse liability. If the borrower feels that the lender has made a mistake in declaring a default, is the borrower prohibited from making a good faith attempt to correct the mistake for fear it will be interpreted as a "contest" or an effort to "delay"? That may be an extreme example, but based on the plain language of our sample carveout above, it is not a baseless concern. Even a borrower who understands the nature of the bargain they are striking on a non-recourse loan will not want to feel powerless to defend itself against a lender who is acting unreasonably or in error.

Some Possible Compromises

Now that we have some basic insight into how each side might view this non-recourse carveout, what are some options for how the provision could be revised to accommodate the competing concerns? One simple solution might be to move the carveout "above the line" to the losses section. In other words, liability would only be imposed on the borrower and guarantor to the extent the lender could prove that the challenge, delay, opposition, etc. resulted in a quantifiable loss to the lender. However, because many lenders view the concept that this carveout protects as a central component of non-recourse lending, they may be unwilling to remove it from the full-recourse section. Moreover, depending on how broadly the provision is drafted, simply moving it to losses may not satisfy the borrower either. The borrower may still feel it is unfair to risk *any* recourse (even loss recourse) for any action that could be interpreted as a challenge to the lender's exercise of remedies.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

A different, and more nuanced, approach could be to keep the provision as a full-recourse carveout, but to narrow the kinds of challenges that can trigger it or exclude certain kinds of challenges. For instance, the lender may agree to exclude good faith compulsory counterclaims that the borrower may bring. Similarly, instead of broadly imposing liability for *any* contest, opposition or delay, the lender might limit the carveout to only apply to the assertion of a defense in a judicial proceeding or a request for injunctive relief that the court (rather than the lender) determines is made with the *purpose* of hindering the lender's exercise of remedies or is otherwise made in *bad faith*. This gives the borrower some comfort that it will not be penalized for legitimate good faith defenses, while at the same time offering the lender protection against frivolous attempts to obstruct its enforcement actions. With this approach in mind, our sample provision above could be revised as follows:

Borrower, Guarantor or any Affiliate of any of them, in connection with the exercise by Lender of any enforcement actions, remedies or other rights it has under or in connection with the Loan Documents, (a) shall seek a defense, injunctive relief, judicial intervention or other equitable relief of any kind, or assert in a pleading filed in connection with a judicial proceeding any defense against Lender or any right in connection with any security for the Loan, and (b) the court in any such action or proceeding determines that Borrower's, Guarantor's or any Affiliate's defense, request for injunctive relief, judicial intervention or other equitable relief (1) was made with the intent to hinder, delay, or otherwise interfere with Lender's exercise or its remedies (whether at law or pursuant to the Loan Documents), or (2) was made in bad faith.

Key Takeaway

The approach described above is of course not the only possible solution. Creative counsel can likely find a myriad of ways to restructure this provision to protect the lender's right to pursue its remedies without unfairly immobilizing the borrower. However, we

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

hope this brief examination of this common non-recourse carveout will prove a useful primer.

If this is an issue you've encountered and found other tenable or even novel solutions to, we welcome your perspective and any follow-up questions you have in regard to this or other posts on ***The Carveout*** blog. Please get in touch with the author or any attorney with our Commercial Real Estate Finance Team. This feedback would be great fodder for our next post.

The Carveout

A legal blog geared toward sophisticated capital market participants, The Carveout provides insight into current trends and developments in commercial real estate finance (CREF)—with a particular focus on non-recourse carveouts and CREF loan platforms including CMBS, debt funds, private capital, REITs, life insurance companies, and other complex sources of capital.

Visit Blog

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons