

Current Issues of Interest to Indenture Trustees

**Authority of an Indenture Trustee to Compromise the Noteholders' Claims –
In re Delta Air Lines, Inc.; In re Calpine Corporation**

Prepayment Premiums - In re Calpine Corporation

**Presentation for the Subcommittee on Trust Indentures of the Business Bankruptcy Committee, Section of
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James Gadsden
212-238-8607
gadsden@clm.com

Authority of Indenture Trustees to Compromise the Claims of Bondholders**In re Delta Air Lines, Inc. (Kenton County Bondholders Committee
v. Delta Air Lines Inc.),
07 Civ. 3968 (JGK) (U.S.D.C., S.D.N.Y.)**

The challenge by dissenting Bondholders to the settlement reached by the Indenture Trustee of claims arising out of a Greater Cincinnati Airport financing raised the issue of the ability of the Indenture Trustee, with the approval of the Bankruptcy Court, to compromise the claims of the Bondholders.

The structure here was conventional airport facility municipal conduit financing. The Kenton County Airport Board issued municipal bonds to finance improvements to be used by Delta at its Greater Cincinnati Airport hub. Delta executed a lease pursuant to which it would make lease payments over the term of the Bonds in an amount equal to the debt service on the Bonds. The Bonds were non recourse to the Airport Board. The lease payments were assigned to the Bond Trustee. Delta executed a separate guarantee of the obligations under the Indenture. Delta filed its chapter 11 case on September 14, 2005. On April 28, 2006, Delta made a motion to reject the Lease. The parties entered into a forbearance agreement pursuant to which Delta made certain payments to the Bond Trustee and was permitted to continue to use the facility. A settlement was reached on February 22, 2007 pursuant to which Delta entered into a new Lease with the Airport Board and new Bonds were issued to the Bondholders in a reduced principal amount. The Bond Trustee was allowed a \$260 million unsecured claim for the Bondholders and was reimbursed for its fees and expenses. The effectiveness of the settlement was conditioned upon approval of the settlement by the Bankruptcy Court and incorporation of the settlement in Delta's chapter 11 plan. Among other things, the settlement included an exchange of releases among the parties including a release of claims that might be asserted by the Bondholders against the Indenture Trustee.

During the period of negotiations, sixteen notices were sent to the Bondholders inviting them to join a Bondholders Committee which ultimately consisted of Bondholders holding 60% of the Bonds. The Bondholder members of the committee gave written direction authorizing the Trustee to enter into the settlement. When the settlement was announced, a group of Bondholders notified the Trustee, Delta and the Airport Board that they objected to the settlement. Delta made a motion for approval of the settlement pursuant to Rule 9019 of the Rules of Bankruptcy Procedure and it was approved by the Bankruptcy Court on April 24, 2007.

Delta's Disclosure Statement had been approved on February 7, 2007 and the Plan was confirmed on April 25, 2007. The vote in the Bondholder class was 97.35% in amount and 89.19% in number in favor of the Plan. The Effective Date of the Plan was April 30 2007 and

the initial distribution of stock in the reorganized company was made on May 3, 2007. Motions by the objecting Bondholders for a stay pending their appeal were denied by the Bankruptcy Court and District Court.

The approval of the settlement generated well written opinions from both Judge Hardin in the Bankruptcy Court¹ and Judge Koeltl in the District Court. Judge Koeltl found that the appeal was mooted by the consummation of the Plan, but his opinion and Judge Hardin's opinion addressed the challenges raised by the objecting Bondholders that can be anticipated to be raised in other bankruptcy cases.

The challenges:

Subject matter jurisdiction of the bankruptcy court over approval of the settlement.

- Holdings:
- The settlement had more than a conceivable effect on the bankruptcy case providing a sufficient nexus for jurisdiction In re Cuyahoga Equipment Corp., 980 F.2d 110, 114 (2d Cir. 1992).
 - The Lease and Guaranty were inextricably related to each other; the court could not resolve the creditor claims of the Airport Board and the bondholders against Delta without resolving the Bondholders' claims against the Airport Board.

The power of the Bankruptcy Court to grant the 'non-debtor releases' to the Indenture Trustee and the Airport Board.

- Holding:
- Under the Second Circuit's decision in In re Metromedia Fiber Networks, Inc., 416 F.3d 136 (2d Cir. 2005), the releases were permissible since they were necessary to prevent re-litigation of the claims that were resolved by the settlement agreement and were part of an agreement under which the Airport Board and the Indenture Trustee gave up their rights to indemnification under the Lease.

The Bondholders were denied due process by the deprivation of their claims against the Indenture Trustee

- Holding:
- Bondholders had more than adequate notice and an

¹ 370 B.R. 537 (Bankr. S.D.N.Y. 2007)

opportunity to be heard on the releases.

The Bondholders' individual claims could not be disposed of except in an adversary proceeding

Holding: • The Bondholders had an adequate opportunity to litigate.

The Indenture did not authorize the Trustee to compromise the claims of the Bondholders for principal and interest without the consent of each affected holder²

Holding: • The impairment of the Bondholders' ability to collect was due to the operation of the bankruptcy laws, not any act of the Airport Board or Bond Trustee. The objecting Bondholders acknowledged that the non-impairment rule does not prevent the reduction of claims in bankruptcy.

• The Bond Trustee has the sole power to commence remedial procedures, subject to the direction of a majority of the holders.

• The power to compromise is inherent in the power to prosecute the litigation.

• The non-impairment language was designed to preclude insiders from affecting the rights of non-insider investors and not intended to preclude a compromise subject to judicial review and approved by a majority of the Bondholders.

• The terms of the Bonds were inextricably related to the terms of the Lease and Guaranty that could unquestionably be impaired in the bankruptcy case.

Analogous provisions

• Foreign bankruptcy decrees given effect in the U.S. over objections that enforcement of the compromises in the foreign proceeding violates the non-impairment clause. In re Board of Directors of Multicanal, S.A., 307 B.R. 384, 389

² Although the Indenture was not a TIA qualified indenture, it contained the same non-impairment language. Extracts from the Indenture are attached to this memorandum.

(Bankr. S.D.N.Y. 2004).

- Lenders in syndicated loan agreement bound by provisions that give the agent the dole power to enforce the collective rights. Beal Bank v. Somer, 8 N.Y.3d 318 (2007).

Authority of the Bondholders to Settle Claims

In re Calpine Corporation, Case No. 05-60200 (BRL)

ULC Canadian Settlement

Facts:

Calpine Corporation and its domestic affiliates filed their chapter 11 petitions on December 20, 2005. Calpine's Canadian affiliates filed CCAA proceedings in Ontario. Among the debts of Calpine and its affiliates were the Notes issued by non-operating Canadian subsidiaries Calpine Canada Energy Finance ULC (US\$2.03 billion and C\$200 million) and ULC2 (approximately \$554 million denominated in pounds sterling and euros) guaranteed (disputed) by Calpine. \$360 million in Notes were ultimately acquired by Calpine Canada Resources Company, a Canadian Debtor. There were a complex set of large claims filed between and among the Canadian and U.S. Debtors and the Indenture Trustees for the two series of ULC Notes. The Canadian and U.S. Debtors negotiated a settlement including a settlement of the claims of the ULC1 Noteholders. Motions were filed in the U.S. and Canadian courts seeking approval of the settlement that recited that the settlement of the claims of the ULC Noteholders was supported by an ad hoc committee of ULC1 Noteholders who delivered a direction to the Trustee for the ULC1 Notes to enter into the settlement and offered the Indenture Trustee indemnity. The Indenture Trustee for the ULC1 Notes filed an objection to the settlement stating that it had not received a direction to enter into the settlement and satisfactory indemnification and could not enter into the settlement, which affected the rights of all ULC1 Noteholders without the consent of each Noteholder since they would receive securities and not cash in the full amount of the principal of and interest on the Notes and the rights under the guarantee given by Calpine Corporation for the Notes would be impaired.

The Ad Hoc Committee of ULC1 Noteholders responded with a joinder in the Debtors' motion and a reply to the Indenture Trustee's objection stating that a majority of the Noteholders had directed and indemnified the Trustee and asserting that "there is a uniform body of case law that holds that indenture trustees have the authority to enter into a court-supervised settlements that impair or affect a Noteholders right under a TIA-qualified indenture to receive payment of principal and interest."³ The order approving the settlement included recitations of the notice

³ The authorities cited were the Delta - Kenton County, two unreported cases, Mbank Dallas v. LaBarge, Inc., No. 86-9583 (N.D. Ill., filed Dec. 29, 1986) and Kemper Investors Life Ins. Co. v. Las Colinas Corp., No. 8809152 (N.D. Ill. docketed June 29, 1989) and the cases giving recognition to Argentinean restructurings over the objection of Noteholders asserting that their "non-impairment rights" were violated. In re Board of Directors to Telecom Argentina, S.A., 2005 WL 3098934 (S.D.N.Y. Nov. 18, 2005); In re Board of Directors of Multicanal S.A., 307 B.R. 384 (Bankr. S.D.N.Y. 1004).

given to the Noteholders of the settlement, including notices distributed through the DTC LENS system and through the Calpine website and of the direction given by a majority of the Noteholders to the Indenture Trustee to withdraw its objection. The order directed the Indenture Trustee to enter into the settlement agreement and contained a finding that the order is binding on all of the holders, the settlement was fair and reasonable to the Noteholders, the execution and delivery of the settlement agreement was authorized and approved and consistent and in furtherance of the Trustee's duty under the Indenture, the Trustee was acting as a prudent person in discharge of its duty under the Indenture, the Trustee and its representatives were released of liability to the holders for any claim relating to the settlement and the holders were enjoined from pursuing litigation against the Trustee and its representatives. The Trustee was granted an allowed claim against a Debtor's estate with the distributions to go first to the Trustee's fees and expenses then to the fees and expenses of the ad hoc committee, including reimbursement of ad hoc committee members who advanced fees and expenses.

Second Lien Notes Settlement

Facts:

Calpine Corporation had outstanding \$3.67 million in principal amount of First Lien Notes and \$3.67 billion in principal amount of Second Lien Notes. Over the objection of the First Lien Noteholders represented by their Indenture Trustee, the Debtors obtained authority to pay off the First Lien Notes using cash proceeds of pre-petition disposition of collateral and borrowings under the DIP facility. Large holders of the Second Lien Notes organized an ad hoc committee, retained counsel and have taken an active role on all matters in the cases.

In July 2006 the Indenture Trustee filed proofs of claim for the principal of and interest on the Second Line Notes aggregating in excess \$2.5 billion including a claim for a makewhole premium. In June 2007 the Debtors filed a motion to value and limit the claims. In particular, the motion sought to eliminate the claim for a makewhole premium in connection with the payment of the Notes prior to maturity. The Indenture Trustee and the Second Lien Committee filed an objection to the motion asserting the claim for the makewhole. A series of further pleadings were filed by those parties and by the Official Creditors' Committee which supported the Debtors' position. The Debtors reached a settlement with the Second Lien Committee allowing a secured claim of \$60 million and a general unsecured claim of \$40 million on account of the makewhole⁴ and filed a motion seeking authority to enter into a stipulation of settlement with the Second Lien Committee and the Indenture Trustee. The Indenture Trustee objected to the settlement.

⁴ The settlement also included a waiver of a 1.5% fee provide for in the stipulation entered into to settle the Second Lien Noteholders' objection to the replacement DIP facility. The Second Lien Debtors reserved their rights under the subordination provisions of the Convertible Subordinated Notes issued by Calpine.

Its objections were first the concern that the settlement could not affect the claims of Noteholders that had not expressly consented to the settlement and second that it was entitled to satisfactory indemnity prior to accepting a direction from the Noteholders who were parties to the settlement to enter into the settlement. The Agreement also provided for the Trustee to facilitate the sale of the unsecured claim prior to confirmation of a plan, for an adjustment of the secured and unsecured claims based on that sale, and for the Trustee to retain its rights to indemnification under the Indenture for claims arising in connection with the sale. The objections were ultimately compromised through the execution of an amended stipulation that included an indemnification of the Indenture Trustee for any liability that it might incur in the sale of the claim and a determination in the order approving the stipulation that the Indenture Trustee was authorized to settle and facilitate the sale of the claim and would have no liability to any Noteholder as a result of its entry into the stipulation of settlement or sale of the claims.

Prepayment Premiums

In re Calpine Corporation

CalGen Opinion – March 5, 2007. Calpine Generating Company, LLC (“CalGen”), one of the Debtors’ largest operating subsidiaries had outstanding three tranches of secured Notes in the aggregate principal amount of \$2.5 billion due in 2009, 2010 and 2011 with a weighted average annual interest rate of 11.25 %. Calpine Corporation negotiated a replacement DIP facility with an increase in the availability of \$5 billion of which \$2.5 billion was to be used to retire the CalGen Notes. Calpine calculated that it would realize an annual interest savings of \$92 million plus \$5 million in annual fees and expenses. The Noteholders and their Trustees objected to the payment of the CalGen debt in the absence of compensation for the early payment. The Indentures had “no call” provisions that did not permit the payment of the debt before dates in 2007 and 2008, but did not include any makewhole payment or other liquidated damages for early payment. Judge Lifland found that the “no call” provisions did not prevent the prepayment of the debt in a bankruptcy cases, but that the Noteholders were entitled to compensation for their “dashed” expectation of an uninterrupted payment stream at least until the expiration of the no call period. He awarded damages based on the 2-1/2% and 3-1/2% prepayment premiums appearing in two of the indentures and applying the 3-1/2% premium to the third Indenture.⁵

Calpine First Lien Notes. The application of the principles of the CalGen decision to another series of Calpine debt is being actively litigated.⁶ One of the events that precipitated the Calpine bankruptcy filing in December 2005 was the dispute with the Calpine Senior Secured Noteholders over the disposition of the proceeds of the sale of Calpine’s Rosetta oil and gas reserve properties which were collateral for the Notes. As required by the Indentures, Calpine made an offer to purchase First Lien Notes with the proceeds. Most Noteholders declined to exercise their purchase right based on an analysis that they were fully secured and would continue to enjoy the coupon rate on the First Lien Notes that was more attractive than alternative available investments. Calpine then sought to use the proceeds to purchase gas in storage. The Delaware Supreme Court’s order requiring Calpine to restore to the cash collateral account for the Secured Notes the \$400 million spent to purchase gas in storage was a precipitator of the chapter 11 filing. Shortly after the filing Calpine sought the right to use the remaining cash in

⁵ Judge Lifland deferred consideration of the Noteholders claim for default interest from bankruptcy until payment.

⁶ Calpine has settled the makewhole claims of two other series of Notes – the Calpine Corporation Senior Notes and the Calpine Corporation Second Lien Notes.

the cash collateral account and money borrowed on its DIP financing to pay off the First Lien Notes. The effect was to force the First Lien Noteholders to accept the offer to purchase without a premium that they had refused pre-petition. The Indenture Trustee for the First Lien Noteholders objected and demanded payment of a makewhole premium in connection with the payment. In May 2006, Judge Lifland entered orders authorizing the payment of the principal of and accrued interest on the First Lien Notes while deferring the right of the First Lien Noteholders to a makewhole premium for later adjudication. The issue is now being addressed in an adversary proceeding in which the creditors' committee is also challenging the validity of the First Lien Noteholders' secured position.⁷ The principal arguments of the parties are

- The default clause of the Indenture provides for automatic acceleration of the Notes upon the filing of a bankruptcy case. There is well established law that debt is automatically accelerated by the filing of a bankruptcy case. The debt was not prepaid because it was due.
- Like the CalGen Indentures, the First Lien Note Indenture had no explicit provision that addressed the parties' rights upon a prepayment after a bankruptcy filing. The First Lien Indenture Trustee emphasized that the only provision in the Indenture for payment prior to maturity is an optional redemption while the Debtors' response was that the prepayment was compelled by the bankruptcy filing.
- Anticipating that argument the Indenture Trustee at the direction of the Noteholders had rescinded the acceleration before the prepayment was made, resulting in a counterargument by the Debtors that the rescission was void as a violation of the automatic stay since it was an attempt to collect a pre-petition debt.

The few cases appear to hold that absent explicit language permitting it to do so, a lender cannot enforce a prepayment premium if it accelerates the debt and demands payment. Demand for payment by the lender is seen as inconsistent with the Lender's insistence on compensation in order to accept prepayment.

The rule in Pennsylvania appears to be that any payment after acceleration is not voluntary so a prepayment premium cannot be required. Berento v. Bell Savings & Loan Ass'n, 419 A.2d 620 (Pa. Super 1980).

Continental Securities Corp. v. Shenandoah Nursing Home Partnership, 188 B.R. 205 (W.D. Va. 1995). The mortgage in this case prohibited prepayment but had no liquidated damages specified for prepayment. The Debtor's chapter 11 plan proposed to pay off the debt

⁷ The issues is whether the First Lien Notes meet the definition of debt that could obtain the benefit of the collateral sharing under an existing Collateral Trust Agreement, by joining the Collateral Trust Agreement at the time that the First Lien Notes were issued.

(without any makewhole) on the effective date of the chapter 11 plan. In addressing the likelihood of success on the merits in connection with the motion for a stay pending appeal of the confirmation order, the District Court conclude that the Debtor could prepay the Note and considered whether it could be required to pay damages to the lender since it had the ability to treat the lender as unimpaired by paying the principal of and interest on the Note.

River East Plaza, L.L.C. v. The Variable Annuity Life Insurance Co., No. 06-3856 (7th Cir. 8/22/07). Reversing district court and enforcing “Treasury Flat” yield maintenance prepayment premium over arguments that it represented an unenforceable penalty.

UPS Capital Business Credit v. Louis A. Gencarelli, No. 06-2700 (1st Cir. 8/30/07) 502(b) rather than 506(c) controls whether an oversecured creditor can collect a prepayment premium, at least in a solvent debtor case; remanded for a determination of the enforceability of the prepayment premium under Rhode Island law. Chapter 11 case.

The Calpine ULC1 Indenture

SECTION 3.1 Payment of Securities.

The Company shall pay the principal of, and interest on the Securities of each Series on the dates and in the manner provided in such Securities. The Company shall pay interest on overdue principal at the rate borne by or provided for in such Securities; it shall pay interest on overdue installments of interest at the rate borne by or provided for in such Securities to the extent lawful. Principal and interest shall be considered paid on the date due if the Trustee or the Paying Agent (other than the Company or a Subsidiary or an Affiliate of the Company) has received from or on behalf of the Company money sufficient to pay all principal and interest then due in accordance with Section 2.5.

SECTION 5.5 Control by Majority.

The Holders of a majority in principal amount of the Securities of a Series may direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on it with respect to the Securities or Guarantee of such Series. However, the Trustee may refuse to follow any direction that conflicts with law or this⁸ Indenture or the Guarantee Agreement, or, subject to Section 6.1, that the Trustee determines is unduly prejudicial to the rights of other Securityholders, or would involve the Trustee in personal liability; provided, however, that the Trustee may take any other action deemed proper by the Trustee that is not inconsistent with such direction. Prior to taking any action hereunder, the Trustee shall be entitled to indemnification from Securityholders of such Series reasonably satisfactory to it against all risk, losses and expenses caused by taking or not taking such action. Subject to Section 6.1, the Trustee shall be under no obligation to exercise any of the rights or powers vested in it by this Indenture at the request or direction of the Securityholders pursuant to this Indenture, unless such Securityholders shall have provided to the Trustee security or indemnity reasonably satisfactory to it against the costs, expenses and liabilities which might be incurred in compliance with such request or direction.

SECTION 5.7 Rights of Holders To Receive Payment.

Notwithstanding any other provision of this Indenture or the Guarantee Agreement, the right of any Holder of a Security to receive payment of principal and interest on the Security, on or after the respective due dates expressed or

⁸ Trustee's duties, prudent man rule; infra.

provided for in the Security, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of the Holder.

SECTION 5.9 Trustee May File Proofs of Claim.

The Trustee may file such proofs of claim and other papers or documents and take such other actions including participating as a member or otherwise in any committees of creditors appointed in the matter as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the amounts provided in Section 6.7)⁹ and the Securityholders allowed in any judicial proceedings relative to the Company, the Guarantor or the creditors or the property of the Company or the Guarantor and, unless prohibited by law or applicable regulations, may vote on behalf of the Holders of each Series in any election of a trustee in bankruptcy or other Person performing similar functions, and any Custodian in any such judicial proceeding is hereby authorized by each Holder to make payments to the Trustee and, in the event that the Trustee shall consent to the making of such payments directly to the Holders, to pay to the Trustee any amount due it for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and its counsel, and any other amounts due the Trustee under Section 6.7. To the extent that the payment of any such amount due to the Trustee under Section 6.7 out of the estate in any such proceeding shall be denied for any reason, payment of the same shall be secured by a Lien on, and shall be paid out of, any and all distributions, dividends, money, securities and other properties which the Holders of the Securities may be entitled to receive in such proceeding whether in liquidation or under any plan of reorganization or arrangement or otherwise.

No provision of this Indenture shall be deemed to authorize the Trustee to authorize or consent to or accept or adopt on behalf of any Holder any plan of reorganization, arrangement, adjustment or composition affecting the Securities, the Guarantee or the rights of any Holder thereof or to authorize the Trustee to vote in respect of the claim of any Holder in any such proceeding; provided, however, that the Trustee may, on behalf of the Holders, vote for the election of a trustee in bankruptcy or similar official and be a member of a creditors' or other similar committee.

SECTION 6.1 Duties of Trustee.

⁹ Trustee's compensation and reimbursement of expenses.

(a) If an Event of Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture and the Guarantee Agreement, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of his own affairs.

(b) Except during the continuance of an Event of Default:

(i) The Trustee need perform only those duties that are specifically set forth in this Indenture or the Guarantee Agreement and no others and no implied covenants or obligations shall be read into this Indenture or the Guarantee Agreement against the Trustee.

(ii) In the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture or the Guarantee Agreement. However, the Trustee shall examine the certificates and opinions to determine whether or not they conform to the requirements of this Indenture or the Guarantee Agreement, as the case may be (but need not confirm or investigate the accuracy of mathematical calculations or other facts stated therein).

(c) The Trustee may not be relieved from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that:

(i) This paragraph does not limit the effect of paragraph (b) of this Section.

(ii) The Trustee shall not be liable for any error of judgment made in good faith by a Trust Officer, unless it is proved that the Trustee was negligent in ascertaining the pertinent facts.

(iii) The Trustee shall not be liable with respect to any action it takes or omits to take in good faith in accordance with a direction received by it pursuant to Section 5.2, 5.4 or 5.5.¹⁰

(iv) No provision of this Indenture or the Guarantee Agreement shall require the Trustee to expend or risk its own funds or otherwise incur

¹⁰ Control by majority; supra.

any financial liability in the performance of any of its duties hereunder, or in the exercise of any of its rights or powers, unless it receives indemnity satisfactory to it against any risk, loss, liability or expense.

(d) Every provision of this Indenture that in any way relates to the Trustee is subject to paragraphs (a), (b) and (c) of this Section.

(e) The Trustee, in its capacity as Trustee and Registrar and Paying Agent, shall not be liable to the Company, the Guarantor, the Securityholders or any other Person for interest on any money received by it, including, but not limited to, money with respect to principal of or interest on the Securities of any Series, except as the Trustee may agree with the Company.

(f) Money held in trust by the Trustee need not be segregated from other funds except to the extent required by law.

SECTION 8.2 With Consent of Holders.

The Company, when authorized by a Board Resolution, and the Trustee may amend or supplement this Indenture or the Securities of a Series with the written consent of the Holders of a majority in principal amount of the Securities of each Series affected by such amendment or supplement. However, without the consent of each Securityholder affected, an amendment or supplement under this Section may not: . . .

(e) make any Security payable in currency or consideration other than that stated in the Security;

(f) modify the Guarantee to the detriment of a Holder;

(g) make any change in Section 5.4, Section 5.7¹¹ or this second sentence of this Section 8.2.

¹¹ Rights of Holder to receive payment; supra.

Selected Sections from the Delta - Keaton County Indenture**SECTION 9.04. Owners' Right to Direct Proceedings.**

Anything in this Indenture to the contrary notwithstanding, the Owners of a majority in principal amount of the Bonds then Outstanding hereunder shall have the right, by an instrument in writing executed and delivered to the Trustee, to direct the time, method and place of conducting all remedial proceedings available to the Trustee under this Indenture or exercising any trust or power conferred on the Trustee under this Indenture; provided, however, that so long as the Letter of Credit or any other Credit Facility is in effect with respect to a Series of Bonds and no default specified in Section 9.01(a), 9.01(b) or 9.01(c) has occurred, the Credit Bank or the issuers of any such Credit Facility shall have the right to act on behalf of the Owners of such Series of Bonds in directing such proceedings.

SECTION 9.06. No Impairment of Right to Enforce Payment.

Notwithstanding any other provision in this Indenture, the right of any Owner to receive payment of the principal of or purchase price of and interest and any premium on his Bond, on or after the respective due dates expressed therein, or to institute suit for the enforcement of any such payment on or after such respective date, shall not be impaired or affected without the consent of such Owner.

SECTION 10.10. Construction of Indenture; Existence of Facts.

The Trustee may construe any of the provisions of this Indenture insofar as the same may appear to be ambiguous or inconsistent with any other provision hereof, and any construction [sic] of any such provisions hereof by the Trustee in good faith shall be binding upon the Owners. . . .

SECTION 10.18. Standard of Care.

The Trustee, prior to the occurrence of an Event of Default and after the curing of all Events of Defaults which may have occurred, undertakes to perform such duties and only such duties as are specifically set forth in this Indenture, and no implied agreements or obligations shall be read into this Indenture against the Trustee. Notwithstanding any other provisions of this Article, the Trustee shall, during the existence of an Event of Default of which the Trustee has actual notice or is deemed to have notice, exercise such of the rights and powers vested in it by this Indenture and use the same degree of skill and care in their exercise as a

prudent person would use and exercise under the circumstances in the conduct of his own affairs.

SECTION 12.03. Supplemental Indenture with Consent of Owners.

(a) Except for any Supplemental Indenture entered into pursuant to Section 12.02, subject to the terms and provisions contained in this Section, the Owners of not less than a majority in aggregate Outstanding principal amount of the Bonds shall have the right from time to time to consent to and approve the execution and delivery by the Issuer and the Trustee of any Supplemental Indenture deemed necessary or desirable by the Issuer for the purposes of modifying, altering, amending, supplementing or rescinding in any particular, any of the terms or provisions contained in this Indenture; provided, however, that, unless approved in writing by the Owners of all the Bonds, nothing herein shall permit, or be construed as permitting, (i) a change in the times, amounts or currency of payment of the principal of or interest or any premium on any Bond, change in the terms of the purchase of Series of Bonds pursuant to Section 2.02 (other than as permitted by Section 12.02(g)), or a reduction in the principal amount or redemption price of any Bond or a change in principal amount or redemption price of any Bond or a change in the method of determining the rate of interest thereon, or (ii) the creation of a claim or lien upon, or a pledge of, the Receipts and Revenues ranking prior to the claim, lien or pledge created by this Indenture, or (iii) a preference or priority of any Bond or Bonds over any other Bond or Bonds, or (iv) a reduction in the aggregate principal amount of Bonds the consent of the Owners of which is required for any such Supplemental Indenture or which is required, under Section 12.07, for any modification, alteration, amendment or supplement to the Agreement. . . .

(d) If Owners of not less than the percentage of Bonds required by this Section shall have consented to and approved the execution and delivery thereof as herein provided, no Owner shall have any right to object to the execution and delivery of such Supplemental Indenture, or to object to any of the terms and provision contained therein or the operation thereof, or in any manner to question the propriety of the execution and delivery thereof, or to enjoin or restrain the Issuer or the Trustee from executing and delivering the same or from taking any action pursuant to the provisions thereof.

SECTION 12.06. Amendment of Agreement or Guaranty without Consent of Owners.

Without the consent of or notice to the owners of the Bonds, the Issuer may modify, alter, amend or supplement the Agreement, including the exhibits

and attachments thereto, and the Trustee shall consent thereto (unless such consent specifically is not required by the Agreement), (i) as may be required by the provisions of the Agreement and the Indenture, (ii) for the purpose of curing any formal defect, omission, inconsistency or ambiguity therein, or (iii) in connection with any other change therein which is not materially adverse to the owners of the Bonds.

The Issuer shall not enter into, and the Trustee shall not consent to, any amendment, alteration, modification of or supplement to the Agreement other than as described in the preceding paragraph, without the written approval or consent of the owners of not less than a majority in aggregate principal amount of the Bonds then outstanding; provided that, unless approved in writing by the owners of all Bonds then outstanding, no change in the obligations of the Company under the Agreement relating to payments of the principal of and premium, if any, and interest on the Bonds may be made.

Without the consent of or notice to the owners of the 1992 Series A and B Bonds, the Company and the Trustee may modify, alter, amend or supplement the Guaranty, (i) as may be required by the provisions of the Guaranty and the Indenture, (ii) for the purpose of curing any formal defect, omission, inconsistency or ambiguity therein, or (iii) in connection with any other change therein which is not materially adverse to the owners of the 1992 Series A and B Bonds.

The Company and the Trustee shall not enter into any amendment, alteration, modification of or supplement to the Guaranty other than as described in the preceding paragraph, without the written approval or consent of the owners of not less than a majority in aggregate principal amount of the 1992 Series A and B Bonds then outstanding; provided that, unless approved in writing by the owners of all 1992 Series A and B bonds then outstanding, no change in the obligations of the Company under the Guaranty relating to payments of the principal of and premium, if any, and interest on the 1992 Series A and B Bonds may be made.

SECTION 12.07. Amendment of Agreement or Guaranty with Consent of Owners.

Except in the case of modifications, alterations, amendments or supplements referred to in Section 12.06, the Issuer shall not enter into, and the Trustee shall not consent to, any amendment, alteration, modification of or supplement to the Agreement or the Guaranty, without the written approval or consent of the Owners of not less than a majority in aggregate principal amount

of the Bonds then Outstanding, given and procured as provided in Section 12.03, provided, however, that, unless approved in writing by the Owners of all bonds then Outstanding, nothing in this Section contained shall permit, or be construed as permitting, a change in the obligations of the Company under Section 4.03 of the Agreement. If at any time the Issuer or the Company shall request the consent of the Trustee to any such proposed modification, alteration, amendment or supplement of the Agreement or the Guaranty, the Registrar shall cause notice thereof to be given in the same manner as provided by Section 12.03 with respect to Supplement Indentures. Such notice shall briefly set forth the nature of such proposed modification, alteration, amendment or supplement and shall state that copies of the instrument embodying the same are on file at the Principal Office of the Trustee for inspection by all Owners of Bonds Outstanding. The Issuer may enter into, and the Trustee may consent to, any such proposed modification, alteration, amendment or supplement of the Agreement or Guaranty, subject to the same conditions and with the same effect as provided in Section 12.03 with respect to Supplemental Indentures.

Extract from Model Simplified Indenture § 5.09**SECTION 5.09. Restoration of Rights and Remedies.**

If the Trustee or any Debentureholder has instituted any proceeding to enforce any right or remedy under this Indenture and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Trustee or to such Debentureholder, then and in every such case the Company, the Trustee and the Debentureholders shall, subject to any determination in such proceeding, be restored severally and respectively to their former positions hereunder, and thereafter all rights and remedies of the Trustee and the Debentureholders shall continue as though no such proceeding had been instituted.

SECTION 5.10. Rights and Remedies Cumulative.

No right or remedy herein conferred upon or reserved to the Trustee or to the Debentureholders is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

Commentary

Sections 5.09 and 5.10 are of greater moment in mortgage indentures where a greater variety of rights and remedies are always provided, such as the trustees' right of entry on and possession of the mortgaged property, the trustee's right to sell the mortgaged and pledged property by non-judicial proceedings, and the trustee's right to a sale by judicial foreclosure or other judicial means. Even in an unsecured issue the Trustee typically has a variety of remedial procedures available under the indenture, such as suit for defaulted payments, acceleration and suit on the entire indebtedness and suit for specific performance of particular covenants, as well as the remedies of a creditor given by law.