

Expert Testimony in the Real Estate Arena



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Expert Testimony in the Real Estate Arena

The ongoing impact of the decline in real estate values is resulting in the need for expert testimony to establish reasonable lending structures, reorganization plans, market oriented reconciliation of valuations, and highest and best use review. The professionals of Focus Management Group regularly supply this expert testimony and litigation support on behalf of debtor and creditor counsel. Our expert testimony and litigation support assists counsel in achieving the best outcomes for their clients.

The work out process related to real estate loans has been evolving over the past few years. The first stages involved amending existing loans and establishing new repayment plans. When those repayment plans were not successful, the second stage required additional amendments, or bankruptcy protection. In many cases the borrower/lender relationship is in a new stage—one which involves litigation related to reasonable lending structures, achievable reorganization plans, values, and lender liability.



Case Example 1: Reasonable Lending Structures

In a recent case, a Focus professional, with several decades of real estate lending experience, was able to quickly survey the current market for loan structures and provide Expert Testimony regarding the reasonableness of a lending structure proposed by the borrower.

In this example, the Focus professional supported lender's counsel in establishing reasonable current advance rates, interest rates, and repayment strategies. When dealing with a troubled lending situation, Focus professionals are uniquely qualified to understand and opine regarding the reasonableness of a proposed lending structure.



Case Example 2: Achievable Reorganization Plans

In another case, a Focus professional reviewed the borrower's reorganization plan to establish achievability. During the review of the real estate property entitlements, the Focus professional discovered the borrower had failed to meet certain requirements related to property tax abatement. The financial impact of this issue was significant to this case and resulted in the need to develop an alternative reorganization plan.

Without the review of the Focus professional, this problem would not have been discovered until well into the reorganization time period and would have caused the plan to fail.

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Case Example 3: Valuation

In another case, our Professionals provided fairness opinions and related expert witness support in confirmation of the prices paid and recovery generated by the sale of projects and divisions of real estate entities. The opinions prepared by Focus professionals assisted the client company in finalizing the sale closings at market prices. By contrast, without those opinions, the purchasers would have required reduced prices and the lenders would have been unwilling to release assets.

The timely preparation of the opinions, and the expert testimony support, allowed the divisions of the company to be sold quickly and at market prices.




Case Example 4: Lender Liability

Lender liability takes many forms. Focus professionals have extensive experience in real estate lending and are able to address any aspect of the borrower/lender relationship.

In one case, a Focus professional provided an expert opinion regarding the material adverse change clause of a loan agreement. The Focus professional determined changes that had occurred in the financial performance of the company, determined whether those changes were adverse, and then opined whether those changes warranted invoking the material adverse change clause in the loan agreement.

In this case, the changes in the financial performance of the company, did not warrant invoking the material adverse change clause. Both parties were able to negotiate a settlement without experiencing a protracted legal fight related to lender liability.




Focus Litigation Support

Focus professionals are able to assist our clients by providing sound arguments relating to expert analysis of complex situations by combining real estate experience, industry contacts, and high ethical standards.

Expert testimony does not begin or end with the written expert testimony report or the oral court testimony. Focus professionals are able to maximize our clients' outcome when we use our expertise to assist counsel in a variety of steps along the way to the final court decision. This assistance may occur at the beginning of a workout situation, or may begin at the first sign of potential litigation. Our Professionals are able to step in at any part of the process, and have provided the following types of litigation support:

- **Discovery Request Review**
Review of Discovery Requests to provide expansion and a focus of the information requests submitted to the opposing party to maximize useful discovery. In this capacity, the professionals of Focus Management Group are able to use their extensive experience in business operations and management, coupled with their extensive knowledge of banking and restructuring management, to develop an information list that provides counsel with the data necessary to better approach the case.
- **Attend Depositions**
Attend depositions to provide immediate feedback to counsel on questions and information provided. This can be helpful when the party being deposed is coming to the scheduled deposition with new or additional financial information or banking policies and procedures. Focus attendance in depositions also provides an immediate opportunity to support counsel in exploiting testimony to optimize the objectives of the deposition.
- **Develop Lines of Questioning**
Develop thorough lines of questioning for depositions to gather needed information in a timely, efficient and expositive manner. Assistance in this category includes reviewing the materials already provided for inconsistencies or problems, as well as providing suggested topics and lines of questioning for counsel to utilize in the depositions.
- **Deposition Transcript Review**
Complete a thorough review of deposition transcripts for additional information requests. In this capacity, Focus professionals review existing depositions in order to identify financial, operating, or banking-related inconsistencies, issues, or openings that might be used by counsel to weaken the position of the opposing side.
- **Expert Witness Report Generation**
Prepare written expert witness reports to be submitted to the appropriate court. These reports include topics such as reorganization plan feasibility, reasonableness testing of proposed financing terms, or critical examination of appraisals and other valuation documents. These expert witness reports are developed based on a thorough review of the materials provided and include substantial discussion with counsel related to the case.
- **Deposition Preparation**
Support written expert witness reports with depositions. Focus professionals are experienced in giving depositions and adept at understanding the intricacies of each case.
- **Court Testimony**
Support written expert witness reports with court testimony. Focus professionals regularly provide oral testimony in support of their expert witness report.



Focus Litigation Support

While expert witnesses may join the process at various stages in the litigation, it is beneficial to fully involve the expert as early as possible. Focus' extensive knowledge of real estate lending, project management and financial analysis, as well as banking practices and procedures, allows us to serve as an integral team member for litigation support.



Case Example 5: Provide Expert Testimony to Assist the Bankruptcy Trustees in Mitigating Claims Against the Estate

A Focus professional recently provided expert witness testimony, which built on knowledge gathered as Financial Advisor to a company operating under Chapter 11 bankruptcy protection. This expert testimony included many facets of the reorganization process, and specifically included 1) analysis and review of project and company solvency, 2) reasonable equivalent value, and 3) determination of the existence of a Ponzi scheme.

Our extensive knowledge of the company, developed during our tenure as the Financial Advisor, allowed us to continue to provide support to the Chapter 11 Trustee during the claims mitigation process and the plan reorganization process.

Summary

Irrespective of the type of expert witness work required, Focus Professionals stand ready to assist companies, lenders and counsel during the real estate work out process. The experience of Focus Professionals in real estate, lending, and work out strategies, uniquely qualifies Focus to provide the type of expert testimony and reports that augment the work out process.

Contact

Focus Management Group is a leading business restructuring firm headquartered in Tampa, with offices in Atlanta, Chicago, Cleveland, Dallas, Los Angeles and Philadelphia. For more information regarding our expert witness and litigation support services, contact one of our experienced Managing Directors listed below:

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About the Authors



Jay Kelley, Managing Director and Head of Focus Management Group's Real Estate Practice, is a seasoned finance professional with more than 25 years experience in every aspect of commercial and residential real estate investments for both public and private concerns. Jay specializes in real estate restructuring, as well as turnaround and rescue plans for businesses with financial difficulties.



Alan Weiner brings over 25 years of experience as a Senior Financial Executive to Focus Management Group. Alan has raised significant private equity funding for various firms and managed and executed successful turnaround and litigation strategies. Prior to joining FMG, Alan was a Co-Chief Executive Officer for the country's largest franchisor of independently owned and operated building companies.



Juanita Schwartzkopf is a senior consultant at Focus Management Group and has 25 years of experience in commercial banking, financial management and risk management. Throughout Juanita's career, she has handled diverse crisis management and asset recovery situations involving bankruptcy, dissolution and liquidation. Juanita is an expert at analyzing and working with a variety of real estate assets, ranging from REITs to privately-owned real estate.