WHITE PAPER

NEGOTIATING NON-RECOURSE TERMS WITH YOUR LENDER

How to keep a "non-recourse" loan from inadvertently becoming personally guaranteed

Non-recourse loans often fail to function as “non-recourse” because borrowers overlook how carve-outs are drafted. Small mistakes at the term-sheet stage can shift normal operating decisions into personal liability traps, giving lenders unintended leverage once documents move to counsel and later to servicing.

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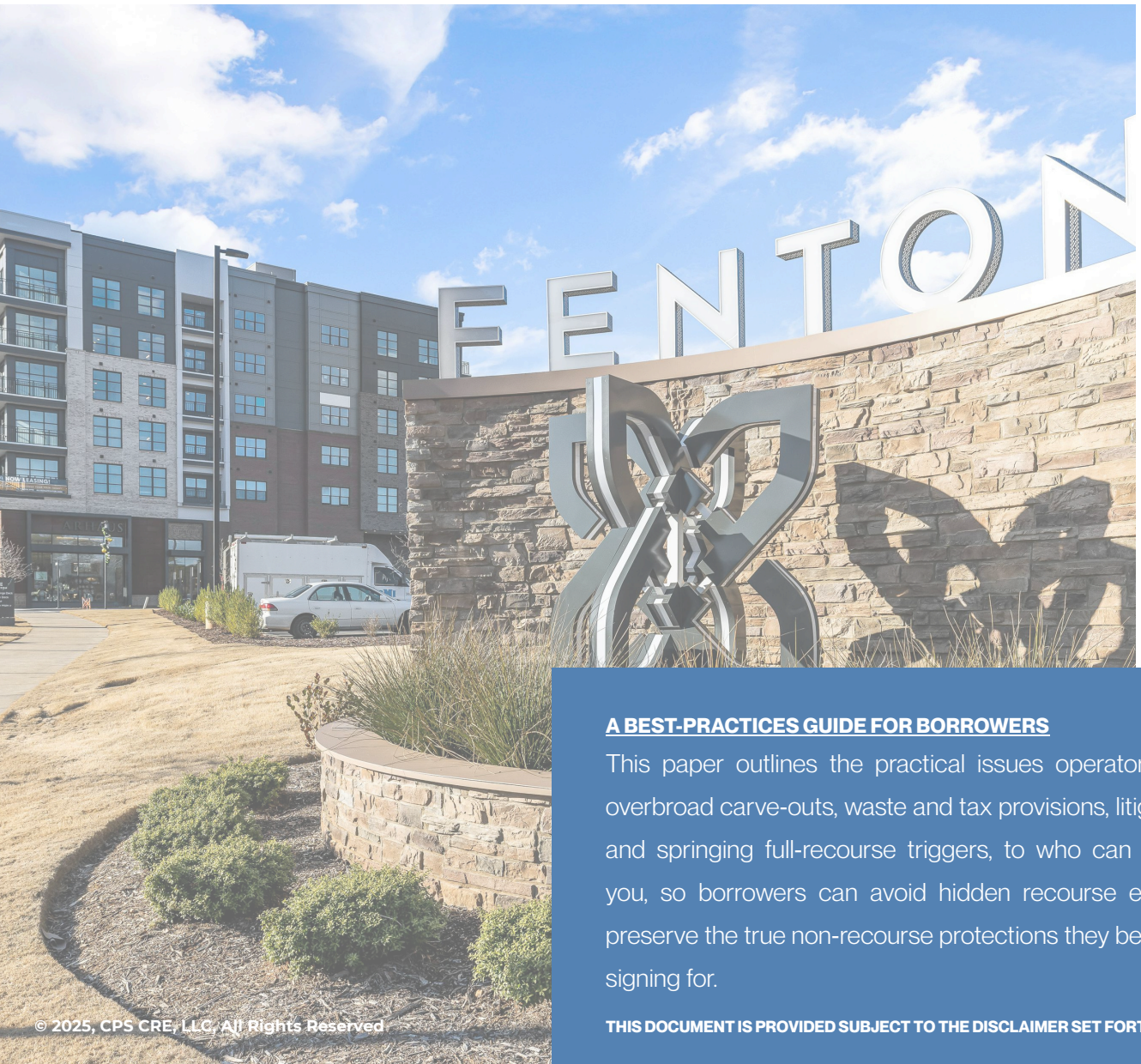
Firm overview on page 10.



A BEST-PRACTICES GUIDE FOR BORROWERS

This paper outlines the practical issues operators face, from overbroad carve-outs, waste and tax provisions, litigation pitfalls, and springing full-recourse triggers, to who can actually bind you, so borrowers can avoid hidden recourse exposure and preserve the true non-recourse protections they believe they are signing for.

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Negotiating Non-Recourse Terms with Your Lender

by: Shlomo Chopp, Managing Partner | CASE

Your loan originator is not trying to hurt you. They want you as a repeat customer. But the moment you sign the term sheet, control shifts. At that point, your salesperson is limited in how they can advocate for you, you are dealing with seasoned lender counsel, and your good faith deposit is paying for them. Then, once the loan closes, you are dealing with a servicer that will "prosecute" the loan to the letter of the documents – as they have committed to their investors, shareholders or bondholders and their obligation is prompt payments and recovery of principal.

At CASE, we see this often. Loans default because the real estate failed, but lenders gain unintended leverage over borrowers when documents were poorly negotiated. Borrowers assume "non-recourse" means what it sounds like. Often the real-world effects are not.

Negotiating the carve-out language after the term sheet is signed is materially harder. Once a term sheet is executed, leverage disappears and Borrowers' desires gets lost in a game of telephone between both counsel. In many deals, carve-outs matter as much as economic terms. Get your salesman, your originator, to deliver you these concessions in exchange for the business. Don't sign on the dotted line, the process of transferring the loan to legal and due-diligence, until you have evened some of the playing field on this front.

This paper is intended to provide important context, but isn't intended to replace your attorney, or allow you to hire an attorney who "knows loan documents" but has no real expertise. It is certainly not to provide legal or uncompensated business advice, so take this white paper for what you paid for it – nothing but an interesting read informed by our experience. Our goal is to help borrowers understand where non-recourse loans break and how avoiding certain drafting mistakes can reduce the possibility of personal exposure.

Again, this is not intended to be a comprehensive list and your attorney is likely to have many more points to add. It is intended to flag some fundamental, common, and other not so well-known mistakes or pitfalls.

WHAT "NON-RECOURSE" REALLY MEANS (AND WHERE IT BREAKS).

On its face, a non-recourse loan means this: if the loan defaults, the lender can take the property and any additional collateral but will not pursue the guarantor personally – other than any other guarantees (i.e. completion guarantee) or indemnities (i.e. environmental). In practice, however, every non-recourse loan contains exceptions, commonly referred to as recourse carve-outs or "bad boy" carve-outs. In most non-recourse structures, the guarantor signs an unconditional guaranty, but the loan documents expressly limit enforcement to recovery from the property unless an act or omission falls within the non-recourse carve-outs. These, as it sounds, carve-out from the lender commitment not to pursue a monetary judgement against the borrower and personal liability against the guarantor as a result of its unconditional guaranty.

The problem is not that carve-outs exist. The problem is that inexperienced borrowers and inexperienced attorneys often allow some of those carve outs to be drafted far too broadly.

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There are two categories of carve-outs. The first is "above the line" carve-outs (also known as limited-recourse carve-outs). These create personal liability only to the extent the lender suffers actual losses as a result of specified misconduct (and potentially costs to recover). To recover, the lender will claim and show damages.

The second is the "below the line" carve-outs (also known as springing or full recourse). The violation of these convert the entire loan into a personal obligation, often without any requirement that the lender prove actual loss. If you are not careful when negotiating loan documents, items that should remain above the line migrate below it.

These limitations are only as good as the document drafting.

A PRACTICAL WARNING TO BORROWERS.

Any competent owner operator can identify not so far-fetched scenarios where they could technically violate a carve-out, and frankly any other loan default while acting in the best interests of the property. This is especially true when lenders are slow to respond (an issue that good attorneys can help mitigate when negotiating loan documents), and Borrowers must improvise to preserve value.

Loan documents are written by lawyers, not operators. If the borrower themselves is not present in these negotiations, the documents may not only not reflect operational reality but inadvertently impair it – something nobody, even the lender desires.

Murphy's Law applies with full force here. The objective is not to eliminate carve outs. It is to ensure that they are narrow and precise. They must capture real misconduct, not business stress, and only people you actually control should trigger them.

What follows is a practical framework for doing exactly that. Some points will seem obvious, and it may shock you to learn that any loan documents even include such clauses. Others will be issues that, once you inspect your loan documents, will show you where you can do better next time.

It's also worth noting: There is a multi-billion-dollar commercial mortgage service industry making sure that borrowers keep to their loan terms, yet most Borrowers can't explain their loan documents. Who looks out for them before it comes time for a firm such as ours to solve problems?

THE NON-RECOURSE PROMISE.

A non-recourse loan should clearly state that the lender's sole remedy is the property and its income. This is typically set forth in an exculpation section followed by a list of exceptions.

Avoid broad cross references that allow personal liability to arise under "any Loan Document" or under vaguely defined "recourse obligations" that live outside the carve out list. Clauses like that can undermine the non-recourse promise because they give the lender room later to argue that some other provision quietly created personal liability, even when the exculpation language appears protective.

The language should make clear that no borrower party has personal liability for repayment or performance.

The lender's sole recourse is the property and its cash flow, and that no other provision of any loan document creates personal liability unless it is expressly listed in the recourse carve outs. If liability is not listed, it does not exist. Full stop.

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BUSINESS RISK VS BAD ACTS.

There is a fundamental difference between business risk and misconduct. Business risk includes such things as tenant turnover, declining rents, rising expenses, market dislocation, and other forces you cannot control.

Bad acts include such things as fraud, intentional misrepresentation, theft or diversion of rents or other collateral, deliberate damage to the property or the use of bankruptcy or similar processes.

Loan documents are written by lawyers, not operators. If the borrower is not present in these negotiations, the documents will miss operational reality. The real-world caution is that operators routinely face decisions that could trigger an overbroad carve-out while they are actually doing the right thing for the property.

Any competent owner operator can identify scenarios where they could technically violate a carve-out while acting in the best interests of the property. Examples include choosing which bills to pay during a cash crunch, deferring non-critical work to preserve capital, reallocating cash to preserve key tenants, removing obsolete equipment without lender approval, or moving quickly when a lender is slow to respond or is controlling the cash.

A fair non-recourse loan limits personal liability to actual bad acts, not ordinary operating stress. Yet many badly negotiated loan documents empower lenders to treat cash flow shortfalls as moral failures and normal business decisions as misconduct. The carve-outs should clearly state that personal liability arises only from lender losses directly caused by things such as fraud, willful misconduct, or intentional misstatements by the borrower, the guarantor, or entities they control. Market conditions and operating underperformance should never, standing alone, create recourse.

In the same vein, ordinary capital contributions from your own equity, even as classified for purposes of accounting as “loans” or “exchanges” should not be turned into a “non-permitted debt” default (true story). The documents should clarify that bona fide, unsecured, subordinated capital contributions from equity holders that do not bear interest and sit behind the loan are treated as equity and not as debt, and that these contributions cannot, by themselves, be used to claim an SPE breach or a non-monetary default.

Because these distinctions are so important, the non-recourse framework, including which items are above the line and which are below the line, should be negotiated at the term sheet stage, while economic terms are still in play and

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the originator is motivated to close. Despite being non-binding, it sets precedent and once the term sheet is signed and the file moves to lender counsel, leverage drops significantly and overbroad carve outs become much harder to fix.

A word to the wise, if you are unable to procure a concession from the lender on some of these fronts, at least make certain to account for them in your operations. It is imperative that just as your leases are abstracted, so should your loan be abstracted, and not just by counsel, but by you as well. It is up to you, the borrower, to understand the documents clearly so that you can make certain that all important operational points are present in the abstract.

Additionally, as issues arise it is important for you to understand more than the cliff-notes of your loan documents, and if you do not, you might pay for it in more than the time it would have taken to understand your loan documents.

WASTE (DAMAGE OR NEGLECT).

At its core, "waste" should mean intentional damage to the property. Overly broad drafting can classify normal operational decisions, such as deferring work, removing obsolete equipment, and reallocating capital that does not otherwise trigger recourse, as waste.

A disciplined approach limits recourse to intentional acts or omissions that materially damage the property, committed by the borrower or controlled parties. The language should specifically exclude removal of obsolete or damaged personal property in the ordinary course and replacement of equipment or personal property with items of similar or better utility or value. It should also exclude the possibility of the lender considering borrower's business actions or inactions as waste. This includes a decision not to pursue actions (or leases) that may, in others' opinion (including the lender) improve the property.

Equally important is that there should be no implied obligation for owners to contribute additional capital simply to avoid recourse. Notification to the lender may be appropriate, but mandatory capital calls are not. The documents should make clear that there is no hidden obligation for owners to write extra checks just to preserve the property from recourse penalties.

In some deals, borrowers have successfully negotiated that waste arises only from affirmative misconduct, meaning actions taken to diminish the collateral value, not inaction.

TAXES, INSURANCE, AND LIENS.

Lenders care about taxes, insurance, and lienable charges because they threaten recovery of loan proceeds from the collateral, not because they want personal guarantees by stealth.

Payment of property taxes would typically be superior to the lenders first mortgage. A casualty at the property that is not covered by insurance would impair the lenders collateral. Some liens in certain states can be superior to the lenders' first mortgage, and certainly unsecured creditors can complicate matters when it comes to bankruptcy.

The common drafting failure is language that imposes personal liability for nonpayment regardless of available cash, even where rents are insufficient, or the lender controls cash or holds reserves. A well-structured carve-out includes safe harbors and no recourse if funds were unavailable, or if such available funds were controlled by the lender or a

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receiver. You should take the position that the insufficiency of rents or failure by lender or a receiver to release available funds after borrower's written request should not create personal liability, and borrower should have no obligation to contribute additional capital to avoid such nonpayment.

For liens, the carve out should clarify that losses come only from failure to pay charges that actually create a lien on the property, and in circumstances where borrower had sufficient funds it was permitted to use and failed to do so, and the charges are not the subject of a bona fide dispute being contested in good faith as permitted by the loan documents.

Lender's counsel may counter that if there are no funds, then such expenses should not be incurred. A response to this is the borrower's obligation under the loan documents to properly operate the property, and until such time as there is a receiver placed, it is the responsibility of the Borrower under the loan documents to contract for services. This is a winning argument, although the lender may require notice if services are contracted for which there will be insufficient funds, so that Lender can advance for such expenses.

LITIGATION AND "FIGHTING FAIR."

Lenders understandably want to prevent frivolous litigation designed solely to delay enforcement. The problem arises when loan documents punish any resistance, including good faith defenses or legitimate counterclaims.

Personal liability should be attached only to bad faith litigation, as determined by a court, but not to the proper use of the legal system. You shouldn't trigger recourse simply

BORROWER TIP:

When evaluating a financial clause, run the numbers.

When evaluating a default provision, play out worst case scenarios.

When evaluating recourse carve-outs, think of your family's future.

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because you refused to sign a one-sided pre negotiation agreement, challenged an inflated default interest bill, or took a lender or servicer to court over a genuine dispute (although litigating with your lender is very limited under most loan documents).

Borrowers should preserve the right to assert defenses, file counterclaims, and seek judicial resolution of genuine disputes. Where possible, litigation carve-outs should remain above the line. Where that is not feasible, precision matters.

Some language might be: "Borrower and Guarantor shall be personally liable for Lender's reasonable attorneys' fees and costs incurred as a result of any litigation or proceeding initiated by Borrower, Guarantor or their controlled affiliates in bad faith and solely for the purpose of delaying, obstructing or harassing Lender's exercise of its rights and remedies, as determined by a court of competent jurisdiction. For the avoidance of doubt, Borrower and Guarantor shall have no personal liability for (i) asserting defenses, (ii) filing counterclaims, or (iii) initiating or participating in any legal proceeding in good faith to resolve a bona fide dispute regarding Lender's rights or obligations under the Loan Documents."

BANKRUPTCY AND SPRINGING FULL RECOURSE.

Springing full recourse provisions are the most dangerous aspect of non-recourse loans. Lenders are concerned about bankruptcy because it shifts control to a court and may impair and delay remedies. That concern is legitimate. What is not legitimate is allowing full recourse to be triggered by technical or protective actions taken in good faith.

A reasonable framework limits springing recourse to a short list of intentional acts, voluntary bankruptcy filings by the borrower, collusive involuntary filings, or intentional violation of separateness covenants (consolidating entities). Good faith participation by a Borrower in a bankruptcy case (that it didn't initiate or support) to protect its interests (including negotiating cash-collateral use) or failure to take extreme defensive action when no good defenses are available, should not, by itself, create personal liability.

Another important area where borrowers inadvertently trigger springing full-recourse is a non-permitted conveyance of lenders collateral. Of course, taking a second loan or selling the property without consent is a clear violation of this intent. But how about signing a lease that requires lender approval, without first procuring that approval. This is a springing full-recourse trigger as you conveyed an interest in the property that would otherwise need lenders consent, absent lenders consent. I'm not suggesting that this can be carved out – although you should surely try. I am suggesting that ignoring or being unaware of certain sections of your loan documents, can result in the triggering of springing full-recourse.

WHO CAN TRIGGER RECOURSE.

Who can trigger recourse matters as much as what triggers it. Many loan documents attribute liability to acts of "Borrower, Guarantor, Affiliates, or Agents," with "Affiliate" defined so broadly it captures parties the guarantor does not control. If "Affiliate" is defined too broadly, this can include investors or related companies you do not really control.

Recourse should be limited to actions of the borrower, the guarantor, direct owners, managers and controlled affiliates. Actions taken by third parties outside your control should not automatically impose personal liability. Fences make good neighbors and documents are there for when things go

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sideways. If lovers can divorce in bloody battles, then certainly your partner can surely take a scorched earth approach – let alone a mezz lender or preferred equity member (lender).

It is therefore important to consider these issues up front and narrow the group of people whose bad acts count. If someone outside that group acts on their own, it should not automatically create personal liability for you.

THE "CHERRYLAND" INSOLVENCY TRAP (FOR CONTEXT ONLY).

One notorious example of overbroad non-recourse carveout drafting is the Cherryland case, which many experienced real estate and finance lawyers already know well. The short version is that the borrower's single-purpose entity was required, in its separateness covenants, to remain solvent and able to pay its debts as they came due. When the loan defaulted and the borrower, and SPE (single-purpose bankruptcy-remote entity, of course) became insolvent, the lender successfully argued that this insolvency itself was a breach that triggered full personal recourse on a supposedly non-recourse loan.

The critical feature of that language was that "remaining solvent" and "paying debts as they become due" were drafted as absolute SPE/separateness obligations and then cross-referenced into the bad-boy/recourse guaranty. In effect, the guarantor had promised that the SPE would never become balance-sheet insolvent or fail to pay obligations as they came due, even though those are exactly the conditions that exist in almost every distressed deal. Once the property ran into trouble and the borrower could not pay, the lender claimed a bad-boy breach and full recourse, not because of fraud or misconduct, but because the business failed.

Non-lawyer readers may be surprised, but this single sentence about solvency or "paying debts as they come due" in the wrong place can quietly turn a non-recourse loan into a de facto guaranty. The same concern applies to clauses that make it a bad-boy event if the borrower "admits in writing or in any legal proceeding its insolvency or inability to pay its debts as they become due." In practice, that means an offhand email to the lender saying, "we can't pay our bills," or a pleading that uses the word "insolvent," can be treated as a technical trigger for full recourse.

Sophisticated attorneys will likely already recognize this risk, but the operator audience needs to understand that both the promise to remain solvent and the promise never to admit the opposite are legal tripwires that should either be negotiated out of the recourse list or handled with extreme care in any distressed-deal communication.

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The goal is not to eliminate recourse carve-outs. It is to keep non-recourse loans genuinely non-recourse, except for a tightly defined list of real misconduct. If you understand these concepts and insist on disciplined drafting, carve outs stay narrow and clear, normal business stress is not treated as wrongdoing, personal liability is triggered only by people and actions you actually control. That is the difference between a killer deal and a deal that kills you.

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About US

Since 2010, CASE has guided institutional investors, family offices and hands-on property owners through the complexities of distressed commercial real estate finance. We combine deep CMBS, structured-finance and capital-stack expertise with real-world operational experience—having sat in the borrower's, lender's and bondholder's seats. Working hand-in-hand with your counsel, we craft clear, custom strategies and solutions to demystify the process, enable effective risk mitigation and put you in control.

Our Loan Workout Advisory is geared for loans typically exceeding $25 million, and in our experience we have advised on capital stacks as high as $1 billion. Our method mirrors the lender's own approach, prepared in accordance with a systematic strategy that spans from diligence through resolution. We begin by conducting comprehensive property and covenant analysis to establish your negotiation baseline. As lenders progress through appraisal and valuation, we refine your value-creation story, surface hidden risks and develop solution-focused scenarios—whether discounted payoffs or covenant modifications. We then lead negotiations with servicers and special servicers, coordinating closely with your legal team to prioritize battles that drive results and optimize risk mitigation.

Pre-Workout & Small-Balance Advisory: Built to guide hands-on property owners and small family offices through the early warning signs of loan distress—before special servicing or full workouts kick in. This service provides actionable guidance within 1–4 weeks. We collaborate with the borrower in developing a concise action roadmap, by developing a strategy based on property and loan review, including, identifying often misunderstood issues such as lockbox triggers and recourse carve-outs before they escalate. We also help interview and identify the right counsel to assist in executing a viable strategy. This solution-oriented approach ensures you know precisely where risks lie, which steps to take and how to negotiate confidently—all without committing to a full workout.



About the Author

Shlomo Chopp is the Managing Partner of Case Equity Partners, bringing over 20 years of commercial real estate investment and advisory experience specializing in distressed real estate. He began his career in 2003 at a pioneering proptech firm, rapidly excelling in deal-making and acquisitions while harnessing emerging technologies to spot undervalued opportunities. These early years provided him with a strategic mindset and a robust network that would later prove invaluable in navigating complex markets and transforming distressed assets into success stories.

In the wake of the Great Financial Crisis, Chopp's expertise shone through when he founded Case Property Services (CPS) in 2010. Focused on restructuring, unwinding, and turning around distressed debt, CPS mastered the challenges of structured finance loans. His innovative approach and deep understanding of commercial mortgage-backed securities consistently secured recoveries well beyond initial forecasts.

Throughout his career, Chopp has managed and advised on over $5 billion in commercial real estate assets, driving strategic acquisitions and leveraging his expertise across every level of the capital stack—from bonds and loans to properties and other derivative interests. His commitment to innovation is exemplified by his four granted U.S. patents, with additional patents pending, which underscore his pioneering integration of e-commerce with retail environments. This groundbreaking work has earned him industry accolades — including being named a Top Retail Expert by Rethink Retail for five consecutive years.

Beyond his corporate achievements, he generously dedicates time pro bono to assist borrowers with smaller loans who lack the necessary expertise to navigate complex transactions independently. Residing with his family in the Hudson Valley of New York, Chopp remains deeply engaged in his local community, widely recognized as a thought leader whose insights are sought by top-tier publications, institutions, and investors.

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