Mitigating Problem Loan Risks in the COVID-19 Era

A Presentation for the

Hampton Roads Chapter of

The Risk Management Association

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WILLIAMS MULLEN

finding yes®

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ABOUT US

Williams Mullen is a regional, full-service law firm with approximately 240 attorneys in offices across North Carolina, South Carolina, Virginia and Washington D.C. Since our firm began in 1909, our goal has been to provide business and legal solutions to help our clients' businesses thrive.

While we excel within our mid-Atlantic footprint, our clients come to us for their legal needs across the United States and internationally. They tell us they appreciate our *Am Law 200* big firm capabilities and experience without the big firm rates.

Our clients have peace of mind knowing we are responsive and act with a sense of urgency in today's fast-moving business environment. We are committed to being clear, concise and transparent in our communications. We believe in being fair in the delivery of our services from pricing to scope of work to billing practices. And lastly, we make sure that we bring a team together that is excited to understand you and your business. This is our pledge to all clients.

At Williams Mullen, we don't have offices located around the world, but we proudly offer the highest quality of work that, combined with consistently excellent client service, creates a better value for our clients.

Together, we work each day on Finding Yes®.

Practice Areas Include:

- Corporate
- Construction
- Data Protection & Cybersecurity
- Employee Benefits & Executive Compensation
- Energy
- Environment & Natural Resources
- Estate Planning: Private Client & Fiduciary Services
- Financial Services
- Government Relations
- Health Care
- Intellectual Property
- International
- Labor, Employment & Immigration
- Litigation
- Real Estate
- Tax Law
- White Collar and Investigations

Industries Include:

- Alcoholic Beverage Control
- Banking & Financial Services
- Community Banks
- Economic Development
- Education
- Emerging Technology
- Firearms Industry
- Government Contracts
- Hospitality
- Insurance Brokerages
- Manufacturing
- Post-Acute and Long-Term Care
- Retail
- Senior Housing Transactions
- Unmanned Systems

Included in *The American Lawyer's* Am Law 200.

Named one of *Virginia Business'* "2020 Best Places to Work."

Named one of *Business North Carolina's* "2019 Best Employers in North Carolina."

Received a perfect 100 for three consecutive years on the 2020 Corporate Equality Index, which is "the national benchmarking tool on corporate policies and practices pertinent to lesbian, gay, bisexual and transgender employees."

Named to the 2020 "Client Service A-Team" by BTI Consulting Group.

30 attorneys and 12 practice areas ranked by *Chambers USA* in 2019.

110 attorneys in 61 categories named to the 2019 edition of *The Best Lawyers in America©*; 14 attorneys named among the 2019 "Lawyers of the Year."

50 attorneys listed as "Super Lawyers" and 20 listed as "Rising Stars" in 2019 by *Virginia Super Lawyers*, *North Carolina Super Lawyers* or *Washington, D.C. Super Lawyers*.

59 attorneys named among the "Legal Elite" in 2019 by *Virginia Business*, *Business North Carolina* or *Columbia Business Monthly*

Received National First-Tier Rankings for the firm's Banking and Finance, Construction, Construction Litigation, and Trusts & Estates practices in the 2020 U.S. News – *Best Lawyers®* "Best Law Firms" report; Received 71 Metropolitan First-Tier Rankings.

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Cart Reilly's practice focuses on financing transactions, real estate acquisitions and sales and commercial leasing. She actively represents sellers and purchasers in nearly every aspect of a commercial real estate transaction, from contract drafting and negotiation to due diligence and closing. She also routinely serves as lender's counsel for financial institutions in a wide variety of financing transactions. She often represents regional and national landlords and tenants in the preparation and negotiation of office, retail and industrial leases.

Cart is a Hampton Roads native and enjoys being actively engaged in her community. She serves on the City of Norfolk's Board of Zoning Appeals, on the board of directors for Norfolk Festevents and for the Virginia Zoological Society and on the Hampton Roads Community Foundation's Professional Advisors Committee and the Community Leadership Partners' Steering Committee. She is the sponsorship chair for CREW Hampton Roads and serves as president of the Risk Management Association's Hampton Roads chapter. She also serves on the Norfolk & Portsmouth Bar Association's (NPBA) Executive Committee, as secretary of the NPBA's Foundation and as an area representative for the Virginia State Bar's Real Property Section.

Cart has been named among *Virginia Business*' "Legal Elite" for Real Estate/Land Use (2015-present). She has been recognized as an emerging leader by several publications, including *CoVa Biz Magazine's "*Millennials on the Move" (2018) and the "Top Lawyers of Coastal Virginia" (2020), *Inside Business*' Top 40 Under 40 (2018) and *Virginia Lawyers Weekly's* Up and Coming Lawyers (2017). In 2019, the Norfolk & Portsmouth Association awarded her the Walter E. Hoffman Community Service Award.

Cart received her Bachelor of Arts degree in history from the University of North Carolina at Chapel Hill and her Juris Doctor degree from the Catholic University of America's Columbus School of Law, where she served as executive editor of the Catholic University Law Review. Following law school, Cart served as a law clerk to the Honorable Charles E. Poston and the Honorable Karen J. Burrell of the Norfolk Circuit Court.

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For more than 35 years, financial services companies have looked to Grig Scifres for responsive and efficient assistance with originating, documenting, restructuring and enforcing all types of credit facilities. He assists creditors with resolving problem loans and distressed debt, and helps businesses acquire assets from bankrupt companies. His experience encompasses both real estate and commercial/industrial credit extensions, including asset-based loans, syndicated financings, construction loans for tax credit projects, residential acquisition, development and construction loans, issuance and credit enhancement of tax-exempt bonds, securitization financings, UCC Article 9 issues, lender liability issues, loan workouts, bankruptcy, real and personal property foreclosures, consumer credit issues and loan participations.

He has assisted lenders with credit extensions to government contracting companies throughout his career and has provided training and sample documentation for lenders and underwriters with respect to this industry.

Grig also helps developers of mixed-use, apartment, hotel and headquarters projects with acquisitions, sales, construction, financing and franchise license transactions.

Businesses that rely on Grig's help include financial institutions, non-bank financial services companies, hotel developers and real estate developers. He understands these businesses, their customers, their challenges and how they work.

A graduate of the University of Michigan with a bachelor's degree in economics, Grig received his law degree with honors from the Michigan State University College of Law, where he was editor-in-chief of the *Law Review*. He earned his Master of Law and Taxation degree from the College of William & Mary School of Law. Following law school, he served as a law clerk to the Chief Justice of the Michigan Supreme Court.

Grig has been recognized by *Best Lawyers in America* for Banking and Bankruptcy/Creditors' Rights (2007-present), by *Virginia Super Lawyers* for Banking (2006-present) and by *Virginia Business* as one of Virginia's "Legal Elite" for Bankruptcy/Creditors' Rights (2008, 2010). He is rated an AV attorney by Martindale–Hubbell, its highest rating, for ethical standards and legal ability. *Best Lawyers'* named him the 2013 Norfolk Banking and Finance Law "Lawyer of the Year."

Jennifer McLain McLemore

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Jennifer McLain McLemore advises business creditors, commercial landlords, mineral lessors, trade vendors, official committees, banks, and credit unions in bankruptcy and bankruptcy litigation matters. She frequently represents clients in matters involving debtor-in-possession financing arrangements, priority lien disputes, lease and landlord protections, vendor and critical vendor agreements, and asset identification and recovery matters. She also represents clients in bankruptcy litigation involving lease assumption/rejection issues, avoidance actions, alleged fraudulent transfer claims, claim objection disputes, and discharge/dischargeability suits.

Jennifer has handled bankruptcy cases for numerous clients, including business owners, corporate entities, contract counterparties, commercial landlords; vendors; banks and other lenders; official committees of unsecured creditors; chapter 7 trustees; chapter 11 trustees; and debtors.

Jennifer is listed in *The Best Lawyers in America*© for Bankruptcy & Creditor Debtor Rights/Insolvency & Reorganization Law (2013-present). She is listed in *Virginia Super Lawyers* for Bankruptcy Law (2014-present) and has been named among Virginia's "Legal Elite" by *Virginia Business* for Bankruptcy/Creditors' Rights (2011-2017; 2019).

Jennifer is a past chair of the International Women's Insolvency and Restructuring Confederation (IWIRC). She founded IWIRC's Virginia network in 2006, and, in 2012, she received the IWIRC's Melnik Award, which is awarded to a member who has made an exceptional contribution to IWIRC, either through efforts over the past year or for the culmination of efforts over a period of years.

She currently serves on the board of the American Bankruptcy Institute (ABI) and as co-chair of the ABI's Southeastern Bankruptcy Workshop Advisory Board. She was a member of Leadership Metro Richmond's Class of 2016 and is a sustaining member of the Junior League of Richmond.

Jennifer earned her Juris Doctor degree from the University of Richmond School of Law, where she served as an associate editor for the *University of Richmond Law Review.* She earned her Bachelor of Arts degree, *cum laude*, from Miami University.

BANKING & FINANCIAL SERVICES

The Banking and Financial Services Industry Service Group represents the complete spectrum of financial institutions — from international and national financial organizations to non-regulated lenders to community banks. From our start over 100 years ago to today, we have represented the banking industry and proudly still do so today. We understand this industry's unique and complex needs and relationships.

We have many dedicated client service teams that work across legal practices to counsel banks and financial institutions on a variety of financing transactions, asset securitizations, workouts, debt restructures, Uniform Commercial Code (UCC) issues, bankruptcy cases and regulatory compliance matters. We also regularly represent financial institutions in mergers and acquisitions, corporate and securities law, the creation of new financial products and services, lender-related litigation, Internet banking issues, collections and creditors rights cases.

Financing

We provide clients with timely, cost-effective solutions to every kind of transaction, including:

- Asset securitizations.
- Loans to finance leveraged acquisitions.
- Investment funds.
- Tax-exempt bond financings.
- Commercial real estate loans.
- Tax credit financings.
- Working-capital lines of credit.
- Equipment loans.
- Asset-based loans.
- ESOP loans.
- Multi-layered debt financings.
- Leveraged-lease transactions.
- Municipal lease financings.
- Mortgage warehouse financings.
- Letter of credit-backed transactions.
- Mezzanine financings.
- Syndicated and single-lender commercial loans.
- Swaps and other interest rate protection agreements.
- Capital markets transactions.
- Project financings.
- Loans to limited partnerships (both public and private offerings).

Securities and Corporate

Our attorneys provide the skills and depth of understanding to handle securities and corporate matters, including public and private offerings of stock and debt, mergers and acquisitions, trust preferred securities and broker-dealer arrangements.

In addition, we have extensive experience in designing and implementing dividend reinvestment and stock option plans. Section members have frequently represented clients organizing de novo or start-up financial institutions, with attorneys providing assistance in crafting executive compensation and employee benefits plans and handling compliance and examination issues. Other services include:

> New bank formations.
> Representation of bank holding companies in the acquisition of additional banks.
> Investment advisory affiliates formations.
> Preparation of periodic reports, proxy materials and beneficial ownership reports required by the Securities Exchange Act of 1934.

Regulatory

In today's complex regulatory environment, Williams Mullen attorneys are routinely called on to counsel clients regarding provisions in the Truth in Lending Act, Equal Credit Opportunity Act and Fair Credit Reporting Act, as well as other federal credit laws.

We keep abreast of regulatory developments, continuously track legislation and maintain excellent working relationships with state and federal regulators to ensure constructive resolution of client initiatives or regulatory inquiries.

Section members routinely represent financial institutions before various regulatory bodies such as the State Corporation Commission, Federal Reserve Bank, Comptroller of the Currency, Office of Thrift Supervision and the FDIC.

Workouts and Creditors' Rights

The firm's Financial Services Section has extensive experience handling workouts and creditors' rights cases. We have created skilled teams of attorneys to re-negotiate and restructure loans for creditors of all sizes and types.

Specifically, our Creditors' Rights Bankruptcy and Creditors' Rights Practice works with clients to successfully recast debt, secure additional collateral, postpone actions and resolve bankruptcy and collection issues. Our attorneys draw on their experience to provide early intervention and focused representation for creditors. Some examples of the firm's services include:

> Significant experience in chapters 7, 11, 12, and 13 of the United States Bankruptcy Code.
> Informal debt restructures, forbearance agreements and non-bankruptcy reorganizations.
> Bankruptcy litigation in all areas of creditor representation, including challenges to discharge of debt, defense of trustee's claims to avoid liens such as preferences and fraudulent conveyances, use of cash collateral, DIP financing, recovery of assets, stay litigation, objections to plans and motions to convert or dismiss.

Bank Operations

Our firm has comprehensive experience in representing and advising national and state banks on all aspects of bank operations, including ACH/Clearinghouse rules, Federal Reserve Bank operations procedures, electronic payments and check truncation, The Bank Secrecy Act, general check processing issues and issues arising out of creditor process against deposit accounts.

Intellectual Property

The Intellectual Property Section counsels financial institutions of all sizes about the commercial exploitation of intellectual property assets, management of contractor and strategic partnering agreements, telephony agreements and compliance with statutory and regulatory privacy requirements, such as the Graham-Leach Bliley Act. Areas of proficiency include portfolio prosecution and analysis; software and internet law; litigation and infringement disputes; licensing, contractor and strategic partnering agreements; and other transaction-related services such as patent prosecution and trademark and copyright registration.

Labor, Employment & Immigration

The majority of the labor and employment work that we do with banks involves advice on preventive employment practices — including management training, audit of wage and other employment practices — and assistance in developing policies and procedures and advising management on employment issues — including how to investigate and respond to complaints of harassment — FMLA, termination and discharge issues. We also draft employment agreements, assist in the development of affirmative action plans and defense of OFCCP audits and defense of employment-related claims and lawsuits.

Because we have worked with so many banks of various sizes, we are familiar with issues commonly facing banks, such as teller overage and shortage policies, the legal impact of fiscal responsibility policies, the use of financial history as hiring criteria and the increased threat of union organizing for banks that have opened branches in grocery stores. We have successfully defended banks, as well as executives that have been sued individually, in all types of employment-related actions. Because of the particular community relations issues facing banks, we are proponents of alternative dispute resolution in appropriate cases.

Wealth Management

Williams Mullen represents bank trust departments and trust companies, as well as individual executors, administrators and trustees regarding both complex and routine issues arising in the context of a fiduciary relationship. We also advise bank executives and directors, as well as other fiduciaries, in matters involving fiduciary obligations. We handle claims involving breach of fiduciary duty, malfeasance or mismanagement.

Fiduciary Litigation

We defend corporate and institutional executors and trustees in matters involving allegations of breach of fiduciary duty, including failure to adhere to the prudent investor rule, improper distribution to beneficiaries, and breach of duty of loyalty and impartiality. We advise bank clients with respect to best practices to minimize and avoid fiduciary liability. Section attorneys handle trust construction, reformation suits and rescission suits, as well as tax controversy matters before the Internal Revenue Service and state taxing authorities. We also represent corporate fiduciaries in tax-related litigation in Federal Court (including U.S. Tax Court) and state courts. On a regular basis, we handle matters involving charitable trusts and tax-exempt organizations, and substitution of trustee matters.

Internet Banking

Our Financial Services Section is a leader in internet technology and online banking issues. In conjunction with our technology law and e-commerce teams, we offer clients an array of services related to internet banking, compliance issues and other online matters.

Litigation and Lender Liability

Attorneys in the Financial Services Section work with the firm's trial teams to represent clients with civil litigation needs in state and federal courts and before administrative agencies at all governmental levels. We have significant experience in a wide variety of commercial, banking and finance issues, including contracts, construction, secured transactions, creditors' rights, bankruptcy, defense of lender liability claims, eminent domain and regulatory matters

BANKRUPTCY & CREDITORS' RIGHTS

Williams Mullen partners with regional, national and international clients to find creative solutions in loan workouts and collections, troubled company turnarounds, bankruptcy planning and proceedings and corporate restructurings through negotiation, litigation or a transactional approach. The group is supported by other Williams Mullen lawyers working in related fields such as corporate and securities law, finance, tax, government contracts, real estate, government relations, intellectual property and labor and employment. Experience includes the representation of individual creditors and committees in reorganization and workout matters, advising buyers and sellers of distressed assets and debt and structuring and closing a variety of debt transactions for lenders, investors and borrowers. Our partner clients reflect a broad industry array such as financial institutions, retail, communications, manufacturing and hospitality.

Documentation of Financings, Restructurings, Sales, Acquisitions and Workouts

Williams Mullen represents clients in the planning, negotiating and documenting debt restructurings; sales and acquisitions of assets entities and debt instruments; and negotiated financings with the goal of enforcing and protecting their rights. Our lawyers represent lenders, landlords, issuers and borrowers in a broad variety of restructuring transactions, including senior and mezzanine financings, debtor-in-possession (DIP) and letter of credit financings. We help clients manage risk relating to the sale and acquisition of assets and debt of financially distressed businesses via bankruptcy sales, reorganizations, foreclosures and other proceedings. Due to our broad range of experience, our attorneys have developed strong proficiencies in various fields including the financial, retail, real estate, hospitality, technology and government contracts industries.

Fraudulent Conveyance and Preferential Transfer Analysis and Litigation

Fraudulent conveyance or transfer analysis and preference analysis may be a critical step in negotiating a litigation settlement or in representing a client in an asset sale or acquisition. Avoiding or limiting preference and fraudulent conveyance liability in the first instance can be complicated, but strategies may be implemented to minimize potential future loss. Williams Mullen has extensive experience in identifying fraudulent conveyance and preference issues and advising clients on how fraudulent conveyance and preference considerations may impact the value of a settlement or an asset transaction.

Often a simple modification of a transaction structure may dramatically reduce a client's preference or fraudulent conveyance risk. Similarly, when a client is faced with a demand for return of a transfer alleged to be fraudulent or preferential, Williams Mullen has skilled professionals who can offer valuable and practical advice on available defenses, negotiate settlements or handle complex litigation that may involve intricate valuation and accounting issues.

Bankruptcy Litigation

In addition to the traditional bankruptcy related creditors' rights services we provide, Williams Mullen bankruptcy and litigation lawyers have handled claims and disputes relating to debtor-in-possession financing, fraudulent conveyances, equitable subordination and debt recharacterization, professional retention and compensation, plan confirmation contests, substantive consolidation, director and officer liability issues and appeals, among other things. In complex matters, our bankruptcy and litigation teams often collaborate to provide the optimum focus and experience to address the client's interests.

Many of the most complicated disputes that arise in the debtor/creditor context can be resolved with creative and thoughtful lawyering. When negotiated resolutions fail, however, we have the litigation experience to serve our clients from discovery through trial and beyond.

Foreclosure of Security Interests

Williams Mullen represents clients in the handling of real estate foreclosure sales and secured party personal property sales. Our lawyers represent banks, commercial lenders, mortgage companies and institutional lenders in executing deeds of trust through the conduct of foreclosure sales on all forms of commercial and/or residential property. Our attorneys also advised lenders as to potential real estate title issues which may arise throughout the course of a foreclosure sale, including proper disposition of Federal tax liens and/or mechanic's liens, which may be recorded against the property. Our attorneys are also familiar with alternative methods of disposition of real estate collateral, including Deeds in Lieu of Foreclosure, short sales and similar arrangements.

With respect to personal property, our attorneys have represented the same lenders in handling the disposition and enforcement of security interest in personal property through secured party sales, which may be through public or private sales. Due to our broad range of experience, our attorneys have developed strong skills in the most efficient and profitable method of the disposition of assets which serve as collateral for our clients.