

# SMART BUSINESS

INSIGHT. ADVICE. STRATEGY

CHICAGO

LIVING LIFE  
WITH A SENSE  
OF PURPOSE

4 WAYS TO  
IMPROVE YOUR  
"ABOUT US"  
PAGE

KNOWING  
WHAT YOUR  
EMPLOYEES  
HAVE LEARNED

## SAVORING ALL SIDES

HOW BILL NEWLANDS MAKES  
COLLABORATIVE DECISIONS AT  
BEAM GLOBAL SPIRITS & WINE

PRSR1 STD  
US POSTAGE PAID  
MECHANICSBURG  
PA  
PERMIT 205

# Lender liability

The borrower's rights when it comes to loans and loan commitments **Interviewed by Troy Sympson**

**C**ommercial lenders continue to dig themselves out of the credit crisis that began in 2008. In doing so, many lenders are trying to shore up their balance sheets by writing down the loans that, in hindsight, they regret making. However, the law requires that a lender have a legitimate basis to call in a loan or otherwise declare a default.

In general, a loan agreement is like any other contract — there are rights and obligations that run both ways. A lender can breach a loan agreement just as easily as a borrower can default. Thus, lenders must treat their borrowers fairly and as required under the loan agreement and applicable laws. If they don't, they are subject to litigation.

"Lender liability claims have not gained this much attention since the last banking crises in the late 1980s and early 1990s," says Monte Mann, a partner with the business litigation specialty firm Novack and Macey LLP. "These claims have returned to prominence since the credit crisis began in 2008 because banks have been trying to improve the overall health of their commercial loan portfolios by, among other things, declaring borrower defaults."

*Smart Business* spoke with Mann about lender liability claims and how — as a commercial borrower — you can maintain better balance of power in the relationship with your lender.

## What is lender liability?

Lender liability is a general term used to describe a variety of claims that borrowers assert against lenders. These may include claims for breach of: (i) a loan commitment or loan agreement; (ii) the duty of good faith and fair dealing that the lender owes the borrower; (iii) fiduciary duty; or (iv) any other legal obligation the lender owes the borrower.

For example, since 2008, there has been a dramatic increase in the number of lawsuits in which builders and real estate developers have sued lenders, alleging that lenders have improperly refused to honor written commitments to fund construction loans. Moreover, although it may seem counterintuitive, borrowers may have claims against lenders even in instances in which the borrower concedes that it has failed to make payments required under a loan. In particular, borrowers have increasingly sued lenders for selling loan collateral for less than fair market value.

The relationship between lender and borrower is typically harmonious at the beginning, but when it goes bad, it does so quickly. Commercial borrowers must know that they



**Monte Mann**  
Partner  
Novack and Macey LLP

have rights and understand them in order to protect themselves.

Cynics contend that in the current lending environment, unscrupulous lenders are contriving defaults in order to call in loans. In other words, skeptics argue that lenders are actively searching for technical deficiencies to exploit circumstances that they never would have acted on during better economic times. Commercial borrowers must be aware, prepared and protected.

## What should a commercial borrower look for if it thinks it may have a lender liability claim?

Commercial borrowers should keep a close watch on the borrowing relationship and must be keenly aware of any sudden changes in lender conduct. Consider pursuing a lender liability claim if your lender:

- Wrongfully refuses to honor a loan commitment
- Wrongfully refuses to honor a 'side deal' that is not in the loan agreement
- Wrongfully fails to fund a loan
- Wrongfully refuses to renew a loan
- Negligently processes or administers a loan
- Misrepresents information about a borrower in responding to third-party credit inquiries
- Threatens to take enforcement action,

which it does not intend to carry out but that causes the borrower to act to its detriment

- Improperly forecloses a deed of trust, a mortgage or a security agreement without giving the required notice or otherwise following proper statutory procedures

- Sells a borrower's collateral for less than its fair market value

- Interferes, to the borrower's detriment, with a borrower's day-to-day management or contractual relations with third parties

- Breaches a fiduciary duty that may have arisen or that a lender may have assumed, whether purposely or inadvertently, with respect to a borrower

- Engages in other acts that may constitute a breach of the lender's duty of good faith to a borrower in carrying out the terms of the parties' loan contract

## What are the potential consequences of failing to stay on top of your financing relationships?

Borrowers need to carefully monitor their relations with lenders to quickly recognize if they are being mistreated. Borrowers may have valid claims against lenders without realizing it. Again, this isn't a one-sided relationship in which the lender has all the power and can do whatever it wants. If a lender engages in misconduct, a borrower must be able to recognize it and use it as leverage to bring balance back to the relationship — even if the borrower does not intend to file litigation against the lender.

Additionally, the line of communication between the borrower and lender needs to remain open. Good lenders have three separate teams — the origination team that sources the loan, the loan administration team that administers the loan and the workout team that deals with loan defaults. The borrower needs to show the administration team and, if need be, the workout team, that it is a thoughtful and savvy borrower, and that it knows how to assert leverage to bring balance to the relationship.

## If you think you may have a lender liability claim, who should you consult?

The best person to consult is legal counsel who has litigated lender liability claims in the courts. The experienced litigator will be able to tell you if you really have the basis for a lender liability claim. <<

**MONTE MANN** is a partner with the business litigation specialty firm Novack and Macey LLP. Reach him at (312) 419-6900 or [mmann@novackmacey.com](mailto:mmann@novackmacey.com).

**Insights Legal Affairs** is brought to you by Novack and Macey LLP