

Pennsylvania – recommendations to protect against lender liability

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In the face of the COVID-19 crisis, businesses today face rapidly changing and unique financial challenges. Laudable government efforts to save lives and stop the spread of COVID-19 through business closure and stay at home orders are unavoidably contributing to significant cash flow shortages and wider economic damage. Borrowers' abilities to make loan payments and keep financial covenants under loan documents are strained and will likely continue to weaken. Lenders and borrowers will shortly face significant questions as to how to handle these troubled loans (e.g., will the lender enforce its rights by holding the loan in default, by attempting to accelerate payments under the loan, by initiating a foreclosure on collateral, or will the lender attempt a loan workout or forbearance by extending or modifying the terms of the loan?).

Regardless of what steps the lender ultimately takes, some borrowers against whom adverse actions are taken, and even some borrowers for whom a workout was attempted but failed, may seek to defend against foreclosures, confessions of judgment or other legal actions taken by their lenders, by asserting lender liability claims, or by bringing actions against their lenders in an attempt to recoup some of the borrowers' losses.

To mitigate against such risks, lenders should be aware of the types of claims brought by borrowers under the umbrella of lender liability, and to act in a manner that best avoids misunderstandings that might lead to claims by borrowers.

What is a “Lender Liability Claim” in Pennsylvania and What Can A Lender Do Now?

While there is no single, all encompassing “lender liability” cause of action in Pennsylvania, borrowers often bring a slew of common law and statutory-based claims or counterclaims when faced with adverse actions taken by a lender. These claims include, among others, common law causes of action such as breach of contract/breach of duty of good faith and fair dealing, fraud and/or negligent misrepresentations, breach of a fiduciary duty, tortious interference with contract, defamation, and statutory claims if brought by consumers for violation of the Unfair Trade Practices and Consumer Protection Law.

To mitigate against the risk of breach of contract claims, lenders should review, know and follow the provisions in their loan documents – particularly with respect to those provisions which provide a standard for the lender's exercise of discretion for actions that may be considered adverse to a borrower. In addition to the more straight-forward breach of contract claims, borrowers often base lender liability claims on the implied duty of good faith and fair dealing, which generally arises from every contract, even if absent from express terms. To protect against these claims, lenders should deal honestly and fairly with borrowers, be circumspect in verbal discussions that may seem casual, and refrain from making promises or giving assurances that differ from the loan documents or before formal internal

approvals. In addition, lender liability claims often arise when lenders involve themselves too closely with the day-to-day operations and business decisions of the borrower. If a lender exercises too much influence over how a borrower's business is run, borrowers may argue that the lender should bear responsibility for the failures of the borrower's business. Principally, these causes of action, whether it be fraud, defamation, good faith and fair dealing, violation of the UTPCPL, or even tortious interference, stem from or have elements or defenses relating to questions of truthfulness, misrepresentations, actions taken on pretext, or actions taken in an unreasonable manner or by unreasonable means by lender.

Therefore, it is important that lenders act in a straight-forward manner with their borrowers at all times, that they work within the loan documents, that they accurately record discussions and communications with their borrowers, and that they undertake to document all actions in writing being careful to avoid making oral promises or statements that a borrower may misunderstand or use to bring a claim against its lender, and that they consult counsel before taking action from which a lender/borrower dispute might arise.

Your Key Contacts



Mark A. May

Shareholder, Pittsburgh

D +1 412 297 4699

mark.may@dentons.com



Thomas D. Maxson

Shareholder, Pittsburgh

D +1 412 297 4706

thomas.maxson@dentons.com