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BEST PRACTICES FOR LENDERS TO AVOID AND PREVAIL IN LENDER LIABILITY LAWSUITS

Claims against lenders by defaulting borrowers frequently sound in breach of contract, fraud, or breach of fiduciary duty. The author — a litigator — discusses contractual provisions to defeat such claims. He focuses on the drafting of key provisions in loan documents, such as merger and integrations clauses, waiver and modification clauses, damages clauses, and provisions negating fiduciary duty or other special relationships. He concludes with points to avoid when servicing a loan and protective measures during workout discussions.

By Natan M. Hamerman *

When a commercial loan matures but is not repaid, a lender hopes for a smooth path forward to foreclosure and sale of the collateral. It's bad enough when the defaulting borrower tries to fight the foreclosure. But things can get worse — much, much worse.

This article explores how commercial lenders — particularly real estate lenders, but other lenders as well — can best insulate themselves against "lender liability" lawsuits. It is based on my experience defending against, and research concerning, lender liability claims on behalf of different financial institutions. The first issue I examine is what a lender liability claim is. Second, I discuss some of the contractual provisions most frequently at issue in lender liability cases. Third, I examine how the facts underlying lender liability claims can arise during the servicing of a loan, and, fourth, I provide some thoughts on how lenders can protect themselves from potential lender liability claims when their loans are in default or workout situations.

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I. WHAT IS A LENDER LIABILITY CLAIM?

"Lender liability" is an umbrella term used to describe various types of claims sometimes brought against lenders, most typically by borrowers (or their principals).[1] Often, these cases have less to do with a lender's conduct (which may have been completely proper) and are more about a borrower trying to avoid liability under a credit or loan facility. The borrower's goal in such suits frequently is to divert blame and liability for its own problems and defaults away from its own management or principals to the lender. Similarly, a borrower may use lender liability litigation as a bargaining chip to increase its leverage in workout negotiations or in foreclosure litigation. And, of course,

[1] *See, e.g., Airbus DS Optronics GmbH v. Nivisys LLC*, 183 F. Supp. 3d 986, 993 (D. Ariz. 2016); *BH Sutton Mezz LLC v. Sutton 58 Assocs. LLC*, 2016 WL 8352445, *15 (Bankr. S.D.N.Y. 2016) (both collecting cases).