



Building Success. Together.

ABA COMMERCIAL LENDING SCHOOLS

April 18 – April 24, 2026

Emory Conference Center Hotel
Atlanta, GA

Avoiding Lending Liability Issues

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Note: Class will be utilizing Mentimeter for polling.
Log into Menti.com.
Enter code: 62398362

Q: Who are your classmates?

- ☐ Bank Executive
- ☐ Loan Officer
- ☐ Attorney/In-house Counsel for Bank
- ☐ Relationship Manager

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Q: How large is your bank?

- ☐ Too big to fail
- ☐ Mid-size, in many states
- ☐ Community Bank
- ☐ Other, including non-traditional lenders

Q: What part of the country do you work?

- ☐ North
- ☐ South
- ☐ East
- ☐ West
- ☐ Somewhere more exotic

Q: How often do you deal with borrowers?

- ☐ Who are borrowers?
- ☐ Everyday
- ☐ Sometimes, only if there are problems or we need to bring in the business

Q: How often do you communicate with borrowers and potential customers?

- ☐ Face to face
- ☐ Telephone
- ☐ E-mail
- ☐ Text
- ☐ All of the above

Q: Lender Liability Experience

- ☐ Yes, our bank has been sued for lender liability
- ☐ Yes, our bank has been sued, and I have been involved in the lawsuit via deposition or trial
- ☐ Thankfully, I have never received a demand or lawsuit

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Q: What do you most want to learn from this class?

- Share the worst-case scenarios so I have a gauge for to avoid
- Tell me the best practices for avoiding lender liability demands and lawsuits
- I am indifferent. I am here to win Starbucks gift cards.

Today's Discussion Topics

- Define lender liability and borrowers' most common causes of action.
- Identify the red flags and what you recommended reactions should be.
- Discuss how to properly exert pressure on distressed borrowers.
- Best practices for pre-workout negotiations.
- What to do when the borrower files for bankruptcy protection.
- Looking ahead—what can you proactively do now to gain advantages in borrower-based litigation?

Big Picture Take-Aways

- What you say to borrowers matters. E-mails, texts and even recorded phone conversations may be exhibits in litigation.
- Exerting too much control or pursuing aggressive resolutions that are not contained in your loan agreements (or supported by law) will place you at risk.
- Never let your borrower make a “your problem” a “my problem.” Remain disciplined in your approach no matter how emotional or distressed the borrower is.

Lender Liability Definition

When a lender's conduct or statements demonstrate that it either: (1) did something that it did not have the right to do, or (2) failed to do something that it had an obligation to do and the borrower or a third-party is injured by it.



Don't you loan documents completely insulate it from lender liability?

Not necessarily!



Most Common Lender Liability Claims

- Breach of Contract
- Negligent Misrepresentation
- Fraud
- Bad Faith
- Breach of Fiduciary Duty
- Duress
- Labor Violations
- Environmental Violations
- Deepening Insolvency
- Tortious Interference



Most Common Lawsuit Scenarios

- Borrower sues lender for breach of the loan agreement or for statements orally made by borrower (fraud, negligent misrepresentation)
- Borrower seeks to impose fiduciary duty upon lender
- Borrower or guarantors claim lender effectively controlled borrower or its operations

Why Should I Care About Lender Liability?

- Any borrower can sue you for any reason. Litigation is risky and expensive.
- Some claims are not covered by insurance.
- Lenders typically cannot recover attorneys' fees when defending lender liability claim.
- Reputational risk; bad press.
- Judgments can bankrupt a company. Largest judgment against a lender upheld on appeal was \$288M.



Red Flags from Your Borrower

- Monthly payment missed or late
- Taxes not paid
- Financial covenants breached
- Notice of mechanic's lien
- Borrower stops timely returning your phone calls
- Other projects have been posted for foreclosure



Appropriate Response to Red Flags

- Contact borrower on phone to determine reason for default.
- If problem is temporary, exercise best judgment. Consult with in-house legal team to determine when and what pressure to exert.
- Make concessions or agreements to potentially:
 - Modify or waive covenant defaults
 - Request more frequent check-in calls and reporting
 - Try to avoid bankruptcy
- If problem is on-going/serious, ensure collateral is secured.
 - Ask for current financial statements (borrower/guarantors), construction budget (if applicable)
 - Inspect property or collateral
 - Run check of title, taxes, judgment liens

Exerting Appropriate Pressure

- Determine whether informal discussions are productive. Don't wait too long to exert pressure.
- Contact in-house legal and HK to prepare notice of default.
- Default notice will describe all defaults, provide time period to cure, and specifically state what lender will do if default is not cured. Copies sent to guarantors and any interested parties at notice addresses.
- If no cure, consider acceleration and commencement of remedies to encourage reasonable negotiations. Foreclosure posting may prompt action.

Pre-Workout Negotiation Agreement

- Fosters free-flowing communication (confidential, inadmissibility of negotiations, no reliance by borrower)
- No waiver of defaults
- Protects you from borrower's claims of oral modification, waiver or reliance
- Not intended to modify the underlying loan agreements
- Right to terminate at any time

Advantages of Forbearance Agreement

- Why do it?
 - Allows time to negotiate a workout.
 - Gives borrower breathing room to find solution (sale, refinance)
- Typical provisions:
 - Borrower acknowledges outstanding debt balance.
 - Borrower acknowledges validity of your lien.
 - Borrower acknowledges default.
 - Borrower acknowledges your right to exercise remedies.
 - Borrower provides full release and waives defenses.
 - No forbearance if new default occurs.

Risk of No Forbearance Agreement

A “wait and see” practice or merely sending a generic reservation of rights after a default gives borrower all benefits of forbearance without the corresponding benefits for lender.



Releases Protect Lenders from Liability

Case Study:

Twiford Enterprises, Inc. v. Rolling Hills Bank & Trust, 2021 WL 2879126 (10th Cir. July 9, 2021)

- The borrower, Twiford Enterprises Inc (TEI), a cattle-ranching business in WY and the Twiford family members who are shareholders in TEI, refinanced its cattle loans with a new lender, Rolling Hills Bank & Trust (RHB), who later convinced them to refinance their real estate loans with RHB
- Lender, RHB, stopped advancing funds to the borrower on the cattle loans, and those loans went into default
- Entered into several loan modification agreements and forbearance agreements to revise payment terms, extend maturity dates, and provide for additional credit advances
- ****All the modification and forbearance agreements contained releases or waiver provisions in which the borrower and guarantors waived any claims or defenses relating to the loans****
- Borrower later filed Chapter 11 bankruptcy petition and guarantors filed a complaint against the lender alleging breach of contract, breach of implied covenant of good faith and fair dealing, negligence, fraud, and negligent misrepresentation
- Guarantors claimed that lenders misrepresented its confidence in the borrower's business to induce it to refinance its real estate loan and then the lender manufactured a default

Releases Protect Lenders from Liability

Ruling:

- The trial court held that the claims would be barred by the releases contained in the forbearance agreements
- On appeal, the guarantors argued that the releases were not enforceable because they were wrongfully obtained through economic duress
- The 10th circuit affirmed the trial court's ruling, noting that under applicable state law, ***an alleged victim of duress may not obtain part of the benefits of an agreement and disavow the rest***
 - Since the guarantors obtained valuable concessions in connection with the forbearance agreements (such as credit advances) the Court held that they could not evade the releases under economic duress theory

Similarly in the 5th Circuit: *Lockwood International, Inc. v. Wells Fargo Bank, N.A.*, No. 20-40324, 2021 WL 3624748 (5th Cir. Aug. 16, 2021)

- The 5th Circuit affirmed the lower court's holding that ***waivers and releases signed as part of forbearance agreement waived any argument that a guarantor was fraudulently induced to provide a personal guaranty***
- The Court noted that, because the guarantor ratified his guaranty in connection with the forbearance agreements, the guarantor would need to invalidate the forbearance agreements before he could escape liability and found no basis to support a fraudulent inducement defense

Twiford & Lockwood Takeaways

- Reminder that a well-crafted workout agreement can serve multiple purposes:
 - Great opportunities for lenders to develop retention or non-retention strategies for troubled loans
 - Even if the workout strategy fails, these agreements can help mitigate potential exposure to lender liability claims
 - As *Lockwood* illustrates, so long as a lender is acting within the bounds of its loan agreement authority, it may elect to apply its leverage to obtain valuable concessions from a troubled borrower in a workout scenario



But....don't take active control in borrower's business

- Never use lending power to coerce and control the direction of the borrower's business.
- Do not act like the property owner.
- Do not take actions which deviate from loan agreement.
- Consider how your actions will be perceived by jury.
- Avoid oral promises or threats.
- E-mail and text will be exhibits.



Examples of too much lender control:

- Don't direct the borrower's choice of third-party vendors, consultants, accountants, etc.
- Don't direct the reduction in officers' salaries.
- Don't direct the day-to-day management of borrower's operations.
- Don't give operational, business, tax or legal advice.
- Without a receiver, don't exercise direct or indirect control over collateral (pay taxes, put your employees on borrower premises)
- Don't direct what bills should be paid.
- Don't direct the retention or replacement of management.
- Don't discuss maximizing recovery.



Think before you say something like:

1. “I’m sending in a troubleshooter on Monday—who I’ve worked with for 20 years—to clean things up at the Company.”
2. “Ms. May Day of A-Plus Consulting has been engaged by you to manage your operations going forward.”
3. “You have lost confidence in your management of the Company and requires that you engage a competent distressed advisor. I recommend a chief restructuring officer that we have seen work wonders with other clients.”

But what if this happens. . .

Borrower calls you at 10:00 on a Friday morning and explains:

- Employees are quitting at 5:00 that day unless they get paid.
- Operating account is overdrawn, but there is \$50k left on a revolving LOC.
- If not paid current by 5:00 p.m., borrower’s most critical vendor/customer is threatening to cancel its contract with borrower and go with a competitor.
- Borrower suspects its CFO is stealing money from the company and wants you assurance that it is okay to fire her now.

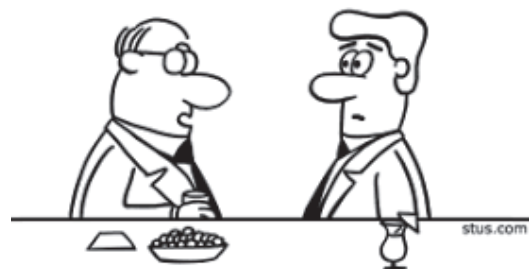
Or what if you hear this?

Right before maturity date, borrower calls you and says borrower cannot pay off loan at maturity:

- **Do say:** “Understood. Do you have a proposal that you would like us to consider?”
- **Instead of:** “If you don’t pay in full on maturity, we will immediately file for foreclosure, have my counsel find recourse carveout violations, and sue you on the guaranty.”
- **Instead of:** “We will foreclose on the property.” When, in fact, you are sitting on e-mails from the business team that gives you pause about foreclosing (i.e. environmental contamination).

Lender is Rarely a Fiduciary Though

- Lenders are rarely held liable under a fiduciary obligation unless the lender knowingly assumes a relationship similar to that of a principal and an agent.
- Lenders can exercise limited control over a borrower’s business operations without fear of assuming a fiduciary obligation to pursue the borrower’s best interests.



This “fiduciary” thingy really complicates pillaging a corporation.

Bankruptcy Issues

- Cash collateral
- Motion for relief from automatic stay
- Valuation
 - Oversecured
 - Undersecured
 - Proof of claim
- Sale of assets
 - Ordinary course
 - Outside of ordinary course
 - Going concern v assets
 - Inside or outside of a plan
- Costs of case administration, trustee, committee



Lender Liability Claims in Bankruptcy

- Equitable subordination
- Avoidance actions
- Lien stripping
- Deepening insolvency

Your Proactive Considerations

- Tracker on borrowers and guarantors for litigation, news, liens
- Consider venue in future loan agreements. Texas v. NY and the expansion of Texas Business Court.
- Regular training for those communicating and negotiating with borrowers, especially on what should be communicated in writing and retained.

Fraud

- **A lender may be liable for fraud if a lender:**
 - misrepresents a material fact or makes a promise with the intent not to perform that promise; and
 - a debtor reasonably relies on the representation to his or her detriment.



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If a lender comments on a customer's credit and makes a negligent or fraudulent response, it may be the basis if a lender liability lawsuit.

- True
- False

Q: The lender can rely on a demand clause in a loan agreement because the borrower agreed to the terms when signing the loan agreement.

- True
- False

Negligent Misrepresentation



Burleson State Bank v. Burt Plunkett, 27 S.W.3d 605 (Tex. App.—Waco 2000).

- **2 contractors signed a \$60k construction loan with Burleson State Bank, which funded the remodel of a client's house.**
- **A bank employee represented to the contractors and to the clients that the clients were responsible for repaying the \$60k loan, not the contractors.**

Negligent Misrepresentation

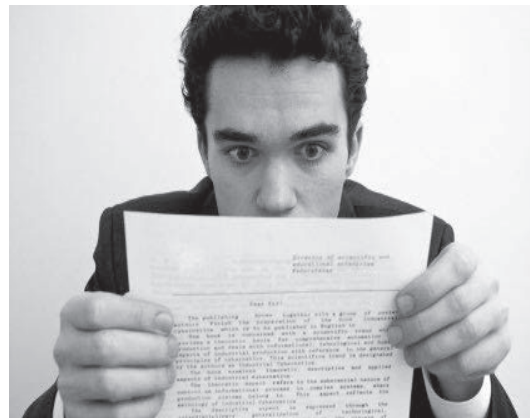
- When the bank required the contractors to repay the loan, the contractors brought claims against the bank for:
 - Negligent Misrepresentation
 - Fraud
 - Violation of the DTPA
 - Breach of Fiduciary Duty



How did the court rule?

Loan Documents Should Say It All

- The loan documents must disclaim reliance on anything other than what is contained in the loan documents.



Loan Documents Should Say It All

- Make clear there are (1) no agreements other than what is in the contract; and (2) neither party is relying upon promises not in the contract.



Sample Disclaimer

- Always insert an integration clause into the contract that is **boldfaced**, **CAPITALIZED**, **underlined**, or otherwise set apart from the surrounding written material so that it is **CONSPICUOUS**.

Model Language for Disclaimer

- THIS WRITTEN LOAN AGREEMENT PRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

Top 10 Takeaways



10. Distinguish the material from the immaterial breaches.
9. Avoid sudden changes in the agreements.
8. Don't "help" or excessively control the borrower's business.
7. Document everything in the file, especially late payments.

Top 10 Takeaways

6. Keep all e-mails objective, unemotional and accurate.
5. Never lie or fail to disclose unfavorable information if you choose to speak about a customer.
4. Hire appropriate counsel, not the collection law firm.



Top Ten Takeaways



3. Be careful when offering words of encouragement.
2. Consider discontinuing additional lending if red flags exist.
1. Your lawyers are your friends. Put a second set of eyes on troubled accounts.

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Tricia DeLeon is a Dallas litigation partner at Holland & Knight LLP with over 25 years of business litigation and first-chair trial experience. She has been recognized as one of the Top 50 female attorneys in Texas. She has handled complex matters for various industries, especially financial institutions. She advises banks of all sizes on lender liability, defends against consumer-based claims under Articles 3 and 4 of the UCC and represents secured lenders in bankruptcy court. She has prosecuted and defended over 100 fraudulent transfer and preferential transfer suits under the Bankruptcy Code and Uniform Fraudulent Transfer Act (UFTA). She is also a FINRA arbitrator.

Before entering private practice in 2000, Ms. DeLeon served as a briefing attorney for the Honorable James A. Baker of the Texas Supreme Court.