THE LENDER'S
Perspective
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This newsletter is designed to address legal issues that impact lending in Florida.
Whether making loans or collecting bad loans, *The Lender's Perspective* will provide timely and valuable insight to the creditor.

Lender Liability After the Sale of Loan Documents

By Douglas L. Waldorf, Jr., J.D., M.B.A.

Banks contending with troubled assets frequently consider alternatives to litigation. One such alternative involves the sale of loan documents to a third party. While these transactions generate badly needed cash and reduce the bank's portfolio of bad loans, they create an air of uncertainty regarding whether the bank has ongoing liability and, if so, to whom. These issues are the subject of this edition of ***The Lender's Perspective***.

"We sold the loan, its your problem now !"

While enticing, this may not be an accurate statement. There are instances in which the selling bank may be liable. The questions are: for what might the selling bank be liable and to whom ?

First, let's consider the various ways in which a selling bank may be liable. Generally, it can be said that liability may continue for the acts undertaken by the selling bank itself, either in connection with the making of or the administering of the loan. For example, a lender in a residential loan transaction may be liable for violations of the Federal Truth in Lending Act. Various state law theories of liability also exist, including usury, negligence and, in Florida, violation of the Florida Deceptive and Unfair Trade Practices Act. Case law suggests that the sale of loan documents will not prevent a borrower from suing the original lender under these theories. The common thread here is that the acts which give rise to the liability were committed by the selling bank prior to the time it sold the loan. It is unlikely that the selling bank will be liable for the actions taken solely by the purchaser of the loan.

In the case of a claim of negligence, it is possible that the selling bank may not be liable if the purchaser's actions are deemed to be "intervening causes." Even though the selling bank may have been negligent in making or administering of the loan, it may escape liability if it can show that the purchaser's actions were the cause of the damage to the borrower. Whether this defense is available to the bank in a negligence case is dependent on the facts of a given situation.

The various legal theories mentioned above are all subject to statutes of limitation. That is, if the lawsuits are not filed within a given period of time, the claimant will be prevented from filing suit. Thus, the selling bank may benefit by the running of the applicable statute of limitation. If the seller instead pursued collection action, the borrower may bring the claim sooner, thus exposing the seller to potential liability.

Who else can sue the selling bank?

The second issue to consider involves determining who might have a claim against the seller of loan documents. Generally, potential claimants include not only the borrower and guarantors but also the purchaser of the loan documents. We have already discussed potential theories of liability to the borrower and guarantors. Purchasers of the loan documents may also bring claims based on fraud, breach of contract or negligence. These claims usually

involve allegations of misrepresentations or failure to disclose material facts by the selling bank. To minimize this risk, most banks will sell a loan "as is" with no representations or warranties other than as to the outstanding balance and the fact that the loan has not previously been sold or transferred. Further, the selling bank may seek to be indemnified and held harmless by the purchaser of the loan documents.

Final thoughts.

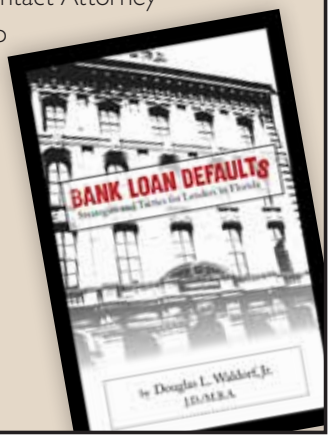
Here are a few final thoughts on liability after the sale of the loan:

- The selling bank will have received money for the loan and can remove the asset from its books. Therefore, it is hard to argue that its position will be worse off after selling the loan.
- The liability of the selling bank will likely exist whether it sells the loan or not. This liability will most commonly be based on the selling bank's actions during the time it held the loan. Again, the sale of the loan will not generally worsen the bank's position.
- As they say, "misery loves company". In this case, that means the purchaser will most likely be sued as well and this may dilute the impact on the selling bank.

Mr. Waldorf is a Board Certified Real Estate Lawyer whose practice focuses on banking industry clients. He represents lenders in commercial and residential loan transactions, mortgage foreclosures, deeds in lieu of foreclosure, forbearance agreements, and defaulted loan workouts.

He can be reached at 239.344.1213 or douglas.waldorf@henlaw.com

Douglas Waldorf's first book, *Bank Loan Defaults: Strategies and Tactics for Lenders in Florida*, is now available. *Bank Loan Defaults* is a practical guide creditors need to consider when evaluating defaulted loans. From analyzing events of default, understanding how to foreclose a mortgage, obtaining a deficiency judgment and collecting a judgment, this book provides timely, real-world insight. Contact Attorney Waldorf to obtain your copy.



AUDIO VERSIONS OF MR. WALDORF'S RECENT WEBINARS *ENTITLED LOAN DOCUMENTATION IN TOUGH TIMES* AND *COMMERCIAL LOAN DEFAULTS: STRATEGIES AND TACTICS FOR LENDERS* ARE AVAILABLE FOR ORDER AT WWW.BANKWEBINARS.COM.

As always, thanks for reading and watch for the next issue of The Lender's Perspective.

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ATTORNEYS AT LAW

1715 Monroe Street
Post Office Box 280
Fort Myers, FL 33902

- Fort Myers
- Bonita Springs
- Sanibel

239.344.1100

www.henlaw.com