

Lending Law Update



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Ten Titillating Tidbits of Transactional (Lender Oriented) Trivia*

This article is intended to be a potpourri of recent legal matters that affect lenders.

10) Beware: Email Can Satisfy Contracts Required to be In Writing Under the Statute of Frauds

- The Delaware Uniform Electronic Transactions Act §12A-101 et. seq., permits business transactions (including such things as commitment letters, loan covenants and lending terms and conditions) to be conducted electronically, via email, and be binding upon the recipient and senders.

9) The Equal Credit Opportunity Act (“ECOA”) (15 U.S.C. §1691) Has Stringent Requirements.

- Under the ECOA, lenders can’t require the signature of a spouse or other person (other than a joint applicant) on any credit instrument if the applicant qualifies under the creditor’s standards of creditworthiness for the amount and terms of credit requested. There is a current split of authority on whether a violation of the ECOA is an affirmative defense to the enforcement of a personal guarantee.

8) Cancellation of Debt-Tax Implications

- When considering loan modifications and / or loan workouts, lenders and borrowers should always factor in the tax effects of debt cancellation. With proper planning, the detrimental effects of taxation on “phantom” income can be avoided for the benefit of the homeowner and the lender.

7) One Lender Financing Competing Projects

- A lender that finances competing projects should be wary of the duty of good faith and fair dealing. See for example, *West Run Student Housing Assoc. LLC v. Huntington National Bank*, 712 F. 3d 165 (3d Cir. 2013) filed April 4, 2013, where one lender appeared to have engaged in unreasonable conduct involving two competing projects (one a success, the other a failure).

6) 2010 Revisions to UCC Article 9 Were Effective July 1, 2013

- Under the 2010 revisions to UCC Article 9, the safe harbor for lending to individual debtors requires sufficient due diligence (like checking a driver’s license) to ascertain the identity of the debtor. Make sure the UCC-1

Financing Statement is consistent with the identification you receive.

5) Use of Eminent Domain to Condemn Underwater Mortgages

- The legal challenges are many, but several blighted geographical areas are now considering using eminent domain powers to condemn underwater mortgages to force lenders to transfer lender-owned real estate to someone else.

4) Did Someone Miss the “All Appropriate Inquiry” (“AAI”) In the Phase I Environmental Assessment?

- There are a number of Phase I Environmental Assessments that do not meet current legal requirements for AAI. Make sure that the inquiry level the environmental professional follows is in compliance with federal guidelines, so that the report can be relied upon for the level of diligence needed.

3) ACORD Insurance Certificates Routinely Received by Lender Are Often Incorrect?

- The insurance industry goes to great lengths to protect its agents, especially since secondhand information over coverages and policy information routinely creates mistakes for the mortgage/loss payee. Check these certificates carefully to make sure the required coverages are there.

2) New Title Insurance Endorsements Affect Loan Title Policies

- Effective October 1, 2013, be aware that a number of title insurance endorsements were revised. Learn what they are from the national title insurers themselves.

1) The Erosion of Strict Construction

- The legal system is no longer giving strict effect to the ordinary meaning of unambiguous contractual provisions. The erosion of strict construction is a detriment to business. Eliminate, where possible, cumbersome sentences or complicated phrases because they might be taken out of context.

**The content of this article is based largely upon a Seminar Program. For further explanations on these topics, please contact the author.*