

LENDER LIABILITY: TAKING STOCK IN AN UNCERTAIN TIME

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I. INTRODUCTION

Despite several years of little activity in the area of lender liability, the unprecedented slowdown in the global economy and continuing unrest in the credit markets may prove to be fertile ground for disputes between lenders and borrowers, guarantors or other third parties. When lending institutions pursued enforcement remedies in response to widespread defaults in the 1980s and 1990s, they were met by a massive upsurge in claims filed against them. Today, the number of lenders taking enforcement actions is once again on the rise, which may result in a corresponding increase in borrowers challenging and courts probing lender practices.

Lender liability refers to a body of law amalgamated from assorted liability theories based in contract, tort, other common law and statutes. The common element that unifies these theories is that they are asserted against lenders, typically large financial institutions. Causes of action under these theories may arise when actions taken or not taken by a lender in connection with a loan directly or indirectly result in losses to a borrower or third party.

Lender liability cases rose to prominence in the mid-1980s, when a series of court decisions fueled a boom in lenders being found liable for enforcing repayment terms under loan agreements.¹ During this period, the courts greatly expanded the theories under which lenders could be held liable and often awarded substantial damages to plaintiffs.² The late 1980s and early 1990s saw a reversal in this trend, where the courts circumscribed some of the more expansive lender liability theories and even reversed high-profile judgments from previous years.³ Despite this curtailment, lender liability cases experienced a resurgence starting in the mid-1990s, due in part to the explosive growth of the second-lien market and more companies carrying debt loads swollen by cheap, easy money. In the current economic climate, borrowers and affected third parties are once again bringing claims against banks and other financial institutions under various lender liability theories, not only to maximize their ultimate recoveries but also to increase leverage in workout negotiations.

¹ *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985) (finding that a lender who terminated a loan in conformity with a loan agreement could nonetheless be sued for lack of good faith and should have notified the borrower prior to termination); *State National Bank v. Farah Mfg. Co.*, 678 S.W.2d 661 (Tex. App. El Paso 1984) (affirming a large jury award against a lender who threatened to terminate a loan under a "change in management" provision to prevent the borrower from rehiring its former CEO) (judgment subsequently set aside, cause dismissed on March 6, 1985).

² *Id.*

³ *Kruse v. Bank of America*, 202 Cal. App. 3d 38 (1988); *Penthouse International, Ltd. v. Dominion Federal Sav. & Loan Assn.*, 885 F.2d 963 (2d Cir. N.Y. 1988).

In light of a fresh spate of contract claims brought by struggling real estate developers, this article will touch on the most common types of lender liability, explore the concepts and theories brought to bear by these recent claims and look at recent developments in this area of law.

II. LEGAL THEORIES

Legal theories of lender liability originate in contract, tort, other common law and statutes.

A. Contract Theories

A lender-borrower relationship is a contractual relationship, which may result in a lender being held liable for breaching written, oral and implied contracts or agreements. Some common breach of contract claims are that a lender failed to (a) lend after a loan commitment became legally binding,⁴ (b) extend a loan, honor loan modification terms or forbear from exercising remedies after promising to do so,⁵ or (c) take actions required under loan documents or interpret loan documents properly.

In breach of contract claims, the courts have considered "course of conduct" between parties as a critical factor in interpreting the language of a contract. In some circumstances, course of conduct may even amend the written terms of a loan document, but only where the parties have consistently deviated from the documented terms. If this is established, a lender's failure to recognize its own course of conduct may result in its inadvertent breach of the "amended" terms of the loan document. However, this does not mean a lender is obligated as a matter of course to comply with all requests made by counterparties to the loan documents.⁶ Rather, a lender is entitled to demand strict compliance with the terms of the loan documents,⁷ but should be mindful that a course of conduct is a fertile source for dispute over the actual meanings of those terms.

Borrowers have also used traditional breach of contract claims to piggyback claims based on the evolving theory of breach of the implied covenant of good faith and fair dealing.⁸ Although good faith liability shares some characteristics with tort liability, it has been

⁴ *LeMaire v. M Bank*, 1989 WESTLAW 30995 (Tex. Ct. App. 1989); *Crystal Springs Trout Co. v. First State Bank*, 732 P.2d 819 (Mont. 1987).

⁵ See *Alaska State Bank v. Fairco*, 674 P.2d 288 (Alaska 1983); *First Nat'l Bank v. Twombly*, 213 Mont. 66, 689 P.2d 1226 (1984).

⁶ *Brighton Dev. Corp. v. Barnett Bank*, 513 So. 2d 1103 (Fla. Dist. Ct. App. 1987)

⁷ *Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 7008 F.Supp. 612 (S.D.N.Y. 1989).

⁸ In order to bring a claim for breach of implied good faith, the plaintiff must first establish breach of an express provision in the contract. The courts have not recognized a separate cause of action for a good faith breach. See *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990); *Bohm v. Commerce Union Bank of Tennessee*, 794 F. Supp. 158 (W.D. Pa. 1992); *Eaglehead Corp. v. Cambridge Capital Group, Inc.*, 170 F. Supp. 2d 552 (D. Md. 2001).

increasingly accepted by the courts as based in contract.⁹ A covenant of good faith and fair dealing has been recognized to varying degrees by courts in a number of jurisdictions.¹⁰ In these jurisdictions, lenders have been found liable for (a) refusing to release a deed of trust in an effort to pressure the borrower into paying off another loan¹¹ and (b) manipulating the appraisal of the borrower's property to trigger a default and deliberately delaying foreclosure to increase the debt through interest accrual, thereby enabling the lender to take the entire collateral.¹²

One of the earlier cases in this area is *K.M.C. Co., Inc. v. Irving Trust Co.*, where the 6th Circuit affirmed a judgment in excess of \$7.5 million against a lender.¹³ The court found the lender liable for damages resulting from the lender's unreasonable and unilateral refusal to advance funds without prior notice to the borrower.¹⁴ According to the court, the lender's decision not to provide notice violated the implied obligation of good faith inherent in every contract.¹⁵ The court also stated that reasonable notice by the lender to the borrower might have changed the result of the case.¹⁶ However, the court's line of reasoning has since been criticized by more recent holdings.¹⁷

Starting in the late 1990s, the courts have moved toward a more constricted conceptualization of the good faith covenant. The prevailing notion is that the good faith obligation does not compel a lender to refrain from enforcing contract terms as written.¹⁸ Instead, it merely requires that, in exercising its enforcement rights under a contract, a lender perform its contractual obligations in good faith.¹⁹ Thus, there is no breach of a separate duty of

⁹ See, e.g., *Reid v. Key Bank of S. Maine, Inc.*, 821 F.2d 9 (1st Cir. 1987).

¹⁰ Connecticut, New York, Tennessee, Texas and Vermont are among the states whose courts have professed recognition of the covenant of good faith and fair dealing.

¹¹ *Robinson v. McAllen State Bank*, 48 BNA Banking Rptr. 1004 (Tex. Dist. Ct. 1987).

¹² *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359 (Colo. App. 1994).

¹³ 757 F.2d 752 (6th Cir. 1985). This decision was later rejected by a court stating that a lender who is simply enforcing its contract rights does not necessarily act in bad faith. *Needham v. Provident Bank*, 110 Ohio App. 3d 817 (1996).

¹⁴ *Id.* at 763.

¹⁵ *Id.* at 760.

¹⁶ *Id.* at 763.

¹⁷ *Travel Servs. Network v. Presidential Fin. Corp.*, 959 F. Supp. 135 (D. Conn. 1997); *Needham v. Provident Bank*, 110 Ohio App. 3d 817 (1996).

¹⁸ *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44 (2002) (holding that there can be no breach of an implied covenant of good faith and fair dealing if the implied covenant is inconsistent with an express term of the contract); *Spectra Plastics, Inc. v. Nashoba Bank*, 15 S.W.3d 832 (Tenn. Ct. App. 1999) (holding that a bank did not act in bad faith because performance under the terms of a contract cannot be bad faith); *Cyprus Copper Marketing Corp. v. Swiss Bank Corp.*, 222 B.R. 213 (S.D.N.Y. 1998) (noting that a bank did not take any action that was not authorized by the terms of the credit agreement).

¹⁹ *Duffield v. First Interstate Bank of Denver, N.A.*, 13 F.3d 1403 (10th Cir. 1993); *Kham & Nate's Shoes No. 2 Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990). See *Ultra Fabricators, Inc. v. M C Bank & Trust Co.*, 714 So.2d 210 (La. Ct. App. 1998) (where the court implied that a claim could only be asserted if the lender's actions were ". . . prompted by fraud, ill will, or sinister motivation.").

good faith when a lender acts in accordance with the terms of a lending contract. Some courts have shown even less willingness to impose liability for a good faith breach where no fiduciary or special relationship exists between lender and borrower.²⁰ Moreover, some courts have refused to even recognize claims based upon an implied covenant of good faith in the context of a loan transaction.²¹

In addition to the "implied" covenant of good faith, there are statutory sources of the covenant to act in good faith. For example, the Uniform Commercial Code ("UCC") contains a provision stating that every contract under the UCC implies an obligation of good faith in its performance or enforcement.²² In other words, if the transaction is covered by the UCC, the participants are required to deal with each other honestly. Due to the vagueness of the UCC standard for good faith, however, its application by the courts has proven to be unpredictable.

Damages for a lender's breach of contract are usually limited to compensatory damages, which have generally been defined as the additional costs of obtaining funding elsewhere.²³ Because the covenant of good faith and fair dealing essentially represents a contract term that aims to effectuate the intentions of the parties, compensation for its breach has traditionally been limited to compensatory damages as well. Additionally, most courts will now consider awarding consequential damages in the context of a loan transaction,²⁴ but punitive damages are generally not recoverable.²⁵

B. Tort Theories

Although a wide variety of tort claims may be brought against lenders, this article will briefly discuss those that are most commonly asserted by borrowers: fraud, economic duress, tortious interference with a contract, and negligence.

Generally, a fraud claim may arise when a lender makes a material, false misrepresentation with knowledge of its falsity or conceals a material fact when it has a duty to disclose, in either case resulting in damages to a borrower or third party. Even where the law imposes no obligation upon a lender to answer an inquiry in the first place, the lender's voluntary

²⁰ See *Krondes v. Norwalk Sav. Soc'y*, 53 Conn. App. 102 (Conn. App. Ct. 1999); *Pension Trust Fund for Operating Engineers v. Fed. Ins. Co.*, 307 F.3d 944 (9th Cir. 2002).

²¹ See *Power Equip. Co. v. First Alabama Bank*, 585 So.2d 1291 (Ala. 1991); *Ulrich v. Federal Land Bank of St. Paul*, 192 Mich. App. 194 (Mich. Ct. App. 1991).

²² U.C.C. § 1-203 reads as follows:

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

²³ See, e.g., *Rubin v. Pioneer Fed. Sav. & Loan Ass'n*, 214 Neb. 364 (1983).

²⁴ The prevailing position is that a borrower may recover "special" damages, subject to the general damage rules of foreseeability, avoidability, and certainty of proof. See *Indu Craft, Inc. v. Bank of Baroda*, 47 F. 3d 490 (2d Cir. 1995).

²⁵ But see, e.g., *Robinson v. McAllen State Bank*, 48 BNA Banking Rptr. 1004 (Tex. Dist. Ct. 1987) (awarding \$50 million in punitive damages and \$9.26 million in actual damages where the bank's breach of its good faith obligation ultimately resulted in the borrower going into bankruptcy).

response may trigger a duty to disclose additional, pertinent information in a truthful and complete manner.²⁶ Fraud is usually found in an affirmative representation. However, even where a lender possesses no actual fraudulent intent, constructive fraud may still arise if a relationship of confidence and trust exists between borrower and lender and the lender subsequently breaches its duty to the borrower. Additionally, silent fraud may be found if the lender has a duty to speak but chooses to remain silent. Both actual and punitive damages have been awarded with respect to fraud liability.²⁷

An economic duress claim may arise when a lender threatens a borrower with actions that the lender has no legal right to take or demands more than a borrower is obligated to give, in either case at a time when the borrower has little choice other than to comply with the lender's demands. The courts have drawn a distinction between a lender (a) making inappropriate threats or demands and (b) threatening to do that which it has a legal right to do or refusing to do that which it is not legally required to do.²⁸ Since it is difficult to assess if a lender has made improper use of legitimate rights or remedies, the courts have tended to find liability in cases where the lender's conduct was tainted with some fraud or wrongdoing.²⁹

A claim asserting tortious interference with a contract may arise when a plaintiff has a valid contract with a third party, the lender knows of the contract and intentionally induces the third party to breach the contract or the lender prevents the plaintiff from performing on the contract, and the plaintiff is damaged as a result of such interference. However, lenders who have interfered with contracts through the bona fide exercise of their rights and remedies have been deemed privileged to do so.³⁰ The courts have taken varied approaches with regard to whether malice or an purposeful or improper motive are essential elements to this cause of action. Moreover, some courts have allowed lenders to interfere with contracts between borrowers and third parties if the lenders hold equal or superior interests in the subject matter.³¹ When an interference claim succeeds, lost profits and all other reasonably foreseeable damages may be obtained.

Lenders may also be found liable to borrowers and third parties on a negligence theory. In order to successfully assert a cause of action on a negligence theory, a plaintiff must typically show that the lender owed the plaintiff a duty of care, the lender breached that duty, and the breach proximately caused the plaintiff's injury. The general rule is that a lender owes no duty of

²⁶ *Central States Stamping Co. v. Terminal Equip. Co.*, 727 F.2d 1405 (6th Cir. 1984).

²⁷ *Crystal Springs Trout Co. v. First State Bank*, 732 P.2d 819, on reh'g, 736 P.2d 95 (Mont. 1987) (where the defendant, who repeatedly and knowingly misled the borrower as to the status and availability of interim financing, was held liable for actual and punitive damages).

²⁸ *Marine Midland Bank v. Cafferty*, 174 A.D.2d 932 (1991) (dismissing a borrower's duress claim because the bank had no duty to provide further loan advances).

²⁹ *Continental Ill. Nat'l Bank & Trust Co. v. Stanley*, 606 F. Supp. 558 (N.D. Ill. 1985). See also *Feedlander, Inc. v. NCNB*, 706 F. Supp. 1211 (E.D. Va. 1988); *First Tex. Sav. Ass'n v. Dicker Center, Inc.*, 631 S.W.2d 179 (Tex. Ct. App. 1982).

³⁰ *Felsen v. Sol Café mfg. Corp.*, 24 N.Y.2d 682 (1969).

³¹ *Del State Bank v. Salmon*, 548 P.2d 1024 (Okla. 1976).

care to a borrower when the lender's role in the transaction does not exceed the scope of its conventional role as a mere lender of money.³²

C. Other Common Law Theories

A lender may also be found liable where the lender-borrower relationship deviates from a typical creditor-debtor relationship.

Under the instrumentality theory, a lender may expose itself to direct liability to the borrower and third parties where the lender exercises such control over the borrower's day-to-day operations that, in effect, the lender becomes the borrower.³³ However, merely lending money and monitoring a borrower's business affairs do not impose direct liability under this theory.³⁴ Rather, liability is imposed where the lender's day-to-day involvement in the management and operation of the borrower's business is sufficient to establish actual, participating and total control of the debtor by the creditor.³⁵ Direct liability can also be found where total control of the borrower pursuant to the instrumentality theory does not exist, but the lender exercises substantial control over the borrower such that the lender may be characterized as an agent or principal of the borrower, or the lender's relationship with the borrower is more akin to a partnership or joint venture.³⁶

In addition, a fiduciary relationship between a lender and borrower may arise where an ordinary creditor-debtor relationship is transformed into a "special" relationship based on a lender's excessive control or domination of a borrower or its substantial control over the business affairs of the borrower.³⁷ In one recent decision, the court held that the elements to establish a fiduciary relationship between a bank and a debtor are: (a) the borrower reposes faith, confidence, and trust in the bank, (b) the borrower is in a position of inequality, dependence, weakness or lack of knowledge, and (c) the bank exercises dominion, control, or influence over the borrower's affairs.³⁸ Where a fiduciary duty is found, the lender will owe far greater duties to the borrower than those arising under a loan agreement.

Thus far, courts have declined to expand lender liability to impose regulatory and reporting duties on lenders when borrowers themselves engage in actionable misconduct. The 2nd Circuit and 7th Circuit, in addressing whether lenders should be liable for aiding and abetting improper actions and poor business decisions taken by management of suffering businesses, held

³² *Plata v. Long Beach Mortgage Co.*, 2005 U.S. Dist. LEXIS 38807 (N.D. Cal. 2005).

³³ *McFadden, Inc v. Baltimore Contractors, Inc.*, 609 F. Supp. 1102 (E.D. Pa. 1985).

³⁴ *Id.* at 1105.

³⁵ *Id.*

³⁶ *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981) (finding that an agency relationship existed between a creditor and debtor where the creditor actively participated in the debtor's operations by making key economic decisions for the debtor and keeping the debtor in existence).

³⁷ E.g., *Deist v. Wachholz*, 678 P.2d 188 (Mont. 1984); *Stewart v. Phoenix Nat'l Bank*, 64 P.2d 101 (Ariz. 1937); *Barnett Bank of West Florida v. Hooper*, 498 So. 2d 923 (Fla. 1986).

³⁸ *Cowan Bros., L.L.C. v. Am. State Bank*, 743 N.W.2d 411 (S.D. 2007).

that where no fiduciary duties exist, lending institutions have no legal obligation to warn third parties as to the borrower's fraudulent acts.³⁹

D. Statutory Theories

Lender liability claims may also be premised on state and federal statutory authorities. As mentioned above, the UCC imposes an obligation of good faith for all contracts within its scope.⁴⁰ Thus if a contract is within the UCC, a borrower may sue for compensatory damages for a lender's breach of good faith without having to prove the existence of a fiduciary relationship.

With respect to federal tax laws, a lender with sufficient control over a borrower may be liable under the Internal Revenue Code ("IRC") for withholding federal taxes.⁴¹ In addition to liability for the actual taxes (plus accrued interest) owed, the IRC authorizes the collection of statutory penalties for the willful withholding of federal taxes.⁴²

Courts have also held lenders liable under the Racketeer Influenced and Corrupt Organizations Act ("RICO") if they engage in activities prohibited thereunder.⁴³ In addition to criminal penalties, RICO provides a private right of action for civil damages whereby individuals or entities injured by the RICO violation may seek treble damages.⁴⁴

Also, a significant amount of lender litigation has occurred under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in relation to lenders exercising a certain degree of control over the day-to-day operational aspects of a borrower's

³⁹ *Sharp International Corp. v. State Street Bank and Trust Co.*, 403 F.3d 43 (2nd Cir. 2005) (where a senior lender was not found liable for aiding and abetting breaches of fiduciary duty or constructive or intentional fraudulent conveyance when it knew of the borrower's fraud and it (1) demanded that the borrower find new sources of financing to repay the senior lender's debt, (2) failed to inform subordinate note holders of the borrower's fraud, and (3) consented to the subordinated financing); *B.E.L.T. Inc. v. Wachovia Corp.*, 403 F.3d 474 (7th Cir. 2005) (where a lender was not liable for failure to disclose its knowledge of the borrower's fraud and money laundering practices even though the lender arranged to be repaid from subsequent loans made to the borrower from other banks).

⁴⁰ U.C.C. § 1-304.

⁴¹ See 26 U.S.C.S. §§ 3402 & 3505 (a lender who finances the wages of a borrower's employees is liable for the taxes required to be deducted and withheld from such wages by the borrower); 26 U.S.C.S. § 6672 (liability is imposed on third parties responsible for the borrower's failure to fulfill withholding tax obligations); *Pac. Nat'l Ins. Co. v. United States*, 422 F.2d 26 (9th Cir. Cal. 1970) (26 U.S.C.S. § 6672 imposes liability on any entity that assumes the function of determining whether or not an employer will pay taxes withheld from its employees).

⁴² See *United States v. Sec. Pac. Bus. Credit*, 956 F.2d 703 (7th Cir. Ind. 1992).

⁴³ See *Brown v. LaSalle Northwest Nat'l Bank*, 820 F. Supp. 1078 (N.D. Ill. 1993) (finding that a bank's practice of leaving certain federally required provisions out of auto financing contracts was sufficient to form the basis for an action under RICO since a business arrangement or referral relationship existed between the bank and the dealer); *Banowitz v. State Exchange Bank*, 600 F. Supp. 1466 (N.D. Ill. 1985) (where plaintiffs who purchased investment notes issued from a financing company alleged a sufficient RICO claim against a bank where the bank misrepresented the financial condition of the financing company and security of its notes).

⁴⁴ 18 U.S.C.S. § 1964.

mortgaged property.⁴⁵ Where a lender is deemed to qualify as an "owner" or "operator" under CERCLA, it can be liable for civil penalties as well as the costs of cleaning up contaminated property.⁴⁶

III. LENDER LIABILITY ISSUES TODAY: TROUBLED DEVELOPERS SUING BANKS

During the housing boom of prior years, builders looked to take advantage of easy financing in order to capitalize on profitable housing developments and rising land values. Now, as land values slide and the housing market shrinks, many developers are filing lawsuits in last-ditch efforts to salvage their projects. In California and Florida (two formerly "hot" real estate markets), several developers have sued construction lenders for alleged misconduct in connection with the lenders' efforts to enforce their rights to repayment.

A sampling of some recent cases is described below:

- In 2008, Regent Hotel, LLC, a developer of a 222-unit hotel and condominium project located in California, sued First Bank, one of its construction lenders, for the bank's failure to fund the last installment of a multi-million dollar construction loan.⁴⁷ In its breach of contract claim, the developer alleged a long-term relationship with the bank extending for over ten years, during which the bank had allegedly established a course of conduct whereby it had never interrupted funding on any of the developer's projects.⁴⁸ The developer also made a fraud claim, alleging that the bank orally represented to the developer its intention to make the remaining loan funds available, but subsequently failed to do so.⁴⁹
- In another California lawsuit filed in 2008, J.P. Eliopulos Enterprises Inc., the developer of a 900-acre housing development, sued IndyMac Bancorp, Inc., its construction lender, for breach of the implied covenant of good faith and fair dealing. The developer alleged that the bank caused unreasonable delays in the development of the project by conducting an extensive audit, ordering an erroneous appraisal, and subsequently failing to fund disbursements.⁵⁰
- In Florida, another developer brought suit against Wachovia Bank for breach of contract, bad faith and unfair dealing, based on allegations that the bank failed to fully fund its

⁴⁵ See *Kelley v. United States*, 304 U.S. App. D.C. 369 (D.C. Cir. 1994); *Z & Z Leasing v. Graying Reel*, 873 F. Supp. 51 (E.D. Mich. 1995); *Snediker Developers Ltd. P'ship v. Evans*, 773 F. Supp. 984 (E.D. Mich. 1991).

⁴⁶ 42 U.S.C.S. §§ 9607 & 9609.

⁴⁷ Complaint, *Regent Hotel, LLC v. First Bank*, No. 34-2008-00009879 (Cal. Super. Ct. May 1, 2008).

⁴⁸ *Id.* at ¶ 8.

⁴⁹ *Id.* at ¶ 29.

⁵⁰ Michael Corkery, *Builders Sue Banks That Pull Financing as Construction Projects Lie Unfinished*, Wall St. J., July 23, 2008, at C1.

construction loan and made unwarranted setoffs and holdbacks from the developer's draw requests.⁵¹

As of yet, none of the foregoing developer cases have been decided. Even after decisions come down, appeals will likely run for years before any new case law is created. It will likely be years before we know the impact, if any, of these new cases.

IV. CONCLUSION

Since its heyday, lender liability law has been heavily influenced by fluctuations in the economy and financial marketplace. In the 1980s, the body of lender liability law grew to encompass a range of legal theories, including those based in contract, tort, other common law and statutory authority. In breach of contract claims, "course of conduct" has often played a pivotal role in interpreting the terms of a loan contract. The implied covenant of good faith and fair dealing has been widely recognized and accepted within the scope of lending transactions, but the reach of this theory has also been scaled back significantly. Tort theories of liability abound, with the most common being fraud, economic duress, tortious interference with a contract, and negligence. The courts have also recognized other common law claims based on instrumentality theory or breach of fiduciary duty, as well as statutory claims alleging violations of the UCC, IRC, RICO or CERCLA.

Today, in response to the continuing tightening of the credit markets and concurrent devaluation of real property, many construction lenders are starting to exercise their enforcement remedies upon defaults by struggling developers. Instead of idly standing by, however, many developers are fighting back with lender liability claims, most of which are based in contract. These new claims bring up familiar issues, such as course of conduct and the covenant of good faith and fair dealing. However, because these cases have only begun to be filed in the past year, they presently offer nothing in the way of precedent, making it difficult to predict which path lender liability law will take in the future.

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⁵¹ *Developer Sues Wachovia for more than \$1M*, South Fla. Biz. J., August 18, 2008.