



A.S. Pratt

March 2012

Subject: 2012 Update No. 1 to *The Law of Lender Liability*

Dear Valued Customer:

The Law of Lender Liability helps you protect your institution by making informed decisions based on developments in this important area. This update contains the following new information:

- **Reviewing relevant documents.** It is imperative that a borrower receive certain documents and it is equally important that this is recorded in each borrower's file to preserve the materials the lender has provided. See ¶ 13.02[1].
- **Motion to dismiss for failure to state a claim.** A lender should note that recent Supreme Court decisions give a lender a strategic advantage in the realm of the motion to dismiss for failure to state a claim. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests whether the complaint properly states a claim on which relief may be granted. See ¶ 13.05[1].
- **Special relationship.** The Supreme Court in Montana, in reviewing the duty owed to a customer by a bank, said in order to determine whether a "special relationship" exists between a bank and a customer, a court may be required to make a fact-intensive inquiry. Therefore, courts have begun to determine the question of duty owed in special circumstances on summary judgment. See ¶ 4.02[1].
- **Economic loss rule.** The economic loss rule operates to create a divide between tort and contract law. When a contracting party's damages amount to only an economic loss due to the breach, then that party may not state a claim in tort and is limited to contract actions. In one case, the court prevented the plaintiffs from recovering on their negligence claims due to the economic loss doctrine. See ¶ 5.10[2][b].
- **Repossession.** If a lender attempts to in self-help repossession, they must do so without a breach of the peace. A borrower who is aggrieved by a lender's breach of the peace during repossession can pursue compensatory damages pursuant to UCC § 9-625 and some courts have allowed punitive damages. See ¶ 5A.07[1].
- **Anti-waiver provision.** It is extremely important to include an anti-waiver provision in loan documents. While generally acceptance of a late or partial payment will waive the right to declare default, the past practice of accepting

such payments will not waive the lender's right to declare default if the loan includes an anti-waiver provision. See ¶ 2.02[4].

- **Receivership.** Lenders, lawyers, and court-appointed receivers have long disputed the bounds of a receiver's power to sell real property out of a receivership. Receivers often rely upon common law and some ambiguous statutory authority for the proposition that they are empowered to sell real property out of a receivership. In this new section, we discuss a recent case that concluded that there are significant restraints on a receiver's ability to conduct a sale out of a receivership. See ¶ 11.05A.
- **Volcker Rule.** The Volcker Rule will impact almost all subsidiaries of bank holding companies and also will impact the activities of nonbank financial companies supervised by the Fed, as well as companies treated as bank holding companies. Regulators have given the public until January 13, 2012 to comment on the proposed draft of the law. Under the Dodd-Frank financial reform bill, the regulations go into effect on July 21, 2012. See ¶ 10.17.

Our goal with *The Law of Lender Liability* is to provide you with the definitive source on which to rely for information in this critical area. Please let us know how we are doing or if you have suggestions. Visit our web site at www.aspratt.com or call us at 1-800-456-2340.

Sincerely,
Diane Calmes
Editor