

**EIGHTH CIRCUIT SLAMS DOOR SHUT ON MALPRACTICE CLAIMS BY PARTICIPANT LENDERS AGAINST LEAD LENDER'S ATTORNEY**

After several years of litigation over a failed casino loan, the Eighth Circuit Court of Appeals ruled that participant lenders lacked standing to sue the lead lender's attorney. The attorney failed to obtain necessary regulatory approval before closing the loans, which rendered the notes and security documents unenforceable. The lead lender did not fund any portion of the loans, and therefore the participants suffered the full loss due to the attorney's negligence. The participants argued that they were third-party beneficiaries that had standing to sue the attorney, even though there was no contact between the attorney and the participants. The court rejected this argument finding that unless the attorney believes its work is entirely intended to benefit the participants, there is no attorney-client relationship upon which to base a malpractice claim. In this case, the attorney believed that its representation would benefit the lead lender.

The decision in *Leonard v. Miller & Schroeder*, 8<sup>th</sup> Circuit, No. 07-2220, is also notable in its emphasis on the nature of participation relationships in general. In denying relief to the participants, the Court stressed the nature of participation relationships between the participant and lead lender as arms-length where typically the lead lender owes no special duties to the participants. The Court found that the standard participation agreement requires participants to conduct a thorough independent investigation, and this duty forecloses any potential reliance the participants may claim on the legal work performed by the lead lender's attorney.

While recently there has been a trend at the trial court level to grant participants greater protection against a lead bank, *Leonard* reaffirmed strict precedent which is generally unfavorable to participants. Mackall, Crouse & Moore represents both lead lenders and participants in drafting loan documentation and in disputes arising out of participation lending.

**FRAUD CLAIM UNDER BANK BOND DENIED**

A court recently denied coverage under a Financial Institution Bond where the bank was defrauded while lending under a warehouse line of credit to a borrower who was funding purchases of distressed real estate. The transfer documents obtained in the purchase of the properties were invalid because the vendor signing them knew that title was defective. After the loan had been funded, the bank and the borrower discovered the fraud. The court found that coverage under the bond did not automatically apply when a covered document contains a fraudulent signature. The court held that there had to be a showing that the signature was defective because the signatory was tricked or defrauded as to the nature of the document. There is no coverage if the signatory knows what he is signing. This case (*TierOne Bank v. Hartford Fire Insurance*, D. Neb. 12/09/08) is consistent with other Eighth Circuit decisions which strictly interpret bond language against the banks.

Mackall, Crouse and Moore's professionals have investigated and litigated a number of banker's bond claims to successful settlements or verdicts. In these times of weakening credit banks are submitting more bond claims, and pre-litigation evaluation of these claims is essential.



Advertising Material

## FACING THE ISSUES®

Legal Briefs from the Attorneys of  
Mackall, Crouse & Moore, PLC

*If you have any questions, please call one of the following  
in our MCM Creditors' Remedies group:*

**Timothy D. Moratzka**  
(612) 305-1456  
tdm@mcmlaw.com

**Allen E. Christy, Jr.**  
(612) 305-1490  
aec@mcmlaw.com

**Robert S. Lee**  
(612) 305-1448  
rsl@mcmlaw.com

**Patrick C. Summers**  
(612) 305-1473  
pcs@mcmlaw.com

**Stacy A. Woods**  
(612) 305-1409  
saw@mcmlaw.com

**Matthew A. Anderson**  
(612) 305-1401  
maa@mcmlaw.com

**Andrew P. Moratzka**  
(612) 305-1418  
apm@mcmlaw.com

**Mychal A. Bruggeman**  
(612) 305-1478  
mab@mcmlaw.com

"MCM has prepared these materials for informational purposes only and not as legal advice or **recommendations for specific situations**. Receipt of this information does not create an attorney-client relationship. You should not act upon this information without seeking professional counsel **for specific legal guidance**."

If you do not wish to receive future newsletters from Mackall, Crouse & Moore, please email [mcmlaw@mcmlaw.com](mailto:mcmlaw@mcmlaw.com) with the subject of Unsubscribe.

### IMPORTANT NOTICE:

This email message, including attachments, is covered by the Electronic Communications Privacy Act, 18 U.S.C. 2510-2521, and for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, copying, disclosure or distribution is prohibited. If you are not the intended recipient, please contact sender by phone or reply via email and destroy all copies of the original message. Thank you.

***Any tax information contained in this email or its attachments is not intended, and cannot be used by the taxpayer or any other person, to avoid any civil or criminal tax penalties which the Internal Revenue Service or another governmental agency may impose on the taxpayer or any other person for acting in reliance upon information contained in this email or its attachments.***

1400 AT&T Tower · 901 Marquette Avenue · Minneapolis, MN 55402

Telephone: 612.305.1400 · Fax: 612.305.1414

E-mail: [mcmlaw@mcmlaw.com](mailto:mcmlaw@mcmlaw.com) · Web: [www.mcmlaw.com](http://www.mcmlaw.com)