

LENDER LIABILITY

LAW, PRACTICE, AND PREVENTION

By **Gerald L. Blanchard**

Partner

Bryan Cave, LLP

Atlanta, Georgia

Volume 1

<http://www.pbookshop.com>

WEST[®]

A Thomson Reuters business

For Customer Assistance Call 1-800-328-4880

Mat #41135625

© 2012 Thomson Reuters

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

<http://www.pbooksin.com>

To my parents

<http://www.pbookshop.com>

<http://www.pbookshop.com>

About the Author

Gerald L. Blanchard is a partner in the law firm of Bryan Cave, LLC in Atlanta, Ga., where he works in the area of financial institution law, commercial lending, lender liability, bankruptcy, and problem loan workouts. His financial institutions practice involves representing banks of all sizes, from small local community banks to large national banks. Prior to joining Bryan Cave he spent 24 years in the legal department of Bank of America and its predecessors, starting with the Citizens and Southern National Bank in 1980, where he managed a national team of lawyers providing legal support to the middle market lending, small business lending, private banking, and bankruptcy groups. Blanchard has advised clients on all aspects of commercial and private lending and managed all forms of legal risk arising out of lending operations, lender liability claims, and fraud. He has worked with senior management and boards of directors on strategic planning and negotiating enforcement orders with banking regulators. A large part of his practice involves working with bank credit risk departments on managing legal and reputation risk and with compliance departments to insure compliance with state and federal laws and regulations.

Mr. Blanchard is a frequent speaker on various banking topics including managing legal risk, dealing with regulators, lender liability and legal developments facing banks.

Mr. Blanchard obtained his bachelor's degree from Berry College in 1975 and his juris doctor from Emory University School of Law in 1978. He participates in a number of civic and pro bono activities. In 2002 he was city leader for Bank of America's United Way campaign. In 2004 he received the "Business Commitment Pro Bono Award" from the State Bar of Georgia for professionalism and strong commitment to the delivery of pro bono business law services to the nonprofit and community economic development sectors in Georgia. Blanchard presently serves as treasurer of the Pro Bono Partnership of Atlanta. He has served as chair of the Lender

LENDER LIABILITY

Liability Subcommittee, Commercial Financial Services Committee, Business Law Section of the American Bar Association. He is a past president of the Atlanta Chapter of the Association of Corporate Counsel.

<http://www.pbookshop.com>

Preface

The economic fallout from the Great Recession continues to generate a high volume of lender liability litigation over the past year. Borrowers and guarantors continue to try and shift legal responsibility for their losses to their lenders. The dynamic is the same regardless of whether the borrower is a consumer or a commercial borrower. Outside of exceptional situations, the courts generally continue to uphold the principle that lenders do not owe borrowers a fiduciary duty. In one interesting case from California, an appellate court summed it up by noting that while a lender had a duty to refrain from committing fraud, absent a fiduciary duty between itself and the borrower, the lender had no independent duty to disclose to borrowers an alleged fraudulent scheme to sell mortgage pools to investors at inflated values.

Interestingly, lenders face what may be a more difficult adversary in the form of state attorney generals who are asserting claims based upon robo signing, improper foreclosures and other alleged wrong doing in the generation and servicing of residential mortgage loans. The typical calculation that a lender performs in any normal type of litigation concerning its legal fees, possible losses, the costs to the other side and their potential best and worst case outcomes becomes extremely difficult to make when the dispute essentially becomes a political one. To some extent the attorney generals are using the courts to press a populist anti-bank political position that is not based on the proof of damages by any particular homeowner. Settlements and any case law coming out of the resolution of such disputes may not have very much relevance for the normal lender borrower dispute.

We should expect to see an uptick in the number of lawsuits brought against bank officers and directors. Historically, the FDIC has brought actions in almost 1/3 of all the bank failures. To date there has only been a handful of cases brought across the country. It typically takes the FDIC around 18 months to finish their analysis of the facts and

LENDER LIABILITY

potential claims arising out of any particular bank failure.

The ongoing bank failures will also tend to generate their own form of litigation. Many loan participants are unhappy with the manner in which loans are currently being administered by a bank that acquired the lead position through a loss-share arrangement with the FDIC or an investor group that purchased it directly from the FDIC. Expect to see litigation over what the lead bank's duties are in those situations.

Gerald L. Blanchard
Atlanta, Georgia

<http://www.pbookshop.com>



WestlawNext™

THE NEXT GENERATION OF ONLINE RESEARCH

WestlawNext is the world's most advanced legal research system. By leveraging more than a century of information and legal analysis from Westlaw, this easy-to-use system not only helps you find the information you need quickly, but offers time-saving tools to organize and annotate your research online. As with Westlaw.com, WestlawNext includes the editorial enhancements (e.g., case headnotes, topics, key numbers) that make it a perfect complement to West print resources.

- FIND ANYTHING by entering citations, descriptive terms, or Boolean terms and connectors into the WestSearch™ box at the top of every page.
- USE KEYCITE® to determine whether a case, statute, regulation, or administrative decision is good law.
- BROWSE DATABASES right from the home page.
- SAVE DOCUMENTS to folders and add notes and highlighting online.

SIGN ON: next.westlaw.com

LEARN MORE: West.Thomson.com/WestlawNext

FOR HELP: 1-800-WESTLAW (1-800-937-8529)

*

<http://www.pbookshop.com>

Summary of Contents

Volume 1

PART I. INTRODUCTION

Chapter 1. Overview

PART II. CONTRACT CLAIMS

Chapter 2. Breach of Contract and Good Faith

APPENDIX 2A. Bank's Appellate Brief Arguing
Against Enforcement of Oral
Contract

APPENDIX 2B. Complaint Alleging Breach of Duty of
Good Faith

APPENDIX 2C. Answer to Allegations of Breach of
Duty of Good Faith

Chapter 3. Duress

APPENDIX 3A. Petition Against Bank Alleging
Duress

PART III. TORT CLAIMS

Chapter 4. Bad Faith Tort Claims

APPENDIX 4A. Petition of Bank for Hearing on Issue
of Bad Faith Tort Recovery

Chapter 5. Breach of Fiduciary Duty

APPENDIX 5A. Jury Instructions Re Investors' Claim
That Bank Breached Fiduciary Duty

Chapter 6. Fraud and Misrepresentation

APPENDIX 6A. Complaint with Allegations of Fraud
for Failure to Provide Financing

Chapter 7. Negligent Loan Processing and
Administration

LENDER LIABILITY

APPENDIX 7A. Counterclaim of Debtor Alleging
Negligent Loan Administration

Chapter 7A. Tort of Deepening Insolvency

Chapter 8. Interference

APPENDIX 8A. Complaint by Corporation
Bondholders Alleging Tortious
Interference with Economic
Advantages Due to Leveraged
Buyout

PART IV. BANKRUPTCY

Chapter 9. Equitable Subordination

APPENDIX 9A. Bankruptcy Code Subordination Pro-
vision

APPENDIX 9B. Trustee's Brief in Support of
Equitable Subordination of Lender's
Claims

APPENDIX 9C. Lender's Reply Brief Opposing
Equitable Subordination

Chapter 10. Fraudulent Transfers

APPENDIX 10A. Fraudulent Transfers and
Obligations Under Bankruptcy
Code

Chapter 11. Preferential Transfers

Chapter 12. Managing Lender Liability Claims in
Bankruptcy Cases

APPENDIX 12A. Brief of Official Committee of
Unsecured Creditors in Support of
Motions to Terminate Debtors'
Exclusive Periods and for
Appointment of Examiner with
Special Powers

APPENDIX 12B. Creditor's Plan of Reorganization
Discharging Lender Liability
Claims

Chapter 13. Involuntary Bankruptcy

SUMMARY OF CONTENTS

Volume 2

PART V. STATUTORY CLAIMS

Chapter 14. Fair Labor Standards Act

APPENDIX 14A. Selected Provisions of Fair Labor Standards Act

Chapter 15. Antitrust

APPENDIX 15A. Complaint Alleging Antitrust Violations

APPENDIX 15B. Pretrial Order in Action Alleging Antitrust Violations

Chapter 16. Anti-Tying Provisions

APPENDIX 16A. Bank Holding Company Act

APPENDIX 16B. Thrift Institutions Restructuring Act

Chapter 17. Environmental Claims

APPENDIX 17A. CERCLA Definitions

APPENDIX 17B. Abatement Actions Under CERCLA

APPENDIX 17C. Liability Under CERCLA

APPENDIX 17D. Civil Penalties and Awards Under CERCLA

APPENDIX 17E. Settlements Under CERCLA

APPENDIX 17F. Underground Storage Tank Indemnification Agreement—Buyer and Lender Protection

Chapter 18. RICO

APPENDIX 18A. Racketeer Influenced and Corrupt Organizations Act

Chapter 19. Withholding Taxes

APPENDIX 19A. Selected Internal Revenue Code Provisions

APPENDIX 19B. Selected Treasury Regulations

Chapter 20. Securities Laws

APPENDIX 20A. Definition of Security Under Securities Act of 1933

LENDER LIABILITY

- APPENDIX 20B. Prohibitions Re Interstate Commerce and Mails Under Securities Act of 1933
- APPENDIX 20C. Manipulative and Deceptive Devices Under Securities Exchange Act of 1934
- APPENDIX 20D. Employment of Manipulative and Deceptive Devices Under SEC Rule 10b-5
- APPENDIX 20E. State Securities Law Claims
- Chapter 21. Bank Secrecy Act
 - APPENDIX 21A. Bank Secrecy Act
 - APPENDIX 21B. Money Laundering Provisions
- Chapter 22. Equal Credit Opportunity Act

Volume 3

PART VI. DIRECTOR AND OFFICER LIABILITY

- Chapter 23. Duty of Care and Self-Dealing
 - APPENDIX 23A. Complaint Alleging Breach of Fiduciary Duty of Officer and Director for Making Unsafe and Unsound Loan
- Chapter 24. Regulatory and Criminal Sanctions
 - APPENDIX 24A. Civil Money Penalty Under Federal Deposit Insurance Act
 - APPENDIX 24B. Criminal Provision Governing Receipt of Commissions or Gifts for Procuring Loans
 - APPENDIX 24C. Criminal Provision Governing Theft, Embezzlement or Misapplication by Bank Officers or Employees
- Chapter 25. Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990

SUMMARY OF CONTENTS

PART VII. MINIMIZING RISK OF LIABILITY

Chapter 26. Documentation

 APPENDIX 26A. United States Arbitration Act

Chapter 27. Workout Strategies

Chapter 28. Lender Liability Litigation

Table of Laws and Rules

Table of Cases

Index

<http://www.pbookshop.com>

<http://www.pbookshop.com>

Table of Contents

Volume 1

PART I. INTRODUCTION

CHAPTER 1. OVERVIEW

- § 1:1 Scope of treatise
- § 1:2 Contract claims
- § 1:3 Tort claims
- § 1:4 Bankruptcy
- § 1:5 Statutory claims
- § 1:6 Director and officer liability
- § 1:7 Minimizing risk of liability: Documentation and workout strategies

PART II. CONTRACT CLAIMS

CHAPTER 2. BREACH OF CONTRACT AND GOOD FAITH

I. INTRODUCTION

- § 2:1 Generally

II. BREACH OF CONTRACT

- § 2:2 Contract formation
- § 2:3 Oral agreements to lend
- § 2:4 Parol evidence rule
- § 2:5 Liability of F.D.I.C. and failed banks
- § 2:6 Breach of commitment to fund

III. GOOD FAITH

- § 2:7 Common-law duty of good faith
- § 2:8 Good faith negotiations

LENDER LIABILITY

- § 2:9 Good faith as an excluder
- § 2:10 Good faith performance doctrine
- § 2:11 Good faith under UCC
- § 2:12 Revised Article 3 definition
- § 2:13 Demand instruments
- § 2:14 Rejection of implied provisions
- § 2:15 Bad faith acceleration and foreclosure
- § 2:16 Foreclosure practices
- § 2:17 Deemed insecure

IV. RISK MINIMIZATION

- § 2:18 In general
- § 2:19 Oral agreements
- § 2:20 Preliminary agreements
- § 2:21 Preliminary agreement language
- § 2:22 Loan documentation and administration
- § 2:23 Loan forms
- APPENDIX 2A. Bank's Appellate Brief Arguing Against Enforcement of Oral Contract
- APPENDIX 2B. Complaint Alleging Breach of Duty of Good Faith
- APPENDIX 2C. Answer to Allegations of Breach of Duty of Good Faith

CHAPTER 3. DURESS

- § 3:1 Introduction
- § 3:2 Origins
- § 3:3 Elements of claim
- § 3:4 —Restatement of contracts
- § 3:5 Wrongful threat
- § 3:6 —Restatement of contracts
- § 3:7 Reasonable alternative defense
- § 3:8 Representation by counsel
- § 3:9 Ratification
- § 3:10 Duress as a tort
- § 3:11 Risk minimization
- APPENDIX 3A. Petition Against Bank Alleging Duress

PART III. TORT CLAIMS

CHAPTER 4. BAD FAITH TORT CLAIMS

- § 4:1 Introduction

TABLE OF CONTENTS

- § 4:2 Historical background—Origin of remedy
 - § 4:3 —Expansion of remedy to first-party insurance cases
 - § 4:4 Justification for remedy in commercial cases
 - § 4:5 —Superior bargaining power, adhesion contracts and peace of mind
 - § 4:6 —Bad faith and inefficient breach of contract
 - § 4:7 Development of cause of action in California
 - § 4:8 —California rejection of theory
 - § 4:9 Negligence claims
 - § 4:10 Commercial bad faith outside California
 - § 4:11 —Rejection of tort remedy
 - § 4:12 Economic loss doctrine
 - § 4:13 Risk minimization
- APPENDIX 4A. Petition of Bank for Hearing on Issue of Bad Faith Tort Recovery

CHAPTER 5. BREACH OF FIDUCIARY DUTY

- § 5:1 Introduction
- § 5:2 Definition of fiduciary
- § 5:3 Creditor-debtor relationship
- § 5:4 Hostile takeover transactions
- § 5:5 Lenders as fiduciaries
- § 5:6 Origin of control theory
- § 5:7 Creditor in control
- § 5:8 —Indicia of control
- § 5:9 Development of quasi-fiduciary standard in California
- § 5:10 Lender inducement of third parties to breach fiduciary duties
- § 5:11 Risk minimization

- APPENDIX 5A. Jury Instructions Re Investors' Claim That Bank Breached Fiduciary Duty

CHAPTER 6. FRAUD AND MISREPRESENTATION

- § 6:1 Introduction
- § 6:2 Elements of fraudulent misrepresentation
- § 6:3 Aiding and abetting fraud
- § 6:4 Duty to disclose
- § 6:5 —Knowledge of false statements
- § 6:6 —Materiality

- § 6:7 —Reasonable reliance
- § 6:8 Negligent misrepresentation
- § 6:9 Risk minimization

APPENDIX 6A. Complaint with Allegations of Fraud for Failure to Provide Financing

CHAPTER 7. NEGLIGENT LOAN PROCESSING AND ADMINISTRATION

- § 7:1 Introduction
- § 7:2 Loan applications
- § 7:3 Loans for unsuccessful ventures
- § 7:4 Loan administration
- § 7:5 Negligent loan refinancing
- § 7:6 Aiding and abetting terroristic acts
- § 7:7 TARP
- § 7:8 Customer fraud
- § 7:9 Risk minimization

APPENDIX 7A. Counterclaim of Debtor Alleging Negligent Loan Administration

CHAPTER 7A. TORT OF DEEPENING INSOLVENCY

- § 7A:1 Introduction
- § 7A:2 Elements of tort of deepening insolvency
- § 7A:3 Development of tort of deepening insolvency

CHAPTER 8. INTERFERENCE

- § 8:1 Introduction
- § 8:2 Elements of tortious interference
- § 8:3 —Existence of valid contract
- § 8:4 —Knowledge of contractual relationship
- § 8:5 Intentional interference
- § 8:6 Loan collection activities
- § 8:7 Damages
- § 8:8 Interference with corporate management
- § 8:9 Defense of justification
- § 8:10 Risk minimization

APPENDIX 8A. Complaint by Corporation Bondholders Alleging Tortious Interference with Economic Advantages Due to Leveraged Buyout

TABLE OF CONTENTS

PART IV. BANKRUPTCY

**CHAPTER 9. EQUITABLE
SUBORDINATION**

- § 9:1 Introduction
- § 9:2 Origin of concept
- § 9:3 Parties owing heightened duty to debtor
- § 9:4 —Statutory definition of “insider”
- § 9:5 —Judicial interpretation of “insider”
- § 9:6 General obligations owed by creditors
- § 9:7 Creditors as control persons
- § 9:8 —Indicia of control
- § 9:9 Inequitable conduct
- § 9:10 —Application to fraudulent transfer cases
- § 9:11 —Undercapitalization of debtors
- § 9:12 —Creditor fraud and misrepresentation
- § 9:13 —Violation of automatic stay
- § 9:14 Recharacterization alternative
- § 9:15 Tax penalties
- § 9:16 Injury requirement
- § 9:17 Standing
- § 9:18 Assignees
- § 9:19 Burden of proof
- § 9:20 Risk minimization

APPENDIX 9A. Bankruptcy Code Subordination Provision

APPENDIX 9B. Trustee’s Brief in Support of Equitable
Subordination of Lender’s Claims

APPENDIX 9C. Lender’s Reply Brief Opposing Equitable
Subordination

**CHAPTER 10. FRAUDULENT
TRANSFERS**

I. INTRODUCTION

- § 10:1 Generally

II. STATUTORY OVERVIEW

- § 10:2 Bankruptcy Code
- § 10:3 Uniform acts

- § 10:4 Burden of proof
- § 10:5 Proof of insolvency

III. Section 548 of the Bankruptcy Code

- § 10:6 Transfer defined
- § 10:7 Religious and charitable contributions
- § 10:8 Transfers with intent to hinder, delay or defraud creditors
- § 10:9 Transfers for less than reasonably equivalent value—
Generally
- § 10:10 Transfers resulting in unreasonably small capital
- § 10:11 Transfers by debtor about to incur debts which cannot be paid
- § 10:12 Transfer to benefit insiders
- § 10:13 Partnerships
- § 10:14 Protection of good faith transferees for value
- § 10:15 Recovery action against subsequent transferees
- § 10:16 Conduit liability
- § 10:17 Standing
- § 10:18 Limitations period

IV. PROBLEM AREAS

- § 10:19 Foreclosure sales
- § 10:20 —Effect of 1984 Bankruptcy Code amendments
- § 10:21 —Post-1984 decisions
- § 10:22 — —*BFP v. Resolution Trust Corporation*
- § 10:23 Guarantees
- § 10:24 Leveraged buyouts
- § 10:25 —Reasonably equivalent value
- § 10:26 —Fraudulent conveyance law held applicable
- § 10:27 —Fraudulent conveyance law held inapplicable

V. RISK MINIMIZATION

- § 10:28 Foreclosures
- § 10:29 Guarantees
- § 10:30 Leveraged buyouts

APPENDIX 10A. Fraudulent Transfers and Obligations Under Bankruptcy Code

CHAPTER 11. PREFERENTIAL TRANSFERS

- § 11:1 Introduction

TABLE OF CONTENTS

§ 11:2	Elements of a preference
§ 11:3	Transfer of property
§ 11:4	Property of the debtor
§ 11:5	—Garnishments
§ 11:6	—Withholding taxes
§ 11:7	—Third-party payments
§ 11:8	—Letters of credit
§ 11:9	—Earmarking
§ 11:10	Payments to or for the benefit of a creditor
§ 11:11	—Governmental units
§ 11:12	—Guarantors
§ 11:13	Made on account of an antecedent debt
§ 11:14	Insolvency
§ 11:15	—Presumption of insolvency
§ 11:16	Time period
§ 11:17	—Checks
§ 11:18	Creditor receives more than in liquidation
§ 11:19	Foreclosure sales
§ 11:20	Exceptions
§ 11:21	—Contemporaneous exchange for new value
§ 11:22	—Payments made in the ordinary course of business
§ 11:23	—Ponzi schemes
§ 11:24	—Enabling loans
§ 11:25	—Subsequent advances
§ 11:26	—Floating liens
§ 11:27	—Statutory lien
§ 11:28	—Consumer debts
§ 11:29	Small preference exception
§ 11:29.10	Settlement payments exception
§ 11:30	Standing
§ 11:31	Limitations period
§ 11:32	Special problems presented by guarantees
§ 11:33	—Section 550 and transferee recovery
§ 11:34	Risk minimization

CHAPTER 12. MANAGING LENDER LIABILITY CLAIMS IN BANKRUPTCY CASES

I. INTRODUCTION

§ 12:1	Generally
--------	-----------

II. COMPROMISE OF CLAIMS

- § 12:2 In general
- § 12:3 Proper parties
- § 12:4 Nondebtor claims
- § 12:5 Approval standards
- § 12:6 Compromise as substitute for plan
- § 12:7 Jurisdiction and appellate review
- § 12:8 Withdrawal of the reference
- § 12:9 Remand to state court
- § 12:10 Matter preclusion
- § 12:11 Injunctions

III. CHAPTER 11 PLAN

- § 12:12 In general
- § 12:13 Parties entitled to file plan
- § 12:14 —Small business plan
- § 12:15 Contents of plan
- § 12:16 Classification of claims and interest
- § 12:17 —Improvement as impairment
- § 12:18 —Payment in full as impairment
- § 12:19 —Standard of review
- § 12:20 Disclosure statement
- § 12:21 Solicitation
- § 12:22 Voting
- § 12:23 Disqualification of bad faith votes
- § 12:24 Objection to confirmation
- § 12:25 Multiple plans
- § 12:26 Compliance of plan with Chapter 11
- § 12:27 Compliance of plan proponent with Chapter 11
- § 12:28 Plan proposed in good faith
- § 12:29 Disclosure of payments for services and expenses
- § 12:30 Disclosure as to future management
- § 12:31 Approval of rate changes
- § 12:32 Acceptance by at least one class of claims
- § 12:33 Feasibility
- § 12:34 Impaired classes
- § 12:35 Dissenting classes/cram down
- § 12:36 —Secured creditor cash out
- § 12:37 —Retention of lien
- § 12:38 —Sale of collateral
- § 12:39 —Indubitable equivalent

TABLE OF CONTENTS

- § 12:40 —Unsecured creditors
- § 12:41 —Ownership interests
- § 12:42 Release of claims against third party nondebtors
- § 12:43 —Res judicata exception
- § 12:44 Res judicata effect of failure to raise lender liability claims

IV. LENDER ALTERNATIVES

- § 12:45 Creditor strategy

APPENDIX 12A. Brief of Official Committee of Unsecured Creditors in Support of Motions to Terminate Debtors' Exclusive Periods and for Appointment of Examiner with Special Powers

APPENDIX 12B. Creditor's Plan of Reorganization Discharging Lender Liability Claims

CHAPTER 13. INVOLUNTARY BANKRUPTCY

- § 13:1 Introduction
- § 13:2 Commencement of case
- § 13:3 Abstention
- § 13:4 Qualifying claimants
- § 13:5 Exclusion of contingent claims
- § 13:6 Bona fide dispute
- § 13:7 Single creditor cases
- § 13:8 De minimis claims
- § 13:9 Adding claimants
- § 13:10 Interim trustee
- § 13:11 Generally not paying debts
- § 13:12 Damages
- § 13:13 State law preemption

Volume 2

PART V. STATUTORY CLAIMS

CHAPTER 14. Fair Labor Standards Act

- § 14:1 Introduction

LENDER LIABILITY

- § 14:2 Transportation of hot goods
- § 14:3 Accounts receivable
- § 14:4 Plant machinery
- § 14:5 Exemptions
- § 14:6 Application to lenders
- § 14:7 Salaried employees
- § 14:8 Bankruptcy implications
- § 14:9 Risk minimization

APPENDIX 14A. Selected Provisions of Fair Labor Standards Act

CHAPTER 15. ANTITRUST

- § 15:1 Introduction
- § 15:2 Section 1 of Sherman Act
- § 15:3 Contracts, combinations and conspiracies
- § 15:4 —Conscious parallelism
- § 15:5 Per se violations
- § 15:6 —Price fixing
- § 15:7 —Divisions of markets and allocation of customers
- § 15:8 Exclusive dealing
- § 15:9 Tying arrangements
- § 15:10 —Separate products
- § 15:11 —Coercion
- § 15:12 —Market power
- § 15:13 —Amount of interstate commerce involved
- § 15:14 Reciprocal dealing arrangements
- § 15:15 Refusals to deal
- § 15:16 Bank sharing of confidential business information
- § 15:17 Section 2 of Sherman Act
- § 15:18 —Attempts to monopolize
- § 15:19 Monopoly leveraging
- § 15:20 Standing
- § 15:21 Interlocking directorates
- § 15:22 Risk minimization

APPENDIX 15A. Complaint Alleging Antitrust Violations

APPENDIX 15B. Pretrial Order in Action Alleging Antitrust Violations

CHAPTER 16. ANTI-TYING PROVISIONS

I. Bank Holding Company Act AND Home Owners' Loan Act

- § 16:1 Introduction

TABLE OF CONTENTS

- § 16:2 Defendants
- § 16:3 Comparison to Sherman Act
- § 16:4 Anti-tying arrangements
- § 16:5 —Nontraditional banking practices
- § 16:6 Interest rate swaps
- § 16:7 Exclusive dealing
- § 16:8 Standing
- § 16:9 —Damages
- § 16:10 —Incomplete transactions
- § 16:11 Statute of limitations
- § 16:12 Federal Reserve Board regulatory interpretations
- § 16:13 —Affiliates
- § 16:14 —Brokerage services
- § 16:15 —Affiliate nonbank products
- § 16:16 —Combined balance accounts

II. RISK MINIMIZATION

- § 16:17 Introduction
- § 16:18 Workout or forbearance agreements
- § 16:19 Loans and other services

APPENDIX 16A. Bank Holding Company Act

APPENDIX 16B. Thrift Institutions Restructuring Act

CHAPTER 17. ENVIRONMENTAL CLAIMS

I. STATUTORY LIABILITY

- § 17:1 Introduction
- § 17:2 Resource Conservation and Recovery Act
- § 17:3 —Enforcement provisions
- § 17:3.10 —Enforcement of state programs
- § 17:4 —Injunctive relief
- § 17:5 —Private plaintiff notice requirements
- § 17:6 —Underground storage tanks
- § 17:7 —State regulation of underground storage tanks
- § 17:8 — —Liable parties
- § 17:9 — —Property owned exclusion
- § 17:10 — —EPA UST Lender Liability Rule
- § 17:11 — —New tank requirements
- § 17:12 — —Existing tanks

LENDER LIABILITY

- § 17:13 — —Closure of tanks
- § 17:14 — —Response to leaking tanks
- § 17:15 — —Petroleum as hazardous waste
- § 17:16 —Lender options on gasoline contaminated sites
- § 17:17 —State trust funds
- § 17:18 —Federal Leaking Underground Storage Tank Trust Fund
- § 17:19 —Indemnification agreements
- § 17:20 Petroleum tanks; Financial responsibility requirements
- § 17:21 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or superfund)
- § 17:22 —Small Business Liability Relief and Brownfields Revitalization Act
- § 17:23 —Injunctive relief
- § 17:24 —Responsible parties
- § 17:25 —Retroactivity
- § 17:26 —Private contractual liability
- § 17:27 —Indemnification agreement interpretation
- § 17:28 —Disposal
- § 17:29 —Response costs
- § 17:30 —National contingency plan
- § 17:31 —Environmental Protection Agency response actions
- § 17:32 —Remedial action
- § 17:33 —Private plaintiffs
- § 17:34 —Preemption of public nuisance recovery theories by states
- § 17:35 —Limitations period
- § 17:36 —Strict liability
- § 17:37 —Joint and several liability
- § 17:38 —Officer, director and shareholder liability
- § 17:39 —Successor corporate liability
- § 17:40 —Federal and state governmental liability
- § 17:41 Useful product doctrine
- § 17:42 Financial institution liability
- § 17:43 —Ownership of contaminated real property
- § 17:44 —Control over borrower
- § 17:45 —Ability to affect disposal decisions
- § 17:46 —EPA Lender Liability Rule
- § 17:47 Post fleet factors and EPA Lender Liability Rule cases
- § 17:48 Federal lender liability legislation
- § 17:49 —Fiduciary or trustee liability

TABLE OF CONTENTS

- § 17:50 Federal fiduciary protection
- § 17:51 Statutory guidance for fiduciaries
- § 17:52 Trust provisions checklist
- § 17:53 Defenses to CERCLA liability
- § 17:54 Petroleum exclusion
- § 17:55 —Used oil
- § 17:56 EPA guidelines for de minimis settlements with landowners
- § 17:57 Prospective purchaser agreements with EPA
- § 17:58 Deductibility of cleanup expense as business expenses

II. FEDERAL AND STATE LIENS, TRANSFER RESTRICTIONS AND NOTICE REQUIREMENTS

- § 17:59 Federal liens
- § 17:60 Arkansas
- § 17:61 California
- § 17:62 Connecticut
- § 17:63 Georgia
- § 17:64 Illinois
- § 17:65 Iowa
- § 17:66 Kentucky
- § 17:67 Louisiana
- § 17:68 Maine
- § 17:69 Maryland
- § 17:70 Massachusetts
- § 17:71 Michigan
- § 17:72 Minnesota
- § 17:73 Montana
- § 17:74 New Hampshire
- § 17:75 New Jersey
- § 17:76 Ohio
- § 17:77 Oregon
- § 17:78 Pennsylvania
- § 17:79 Tennessee
- § 17:80 Texas
- § 17:81 Virginia
- § 17:82 State restrictions on transfer of contaminated real property
- § 17:83 Real estate notice provisions

III. INSURANCE COVERAGE

- § 17:84 Introduction

LENDER LIABILITY

- § 17:85 Comprehensive general liability policies
- § 17:86 —Occurrence requirement
- § 17:87 —Interpretation of “damages”
- § 17:88 —Pollution exclusion clauses
- § 17:89 Title insurance
- § 17:90 Environmental lien endorsement

IV. ENVIRONMENTAL LAWS AND BANKRUPTCY

- § 17:91 Introduction
- § 17:92 Effect of automatic stays
- § 17:93 Exceptions to automatic stays
- § 17:94 Abandonment of contaminated property
- § 17:95 Bankruptcy trustee liability
- § 17:96 Assessment of cleanup costs against secured creditors
- § 17:97 Cleanup costs as administrative expenses
- § 17:98 Environmental expenses as “claims” under Bankruptcy Code
 - Definition of claim
- § 17:99 —Definition of claim
- § 17:100 —Claims for contribution
- § 17:101 —Discharge of environmental claims

V. RISK MINIMIZATION

- § 17:102 Introduction
- § 17:103 Site history
- § 17:104 Regulatory review
- § 17:105 Securities and Exchange Commission required disclosures
- § 17:106 Underground storage tanks
- § 17:107 Adjacent sites
- § 17:108 Industry familiarity
- § 17:109 Environmental audits
 - Access onto premises
- § 17:110 Selective foreclosure
- § 17:111 —ASTM standard practices for environmental assessments
- § 17:112 EPA all appropriate inquiry rule
- § 17:113 Selective foreclosure—F.D.I.C. guidelines for environmental risk program
- § 17:114 —Selection of environmental engineer
- § 17:115 —Phase I, II and III audits
- § 17:116 Discovery of hazardous substances

TABLE OF CONTENTS

§ 17:118	Lender disclosure obligation
§ 17:119	Loan documentation
§ 17:120	—Sample provision for commitment letters
§ 17:121	—Sample provisions for loan and security agreements, mortgages and owner’s affidavits
§ 17:122	Sample environmental questionnaire I
§ 17:123	Sample environmental questionnaire II
§ 17:124	Lender environmental insurance
APPENDIX 17A.	CERCLA Definitions
APPENDIX 17B.	Abatement Actions Under CERCLA
APPENDIX 17C.	Liability Under CERCLA
APPENDIX 17D.	Civil Penalties and Awards Under CERCLA
APPENDIX 17E.	Settlements Under CERCLA
APPENDIX 17F.	Underground Storage Tank Indemnification Agreement—Buyer and Lender Protection

CHAPTER 18. RICO

§ 18:1	Introduction
§ 18:2	Constitutionality

I. COMMON ELEMENTS OF RICO ACTIONS

§ 18:3	In general
§ 18:4	Definition of “Person”
§ 18:5	Definition of “enterprise”
§ 18:6	Nexus between person and enterprise
§ 18:7	Interstate or foreign commerce connection
§ 18:8	Racketeering activity
§ 18:9	Securities fraud and RICO
§ 18:10	Mail and wire fraud
§ 18:11	—Scheme or artifice to defraud
§ 18:12	— —Materiality requirement in “defraud”
§ 18:13	—Personal involvement not required
§ 18:14	—Intent to defraud
§ 18:15	— —Materiality
§ 18:16	—Good faith
§ 18:17	—Actual versus constructive fraud
§ 18:18	—Type of injury covered
§ 18:19	Pattern of racketeering activity
§ 18:20	Collection of unlawful debt

II. SPECIFIC RICO CAUSES OF ACTION

- § 18:21 Use of funds acquired through racketeering (Section 1962(a))
- § 18:22 Acquisition of interest in or control of enterprise through racketeering (Section 1962(b))
- § 18:23 Participation in enterprise through racketeering (Section 1962(c))
- § 18:24 Conspiracy (Section 1962(d))

III. PROCEDURAL AND PRACTICE CONSIDERATIONS

- § 18:25 Standing to sue
- § 18:26 —Indirect injury
- § 18:27 Damages and equitable relief
- § 18:28 Statute of limitations
- § 18:29 Concurrent jurisdiction
- § 18:30 Collateral estoppel
- § 18:31 Burden of proof
- § 18:32 Arbitration
- § 18:33 Costs and attorney's fees

IV. RISK MINIMIZATION

- § 18:34 In general

APPENDIX 18A. Racketeer Influenced and Corrupt Organizations Act

CHAPTER 19. WITHHOLDING TAXES

- § 19:1 Introduction
- § 19:2 Employer liability
- § 19:3 Liability of payroll lender
- § 19:4 —Working capital loan exception
- § 19:5 —Notice requirements
- § 19:6 Responsible party liability
- § 19:7 —Willfulness
- § 19:8 Risk minimization

APPENDIX 19A. Selected Internal Revenue Code Provisions

APPENDIX 19B. Selected Treasury Regulations

TABLE OF CONTENTS

CHAPTER 20. SECURITIES LAWS

I. INTRODUCTION

- § 20:1 Generally
- § 20:2 Pleading standards for all actions

II. DEFINITION OF “SECURITY”

- § 20:3 In general
- § 20:4 Economic reality test
- § 20:5 Promissory notes
- § 20:6 Prime bank notes
- § 20:7 Loan participations
- § 20:8 Loan commitments
- § 20:9 Guarantees
- § 20:10 Certificates of deposit
- § 20:11 Sales of condominiums with rental arrangements
- § 20:12 Derivatives

III. REGISTRATION STATEMENT PROBLEMS

- § 20:13 Scope and purpose of Section 11
- § 20:14 Plaintiffs
- § 20:15 Liable parties
- § 20:16 Materiality
- § 20:17 Reliance
- § 20:18 Defenses
- § 20:19 Damages

IV. SALE OF UNREGISTERED SECURITIES

- § 20:20 Section 12(1)
- § 20:21 Interstate commerce or mails requirement
- § 20:22 Privity
- § 20:23 Exemptions
- § 20:24 —Financial institutions
- § 20:25 —Intrastate offerings
- § 20:26 —Private offerings
- § 20:27 Small issues
- § 20:28 Resales

V. Section 12(2) FRAUD IN SALE OF SECURITIES

- § 20:29 Scope of Section 12(2)

§ 20:30 Lender as “seller” of securities

VI. Section 10(b) AND Rule 10b-5 ANTIFRAUD PROVISIONS

- § 20:31 Introduction
- § 20:32 Rule 10b-5
- § 20:33 Privity
- § 20:34 Deceptive practices
- § 20:35 Materiality
- § 20:36 Statutory safe harbor for forward looking statements
- § 20:37 Scienter
- § 20:38 “In connection with” purchase or sale requirement
- § 20:39 Reliance
- § 20:40 Due care
- § 20:41 Damages
- § 20:42 Contribution and proportionate liability

VII. AIDING AND ABETTING LIABILITY

- § 20:43 Elements
- § 20:44 Supreme Court rejection of aiding and abetting liability
- § 20:45 Post-Central Bank liability for secondary parties
- § 20:46 SEC authority over aiding and abetting
- § 20:47 —Primary violation
- § 20:48 —Scienter
- § 20:49 —Substantial assistance

VIII. CONTROL PERSON LIABILITY

- § 20:50 Introduction
- § 20:51 Elements of control
- § 20:52 Insider trading and Securities Fraud Enforcement Act

IX. LENDER NONDISCLOSURE OF MATERIAL INFORMATION

- § 20:53 Introduction
- § 20:54 Disclosure of regulatory actions
- § 20:55 Disclosure of loan losses

X. CRIMINAL VIOLATIONS

- § 20:56 Introduction
- § 20:57 Willfulness

TABLE OF CONTENTS

- § 20:58 No knowledge defense
- § 20:59 Criminal intent
- § 20:60 Criminal referral
- § 20:61 Tactical considerations

XI. DEVELOPMENT OF NEW PRODUCTS

- § 20:62 Retail repo agreements

XII. RISK MINIMIZATION

- § 20:63 Loans
- § 20:64 Reckless dissemination of information
- § 20:65 Loan loss reserves
- § 20:66 Control person
- § 20:67 Retail repo agreements

APPENDIX 20A. Definition of Security Under Securities Act of 1933

APPENDIX 20B. Prohibitions Re Interstate Commerce and Mails Under Securities Act of 1933

APPENDIX 20C. Manipulative and Deceptive Devices Under Securities Exchange Act of 1934

APPENDIX 20D. Employment of Manipulative and Deceptive Devices Under SEC Rule 10b-5

APPENDIX 20E. State Securities Law Claims

CHAPTER 21. Bank Secrecy Act

- § 21:1 Introduction
- § 21:2 Constitutional challenges
- § 21:3 Purpose of Currency and Foreign Transactions Reporting Act
- § 21:4 Domestic currency transactions
- § 21:5 Reports of suspicious activity
- § 21:6 Multiple transactions
- § 21:7 Identification of depositor
- § 21:8 Exclusions and exemptions
- § 21:9 Structured transactions
- § 21:10 —Legislative and regulatory response
- § 21:11 —Willfulness requirement
- § 21:12 Other currency transactions subject to reporting requirements
- § 21:13 Exports and imports of monetary instruments

LENDER LIABILITY

- § 21:14 —Export transaction exemptions
- § 21:15 —Forfeiture of monetary instruments
- § 21:16 — —Civil Asset Forfeiture Reform Act of 2000
- § 21:17 Civil penalties
- § 21:18 Criminal penalties
- § 21:19 —Violations in furtherance of other federal law violations
- § 21:20 —Violations constituting pattern of illegal activity
- § 21:21 False statements
- § 21:22 Suspicious transactions under the reporting threshold
- § 21:23 Suspicious Activity Reports
- § 21:24 Money Laundering Control Act of 1986
- § 21:25 Money Laundering Prosecution Improvements Act of 1988
- § 21:26 USA Patriot Act
- § 21:27 Anti-Money Laundering Program
- § 21:28 Risk minimization

APPENDIX 21A. Bank Secrecy Act

APPENDIX 21B. Money Laundering Provisions

CHAPTER 22. Equal Credit Opportunity Act

- § 22:1 Introduction
- § 22:2 Legislative history
- § 22:3 Overview of major provisions
- § 22:4 —Application for credit
- § 22:5 —Notification of adverse action
- § 22:6 Preemption of state laws
- § 22:7 Retention of records
- § 22:8 Standing to sue
- § 22:9 Purchased loans
- § 22:10 Statute of limitations
- § 22:11 Damages
- § 22:12 Defenses
- § 22:13 Special guarantee rules
- § 22:14 ECOA violation as defense to enforcement of guarantee
- § 22:15 Risk minimization

Volume 3

TABLE OF CONTENTS

**PART VI. DIRECTOR AND
OFFICER LIABILITY**

**CHAPTER 23. DUTY OF CARE AND
SELF-DEALING**

§ 23:1 Introduction

I. DUTY OF CARE

- § 23:2 Functions of officers and directors
- § 23:3 —Selection and review of senior management
- § 23:4 —Compliance with laws and regulations
- § 23:5 —Adoption of major plans and policies
- § 23:6 —Loan portfolio management
- § 23:7 —Funds management
- § 23:8 —Investment policy
- § 23:9 Inside and outside directors
- § 23:10 Business judgment rule
- § 23:11 —Criticism of rule
- § 23:12 Statutory formulations of duty of care
- § 23:13 —Statutory mandates regarding special considerations
- § 23:14 —FIRREA preemption of state statutes
- § 23:15 —FIRREA and state limitations periods
- § 23:16 —Model Business Corporation Act variations
- § 23:17 —Notice–Inquiry statutes
- § 23:18 —Personal business affair standard
- § 23:19 Statutory limitations on liability
- § 23:20 Duty of inquiry
- § 23:21 Proximate cause
- § 23:22 —Contributory negligence

II. SELF-DEALING

- § 23:23 Duty of loyalty
- § 23:24 Disinterestedness
- § 23:25 Restrictions on insider transactions
- § 23:26 —Loans to insiders
- § 23:27 —Preferential loans
- § 23:28 —Overdrafts
- § 23:29 —Permissible loans to executive officers
- § 23:30 —Loans to affiliates
- § 23:31 —Savings and loan associations

- § 23:32 —Duty to creditors
- § 23:33 Penalties for violation of the Financial Institutions
Regulatory and Interest Rate Control Act of 1978

III. RISK MINIMIZATION

- § 23:34 Minimizing director and officer liability

APPENDIX 23A. Complaint Alleging Breach of Fiduciary Duty
of Officer and Director for Making Unsafe
and Unsound Loan

CHAPTER 24. REGULATORY AND CRIMINAL SANCTIONS

I. INTRODUCTION

- § 24:1 Generally

II. REGULATORY ENFORCEMENT

- § 24:2 Informal agreements
- § 24:3 Cease and desist orders
- § 24:4 Consent orders
- § 24:5 Cease and desist orders—Unsafe and unsound practices
- § 24:6 —Administrative procedure
- § 24:7 Civil money penalties
- § 24:8 Affirmative action to correct violations or unsafe
practices
- § 24:9 Removal and suspension powers
- § 24:10 National bank charter revocation
- § 24:11 Revocation of trust powers
- § 24:12 Conservatorship and receivership
- § 24:13 Termination of insured status
- § 24:14 F.D.I.C. enforcement action against savings associations
- § 24:15 Financial Institutions Reform, Recovery, and
Enforcement Act of 1989

III. CRIMINAL SANCTIONS

- § 24:16 Embezzlement and misapplication of funds
- § 24:16.10 Bank fraud—Generally
- § 24:17 Bank Bribery Act
- § 24:18 Conspiracy to defraud the government
- § 24:19 Obstruction of criminal investigations

TABLE OF CONTENTS

§ 24:20 Obstructing examination of financial institution

IV. RISK MINIMIZATION

§ 24:21 In general

APPENDIX 24A. Civil Money Penalty Under Federal Deposit Insurance Act

APPENDIX 24B. Criminal Provision Governing Receipt of Commissions or Gifts for Procuring Loans

APPENDIX 24C. Criminal Provision Governing Theft, Embezzlement or Misapplication by Bank Officers or Employees

CHAPTER 25. Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990

§ 25:1 Introduction

§ 25:2 Subtitle A—Enhanced criminal penalties

§ 25:3 —Concealment of assets

§ 25:4 —Prohibition of control of financial institution by convicted criminals

§ 25:5 —Obstructing examination of financial institution

§ 25:6 —Increased penalties for existing statutes

§ 25:7 —RICO statute of limitations extension

§ 25:8 —Expansion of money—laundering offenses

§ 25:9 —Restitution

§ 25:10 —Continuing financial crimes enterprise

§ 25:11 Subtitle B—Protecting assets from wrongful disposition

§ 25:12 —Attachment of assets

§ 25:13 —Prejudgment attachment

§ 25:14 —Attorney general injunctive actions

§ 25:15 —Nondischargeability of institution—Affiliated parties' liabilities in bankruptcy

§ 25:16 —Restrictions on golden parachutes and indemnification agreements

§ 25:17 —Forfeiture

§ 25:18 —Acquisition of financial institutions by felons

§ 25:19 —Avoidance of fraudulent transfers

PART VII. MINIMIZING RISK OF LIABILITY

CHAPTER 26. DOCUMENTATION

I. GENERALLY

- § 26:1 Introduction
- § 26:2 Oral commitments
- § 26:3 Preliminary agreements
- § 26:4 —Sample term sheet with transmittal letter
- § 26:5 Loan agreements
- § 26:6 Training loan officers
- § 26:7 Loan covenants
- § 26:8 —Sample events of default provision

II. ALTERNATIVE DISPUTE RESOLUTION

- § 26:9 Waiver of jury trial
- § 26:10 —Sample waiver of jury trial provision
- § 26:11 Arbitration
- § 26:12 —Arbitration, mediation and litigation
- § 26:13 —Federal Arbitration Act
- § 26:14 —Federal arbitration law and state law
- § 26:15 —Arbitration of statutory claims
- § 26:16 —Claim of fraud in the inducement
- § 26:17 —Enforcement of arbitration provisions
- § 26:18 Waiver
- § 26:19 Arbitration—Enforcement of arbitration provisions—
Bankruptcy
- § 26:20 — —Adhesion contracts
- § 26:21 — —Binding non-signatories to arbitration agreement
- § 26:22 — —Reservation of power to arbitrate
- § 26:23 — —Class actions
- § 26:24 — —Change in terms
- § 26:25 Dodd-Frank Act and consumer arbitration
- § 26:26 Arbitration—Arbitrability
- § 26:27 —Arbitration procedures
- § 26:28 —Damages
- § 26:29 —Lender strategy for arbitration
- § 26:30 Issue preclusion
- § 26:31 Vacating awards

TABLE OF CONTENTS

- § 26:32 —Sample arbitration provision
- § 26:33 Mediation and bankruptcy
- § 26:34 Statutory basis for mediation
- § 26:35 Mediation programs
- § 26:36 —Mediation register or panel
- § 26:37 —Assignment of matter to mediation
- § 26:38 —Mediation procedure

APPENDIX 26A. United States Arbitration Act

CHAPTER 27. WORKOUT STRATEGIES

§ 27:1 Introduction

I. GENERALLY

- § 27:2 Loan document review
- § 27:3 Oral agreements and course of dealing
- § 27:4 Materiality of defaults
- § 27:5 Notice
- § 27:6 Communicating in writing
- § 27:7 Personality conflicts
- § 27:8 Workout agreements

II. SAMPLE FORMS

- § 27:9 Troubled credit checklist
- § 27:10 Loan officer request for legal assistance
- § 27:11 Workout negotiation letter
- § 27:12 Workout agreement
- § 27:13 Notice of default—Bank form
- § 27:14 Demand letter—Bank form—Unsecured
- § 27:15 —Secured debt
- § 27:16 —Counsel prepared—Secured debt

CHAPTER 28. LENDER LIABILITY LITIGATION

- § 28:1 Introduction
- § 28:2 Evaluation of actual or potential claims
- § 28:3 Collecting and evaluating evidence
- § 28:4 —Loan documents
- § 28:5 —Loan file
- § 28:6 —Client interview
- § 28:7 —Client emotion

LENDER LIABILITY

- § 28:8 —Plaintiff analysis
- § 28:9 Litigation costs
- § 28:10 Settlement considerations
- § 28:11 Pretrial motions
- § 28:12 —Motions to dismiss
- § 28:13 —Motions for summary judgment
- § 28:14 Trial strategy

Table of Laws and Rules

Table of Cases

Index

<http://www.pbookshop.com>