



[PRINT](#) | [CLOSE WINDOW](#)

Lender Liability Suits May Change Bankers' Game

By Worth Sparkman - 1/25/2010

When you're at the end of your rope, sue the guy who loaned the money to buy it.

That seems to be the prevailing trend in Northwest Arkansas these days.

There were eight high-profile complaints filed against Northwest Arkansas lenders in the last eight months of 2009. Combined compensatory and punitive damages sought in those cases were valued at \$480 million. The suits were filed by individual developers and their companies that borrowed money - millions and millions of dollars - from the same banks just a couple of years before.

Though different in their finer details, these complaints are typically called lender liability suits, assuming the onus for a development's failure is on the bank that made the loan.

Most of them allege deceptive trade practices, fraud, breach of fiduciary duty or some other type of related claim. But the overriding common thread in the arguments is that a bank stopped funding projects because the value of the land dropped or something otherwise changed that made a project less attractive. Of course, if funding stops, many times a project can't be completed and therefore won't cashflow.

The developer may or may not already have been in violation of the loan agreement, which may or may not have prompted the plug being pulled. Though the price tag on many of the suits far exceeds the value of the original deal, usually the plaintiff just wants to be relieved of the debt burden.

Several lawyers said lender liability suits are basically a stall tactic to tie up a bank's resources.

"It's kind of like a preemptive strike. 'I'm suing you first so that it gives me a better strategic position,'" said a law professor who asked to not be identified.

These types of suits were common 20 years ago, the professor said, but are being resurrected now because of the tight economic conditions.

Unfortunately, most bankers and lawyers who practice in this field agree, there are likely more suits to come and some of those that have already been filed may end up being protracted battles carried all the way to a jury trial.

The case frequently cited as the Arkansas icebreaker - Tom Terminella's suit against Metropolitan National Bank of Little Rock - has made it all the way to the Arkansas Supreme Court. (Actually, only one of three different suits between the parties; the other two are pending). Many in the state are waiting to see what precedent, if any, will be set.

"We certainly started carrying the torch, that's for sure," said Robert Ginnaven, one of Terminella's lawyers in the MNB suit.

The bank has until Jan. 29 to respond to a brief filed with the Arkansas Supreme Court, then there likely will be time allowed for Terminella's side to respond to that, Ginnaven said.

The Gap

Ginnaven, who also represents J.B. Hays in his suit against The Bank of Fayetteville, said Terminella was proactive in his approach - he assembled all his lenders and tried to open a dialogue before the first foreclosure.

"I think about every bank in town was represented," said Ginnaven. "The effort was to resolve the problem" before it became a problem.

But even Ginnaven, who has been outspoken on behalf of his clients, doubts that if every developer had been as proactive as Terminella, it would've stopped all the lender liability suits.

He maintains that many banks were "throwing money" at people who didn't know what they were doing.

"I think the banks are ultimately responsible," Ginnaven said.

"In my view, we had too many 'developers' - both new to the industry and not so new - simultaneously rushing to meet the same demand with the misguided belief that the growth in Northwest Arkansas would never end," said Marshall Ney, a lawyer with the Mitchell Williams firm in Rogers.

"In my judgment, most lender liability cases are acts of desperation by borrowers who are unwilling to take responsibility for their own failed businesses or negative changes in market conditions," he said. "I believe Judge [Kim] Smith got it right when he threw out Terminella's claims."

Ney represented Legacy National Bank in its conflicts with The Barber Group and its partners over the Legacy Building in Fayetteville.

He said he's not surprised by the number of complaints that have been filed, but does not expect many more, though there are a couple of possibilities.

"We had many developers in Northwest Arkansas who very quickly rode the wave to the top and were ill-prepared to handle our economic slowdown," Ney wrote in an e-mailed response. "They were dealing with failed businesses and impending bankruptcies and doing everything they could to keep creditors at bay and save their businesses.

"I think the mentality became, 'I do not have the money to repay my debts - perhaps I can blame the bank for my failure and recover enough to avoid bankruptcy,'" Ney said.

"Do I think it's fair for a developer to walk away from a promise to pay money when the bank loaned it irresponsibly? Yeah. Hell, yeah," said Ginnaven, though he agrees most of the time borrowers should be accountable for their debts.

"Is it fair for banks to engage in unsafe and unsound banking practices as determined by the federal government? The answer to what's fair depends on whose shoes you're in," Ginnaven said.

James Penick, a lawyer with Eichenbaum Liles & Heister PA of Little Rock said, "Is it fair for a bank to misrepresent the terms and conditions of a transaction of this size? It's for a jury to decide."

Penick represents Terminella in Pulaski County and has worked with Northwest Arkansas lawyers on suits filed by Gary Combs. Combs' various suits and countersuits alone account for more than 82 percent of the 2009 sought-after damages.

The Future

Will the rash of lender liability suits change the legal relationship between borrower and lender?

The answers were as varied as the sides of the suits.

"I don't think so," said Garland Binns, a lawyer with Dover Dixon Horne PLLC of Little Rock. Binns' practice has an emphasis on banking and the business around banking.

"I think banks have to continue with prudent practices ... I don't see any change whatsoever," he said. "I don't think in any way, these suits will have any affect on banking practices."

But Ney, who also typically represents the lender side, had a different take.

"I predict less flexibility and more loans closing outside of the banks with lawyers present," he said.

"You can absolutely expect provisions that emphasize that the loan documents memorialize the entire agreement between the bank and borrower, and that prohibit oral modifications or side agreements," Ney said.

Ginnaven disagreed.

In the big picture - the national scope - banks win, Ginnaven said.

In the small picture, a jury could influence lending practices at the local and state level.

"The only way banks will change their behavior is when 12 peers get together," he said, referring to a jury. "It's obvious [the banks] loaned too much money and it's equally as obvious that they're going to get away with it. Nothing is going to happen unless a jury gets a hold of one of these cases."

Copyright © 2010, [Arkansas Business Limited Partnership](#). All Rights Reserved.