

Syndications: Can Agents and Co-Lenders Find an Equal Ground?



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Topic: [Legal Issues](#)

In multi-lender transactions – whether syndicated or club deals or participations – agents demand and consistently receive very strong exculpatory protections. Certainly, following the rule of *no good deed goes unpunished*, if what can't go wrong does go wrong, the agent does not want to find itself defending itself against claims by the other lenders. Similarly, the co-lenders want and need to be apprised of all material events concerning the loan.

The purpose of this blog is not just to put out a thought for people to consider but, in fact, to invite a dialogue toward a more effective methodology to be utilized in multi-lender transactions.

Too often club members rely extensively on the agent and do not engage in any independent due diligence before entering into a multi-lender transaction. This practice continues after the loan is closed. Of course, this is never a problem – until the loan goes south.

Consider this very standard provision:

Agent shall have no duty or responsibility to provide any Lender with any credit or other information, whether coming into its possession at any time except as shall be provided by any Borrower.

Now, imagine that during the course of a collateral audit, the auditor sends an email to the agent that says, in sum and substance:

In the course of our examination, we have discovered some significant accounting irregularities including the redating of all receivables originally dated July to October.

Based on this provision, the agent has no obligation whatsoever to share this information with the other lenders. I am confident that we all agree that the lender should share this information however, (and this is based on a real experience) the agent did not. In fact, the other lenders did not learn about the problem until three months later and after a massive fraud was disclosed.

Understandably, the agent does not want to be in a position where it must include co-lenders in every bit of minutia, however, there must be a balance between the agent not being obligated to forward any information other than information received from the borrower and requiring the agent to provide all material information to the other lenders.

But what is material? An agent does not want to find itself second guessed some time down the road when what appeared to be immaterial at first with hindsight later turns out to be material.

However, in this electronic era it is very easy to have emails forwarded to the other lenders. Thus, I am suggesting that the above-stated very standard provision be modified so as to require an agent to forward to the other lenders all writings of every kind and nature received by the borrower and by every vendor in connection with the loan. In the event the agent is using its own internal auditors to examine its borrower, then all writings from those auditors as well would be provided.

Consider, also, the following very standard provision:

Agent shall not be required to make any inquiry concerning either the performance or observance of any of the terms of this Agreement or the existence of any Event of Default.

Doesn't this mean that even after the agent is told by the auditor about "accounting irregularities" (auditors' jargon for *there is a fraud*) that the agent has no obligation to share that information with the other lenders? Isn't there something wrong with that? So that leaves us with a situation when the only default that the agent needs to share with the club is a default voluntarily disclosed by the borrower. That leaves us with covenant defaults and situations when the borrower comes in to say "Oh yes, and, by the way, I have been borrowing against fictitious receivables."

I am not suggesting subjecting agents to risk (take note, agent clients). I am suggesting, however, that the agent act in the best interests of the entire lending group and accept the responsibility for disseminating information to the group. I would rather see the agent err on the side of caution by sharing each piece of immaterial data with the other lenders than failing to send the material piece – such as the notice of *accounting irregularities*.

This is the food for thought. Please scroll down to post a comment and let us know what you think. (If you are not yet a member you will to register to post a comment).



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