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LEGAL

DON'T WAIVE WAIVERS IN LOAN DOCUMENTS

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Jeffrey Wurst cautions lenders "to plan your divorce before you get married," when preparing loan documents. Incorporating waivers is one way to avoid subsequent litigation. A Texas case illustrates how even unenforceable waivers can strengthen a lender's position.

While documenting new loan transactions, lenders should be laying out their exit strategies and how to accomplish them in the most cost-effective way. In a recent article in this publication, I suggested that lenders utilize arbitration provisions as a means of saving costs on litigation that might arise out of the loan. A properly drafted arbitration clause can keep the dispute on a fast track, limit discovery, require a rapid decision and maintain confidentiality. In other words, when entering into a new loan, plan your divorce before you get married. Pre-nuptial agreements are better included in your loan documents and not worked out after the default arises.

Lenders have historically included waivers in their loan documents and guarantees to avoid certain issues being raised in an ensuing litigation. When Article 9 of the UCC was completely revised in 2001, a number of those waivers were prohibited. Some were barred completely, while others could be effective if given only following a default. §9-602 enumerates certain waivers that, if included in the loan agreement or guaranty, will not be effective at any time.

For example, debtors cannot waive protection that deal with: (a) use and operation of the collateral by the secured party; (b) requests for an accounting and requests concerning a list of collateral and statement of account; (c) collection and enforcement of collateral; (d) application or payment of non cash proceeds of collection, enforcement, or disposition; (e) the requirement for an accounting for or payment of surplus proceeds of collateral; (f) a secured party's obligation not to breach the peace when taking possession of collateral without judicial process; (g) disposition of collateral; (h) calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor; (i) explanation of the calculation of a surplus or deficiency; (j) acceptance of collateral in satisfaction of obligation; (k) deal with redemption of collateral; and (l) the secured party's liability for failure to comply with Article 9.

§9-624 enumerates certain waivers that can be made only after a default. These include: (a) the right to notification of disposition of collateral; (b) the right to require disposition of collateral; and (c) the right to redeem collateral (which right may not be waived at any time in a consumer transaction).

With these exemptions and limitations, lenders still take advantage of waivers that are not prohibited, such as waivers of right to jury trial, offset, notice of demand, subrogation, reimbursement, indemnity, exoneration, or contribution.

STATUTE OF LIMITATIONS WAIVERS

A recent decision from the Supreme Court of Texas[1] addressed waiver of the statute of limitations. That case involved waivers contained in a guaranty. The waiver provision provided;

> GUARANTOR'S WAIVERS. Guarantor …waives any and all rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law

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> which may prevent lender from bringing any action, including a claim for deficiency, against guarantor, before or after lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by lender which destroys or otherwise adversely affects guarantor's subrogation rights or guarantor's rights to proceed against borrower for reimbursement, including without limitation, any loss of rights guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of borrower, of any other guarantor, or of any other person, or by reason of the cessation of borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; (E) any statute of limitations, if at any time any action or suit brought by lender against guarantor is commenced, there is outstanding indebtedness of borrower to lender which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness....

The lender did not bring its action for a deficiency judgment until after a two-year statute of limitations expired, but it argued the protection of the statute of limitations was waived in the guaranty and, even if the waiver was not effective, a parallel four-year statute of limitations should apply.

TRIAL COURT UPHOLDS WAIVER

The guarantor argued that under Texas law "a statute-of-limitations defense can only be waived if the language in the waiver is specific and for a defined period of time." The trial court disagreed and granted judgment in favor of the lender and the guarantor appealed. The court of appeals affirmed the trial court's decision, holding the guarantor's agreement to waive "all rights or defenses arising by reason of ... any ... anti-deficiency law" was sufficient to waive the two-year statute of limitations. The court of appeals did not consider the guarantor's argument that his contractual waiver of the limitations period was void as against public policy under a long-standing Texas decision from its Supreme Court. The court of appeals determined that the guarantor waived this public-policy argument by failing to affirmatively plead it as a "matter constituting an avoidance."

The guarantor appealed to the Texas Supreme Court, which noted, that, although the court of appeals did not consider the guarantor's public-policy arguments against enforcement of the waivers, it did not decide whether the guaranty agreement's waiver provision was sufficient to waive all of its possible statute-of-limitations defenses. Because the lender sued within the four-year limitations period applying generically to suits to collect debts, the court of appeals concluded that its suit was timely even if the guarantor could not contractually waive all limitations defenses. The court of appeals decided only that the guarantor waived the two-year statute of limitations and that the lender's suit — filed three-and-a-half years after the foreclosure sale — was not barred by the four-year limitations period that would apply in the absence of the two-year period.

In its decision, the Texas Supreme Court determined that

> Blanket pre-dispute waivers of all statutes of limitation are unenforceable, but waivers of a particular limitations period for a defined and reasonable amount of time may be enforced.

The supreme court expressed concerns of public policy, noting that a statute of limitations is not solely a right belonging to the party asserting it. It "protect[s] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise."

SPECIFIC WAIVER ENFORCEABLE

The Texas Supreme Court noted that there were three provisions in the guaranty that waived the statute of limitations and dispensed with two as being unenforceable. However, a third provision provided:

> Guarantor also waives any and all rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent lender from bringing any action, including a claim for deficiency, against guarantor, before or after lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale ....

The court ruled that unlike the other two provisions this section is both "specific" and "for a reasonable time."

Finally, the court stated:

> The guaranty agreement's savings clause further supports this conclusion. It states, "[i]f any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy." Enforcing the section... waiver "to the extent permitted by law or public policy," as the parties agreed we should, we conclude that the four-year statute of limitations applying to suits to collect debts applies as a backstop

The Texas Supreme Court affirmed the court's holding:

> We hold that the court of appeals erred by declining to reach [the guarantor's] argument, but we nonetheless agree with its ultimate disposition of the case. While portions of [guarantor's] contractual waiver are unenforceable under [prior case law, other portions are sufficiently specific and result only in the substitution of a four-year limitations period for a two-year period rather than the abandonment of all limitations prohibited by [such prior case law]. When the enforceable portions of [guarantor's] contractual waiver are applied, limitations do not bar [lender's] suit against him. We therefore affirm the judgment of the court of appeals.

Whether intended or not, the redundancies contained in the guaranty provided for both enforceable and unenforceable waivers. The lender only needed one to be enforceable. Thus, one of the takeaways from this decision is to resist the insistence by borrower's counsel during negotiations to remove redundancies in the loan documents. Another is that it is okay to include waivers that may otherwise not be enforceable inasmuch as the worst thing that might occur is that a court will rule the waiver ineffective. But then again, as it did in this Texas case, it might uphold the waiver. •

[1] *Godoy v Wells Fargo Bank*, (Texas Supreme Court, May 10, 2019) 2019 WL 2064538

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