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LENDER LIABILITY IN WYOMING

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I. INTRODUCTION

Across the country[1] and in Wyoming[2] juries have been returning

1. *E.g.*, Conlan v. Wells Fargo Bank, No. 82852 (Cal. Super. Ct. June 10, 1987) (awarding sixty million dollars to plaintiffs; settled while pending appeal, on confidential terms); K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) (affirming

large verdicts in favor of borrowers and against lenders in so-called "lender liability" cases. To borrowers, such verdicts represent a long overdue balancing of power between borrowers driven to bankruptcy and ruin by the whim and caprice of powerful lenders. To lenders, such verdicts are an assault on legitimate banking practices which threatens, in the long run, to undermine the system and eliminate the availability of financing to worthy borrowers. The truth lies somewhere in between. The development of lender liability represents a realignment of legal rights and responsibilities to conform with contemporary business practices in which lenders have become much more than mere providers of funds.

The phrase "lender liability" was virtually unknown ten years ago, although lenders have long been held accountable to borrowers for torts[3] and breaches of contract.[4] Lender liability is, therefore, not some new cause of action. It is, instead, a catchall phrase that refers to an array of tort and contract claims asserted against lenders by distressed borrowers. The causes of action are not, for the most part, new. What is new is the assertion of traditional, as well as more recently developed tort and contract causes of action in cases brought by borrowers against lenders. Whatever the bases for recovery, there has been a dramatic increase in lender liability litigation across the country and in Wyoming.

Not surprisingly, the upsurge in lender liability cases has begun to generate a body of literature, intended both to analyze the phenomenon and to assist practitioners in prosecuting and defending such cases. There are, as a result, several excellent treatises on the development of theories of recovery and the avoidance of lender liability.[5] There are also at least two loose-leaf services devoted solely to

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jury verdict of $7.5 million); Kruse/Jewell v. Bank of America, No. 112439 (Cal. Super. Ct. July 14, 1985) (awarding $20 million in compensatory damages and $27 million in punitive damages to a family of apple growers), *rev'd*, 202 Cal. App. 3d Supp. 38, 248 Cal. Rptr. 217 (1988), *cert. denied*, 109 S. Ct. 870 (1989); State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661 (Tex. Ct. App. 1984) (affirming jury verdict of over $20 million).

2. Puryear v. Wyoming Prod. Credit Ass'n, No. C88-1012-B (D. Wyo. Nov. 22, 1988), *aff'd*, No. 89-8019 (10th Cir. 1990), *reh'g denied* [hereinafter *Puryear* (No. C88-1012-B)] (awarding $408,000 in favor of rancher for breach of contract, breach of implied covenant of good faith and fair dealing, negligent advising and negligent misrepresentation); Meyers v. Travelers, Inc., Civ. No. 10147 (Wyo. Dist. Ct. Sept. 24, 1987) [hereinafter *Meyers* (No. 10147)] (awarding $3.2 million in compensatory damages in favor of ranching family, case settled on confidential terms before the jury considered punitive damages).

The author was one of the attorneys for the plaintiff in the *Puryear* case.

3. One author has determined that the first reported case involving a fiduciary relationship between a lender and a borrower is M.L. Steward & Co. v. Marcus, 124 Misc. 86, 207 N.Y.S. 685 (1924). Cappello, *Fiduciary Relationships Between Lenders and Borrowers: Maintenance of the Status Quo*, 15 WESTERN ST. U.L. REV. 579, n.4 (1988).

4. A. CAPPELLO & F. KOMOROSKE, LENDER LIABILITY 124 (1987) [hereinafter A. CAPPELLO].

5. *See, e.g.*, G. BLANCHARD, LENDER LIABILITY: LAW, PRACTICE AND PREVENTION

lender liability issues.[6] The treatises and services are national in scope, although they tend to rely heavily on California decisions. Lender liability, however, is almost exclusively a creature of state tort and contract law. Accordingly, while treatises and loose-leaf services are valuable, their usefulness is necessarily limited in any particular jurisdiction.[7] There is a growing body of literature, of which this article is a part, dedicated exclusively to lender liability in specific states.[8]

The Wyoming Supreme Court in recent years has addressed a number of lender liability issues, either directly or tangentially. Some of those decisions are in accord with the general trend of lender liability law across the country. Some are not. In addition, many lender liability issues have yet to be considered by the court. A review of the court's recent opinions shows the emergence of a fairly clearly defined view of the relative rights and responsibilities of borrowers and lenders. It also provides some indication of how the law of lender liability may be expected to develop in Wyoming.

This article discusses the emerging framework of lender liability law in Wyoming with respect to commercial lending.[9] It catalogues and analyzes the causes of action which plaintiffs have asserted in attempting to recover from lenders, the relative advantages and disadvantages of those causes of action and the defenses potentially available to lenders, including preventive actions to avoid lender liability cases altogether.

II. CONTRACT VERSUS TORT CLAIMS

Lender liability cases generally present an amalgam of contract and tort claims arising out of the same set of facts. Therefore, they inevitably raise questions about the respective roles of contract and

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(1989); A. BLOOM, LENDER LIABILITY: PRACTICE AND PREVENTION (1989) [hereinafter A. BLOOM]; A. CAPPELLO, *supra* note 4; H. CHAITMAN, THE LAW OF LENDER LIABILITY (1990).

6. Lender Liability Law Report, published monthly by Warren, Gorham & Lamont, Inc., and Lender Liability News, published biweekly by Buraff Publications, a division of The Bureau of National Affairs, Inc.

7. For example, one of the treatises advises the reader that "there is a great deal of variation among the states" regarding defamation and "the practitioner should carefully examine the law . . . of the relevant jurisdiction." A. CAPPELLO, *supra* note 4, at 215.

8. *See, e.g.*, Rossi, *Lender Liability in Kansas: A Paradigm of Competing Tort and Contract Theories*, 29 WASHBURN L.J. 495 (1990); Note, *Good Faith in Arizona Lender Liability Actions*, 21 ARIZ. ST. L.J. 729 (1989); Williamson & Tanner, *Lender Liability in Mississippi: A Survey, Comparison and Comment*, 57 MISS. L.J. 1 (1987).

9. A lender has special obligations regarding consumer loans as a result of the Uniform Consumer Credit Code (UCCC), WYO. STAT. §§ 40-14-101 to -702 (1977) and the Federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693 (1988).

Whether a loan is a consumer loan must be determined by referring to the statutory definitions of consumer loan and by the specific facts of the case. Anderson v. Foothill Indus. Bank, 674 P.2d 232, 235-36 (Wyo. 1984). A discussion of the disclosure and other requirements of the UCCC and the Federal Consumer Credit Protection Act is beyond the scope of this article.

tort theories of recovery.

By definition, a borrower and a lender have entered into a contractual relationship in which the lender has agreed to lend money to the borrower, who has agreed to repay the money on certain terms and conditions. Almost invariably, the agreement is reduced, at least in part, to writing.[10] Consequently, the duties of the parties have traditionally been established by the terms of the written documents. Since the parol evidence rule precludes the admission of extraneous evidence which contradicts or alters a written agreement,[11] neither borrowers nor lenders were able to recover for the breach of an unwritten understanding. Recovery was generally based on, and limited to, an action for breach of the provisions of the written documents.

Tort actions depend on the existence of a duty. That duty may be imposed by law or by contract.[12] The distinction between tort and contract duty with respect to the parties to the contract has become increasingly confused and complicated. Contracts are "obligations based on the manifested intention of the parties . . . ."[13] Generally, the breach of such intentions gives rise only to contract liability; there are instances, however, where the breach of a contractual obligation may result in tort liability.[14]

Since tort actions present potentially significant advantages over contract theories, borrowers have had a strong incentive to convert lender liability actions into tort actions.[15] Perhaps the most significant development of lender liability law is how courts, including the Wyoming Supreme Court, have recognized a wide variety of tort claims in an arena where the relationship between the parties continues to be, at least ostensibly, controlled by contract.

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10. If the loan is unsecured, there is often only one document—a promissory note. If the loan is secured, there must also be some sort of security agreement. While the note and security agreement are often the only documents, the parties' agreement may include other provisions. For example, a typical additional understanding, at least on the borrower's part, is that the lender will renew the note when it comes due, provided the borrower makes payments of interest.

11. Bethurem v. Hammett, 736 P.2d 1128, 1136-37 (Wyo. 1987). The parol evidence rule precludes the introduction of oral testimony to contradict, alter, add to, or vary the plain terms of the writing. *Id.*

12. Brubaker v. Glenrock Lodge Int'l Order of Odd Fellows, 526 P.2d 52, 58 (Wyo. 1974).

13. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 92 (5th ed. 1984) [hereinafter W. KEETON].

14. *See infra* notes 299-312 and accompanying text.

15. The primary advantage is that the plaintiff in a tort action is entitled to recover all damages proximately caused by the defendant, not just foreseeable damages as in contract. *See infra* notes 334-357 and accompanying text. Also, the recovery of punitive damages is easier in tort than in contract. *See infra* notes 354-357 and accompanying text.

There may be occasions when a contract action is advantageous. For example, the statute of limitations for contract actions in Wyoming is longer than that for tort actions. *See* WYO. STAT. § 1-3-105(a) (1988).

III. THE RELATIONSHIP BETWEEN LENDER AND BORROWER

The starting point of every potential lender liability claim is the relationship between the borrower and the lender. That relationship establishes the parties' respective duties. Those duties, in turn, determine when and under what circumstances the lender may become liable to the borrower and vice versa.

The relationship between a lender and a borrower may take several forms: (1) an ordinary business relationship;[16] (2) a fiduciary relationship;[17] (3) a quasi-fiduciary relationship;[18] or (4) some other special relationship.[19] The Wyoming Supreme Court has yet to expressly address the nature of the relationship. As discussed below, it appears that the Wyoming Supreme Court begins with the presumption that the relationship is an ordinary business relationship, but is prepared to recognize some sort of special relationship given appropriate facts.

A. *Ordinary Business Relationship*

Traditionally, the relationship between a borrower and a lender has been considered to be an ordinary business relationship, governed by the contract between the parties,[20] supplemented by the Uniform Commercial Code (UCC). The duties owed by each party to the other were specified by and limited to the contract and the UCC. Accordingly, the breach of those contract obligations did not give rise to a tort action as neither party owed duties to the other outside the contract.[21]

Assuming an ordinary business relationship, an agreement to lend money is subject to the same rules of construction and interpretation as any other contract.[22] The law in Wyoming is clear. A court will enforce an unambiguous contract, rather than rewriting it "under the guise of interpretation."[23] Furthermore, in the absence of an ambiguity in the written documents themselves, it is not an abuse of discretion for a trial court to preclude evidence of extraneous matters, such as the course of dealing between the parties, which purports to prove a different intention or agreement.[24]

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16. *See infra* notes 20-24 and accompanying text.
17. *See infra* notes 25-57 and accompanying text.
18. *See infra* notes 58-60 and accompanying text.
19. *See infra* notes 61-62 and accompanying text.
20. A. BLOOM, *supra* note 5, at 5.
21. A breach of contract may, in some instances, be tortious. *See infra* notes 299-312 and accompanying text.
22. *Compare* Farr v. Link, 746 P.2d 431, 433 (Wyo. 1987) (setting forth rules of contract construction) *with* Lawrence v. Farm Credit Sys. Capital Corp., 761 P.2d 640, 645-46 (Wyo. 1988) (applying contract construction rules to promissory notes).
23. *Lawrence*, 761 P.2d at 645.
24. *Id.* at 652-53.

B. Fiduciary Relationship

The term "fiduciary relationship" has been applied to a wide variety of legal relationships.[25] Although there is some inconsistency among courts, a fiduciary relationship may be defined as a duty on the part of one party "to act for or give advice for the benefit of another upon matters within the scope of the relation."[26] Such a relationship exists "when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other."[27] The duty to act for the benefit of the other party may be imposed by law, as in the attorney-client relationship, by express agreement of the parties, as in a trustee-beneficiary relationship, or it may be implied because of the nature of the relationship between the parties.[28]

A bank stands in a fiduciary relationship to a customer in at least three situations. First, a bank acting as an agent for a customer owes fiduciary duties to that customer (the principal).[29] Second, a bank which holds funds for a specific purpose is a fiduciary.[30] Finally, a lender which assumes control of a borrower in the event of a default owes fiduciary duties to that borrower, the borrower's other creditors and the borrower's shareholders, assuming the borrower is a corporation.[31] The question which remains, however, is under what other circumstances, if any, does a bank owe fiduciary duties to a borrower, the breach of which will lead to lender liability.

A lender and a borrower do not generally have a fiduciary relationship.[32] Some courts have found such a relationship when the lender goes beyond simply providing money to the borrower and offers

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25. *See, e.g.*, Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970) (finding a fiduciary relationship between an attorney and his or her client which imposes on the attorney an obligation of "the utmost degree of honesty, forthrightness, loyalty and fidelity" towards the client); McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 864 (Wyo. 1990) (Golden, J., dissenting) (insurer owes insured fiduciary duties); Scotti's Drive-In Restaurant, Inc. v. Mile High—Dart, Inc., 526 P.2d 1193, 1196-97 (Wyo. 1974) (finding a trust is a fiduciary relationship).

26. RESTATEMENT (SECOND) OF TORTS § 874, comment a (1977).

27. Kurth v. Ban Horn, 380 N.W.2d 693, 695-96 (Iowa 1986) (quoting BLACK'S LAW DICTIONARY 564 (5th ed. 1979)).

28. A. CAPPELLO, *supra* note 4, at 107. *See infra* notes 30-31 and accompanying text.

29. *See, e.g.*, Janes v. First Fed. Sav. & Loan Ass'n, 57 Ill. 2d 398, 312 N.E.2d 605, 610-11 (1974) (bank which had ordered a preliminary title report and policy for a borrower was an agent of the borrower, and hence a fiduciary).

30. First Interstate Bank v. Big Horn Fed. Sav. & Loan, 770 P.2d 231, 233 (Wyo. 1989) (finding a bank which is depository of Individual Retirement Account holds such funds in a fiduciary capacity). Merely accepting "general deposits" does not, however, make a bank a fiduciary; it simply results in a debtor-creditor relationship between the bank and the depositor. Gray v. Elliott, 36 Wyo. 361, 365-66, 257 P. 345, 346 (1927).

31. A. CAPPELLO, *supra* note 4, at 107.

32. Simmons v. Jenkins, 750 P.2d 1067, 1070 (Mont. 1988); *see also* A. CAPPELLO, *supra* note 4, at 106.1.

advice and consultation.[33] A lender may assume such an advisory capacity either deliberately or inadvertently, or circumstances may virtually dictate such a role. In any event, a fiduciary relationship between a lender and a borrower typically arises over an extended course of dealing between the borrower and the lender where the borrower reasonably relies on the lender for advice and guidance.[34] If such a relationship is found to exist, the bank's obligations change dramatically. The bank is no longer free to act in its best interests, regardless of the impact on the borrower. Instead, the bank becomes obligated to provide advice and consultation and must refrain from taking advantage of its position of power and influence over the borrower.[35]

The Wyoming Supreme Court has never considered whether a fiduciary relationship can develop out of a borrower-lender relationship. Should the issue arise, the court's decision in *Lawrence v. Farm Credit System Capital Corp.*[36] suggests that the court begins with a presumption that the relationship between a borrower and a lender is an ordinary business relationship and is unlikely to recognize a fiduciary relationship.[37]

The Lawrence family owned and operated several ranches in Johnson County, Wyoming. Beginning in 1961, the Lawrences financed the ranches' operations through lines of credit with the Production Credit Association (PCA).[38] The lines of credit were evidenced by promissory notes that were due annually and secured by security agreements and real estate mortgages, which collectively en-

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33. *See, e.g.*, Security Pac. Nat'l Bank v. Williams, 213 Cal. App. 3d 927, 262 Cal. Rptr. 260, 278 (1989), *review denied*; *Simmons*, 750 P.2d at 1070; Tokarz v. Frontier Fed. Sav. & Loan Ass'n, 33 Wash. App. 456, 460-61, 656 P.2d 1089, 1092 (1982); *see also* A. CAPPELLO, *supra* note 4, at 107-12.

34. Deist v. Wachholz, 678 P.2d 188, 193 (Mont. 1984).

35. The advice required of a lender will vary depending on the nature of the borrower's business. In most instances, however, such advice will involve the financial management and planning of the borrower's business, including such matters as whether the borrower should expand its operation, borrow additional operating capital or consider liquidation. In every instance, the duty to advise includes the duty to exercise reasonable care in rendering advice.

36. 761 P.2d 640 (Wyo. 1988).

37. While the decision does not foreclose a finding of a fiduciary relationship, it appears more likely that the court will recognize a quasi-fiduciary or other special relationship. *See infra* notes 58-62 and accompanying text.

38. The PCA is a branch of the Farm Credit System. The Farm Credit System (FCS) is administered by the Farm Credit Administration, an independent agency of the United States Government. The FCS includes: "the Federal land banks, the Federal land bank associations, the Federal intermediate credit banks, the production credit associations [PCAs] [and] the banks for cooperatives." 12 U.S.C. § 2002 (1988). The PCAs provide short-term and intermediate-term operational financing to farmers and ranchers. *See* N. HARL, AGRICULTURE LAW § 100.03[2][a] (1990). The Farm Credit System Capital Corporation was formed to provide financial assistance to FCS institutions, including the PCAs. *Id.* at § 100.03[4].

In the *Lawrence* case, the PCA provided the original funding. The Farm Credit System Capital Corporation subsequently purchased a participating interest in the loans and the collateral. *Lawrence*, 761 P.2d at 643, n.1.

cumbered the ranches' livestock, machinery, equipment and real property.[39]

After a series of financial setbacks, including extensive livestock losses during the blizzard of 1984, the Lawrences requested additional funds from the PCA to replace livestock lost in the blizzard. The PCA refused to advance additional funds.[40] The Lawrences were unable to pay the notes as they became due and defaulted. The PCA filed a foreclosure action.[41] The Lawrences filed counterclaims, alleging both contract and tort claims.[42] At trial, the Lawrences sought to introduce evidence that the PCA was experiencing serious financial difficulties, and those difficulties had resulted in the unjust foreclosure of numerous loans, including their own.[43] After refusing to permit the introduction of evidence of the PCA's financial problems, the trial court granted a directed verdict in favor of the PCA, permitting the foreclosure to proceed and dismissing the borrower's counterclaims.[44] The Wyoming Supreme Court affirmed.[45]

Writing for the majority in a four to one decision, Justice Macy reaffirmed the traditional view that loan agreements are, as any other contracts, to be strictly construed.[46] Accordingly, if the intent of the parties can be ascertained from "the plain and unambiguous language of the contract," evidence to the contrary should not be admitted.[47] Furthermore, the trial court had properly granted a directed verdict against the Lawrences on their claims of bad faith in contract and tort because "there is absolutely no evidence which suggests that [the PCA] improperly manipulated the contract provisions to its benefit and to the Lawrences' detriment."[48] Finally, the court upheld the trial court's refusal to admit evidence regarding the PCA's financial difficulties. The admissibility of evidence is a matter committed to the discretion of the trial court; such rulings will not be disturbed in the absence of an abuse of discretion.[49]

In dissent, Justice Urbigkit upbraided the majority for its ap-

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39. Brief for Appellant at 7, Lawrence v. Farm Credit System Capital Corp., 761 P.2d 640 (Wyo. 1988) (No. 87-168).
40. *Id.* at 8-9.
41. *Id.* at 9.
42. The Lawrences alleged that the PCA had: (1) wrongfully refused to sign nondisturbance agreements, thereby preventing the Lawrences from obtaining alternative financing; (2) interfered with the Lawrences' obtaining a loan from the State of Wyoming Farm Loan Board; (3) acted in bad faith in initiating the foreclosure action; (4) intentionally harassed certain of the plaintiffs and precluded them from taking advantage of a federal assistance program for young ranchers; and (5) breached an agreement to advance additional funds. *Lawrence*, 761 P.2d at 641.
43. *Id.* at 653; *see also* Reply Brief for Appellants at 14-23, Lawrence v. Farm Credit System Capital Corp., 761 P.2d 640 (Wyo. 1988) (No. 87-168).
44. *Lawrence*, 761 P.2d at 642.
45. *Id.* at 653.
46. *See infra* notes 96-99 and accompanying text.
47. *Lawrence*, 761 P.2d at 646.
48. *Id.* at 651.
49. *Id.* at 652.

proval of "the moralistic and legal"[50] approach to lender liability. The majority, he said, improperly focused on the one-year period of the specific loans in question,[51] and ignored the implied covenant of good faith and fair dealing.[52] The loan agreement, he wrote, was derived from an understanding developed "through years of mutual business association as borrower and lender."[53] It was error, therefore, to look solely to the written documents to determine the meaning of the loan agreement.[54]

Although the majority in *Lawrence* did not directly discuss the nature of the relationship between a lender and a borrower, the tenor of its decision is unmistakable. A lender and a borrower have an ordinary business relationship, at least in the absence of evidence to the contrary.[55] That relationship is governed by the terms of the written contract, which are subject to the normal rules of contract construction. That contract is, of course, subject to the implied covenant of good faith and fair dealing.[56] Similarly, the court's affirmation of the trial court's refusal to admit evidence that the foreclosure was motivated by factors outside the relationship indicates the absence of any non-contractual duties.

There is no higher standard which can be imposed on a lender than that which results from a finding of a fiduciary relationship. There is no lesser standard than that which flows from an ordinary business relationship. The *Lawrence* decision is, at least arguably, a clear indication that the Wyoming Supreme Court is unlikely to find a fiduciary relationship between a borrower and a lender in a case involving a commercial loan.[57]

C. *Quasi-fiduciary Relationship*

A quasi-fiduciary relationship, as a fiduciary relationship, is not

50. *Id.* at 654 (Urbigkit, J., dissenting).
51. *Id.* at 657.
52. *Id.* at 655-56.
53. *Id.* at 657.
54. *Id.* at 656.
55. Although the Lawrences argued that the PCA had an obligation to lend them additional funds and continue financing the ranching operation, they did not argue that those duties resulted from a fiduciary relationship, a quasi-fiduciary relationship or any other special relationship. *Id.* at 651-52 (Macy, J., writing for the majority).
56. *See infra* notes 121-130 and accompanying text.
57. It can be argued that the *Lawrence* case means nothing of the sort because there was no evidence of any kind of relationship of trust and confidence between the parties which had been breached by the PCA. While that argument has merit, it seems unlikely that the court will leap from the *Lawrence* case to find a fiduciary relationship in a commercial lender liability case. The more likely scenario is that the court will, given appropriate facts, recognize a quasi-fiduciary or other special relationship.

In *Meyers* (No. 10147), the trial court allowed the question of whether there was a fiduciary relationship between the lender and the borrower to go to the jury. The jury found such a relationship. The case was settled prior to appeal, and the issue was not brought before the Wyoming Supreme Court.

inherently part of a borrower-lender relationship.[58] It, too, arises only where a lender goes beyond the role of simply providing financing and becomes an advisor.[59] The distinction, if any, between a fiduciary and a quasi-fiduciary relationship is unclear. They arise in similar circumstances, and appear to impose similar duties on the lender. The quasi-fiduciary classification may have been created to impose liability on a lender that has assumed a role other than or in addition to the role of providing funds, but to avoid imposing the full panoply of obligations which come with a fiduciary relationship.[60]

D. *Special Relationship*

At least one court has also referred to a "special relationship" between the borrower and the lender which arises when the borrower is "relying upon the superior specialized knowledge and experience" of the lender and the lender has knowledge of a material fact not easily discoverable by the borrower.[61] Whether such a "special relationship" may arise in other circumstances is uncertain.

There is some indication that a special relationship may arise because of the nature of the lender's business. That is, when a lender engages in financing a particular type of business, which requires the lender to possess some particular expertise, the lender may have a special relationship with the borrower.[62] Which areas of lending require particularized knowledge is unclear. There are areas of lending where lenders typically become intimately involved in borrowers' businesses and some higher standard of care ought to apply. For example, a lender which specializes in financing real estate developments must develop sufficient expertise to know whether the development is being done in accordance with applicable zoning regulations and building codes or risk losing the loan. Accordingly, the lender is almost compelled to become significantly involved in the developer's business. Ultimately, whether a higher standard exists because of such involvement will be determined and limited by expert testimony.

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58. Hutson v. Wenatchee Fed. Sav. & Loan Ass'n, 22 Wash. App. 91, 103-06, 588 P.2d 1192, 1199-1200 (1978).

59. *Id.*

60. Imposing fiduciary duties on a lender essentially puts the lender in the position of a trustee that must act solely in the best interests of the beneficiary. By creating a "quasi-fiduciary" or other special relationship a court can impose a duty to refrain from taking action detrimental to a borrower, but avoid imposing all the affirmative obligations of a fiduciary.

61. Favors v. Matzke, 53 Wash. App. 789, 770 P.2d 686, 690 (1989).

62. Agricultural lending is a specialized area of lending, requiring expertise in both lending and agriculture. Puryear v. Wyoming Prod. Credit Ass'n, No. C88-1012-B (D. Wyo. Feb. 13, 1989) (Order on Motion to Correct, Alter or Amend and Order on Motion for Judgment Notwithstanding the Verdict or New Trial) at 10-11 [hereinafter Order on Motion to Amend, *Puryear*]. Accordingly, agricultural lenders owe a "special duty" to their borrowers, including the duty of rendering sound advice. The Agricultural Credit Act of 1987 also provides additional rights and remedies to members/borrowers of the Farm Credit System. 12 U.S.C. §§ 2202(a)-(d) (1988).

If the distinction between fiduciary and quasi-fiduciary relationships is unclear, the distinction between quasi-fiduciary and other special relationships is even murkier. The difference may be nothing more than semantics. Regardless of the name, however, there are occasions when a lender does much more than simply provide funds. When that happens, there is likely some relationship other than a simple business relationship which imposes additional duties on the lender. Those duties, in turn, result in potential tort liability if not properly discharged.

E. Establishing the Relationship

The existence of a fiduciary, quasi-fiduciary or other special relationship will often be the critical issue in a lender liability case. The reason is simple. If there is nothing more than an ordinary business relationship, the parties' rights and responsibilities will be governed by the loan agreement and the Uniform Commercial Code. In all likelihood, the lender will be free to choose and pursue its remedies in the event of default.[63] The borrower's potential claims will be restricted to showing a breach of the contract[64] or that the lender has violated the implied covenant of good faith and fair dealing. If there is some special relationship,[65] however, the imposition of additional duties on the lender gives the borrower a variety of potential tort claims if the lender breaches any of those duties.

Courts have considered several factors indicative of some special relationship: (1) the lender has assumed some obligation;[66] (2) the lender has become involved in the operation of the borrower's business;[67] (3) the borrower is unsophisticated in financial matters;[68] or (4) the borrower is involved in a business with a special nature.[69] While the Wyoming Supreme Court has yet to expressly recognize a special relationship in a lender liability case, it has held that two of the listed factors, the assumption of a duty[70] and the borrower's sophistication,[71] may alter a party's obligations. It seems reasonably likely, therefore, that the court would recognize a special relationship in a lender liability case, albeit not a fiduciary relationship, given appropriate facts.

63. Foothill Indus. Bank v. Mikkelson, 623 P.2d 748, 755-56 (Wyo. 1981).
64. A breach of contract may be tortious. *See infra* notes 299-312 and accompanying text.
65. The term "special relationship" is used hereinafter to refer to anything other than an ordinary business relationship, including a fiduciary or quasi-fiduciary relationship.
66. *See infra* notes 72-75 and accompanying text.
67. *See infra* notes 76-82 and accompanying text.
68. *See infra* notes 83, 85 and accompanying text.
69. *See infra* notes 86-89 and accompanying text.
70. *See infra* notes 73-74 and accompanying text.
71. *See infra* note 74 and accompanying text.

1. Lender's Assumption of Duty

It has long been the law that one who voluntarily undertakes to perform a duty must discharge that duty in a reasonable, prudent manner.[72] The Wyoming Supreme Court recently reaffirmed that principle in a case involving a realtor who gratuitously advised a friend.[73] By volunteering advice, the realtor became subject to liability for failing to exercise reasonable care and for failing to exercise "the high degree of care expected of a real estate salesman."[74]

While the court has yet to consider the applicability of that principle in a lender liability case, courts in other jurisdictions have not hesitated to apply the traditional rule.[75] In addition, an argument that a lender who gratuitously offers advice should be held to a lower standard of care than a realtor is strained, at best. Accordingly, there is every reason to expect that the Wyoming Supreme Court would extend the rule to require a lender that advises a borrower on financial or business matters to be held to the high degree of care expected of a banker.

2. Involvement in Borrower's Business

Lenders must walk a fine line. On the one hand, it is poor banking practice not to keep a close watch on a borrower's business operations. On the other hand, any attempt by the lender to become involved in that business and thereby protect its loan may give rise to liability.[76] *State National Bank v. Farah Manufacturing Co.* is the seminal case in this area.[77]

In *Farah*, a consortium of lenders provided financing for a large clothing manufacturer, the Farah Manufacturing Co. The loan agreement entered into by the lenders and Farah included a "management change clause," pursuant to which certain changes in top management would constitute a default.[78] The management change clause inevitably involved the lenders in Farah's business operations, altering the parties' relationship and extending the lenders' potential liability.

The lenders used the management change clause to ensure the election of a particular slate of candidates to the board of directors, which then, acting upon the desire of the lenders, prevented the reinstatement of the former chief executive officer of the Company.[79] A

72. Ellsworth Bros. Inc. v. Crook, 406 P.2d 520, 524 (Wyo. 1965).
73. Kelly v. Roussalis, 776 P.2d 1016, 1019 (Wyo. 1989).
74. *Id.* at 1019.
75. Production Credit Ass'n v. Vodak, 150 Wis. 2d 294, 441 N.W.2d 338, 344 (Ct. App. 1989); *Tokarz*, 656 P.2d at 1092-93.
76. State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661 (Tex. Ct. App. 1984).
77. *Id.*
78. *Id.* at 667.
79. *Id.* at 668.

jury found that such interference went beyond the scope of the management change clause and constituted an inappropriate involvement in the borrower's business. The jury returned a verdict of over $20 million, which was affirmed on appeal.[80]

The lenders' error in *Farah* was not insisting on the management clause, but using that clause to control the Company's top management.[81] Had the lenders confined themselves to declaring a default in the event of a change of management, as the clause provided, they would have been within their rights. By insisting on the management change clause, however, the lenders inevitably became more involved in the borrower's business. That involvement transformed their relationship with the borrower into something far different than the traditional role of providing financing. That transformation led to additional duties and, ultimately, to liability for breach of those duties.

Given the Wyoming Supreme Court's willingness to enforce written loan agreements, it is reasonably certain that the court would have no difficulty upholding a management change clause or similar provision in a loan agreement. It seems clear, nevertheless, that such a provision fundamentally alters the borrower-lender relationship and imposes additional duties on the lender, the violation of which broadens the potential scope of liability.[82]

3. The Borrower's Financial Sophistication

Borrowers are not fungible. Each has a different level of intelligence, experience and financial sophistication. A lender must take those differences into account in determining whether to make a loan at all,[83] and ignores those differences at its peril in the event of a default or other problem with the loan.

The Wyoming Supreme Court has not addressed whether a borrower's lack of experience and sophistication creates a special relationship with a lender and thereby imposes additional duties. The court has held, however, that an experienced, sophisticated borrower may not reasonably rely on informal actions by bank officers where the borrower has specific knowledge of the bank's lending practices.[84] Having held that a borrower's sophistication and experience are relevant to determining the borrower's rights and obligations, it would be incongruous for the court to disregard a borrower's lack of financial

80. *Id.* at 669.
81. *Id.* at 688-90.
82. Such involvement may also give rise to a claim for intentional interference with contract or prospective advantage. *See infra* notes 240-258 and accompanying text.
83. Lenders typically consider the five "Cs" in deciding whether to lend money: the borrower's character, capacity, capital, collateral and the conditions on which the loan is to be made.
84. Roth v. First Sec. Bank, 684 P.2d 93, 97 (Wyo. 1984).

sophistication in determining the lender's rights and obligations.

A lender which lends money knowing of a borrower's lack of sophistication and that the borrower is relying on the lender for guidance has probably entered into a special relationship with that borrower, and should proceed accordingly. The special relationship may require the lender to offer advice, when appropriate, and it ought to preclude the lender from taking advantage of the borrower's lack of knowledge or expertise when negotiating the terms of a loan, developing a workout plan for a problem loan or foreclosing on a defaulted loan. Such a result would be consistent with decisions in other jurisdictions and the court's holding in *Roth v. First Security Bank.*[85]

4. The Nature of the Borrower's Business

The nature of the borrower's business, and the lender's decision to become involved in financing such businesses, may create a special relationship. As discussed above,[86] a lender which chooses to participate in financing agricultural operations has been held to special duties arising out of the peculiar nature of agricultural lending. Such a rule makes sense when the nature of the business requires the lender to become involved in the planning and operation of the business or where lenders have traditionally become very involved in borrowers' businesses.

In agricultural lending, for example, lenders typically become intimately involved in the ranching or farming operation. Loan officers advise borrowers on both financial and agricultural matters.[87] In addition, the lender is in a position to exercise substantial control over the borrower's business. Oftentimes, the borrower must pay all income to the operation's lender, and all expenses are paid on drafts payable through that same lender. In addition, the lender generally has a blanket security interest which encumbers whatever the ranch or farm produces. This permits the lender to control the operation's income by controlling the release of collateral. By the very nature of the business, therefore, the lender is aware of and participates in the planning and implementation of each year's farming or ranching operation.[88] Furthermore, farmers and ranchers are engaged in an extremely volatile business. A bad storm or other natural disaster can leave even the best farmer or rancher in a precarious financial situation. The market for cattle and crops fluctuates widely, making long-term planning difficult, if not impossible. Because of that volatility, which cannot be avoided, agricultural borrowers are usually totally dependent on their lenders. Without dependable operational financing, such borrowers

85. *Id.* at 97.
86. *See supra* note 62 and accompanying text.
87. Brief for Appellee at 5, Puryear v. Wyoming Prod. Credit Ass'n (D. Wyo. Nov. 22, 1988) (No. C88-1012-B).
88. *Id.*

cannot survive. Those lenders that choose to become involved in financing agricultural operations know of their borrowers' vulnerability and so occupy an inherently powerful position. With that power comes the obligation to abide by generally accepted standards for agricultural lenders—standards which impose duties beyond those of "normal" lenders.

The pattern is not unique to agricultural lending. The key is whether there are generally accepted standards to which a participating lender must adhere. Those standards can be established only through expert testimony.[89]

IV. CONTRACT THEORIES OF RECOVERY

A borrower damaged by the actions or omissions of a lender may recover under any one or more of several potential causes of action. Some are based on contract principles, others on tort law. Many are complementary. Some are inconsistent, but may be pleaded in the alternative. Although tort claims present some advantages,[90] contract claims remain an effective method of recovering damages from a lender.

A. *Breach of Agreement to Lend Money*

An agreement to lend money is enforceable in Wyoming, whether the agreement is written or oral.[91] The party asserting the existence of an agreement to lend money must prove the terms of the contract with specificity.[92] Where the parties have not agreed on the principal amount of the loan, the interest rate, the repayment schedule or the collateral which will secure the loan, there is no enforceable agreement.[93] The absence of any one of those terms is not fatal; their collective absence is.[94] Accordingly, a simple agreement to agree is unenforceable.[95]

Assuming there is no written loan agreement, the course of dealing between a lender and a borrower may be relevant to whether there is an agreement and, if so, the terms of that agreement. A course of dealing may provide evidence of any of the requisite terms of an en-

89. In *Puryear* (No. C88-1012-B) the court permitted expert testimony that agricultural lending is specialized and that there are generally accepted standards for agricultural lenders in Wyoming. One of those standards is to give borrowers sound advice. Order on Motion to Amend, *Puryear*, at 10-11.

90. *See infra* notes 334-362 and accompanying text.

91. Doud v. First Interstate Bank, 769 P.2d 927, 929 (Wyo. 1989). Twenty-five states, not including Wyoming, have adopted laws that preclude borrowers from suing lenders for breach of an oral contract to lend money. *Lender Liability Gets New Life*, The Nat'l L.J., March 18, 1991, at 3, col. 1, at 32, col. 4.

92. *Doud*, 769 P.2d at 929.

93. *Id.*

94. Union State Bank v. Woell, 434 N.W.2d 712, 717 (N.D. 1989).

95. *Doud*, 769 P.2d at 929.

forceable agreement. The more important question, however, is often whether such evidence is admissible to alter or supplement the terms of a written agreement to lend money.

As in any contract dispute, the key to the admissibility of extraneous evidence, such as testimony or the parties' course of dealing, is whether there is an ambiguity in the written documentation. The Wyoming Supreme Court has consistently applied the general rules of contract construction to agreements to lend money.[96] It has upheld unambiguous, written loan agreements, despite proffered evidence of conduct which is inconsistent with the written documents.[97] Accordingly, evidence of course of dealing is unlikely to be admitted to contradict or alter the terms of a written agreement unless the writings are ambiguous or silent.[98] If there is an ambiguity or the written agreement is incomplete, such evidence should be admitted as evidence of the terms of the agreement.[99] The inability to introduce evidence of course of dealing has diminished borrowers' chances of recovering from lenders and may preclude the trier of fact from hearing probative evidence of the parties' understanding and agreement.

Many commercial operating loans are written on an annual basis, with interest tied to some outside standard, such as the prime lending rate, or adjusted annually. The principal amount of the loan is often a specified line of credit, with the borrower free to draw on that credit as necessary. The collateral may be realty, personalty, inventory, accounts receivable or any combination of those types of property. In such a situation, particularly where the borrower is not financially sophisticated, it can be argued that there is more than a simple one-year note, and that the parties have an agreement to continue financing indefinitely. Such an argument is not dependent on the borrower's subjective expectations. It rests, instead, on the objective conduct of the parties in routinely renewing the operational loan.

The Wyoming Supreme Court's adherence to a rule of strictly construing written loan documents ignores commercial reality. For example, commercial loans are generally written on a short-term basis, but the parties have an understanding that the loan will be renewed, rather than paid in full, when it comes due. Without such an understanding, many borrowers would never go into business in the first place or borrow money from that lender. That understanding is, in many instances, not a part of the promissory note and the accompanying security documents. It is, nevertheless, an integral part of the loan agreement. The preclusion of testimony or course of dealing evidence

96. *Lawrence*, 761 P.2d at 645; Jones Land & Livestock Co. v. Federal Land Bank of Omaha, 733 P.2d 258, 262 (Wyo. 1987).
97. *Lawrence*, 761 P.2d at 645; *Jones Land & Livestock Co.*, 733 P.2d at 262.
98. This result is at least arguably inconsistent with the general trend of lender liability cases across the country. *See, e.g.*, *Lawrence*, 761 P.2d at 654 (Urbigkit, J., dissenting).
99. WYO. STAT. § 34.1-1-205 (1990).

to prove such an understanding provides lenders with a powerful tool and raises a significant hurdle for borrowers to overcome. It enables lenders to avoid potential liability through careful contract drafting and other preventive measures.[100] It prevents borrowers from introducing evidence to contradict or alter the terms of the written documents even where the parties' conduct appears to indicate a different understanding. The only means of circumventing the preclusion is persuading the court that the parties' written agreement is either ambiguous or incomplete.[101]

B. Failure to Advance Additional Funds

When parties enter into a loan agreement, they may anticipate the borrower's need for future financing. Accordingly, the agreement may contain provisions regarding the advance of future funds. In the typical situation, the security documents are drafted to include future advances, if any. Problems arise when a lender decides, for whatever reason, not to advance additional funds when requested by the borrower. The usual reason, of course, is that the borrower's need for additional funds indicates that the borrower is in financial difficulty and advancing more funds is not a sound business decision. The borrower usually has no alternative source of funds and suffers financial collapse.

The key question in cases involving the failure to advance additional funds is whether the loan agreement makes such advances obligatory or permissive. An agreement which requires the lender to advance funds is enforceable.[102] An agreement which merely permits the lender to advance additional funds is not enforceable.[103] The language of the documentation is critical. The use of the phrase "which may be advanced" or similar language does not create an enforceable obligation.[104] Furthermore, the Wyoming Supreme Court will not rewrite the plain language of a loan agreement "under the guise of interpretation,"[105] even where the borrower offers evidence of a course of dealing which indicates a contrary intent. Ambiguous documents may be supplemented, however, by evidence of the parties' course of dealing.[106]

A lender's refusal to advance additional funds, even where op-

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100. *See infra* notes 373-376 and accompanying text.
101. It is not inconsistent to allege that the parties to a short-term promissory note had an understanding that the note would be renewed. Nor is it inconsistent to allege the existence of other provisions, such as an agreement to provide partial releases of collateral in exchange for certain actions by the borrower. Where the borrower's understanding is reasonably based on the representations or actions of the lender or where the parties have established a course of dealing which confirms the alleged understanding, such evidence should be admissible.
102. *Lawrence*, 761 P.2d at 646.
103. *Id.*
104. *Id.* at 645.
105. *Id.*
106. *See supra* notes 96-99 and accompanying text.

tional, is also circumscribed by the implied covenant of good faith and fair dealing.[107] As a result, the bad faith refusal to advance funds may be actionable even in the absence of an obligation to advance such funds.[108]

C. Termination of a Line of Credit

Businesses need operating capital. They often acquire the necessary capital by establishing a revolving line of credit. The borrower is permitted to draw on that line of credit, up to the maximum, as necessary.[109] There may come a time, however, when the lender learns or believes that the borrower is in such financial trouble that allowing the borrower to draw up to the authorized credit limit will be throwing good money after bad. The line of credit is terminated and future draws are refused. Properly done, the termination of a line of credit is not actionable. Improperly done, it may lead to significant lender liability.

The issue in the termination of lines of credit cases is notice. With proper notice, the termination is not actionable. Without proper notice it is.

The seminal case, which has been widely followed, is *K.M.C. Co., Inc. v. Irving Trust Co.*[110] K.M.C. had a $3.5 million line of credit secured by all its assets. Without advance notice, the lender refused to advance $800,000, which would have brought K.M.C. near its borrowing limit. K.M.C. was unable to obtain alternative operational financing and quickly collapsed.[111] K.M.C. sued for breach of the agreement to provide a line of credit. A jury returned a verdict of $7.5 million, which was affirmed on appeal.[112] The Sixth Circuit found that every contract, including a financing agreement, contains an implied covenant of good faith and fair dealing.[113] That covenant imposes a duty of reasonable notice in terminating an ongoing financing agreement.[114] Therefore, a line of credit may not be terminated unless the lender provides the borrower with advance notice of intent to terminate financing and a reasonable opportunity to obtain alternative financing.[115]

107. *See infra* notes 121-130 and accompanying text.
108. *Id.*
109. Although there are similarities, a line of credit is not the same as an agreement to make future advances. The former is generally structured to permit the borrower to obtain financing, up to the credit limit, upon the unilateral act of the borrower. The latter usually requires some affirmative act by the lender.
110. 757 F.2d 752 (6th Cir. 1985).
111. *Id.* at 754.
112. *Id.* at 766.
113. *Id.* at 759.
114. *Id.*
115. *Id.* The court cited comment 8 to section 2-309 of the Uniform Commercial Code, which imposes a reasonable notice requirement when a business relationship is terminated.

In determining whether the lender has acted in good faith, its conduct should be measured by "objective standards."[116] That is, there must have been some objective basis upon which a reasonable loan officer could have determined that the lender is insecure, and that a reasonable lender would not advance additional funds under the circumstances.[117] In the absence of a reasonable basis for believing the lender to be insecure, thereby justifying the termination of the line of credit, the question becomes whether the lender's bad faith refusal to advance additional funds prevented the borrower from obtaining alternative financing.[118] If so, that refusal to advance funds is actionable. If not, there is no causation, meaning that the lender's bad faith did not cause the borrower any damages and hence is not actionable.

While the Wyoming Supreme Court has not considered a line of credit case,[119] the *K.M.C.* decision is in line with the Wyoming decisions holding that there is an implied covenant of good faith and fair dealing in loan agreements which limits the parties' rights.[120]

D. Breach of the Implied Covenant of Good Faith and Fair Dealing

The Uniform Commercial Code imposes an obligation of good faith in the "performance or enforcement" of all contracts subject to its terms.[121] "Good faith" means "honesty in fact."[122] The implied obligation of good faith has been extended to the relationship between a lender and a borrower.[123] The recognition of that implied duty means that a cause of action exists when that duty is breached. It is unclear, however, whether such a breach gives rise to a contract action or whether there is an independent tort action. The Wyoming Supreme Court has, without comment or explanation, affirmed a lower court decision finding the evidence insufficient to support claims of bad faith in contract or tort, thereby appearing to recognize an independent tort action.[124] It seems unlikely, however, that the court intended to or will recognize an independent tort action if directly faced with that issue.

The court has recognized a separate, but limited tort of breach of the duty of good faith and fair dealing in the context of a first-party

116. *Id.* at 761.
117. *Id.*
118. *Id.* at 763.
119. Lawrence v. Farm Credit Sys. Capital Corp., 761 P.2d 640 (Wyo. 1988) involved the failure to advance future funds, rather than an operational line of credit.
120. *See infra* notes 121-130 and accompanying text.
121. WYO. STAT. § 34.1-1-203 (1990) (U.C.C. § 1-203).
122. WYO. STAT. § 34.1-1-201(a)(xix) (1990).
123. Sturman v. First Nat'l Bank, 729 P.2d 667, 677 (Wyo. 1986); Garner v. Hickman, 709 P.2d 407, 411 (Wyo. 1985).
124. *Lawrence*, 761 P.2d at 651.

insurance claim.[125] Writing for the majority in a three to two decision, Justice Urbigkit found that insurance contracts are "one of those special classes of contracts" where there is an independent duty of good faith and fair dealing.[126] The majority's primary concern appears to have been the disparate bargaining power between an insurer and an insured.[127] In dissent, Justice Thomas expressed the concern that by adopting a first-party bad faith cause of action the court "may have adopted it for all contractual relationships."[128] Justice Golden, also in dissent, took the position that since the duty of good faith and fair dealing is an integral part of an insurance contract, there can be no independent tort.[129]

There is merit in the argument that some lending relationships involve significantly disparate bargaining positions and the resulting loan agreements are, therefore, within the same "special class" of contracts as insurance contracts. It appears unlikely, however, that the court will recognize an independent tort of breach of the duty of good faith in lender liability cases.[130] Justices Thomas and Golden have already expressed their opposition to any such extension. Furthermore, the cases on which the majority relied in *McCullough* are first-party insurance cases.

E. Equitable Estoppel

The doctrine of equitable estoppel[131] is a traditional means of proving the existence of a contract when the party against whom enforcement of the contract is sought denies its existence. The purpose of the doctrine is to prevent injuries caused by one party's good faith reliance on another.[132] The effect of equitable estoppel is to preclude a defendant that knows the truth from denying a material fact which was used to induce the plaintiff to change his position where the plaintiff was ignorant of the facts and reasonably relied upon the representations of the defendant.[133] Generally, estoppel will not apply where the parties were equally well informed about the material facts

125. *McCullough*, 789 P.2d at 858.
126. *Id.*
127. *Id.*
128. *Id.* at 861 (Thomas, J., dissenting).
129. *Id.* at 863 (Golden, J., dissenting).
130. The primary significance of whether a claim for breach of the duty of good faith is a contract or a tort claim is the standard for punitive damages. In contract cases, punitive damages are recoverable only if there was "fraudulent misconduct" at the inception of the contract. United States v. Redland, 695 P.2d 1031, 1039-40 (Wyo. 1985). Punitive damages are available in a tort case upon a showing of "wanton or willful misconduct." *McCullough*, 789 P.2d at 860-61.
131. The Wyoming Supreme Court has also recognized the "closely related doctrine" of promissory estoppel. Inter-Mountain Threading, Inc. v. Baker Hughes Tubular Services, Inc., No. 90-139, slip op. at 5 (Wyo. S. Ct., June 10, 1991).
132. Kincheloe v. Milatzo, 678 P.2d 855, 862 (Wyo. 1984).
133. 28 AM. JUR. 2D *Estoppel and Waiver* § 27 (1966).

or had equal access to discover them.[134] The doctrine may be very useful in proving the existence of an agreement to lend money or some particular term or terms of that agreement. It has been applied in Wyoming in a lender liability case.[135]

Equitable estoppel exists in a lender liability context if: (1) the borrower (the party asserting estoppel) lacks knowledge of certain material facts and is without means to discover those facts; (2) the lender knows those material facts; (3) the borrower relies in good faith on the actions or inactions of the lender; and (4) the borrower is damaged as a result of that reliance.[136]

In *Roth v. First Security Bank*, a developer sought to establish a line of credit.[137] He engaged in discussions with various bank officers about the proposed loan. After preliminary indications that the bank would provide credit, the bank refused to finalize a loan agreement. The developer sued, arguing that the bank was estopped from denying the existence of a loan agreement. Although the court recognized the applicability of the doctrine, there was no equitable estoppel because the borrower was familiar with the lender's loan practices and policies and could not have reasonably relied on the preliminary representations of bank officers.

Reasonable reliance is the key. Equitable estoppel is most likely to exist where the borrower is unsophisticated, has limited access to information, and has developed a long-term relationship with a lender in which the borrower consistently relies on the lender for advice, or where there is a well-established course of dealing between the parties on which the borrower reasonably relies.[138]

F. *Waiver of Default*

Waiver of default has become one of the most common, and most successful, bases for lender liability suits. The argument is simple. A lender waives its right to insist on strict compliance with the loan agreement by overlooking prior defaults.[139] The most common scenario is that the lender has habitually accepted late payments. The lender finally declares a default and takes collection action. The borrower defends and counterclaims, alleging that the lender's actions in accepting late payments represent a modification of the loan agreement. The lender's decision to declare a default is, therefore, a breach of the modified contract.

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134. *Kincheloe*, 678 P.2d at 862.
135. Roth v. First Sec. Bank, 684 P.2d 93 (Wyo. 1984).
136. *Id.* at 96; *see also* Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1053-54 (10th Cir. 1988).
137. 684 P.2d 93 (Wyo. 1984).
138. *See, e.g., Zimmerman*, 848 F.2d at 1053-54.
139. Default is defined by the loan agreement, not by law. *See infra* notes 363-366 and accompanying text.

In *Foothill Industrial Bank v. Mikkelson*, the Wyoming Supreme Court appeared to recognize the general rule that a lender's acceptance of late payments or acquiescence in other deviations from the terms of a loan agreement may constitute a waiver of strict compliance with those terms.[140] The court went on to say that a lender's acceptance of late payments "does not necessarily" waive the right to insist on strict compliance in the future and to declare a default for future delinquent payments.[141] It appears, therefore, that the court is in step with the majority of jurisdictions across the country which recognize that a lender's actions may represent a waiver of the lender's right to declare a default and proceed with collection or forfeiture.

Where there has been a waiver, virtually any action by the lender to accelerate and collect the debt will lead to liability. The lender may not insist on strict compliance or declare a default until the waiver has been cured by notice of intent to insist on strict compliance.[142]

V. TORT THEORIES

The great transformation in lender liability law over the last decade has been the move from a purely contractual relationship between a lender and a borrower to one where each party has certain non-contractual duties to the other because of some special relationship.[143] As a result of these additional duties, there have arisen corresponding remedies in tort. Numerous tort theories have been recognized in lender liability cases. Many are traditional tort causes of action. Others are of more recent origin. The following discussion considers those tort claims which the Wyoming Supreme Court has either adopted or rejected in lender liability cases, as well as those which have received significant attention in other jurisdictions.

A. Breach of the Implied Covenant of Good Faith and Fair Dealing

The Wyoming Supreme Court has not recognized, and appears unwilling to recognize, an independent tort action for breach of the implied covenant of good faith and fair dealing except in first-party insurance cases.[144] Instead, an action for bad faith involving a lender is derivative of and should be brought in conjunction with an action

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140. 623 P.2d 748, 754 (Wyo. 1981). The court went on to find, however, that while the bank's acceptance of late payments without objection may have waived the borrower's default for failure to make timely payments, the bank had not waived the borrower's failure to timely pay assessments and remove encumbrances on the property. *Id.* at 754.

141. *Id.* at 756.

142. *See infra* note 376 and accompanying text.

143. That special relationship may arise either by the express or implied agreement of the parties or be imposed by law. *See supra* notes 61-89 and accompanying text.

144. *See supra* notes 121-130 and accompanying text.

for breach of contract.[145]

B. Breach of Fiduciary Duty

The formation of a fiduciary relationship imposes certain obligations on both parties, the breach of which is actionable.[146] A lender which has a fiduciary relationship with a borrower has a number of duties. Those duties include: (1) not profiting at the borrower's expense without the borrower's consent;[147] (2) not disclosing confidential information;[148] (3) disclosing all material information which the lender knows or should know;[149] and (4) not lending the borrower more money than he or she can reasonably be expected to repay.[150] Stating that the breach of a fiduciary relationship is actionable, however, begs the question. Is there a fiduciary relationship between a borrower and a lender?

The existence of a fiduciary relationship between a borrower and a lender has never been recognized in Wyoming. Nor is there any indication that the court will recognize such a relationship.[151] It is unlikely, therefore, that the tort of breach of fiduciary duty will provide the basis for a successful lender liability claim in Wyoming.

C. Breach of the Peace

In the event of a default, the Uniform Commercial Code permits a secured party to repossess collateral "without judicial process if this can be done without breach of the peace . . . ."[152] If there is a breach of the peace, acting without judicial process may lead to liability. The critical question is what is a breach of the peace? The Wyoming Supreme Court recently addressed that issue in *Salisbury Livestock Co. v. Colorado Central Credit Union.*[153]

George Salisbury III ("young Salisbury") borrowed money from the Colorado Central Credit Union in Denver, Colorado (where he lived). The loan was secured by four automobiles owned by young Salisbury. He subsequently defaulted on the loan. The Credit Union sent notice of default to young Salisbury's mailing address, and, having received no response, hired a repossession company to repossess the vehicles. The repossessors found and repossessed one vehicle at young Salisbury's Colorado residence. They then travelled just over the state

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145. *Id.*
146. *See, e.g.*, Morfeld v. Andrews, 579 P.2d 426, 433 (Wyo. 1978) (recognizing in passing an action for breach of fiduciary duty). *See also* A. BLOOM, *supra* note 5, at 37.
147. A. BLOOM, *supra* note 5, at 37; A. CAPPELLO, *supra* note 4, at 116-18.
148. A. BLOOM, *supra* note 5, at 37.
149. *Id.*; *see also* A. CAPPELLO, *supra* note 4, at 112.2.
150. A. BLOOM, *supra* note 5, at 37; *see also Meyers* (No. 10147), *supra* note 2.
151. *See supra* notes 25-57 and accompanying text.
152. WYO. STAT. § 34.1-9-503 (1990).
153. 793 P.2d 470 (Wyo. 1990).

line into Wyoming to look for the remaining vehicles on the property of the Salisbury Livestock Company, a family corporation operated by young Salisbury's father, George Salisbury, Jr. Early in the morning, the repossessors entered the property of the Salisbury Livestock Company via a private road, located two of the vehicles and towed them away.[154] No attempt was made to obtain permission to enter the property or to tow the vehicles.[155] Salisbury Livestock Company then sued the Credit Union and the repossessors for trespass and breach of the peace. The trial court granted a directed verdict and Salisbury appealed.[156] The Wyoming Supreme Court reversed and remanded for a new trial.[157]

The court read the self-help statute narrowly "to reduce the risk to the public of extrajudicial conflict resolution."[158] Accordingly, the entry onto the property of another to repossess collateral pursuant to the self-help statute is permissible only if it can be done without breaching the peace.[159] Whether the peace has been breached depends on "the potential for immediate violence and the nature of the premises intruded upon."[160] These factors are related because the potential for immediate violence increases as the creditor's trespass comes closer to a dwelling.[161] The facts of each case must be evaluated using the "reasonableness" criterion of the Restatement (Second) of Torts section 198.[162]

On the one hand, a trespass, alone, is not necessarily unreasonable.[163] On the other hand, the absence of a confrontation does not make the trespass reasonable.[164] The determinative question is whether there was "[t]he possibility of immediate violence."[165] The court focused on two elements which it found could lead a reasonable jury to find a breach of the peace: (1) the entry was onto the premises of a party not privy to the loan; and (2) the entry was into the "secluded ranchyard of an isolated ranch where the vehicles sought [were] not even visible from a public place."[166]

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154. In dissent, Chief Justice Cardine also noted that the repossessors "broke a 2 x 4 board." *Id.* at 476 (Cardine, C.J., dissenting).

155. *Id.* at 471-72 (Golden, J., writing for the majority).

156. *Id.* at 471.

157. *Id.*

158. *Id.* at 473.

159. *Id.*

160. *Id.* at 474 (quoting Cottam v. Heppner, 777 P.2d 468, 472 (Utah 1989)).

161. *Id.*

162. *Id.* "One is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of removing a chattel to the immediate possession of which the actor is entitled . . . ." RESTATEMENT (SECOND) OF TORTS § 198 (1964).

163. *Salisbury*, 793 P.2d at 474-75.

164. *Id.* at 475.

165. *Id.*

166. *Id.* Rural residents, according to the court, have a greater "privacy expectation" than urban dwellers. *Id.*

The court's emphasis on the intrusion onto the property of a third party and the greater privacy expectations of rural residents substantially limits the applicability of the decision. While it is unlikely that the decision will provide the basis for a successful lender liability suit in most instances, lenders are well advised to keep a tight rein on the activities of repossession companies.

D. Conversion

The tort of conversion is one of the oldest forms of civil recovery.[167] It has been, however, successfully adapted to lender liability cases. Conversion is the wrongful exercise of dominion over another's property.[168] There is no requirement of actual wrongful possession; any wrongful denial of property rights is a conversion.[169] The most likely acts of conversion in a lender-borrower relationship are the lender's wrongful repossession and disposition of collateral, the lender's improper setoff or a refusal to surrender repossessed collateral.[170]

The Wyoming Supreme Court upheld a judgment in favor of a borrower and against a lender based on conversion in *Western National Bank of Casper v. Harrison*.[171] In *Harrison*, the borrower defaulted on a promissory note secured by a mobile home. The lender foreclosed on the collateral and issued a "repossession title" to an accommodation party that paid off the note.[172] The borrower successfully sued the lender and the accommodation party, alleging, *inter alia*, that the actions of the lender in disposing of the collateral without proper notice under the Uniform Commercial Code were a conversion.[173] The trial court found the lender liable for conversion and entered judgment for the borrower.[174] The judgment was affirmed on appeal.[175]

It is clear, therefore, that a lender which unlawfully interferes with a borrower's property rights before or during repossession and foreclosure is guilty of conversion.[176] A lender's actions in derogation of a borrower's rights under the Uniform Commercial Code are an unlawful interference with that borrower's property rights.[177] In order to discourage conversion, the measure of damages for a willful or bad faith conversion is either "the benefit received by the tortfeasors" or

167. W. KEETON, *supra* note 13, § 15.
168. Western Nat'l Bank v. Harrison, 577 P.2d 635, 640 (Wyo. 1978).
169. *Id.* at 690.
170. A. CAPPELLO, *supra* note 4, at 207.
171. 577 P.2d 635 (Wyo. 1978).
172. *Id.* at 637.
173. *Id.* at 639-40.
174. *Id.* at 637-38.
175. *Id.*
176. *Id.* at 640.
177. *Id.*

the "rule-of-thumb" damages provided by Wyoming Statutes section 34-9-507(1) ("not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 per cent of the cash price").[178] A plaintiff that fails to prove actual damages is entitled to nominal damages.[179]

E. Defamation

A defamatory statement is one which "tends to hold the plaintiff up to hatred, contempt, ridicule or scorn or which causes him to be shunned or avoided; one that tends to injure his reputation . . . ."[180] Liability exists only if the statement is false and is published, either orally or in writing, to a third party. Truth is an absolute defense.[181] Defamation includes both oral statements (slander) and written statements (libel). Defamation claims are common in lender liability cases, and in *Foothill Industrial Bank v. Mikkelson*, the Wyoming Supreme Court considered a claim of libel brought by a borrower against a lender.[182]

The plaintiffs in *Foothill* borrowed money which was secured by a real estate mortgage. The bank declared a default[183] and elected to foreclose on the property by advertisement and sale.[184] The borrowers attempted to cure by making several payments, but the lender proceeded with the foreclosure. After the foreclosure, the borrowers sued, alleging that they had been libeled by the bank's publication of a foreclosure notice when there had either been no default or, if there had been a default, the lender had waived the default.[185] The trial court found there was no default and awarded compensatory damages of $2,500, and punitive damages of $500.[186] On appeal, the judgment was reversed.[187] The Wyoming Supreme Court found that there had been a default. Because truth is a complete defense, there had been no libel since the publication was truthful.[188]

Actions by a lender to foreclose or collect a loan invariably involve the publication of information which is likely to have an adverse

178. *Id.* at 641-42.
179. *Id.*
180. Tschirgi v. Lander Wyoming State Journal, 706 P.2d 1116, 1119 (Wyo. 1985).
181. *Id.* at 1120.
182. 623 P.2d 748 (Wyo. 1981).
183. The bank claimed that payments were not timely, property taxes and assessments on the mortgaged property had not been paid, the property was not properly insured and judgment liens against the property had not been released. *Id.* at 753-54.
184. *Id.* at 751-52.
185. *Id.* at 758. The borrowers also alleged abuse of process. The court found there could be no abuse of process where there was a default which entitled the lender to assert its remedies, including a foreclosure proceeding. *Id.* at 757. The court also suggested that an advertisement and sale foreclosure does not involve the use of "process" within the meaning of that tort. *Id.*
186. *Id.* at 750.
187. *Id.* at 758.
188. *Id.*

effect on the borrower's reputation. The crucial question is whether the information is true, i.e., has there been a default.[189] If so, the lender has nothing to fear. If there has been no default or if the default has been waived,[190] collections activities, which are invariably public, may result in lender liability for damaging the good name or reputation of the borrower.[191]

F. Duress

Duress is a traditional defense to a contract action, excusing nonperformance by the party asserting duress.[192] At least one court, however, has recognized duress as an independent tort.[193]

Duress, as a defense to a contract action, exists where: (1) the party seeking relief from the contract has been induced; (2) by the unlawful act of the other party; (3) to perform or refrain from performing some act under circumstances which deprive him or her of free will.[194] The normal remedies are rescission or restitution, not damages.[195] The defense of duress in an action by a lender to require performance by a borrower has one significant limitation. It is not duress for one party to insist upon that party's legal rights, even to the detriment of the other party.[196] That insistence may, however, be subject to the obligation to act in good faith.[197]

In the *Farah* case,[198] duress was recognized as an independent tort cause of action, rather than simply as a defense in a contract enforcement action. The borrower was found to have acted under a form of duress known as "business compulsion" created by the lender.[199] The borrower's imminent financial distress and the absence of practical alternatives to the action insisted upon by the bank combined to create the actionable "business compulsion."[200]

The *Farah* court's recognition of the "tort" of duress is an aberration. It is, perhaps, best explained as a creative method of evading the absence of an implied obligation of good faith and fair dealing in

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189. Whether there has been a default is determined by the agreement between the parties. *See infra* notes 363-366 and accompanying text.

190. *See supra* notes 139-142 and accompanying text.

191. *See, e.g.*, Alaska Statebank v. Fairco, 674 P.2d 288 (Alaska 1983) (affirming a judgment in favor of plaintiffs in a defamation action based on wrongful repossession which was made public).

192. *See, e.g.*, A. CAPPELLO, *supra* note 4, at 183.

193. *Farah*, 678 S.W.2d at 682-84.

194. *In re* TR, 777 P.2d 1106, 1110 (Wyo. 1989) (citing SKMD v. SLM, 652 P.2d 974 (Wyo. 1982)).

195. RESTATEMENT (SECOND) OF CONTRACTS § 376 (1979).

196. *Id.* § 176 comment e.

197. *See supra* notes 121-130 and accompanying text.

198. 678 S.W.2d at 682-84.

199. *Id.* at 686-87.

200. *Id.*

Texas lender liability law.[201] There is no reason to expect the Wyoming Supreme Court to accept duress as an independent tort, particularly since the court has held that the implied covenant of good faith and fair dealing applies to the relationship between a borrower and a lender.[202] Duress is likely to, and should, remain a defense in a contract action. It may arise in a lender liability case where the borrower seeks to be relieved from the provisions of an allegedly onerous loan agreement.

G. Fraud

Fraud in a lender liability case encompasses a broad spectrum of conduct from deliberate misrepresentation to very subtle failure to disclose information.[203] It may be actual or constructive.[204] Perhaps because of its flexibility, fraud is the most common cause of action asserted in lender liability cases.[205] The tort of fraud has been expressly recognized in Wyoming in a lender liability case.[206]

Fraud is conduct that is "obnoxious to good morals."[207] It consists of: (1) a false representation made by the defendant to induce the plaintiff to act or refrain from acting; (2) which representation the plaintiff reasonably believes; and (3) relies upon to his detriment.[208] The tort of fraud has several unique aspects. First, the normal rules of pleading[209] do not apply. Instead of "notice pleading," the circumstances constituting fraud "shall be stated with particularity."[210] Second, fraud will not be imputed where the facts are "consistent with honesty."[211] Finally, fraud must be proven by clear and convincing evidence.[212]

Actual fraud consists of some action done by a lender with the intent to deceive the borrower, such as making a false promise to advance funds in the future in order to induce the borrower to pledge additional collateral.[213] Intent to deceive is not necessarily, however, a

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201. *See* Herndon v. First Nat'l Bank, 802 S.W.2d 396, 399 (Tex. Ct. App. 1991), *reh'g denied* (holding no duty of good faith and fair dealing unless it is "intentionally created by express language in a contract or unless a special relationship of trust and confidence exists between the parties to the contract").

202. *See supra* note 123 and accompanying text.

203. A. BLOOM, *supra* note 5, at 18; A. CAPPELLO, *supra* note 4, at 94.

204. A. BLOOM, *supra* note 5, at 19; A. CAPPELLO, *supra* note 4, at 95.

205. A. CAPPELLO, *supra* note 4, at 94.

206. Rocky Mountain Helicopters, Inc. v. Air Freight, Inc., 773 P.2d 911, 919 (Wyo. 1989).

207. Zanetti v. Zanetti, 689 P.2d 1116, 1124 (Wyo. 1984) (citing Otte v. State, 563 P.2d 1361, 1364 (Wyo. 1977)).

208. Duffy v. Brown, 708 P.2d 433, 437 (Wyo. 1985).

209. WYO. R. CIV. P. 8(e).

210. WYO. R. CIV. P. 9(b); *see also* Reed v. Owen, 523 P.2d 869, 871 (Wyo. 1974) (plaintiff must allege fraud "clearly and distinctly").

211. *Duffy*, 708 P.2d at 437.

212. *Id.*

213. The promise of future financing in exchange for additional security is a com-

prerequisite to recovery for fraud. The breach of fiduciary duty[214] has been held to be constructive fraud in those jurisdictions which have recognized a fiduciary relationship between a borrower and a lender.[215]

One of the common allegations by a borrower is that the lender has failed to disclose material information. Ordinarily, silence is not actionable as fraud.[216] Where there is a special relationship, however, the lender has a duty to disclose information.[217] Where there is a duty to disclose material information, silence may constitute fraud.[218] In addition, a party who, without such a duty, decides to speak, must speak the truth.[219] Similarly, half the truth may be a lie.[220]

The duty to disclose information is a continuing one. Accordingly, where one party has made a statement upon which the other party is known to be relying, and the party that made the statement subsequently acquires information which makes the statement untrue or misleading, there is a duty to correct the original assertion.[221]

Although fraud is a "natural" claim in a lender liability case, its attractiveness is significantly reduced by the requirement that fraud be proved by clear and convincing evidence.[222] Clear and convincing evidence in a fraud case is that which will "satisfy the mind and conscience of its existence . . . ."[223] Facts which would permit a jury to decide either way using a preponderance of evidence standard may be insufficient to meet the clear and convincing standard.[224] Because the facts which give rise to a potential fraud action may also support an action for negligent misrepresentation, which need only be proven by a preponderance of the evidence,[225] a borrower should also consider a claim for negligent misrepresentation.[226]

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mon allegation in lender liability cases. A. BLOOM, *supra* note 5, at 18; A. CAPPELLO, *supra* note 4, at 97.

214. *See supra* notes 25-57 and accompanying text (discussion of whether a fiduciary relationship exists).

215. A. BLOOM, *supra* note 5, at 19.

216. *Id.* at 20.

217. *See supra* notes 65-82 and accompanying text (general discussion of lender-borrower special relationship and implied duties which arise therefrom).

218. Meeker v. Lanham, 604 P.2d 556, 558-59 (Wyo. 1979); Steadman v. Topham, 800 Wyo. 63, 81, 338 P.2d 820, 826-27 (Wyo. 1959).

219. *Meeker*, 604 P.2d at 559.

220. Twing v. Schott, 80 Wyo. 100, 113, 338 P.2d 839, 843-44 (1959).

221. W. KEETON, *supra* note 13, at 738.

222. *See supra* note 212 and accompanying text.

223. *Reed*, 523 P.2d at 871.

224. Order on Motions for Summary Judgment, *Puryear* (No. C88-1012-B) at 8 [hereinafter Summary Judgment Order, *Puryear*].

225. *See infra* note 278 and accompanying text.

226. *See infra* notes 274-285 and accompanying text.

H. Intentional Infliction of Emotional Distress

The Wyoming Supreme Court has adopted the tort of intentional infliction of emotional distress as set forth in the Restatement (Second) of Torts section 46.[227] The court has also recognized the tort in a lender liability case.[228] Intentional infliction of emotional distress consists of: (1) extreme and outrageous conduct by the defendant; (2) that intentionally or recklessly; (3) causes the plaintiff severe emotional distress.[229] Liability extends to "bodily harm" resulting from the distress.[230] The key elements are "outrageous conduct" and "severe" emotional distress.

"Outrageous conduct" is that "which goes beyond all possible bounds of decency, is regarded as atrocious, and is utterly intolerable in a civilized community."[231] "It is for the court, in the first instance, to determine whether the defendant's conduct is so outrageous as to permit recovery . . . ."[232] Outrageous conduct is difficult to prove in a lender liability case because a lender's efforts to collect on a promissory note pursuant to the loan agreement and in accordance with the law are, as a matter of law, not outrageous.[233] Accordingly, such conduct will be outrageous only where the lender acts in contravention of the loan agreement or the law.

Emotional distress "includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea."[234] Liability only arises, however, where such distress is "so severe that no reasonable man could be expected to endure it."[235] The court is to determine whether on the facts alleged severe emotional distress can be found.[236] The "severity" standard is very difficult to meet in a lender liability case as the typical emotional distress suffered by borrowers has been deemed not "serious."

The loss of a job which causes lost sleep and worry about the future is not severe; rather, it is "the kind of distress with which the ordinary person must be expected to cope."[237] Similarly, a borrower's loss of his life savings, life's work, pride and trust in others is not

227. Leithead v. American Colloid, 721 P.2d 1059, 1065-66 (Wyo. 1986).
228. *Sturman*, 729 P.2d at 680 (affirming the trial court's determination that there was insufficient evidence of serious emotional distress).
229. *Leithead*, 721 P.2d at 1065.
230. *Id.* "Bodily harm is any impairment of the physical condition of the body, including illness or physical pain." RESTATEMENT (SECOND) OF TORTS § 905 comment b (1977).
231. *Leithead*, 721 P.2d at 1066.
232. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 comment h (1964)).
233. *Sturman*, 729 P.2d at 680.
234. *Leithead*, 721 P.2d at 1066 (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment j (1964)).
235. *Id.* at 1066 (citing RESTATEMENT (SECOND) OF TORTS § 46 comment j (1964)).
236. *Id.*
237. *Id.* at 1067.

"severe," even where it causes the recurrence of an ulcer and high blood pressure.[238] Because of the difficulty in proving "outrageousness" and "severity," a borrower in a lender liability case is unlikely to get a claim of intentional infliction of emotional distress to a jury, let alone obtain a judgment and prevail on appeal.[239]

I. Intentional Interference With Contract or Prospective Advantage

There are three possible claims based on a lender's interference with the business or business relationships of a debtor: (1) intentional interference with contract; (2) intentional interference with prospective advantage; and (3) intentional interference with the borrower's performance of a contract. The Wyoming Supreme Court has recognized the first two causes of action and rejected the third.

1. Intentional Interference With Contract

The tort of intentional interference with contract consists of: (1) an existing contract between the plaintiff and a third party; (2) of which the defendant has knowledge; (3) intentional interference with that contract by the defendant which causes a breach by the third party; and (4) damages as a result of that breach.[240] The Wyoming Supreme Court has recognized this tort in a lender liability case.[241] Interference, even if intentional, is not actionable unless it is improper.[242] The key elements are intent and improper interference.

Intent exists if the defendant acts with the purpose of interfering with the contract, even if there is some other purpose, or if the defendant knows that the interference "is certain or substantially certain" to occur as a result of his actions.[243] An action which is incidental to the defendant's primary purpose is, therefore, potentially actionable.

Commercial borrowers, almost by definition, have contracts with third parties. Accordingly, the acceleration and foreclosure of a defaulted loan will often cause a third party to terminate a contractual relationship with the borrower. That interference is not actionable, however, unless it is improper. It is often not improper for a lender to

238. Summary Judgment Order, *Puryear* at 12 (granting summary judgment to the lender on borrower's claim for intentional infliction of emotional distress); *see also Sturman*, 729 P.2d at 680.

239. Borrowers in other jurisdictions have recovered damages for intentional infliction of emotional distress. *See, e.g.*, A. BLOOM, *supra* note 5, at 36. The distress which provided the basis for recovery included insomnia, tension and anxiety, symptoms which have been expressly rejected in Wyoming. *See, e.g.*, *Leithead*, 721 P.2d at 1065-68; Summary Judgment Order, *Puryear* at 11-13.

240. First Wyoming Bank v. Mudge, 748 P.2d 713, 715 (Wyo. 1988) (citing RESTATEMENT (SECOND) OF TORTS § 766 (1977)).

241. First Wyoming Bank v. Mudge, 748 P.2d 713 (Wyo. 1988).

242. RESTATEMENT (SECOND) OF TORTS § 766 comment a (1977).

243. *Id.* § 766 comment j.

act when a borrower is in default. Where a borrower is attempting to sell property which is subject to a security interest, it is not improper for the secured party to interfere with that sale by obtaining a court order commanding the sheriff to stop the sale and take possession of the collateral.[244] Such "interference" was pursuant to a court order and in accordance with the terms of the security agreement between the parties and was not, therefore, improper.[245] The measure of damages in an action for intentional interference with contract is the amount which will compensate the plaintiff for all of the detriment proximately caused by the breach.[246]

If there has been an improper interference, the plaintiff may simultaneously maintain an action for breach of contract against the breaching party and an action for intentional interference against the party whose improper interference caused the breach.[247]

2. Intentional Interference With Prospective Contractual Advantage

The absence of a contract does not necessarily preclude recovery. A defendant may be liable for intentional interference with a prospective contractual relationship. Such interference is actionable if the defendant induces or otherwise causes a third party not to enter into or continue a prospective contractual relationship with the plaintiff, or if the defendant prevents the plaintiff from acquiring or continuing a prospective relationship with a third party.[248] The Wyoming Supreme Court has never considered the applicability of the tort in a lender liability action, but allowing such a claim would be consistent with the court's decisions.[249]

The elements of the tort are similar to those for intentional interference with contract. There must be: (1) an existing "business expectancy;" (2) of which the defendant has knowledge; (3) intentional interference with that expectancy by the defendant which causes a termination of the expectancy by the third party; and (4) damages as a result of the disruption of that expectancy.[250] Such interference must be "without justification [and] creates liability for the harm caused thereby."[251] The tort is intended to protect the "probable ex-

244. *Sturman*, 729 P.2d at 680.
245. *Id.*
246. Texas West Oil & Gas Corp. v. Fitzgerald, 726 P.2d 1056, 1064 (Wyo. 1986) (citing Martin v. Wing, 667 P.2d 1159 (Wyo. 1983)).
247. RESTATEMENT (SECOND) OF TORTS § 766 comment v (1977).
248. Martin v. Wing, 667 P.2d 1159, 1162 (Wyo. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 766B (1977)).
249. Martin v. Wing, 667 P.2d 1159 (Wyo. 1983). *Martin* involved an action by property owners against neighbors for interference with a prospective sale of their property.
250. *Id.* at 1162 (citing RESTATEMENT OF TORTS § 766 (1939)).
251. *Id.* at 1161.

pectancies" of life.[252] The measure of damages is those which will compensate the plaintiff for all the damages proximately caused by the breach of the expectancy.[253]

The business relations protected against intentional interference include "any prospective relations, except those leading to contracts to marry."[254] It is not necessary that the business expectancy will be reduced to a formal contract. An actionable expectancy may include "quasi-contractual or other restitutionary rights or even the voluntary conferring of commercial benefits in recognition of a moral obligation."[255] The intent element is satisfied if the defendant desires to interfere with the plaintiff's business expectancy or if the defendant knows that his actions are substantially certain to cause improper interference.[256]

The primary issues in such an action are proving the business expectancy and the defendant's knowledge of that expectancy with sufficient specificity. The existence of an expectancy is typically proven through showing a course of dealing between the parties.[257] Whether the defendant had knowledge of the expectancy is a factual determination.[258]

3. Intentional Interference with Another's Performance of His Own Contract

The Restatement recognizes a cause of action where a defendant intentionally interferes with a plaintiff's contract with a third party and causes the plaintiff's performance of that contract to become more expensive or burdensome.[259] The Wyoming Supreme Court has, however, rejected such a cause of action.[260]

Price v. Sorrell is a case which probably should never have been brought. Daniel Price was hired by Riverton Memorial Hospital (RMH) to collect a delinquent debt. Larry Sorrell was hired by the debtor to represent her. Sorrell wrote a letter to the RMH questioning Price's reputation, denying that his client owed the debt and inviting RMH to sue, if it so desired. Price subsequently sued Sorrell, alleging that the letter had damaged his relationship with RMH and had

252. *Id.* (quoting W. PROSSER, LAW OF TORTS, § 130 (4th ed. 1971)).
253. *Id.* at 1163 (citing Douglas Reservoirs Water Users Ass'n v. Cross, 569 P.2d 1280 (Wyo. 1977)).
254. RESTATEMENT (SECOND) OF TORTS § 766B comment c (1977).
255. *Id.*
256. *Id.* comment d.
257. *Martin*, 667 P.2d at 1162.
258. *Id.* at 1163.
259. RESTATEMENT (SECOND) OF TORTS § 766A (1977). *See also* Colorado Interstate Gas v. Natural Gas Pipeline Co. of Am., 661 F. Supp. 1448, 1469 (D. Wyo. 1987), *aff'd in part, rev'd in part*, 885 F.2d 683 (10th Cir. 1989) (predicting that the Wyoming Supreme Court would adopt § 766A).
260. Price v. Sorrell, 784 P.2d 614 (Wyo. 1989).

caused him to incur expenses of $117 to repair the relationship.[261] He sought $25,000 in damages to the relationship and punitive damages. The action was based on section 766A of the Restatement (Second) of Torts, intentional interference with another's performance of his own contract.[262] The trial court granted summary judgment in favor of Sorrell because the alleged interference had neither caused an actual breach nor had it imposed a "substantial expense or burden upon the [p]laintiff."[263] Price appealed, arguing that he did not have to show an actual breach of contract and that the district court erred in finding that there must be a "substantial expense or burden."[264]

The Wyoming Supreme Court chose to restrict its review to whether it should adopt the tort of intentional interference with another's performance of his own contract as set forth in section 766A. The decision produced three opinions: a "majority" opinion by Chief Justice Cardine; a special concurrence by Justice Thomas, joined by Justice Golden; and a specially concurring opinion by Justice Urbigkit.[265] While all five members of the court voted to affirm the trial court's summary judgment in favor of Sorrell, only three agreed to reject section 766A.[266] The court rejected section 766A of the Restatement, even though it had previously adopted sections 766 (intentional interference with contract) and 766B (intentional interference with prospective advantage), because permitting recovery where there has been no breach and only more expense or burden would permit an element of proof that "is too speculative and subject to abuse to provide a meaningful basis for a cause of action."[267]

Justice Thomas, joined by Justice Golden, was of the opinion that the case was not a section 766A case at all because the facts did not support such a claim.[268] Since the court was addressing the issue of section 766A, however, Justice Thomas argued that there is no logical reason to permit recovery under section 766 or 766B and not allow recovery under section 766A. To be consistent, the court should either adopt section 766A or reject sections 766 and 766B.[269] What the court did, concluded Justice Thomas, was "whimsical and capricious."[270]

There is merit in Justice Thomas' concurrence. Nevertheless, a

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261. *Id.* at 615. The damages were incurred to produce recorded telephone conversations of cases involving collections on behalf of RMH and to make telephone and personal contact with RMH employees to respond to the allegations made by Sorrell. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 616.
266. *Id.* Chief Justice Cardine and Justice Macy rejected the tort in the majority opinion. Justice Urbigkit concurred with Chief Justice Cardine and Justice Macy that section 766A should be rejected. *Id.* at 619 (Urbigkit, J., specially concurring).
267. *Id.* at 616.
268. *Id.* at 616-17 (Thomas, J., specially concurring).
269. *Id.* at 618.
270. *Id.* at 616.

majority of the court has rejected section 766A. Perhaps a case arising out of an interference which caused more substantial damages would have reached a different result, although there is nothing in the opinions of Chief Justice Cardine or Justice Urbigkit to suggest that the amount of the plaintiff's costs would make a difference. There is little likelihood, therefore, that a borrower will succeed in recovering from a lender under section 766A.

J. Negligence

The tort of negligence is well-established in Wyoming.[271] It consists of a duty and a breach of that duty which proximately causes harm to the plaintiff.[272] In lender liability cases, the threshold question is whether the lender owes the borrower any duty, the breach of which will lead to tort liability. That depends on the nature of the relationship between lender and borrower.[273] The nature of the relationship varies, depending on the specific facts of each case.

At least three different types of negligence claims have been brought against lenders, with varying degrees of success: negligent misrepresentation, negligent advising and negligent lending. In addition, there is good authority to support a claim for negligent breach of contract. Although all negligence claims share the same underlying elements, each has unique characteristics.

1. Negligent Misrepresentation

Whether regarded as a separate tort or simply as another negligence claim, negligent misrepresentation has been alleged successfully by borrowers in lender liability cases. It offers a substantial advantage to the plaintiff over a claim for fraud.[274]

The elements of negligent misrepresentation are: (1) false information supplied by the defendant in the course of the defendant's business for the guidance of the plaintiff in his business; (2) the failure by the defendant to exercise reasonable care in obtaining or relating the information; and (3) pecuniary loss proximately caused by the plaintiff's justifiable reliance on the false information.[275] The failure to disclose material information may constitute negligent misrepresentation if the lender has a duty to disclose such information.[276]

Negligence of any sort hinges upon the existence of a duty. The existence of a duty depends on the relationship between the borrower

271. *See, e.g.*, McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).
272. *Id.* at 411.
273. *See supra* notes 25-62 and accompanying text.
274. *See infra* notes 284-285 and accompanying text.
275. *Duffy*, 708 P.2d at 437.
276. W. KEETON, *supra* note 13, at 738.

and the lender.[277] Since the standard for proving negligence is a preponderance of the evidence, rather than clear and convincing evidence, the duty and the corresponding scope of liability is more limited. Accordingly, recovery is restricted to the party for whose benefit and guidance the information was provided, and limited to the loss caused by that party's reliance on the negligent misrepresentation.[278]

Liability for negligent misrepresentation exists only if the defendant intended or knew the borrower would rely on the representation.[279] The reason is that the recipient of "commercial information" cannot reasonably expect that the supplier of the information observed a duty other than the duty of honesty unless the supplier of the information knew that the information would be put to a particular use by the recipient of the information.[280] Therefore, the scope of actionable conduct is narrow.

Despite the narrow scope of actionable conduct, a borrower is entitled, at a minimum, to expect that a lender will exercise the "care and competence" which the lender professes to have simply by engaging in the business of lending money.[281] A lender that participates in a specialized area of lending, such as agricultural lending, must adhere to the standard of care that participation in that particular area implies.[282] In addition, the nature of the relationship between the parties may lead to an even higher standard of care.[283]

When contrasted with a fraud claim, an action for negligent misrepresentation presents the plaintiff with a significant advantage and a significant disadvantage. The advantage, to the borrower, of negligent misrepresentation over fraud is the lower standard of proof required. Negligent misrepresentation must be proven only by a preponderance of the evidence.[284] Fraud must be proven by the higher standard of clear and convincing evidence.[285] The disadvantage of negligent misrepresentation is the narrower scope of actionable conduct.

2. Negligent Advising

One of the more recent developments in lender liability has been

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277. *See supra* notes 25-57 (the duty may result from a special relationship) and *see infra* notes 299-312 (a duty may result from a contractual relationship).
278. RESTATEMENT (SECOND) OF TORTS § 552 comment a (1976).
279. *Cf.* RESTATEMENT (SECOND) OF TORTS § 552 (1976) (the borrower and lender are sufficiently analogous to the buyer and supplier in a commercial transaction to make this comment applicable).
280. *Id.* comment a.
281. *Id.* comment e.
282. *Id.*; *see also* Order on Motion to Amend, *Puryear*, *supra* note 62, at 10-11.
283. Order on Motion to Amend, *Puryear*, *supra* note 62, at 10-11.
284. *Id.* at 11; *see also* Landmark Bank v. McGlinn, 684 F. Supp. 1500, 1505 (E.D. Mo. 1988).
285. *See supra* note 212 and accompanying text.

the recognition of a cause of action for negligent advising.[286] As with all negligence actions, a claim for negligent advising is dependent upon the lender's having a duty to advise.

A lender's duty to advise a borrower may arise in two situations. First, under traditional negligence principles, a lender that gratuitously renders advice assumes an obligation to provide sound advice.[287] Second, the existence of a special relationship between the lender and the borrower may give rise to an obligation to proffer advice; that advice, of course, must be sound.[288] Unless the lender has or assumes a duty to give sound advice, the failure to render sound advice, or the failure to give any advice, is not actionable, provided the lender acts in good faith.

A lender which offers advice to a borrower assumes the duty to render sound advice. This duty is a logical outgrowth of the rule that one who voluntarily undertakes to render services to another "which he should recognize" as necessary for the protection of the other is subject to tort liability for physical harm that results from his failure to exercise reasonable care."[289] The Wyoming Supreme Court recently extended the traditional rule to cover a real estate salesman who gratuitously, but negligently, assisted an acquaintance.[290] Liability was expanded beyond physical harm to include pecuniary loss.[291] There is no reason for the court not to extend liability to a lender that voluntarily, but negligently, advises a borrower.

In the absence of an assumption of duty, the duty to proffer sound advice has been found to exist where: (1) the lender participates in a specialized field of lending and the standard of care expected of such lenders includes the duty to render sound advice; or (2) there is a special relationship between the parties.

A lender that chooses to participate in a specialized area of lending does so at its own risk. Participation in a specialized area imposes additional duties, which may include the duty to offer sound advice.[292] The reason is that lenders involved in certain types of lending have traditionally become closely involved with their borrowers' businesses, advised borrowers about financial and business matters, and exercised significant control over the course of a borrower's business operations.[293] Such involvement may give rise to generally accepted stan-

286. *See, e.g.*, *Vodak*, 441 N.W.2d at 344; Order on Motion to Amend, *Puryear*, *supra* note 62, at 10.
287. *See, e.g.*, *Kelly*, 776 P.2d at 1019.
288. *See, e.g.*, *Vodak*, 441 N.W.2d at 344; *see also* Order on Motion to Amend, *Puryear*, *supra* note 62, at 10-11.
289. *Ellsworth Brothers, Inc.*, 406 P.2d at 524 (citing RESTATEMENT (SECOND) OF TORTS § 324A (1964)).
290. *Kelly*, 776 P.2d at 1019.
291. *Id.*
292. *See supra* notes 86-89 and accompanying text.
293. *Id.*

dards of practice, which include an obligation to offer financial or business advice, particularly where the borrower is not financially sophisticated and is relying on the lender for such advice, or where the practice in the field is to offer such advice. The key, of course, is whether there is a separate standard of care for participating lenders that requires the lenders to offer advice. The standard of care must be established through expert testimony.

Finally, a relationship of trust and confidence, developed over time, often results in a lender becoming substantially involved in the borrower's business.[294] If the lender develops a pattern of advising the borrower, and the borrower reasonably relies on that advice, that special relationship imposes on the lender a duty to provide sound advice.

3. Negligent Lending

A claim for negligent lending is, in a sense, a claim that one is entitled to have one's cake and eat it, too. In essence, a borrower sues a lender, alleging that the lender, which lent money to the borrower at the borrower's request, was negligent in having done so. While it may be that the lender is liable in negligence to its stockholders for failing to exercise reasonable care in lending money, it is counterintuitive to argue that the lender had a duty not to lend the borrower money when requested by the borrower to do so, unless there is a fiduciary relationship between the parties.[295]

Whether negligent lending is actionable in Wyoming is an unanswered question.[296] Those appellate courts which have addressed the question have uniformly rejected a cause of action for negligent lending.[297] Given the trend against recognizing the claim, and the Wyoming Supreme Court's general antipathy toward imposing additional liability on lenders, it seems very unlikely that the court will recognize a cause of action for negligent lending.[298]

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294. *See supra* notes 76-82 and accompanying text.

295. *See supra* notes 25-57 and accompanying text.

296. As discussed above, the jury in *Meyers* (No. 10147), *supra* note 2, found that there was a fiduciary relationship between the parties, and that the lender had breached that relationship by convincing the borrower to borrow more money than the borrower could repay in order to obtain additional collateral.

297. *See, e.g.*, Gries v. First Nat'l Bank, 82 Wis. 2d 774, 264 N.W.2d 254, 256-57 (1978); *see also* A. BLOOM, *supra* note 5, at 34.

298. Courts in other jurisdictions have recognized a variety of other negligence claims brought against lenders, including negligence by the lender in processing loan applications, loan administration, loan supervision, disbursement of funds, supervision of loan and damage to property during foreclosure. A. BLOOM, *supra* note 5, at 33-35; A. CAPPELLO, *supra* note 4, at 190-203. None of these has been considered in Wyoming. However, all involve traditional concepts of negligence and should be cognizable as general tort actions.

4. Negligent Breach of Contract

Negligence is based on the existence of a duty. That duty may arise by operation of law or by contract.[299] While the breach of a contractual duty normally results only in an action for breach of contract, there are occasions where the breach of contract may result in tort liability. Although there is no Wyoming case law involving a claim for negligent breach of a contract to lend money, the principles enunciated by the Wyoming Supreme Court in *Brubaker v. Glenrock Lodge International Order of Odd Fellows* appear to apply in a lender liability action.[300]

Brubaker involved an action by a tenant to recover from a landlord for personal injuries. The tenant had leased premises to be used as a store. Pursuant to an agreement with the tenant, the landlord remodeled the property. The remodeling included moving and installing a flight of stairs. Several months after taking possession of the premises, the tenant was injured when the flight of stairs collapsed.[301] Tenant sued, alleging that the remodeling had been negligently done.[302] In upholding a jury verdict in favor of the tenant, the Wyoming Supreme Court held that tort liability "may arise . . . by virtue of a contract . . . ."[303] Conduct that is "merely a breach of contract is not a tort."[304] The question is whether the contract creates a relationship which "demand[s] the exercise of proper care . . . ."[305] If so, liability exists where the breaching party fails to use ordinary care to avoid foreseeable injury.[306] In *Brubaker*, the duty to use ordinary care arose because the landlord knew or should have known when it agreed to remodel the premises that the failure to use ordinary care in so doing presented a foreseeable risk of harm.[307]

It is well-established, therefore, that the breach of a contractual duty which causes physical harm is actionable in tort if the contractual relationship between the parties imposed a duty to use ordinary care.[308] The issue in a lender liability case is whether the breach of a contractual duty which causes economic harm may be asserted as a tort claim.

There is no general duty to use reasonable care to avoid intangible economic loss.[309] However, where one party to a contract makes a

299. *Brubaker*, 526 P.2d at 58.
300. *Id.* at 52.
301. *Id.* at 53-54.
302. *Id.* at 53.
303. *Id.* at 58.
304. *Id.* (quoting Weeg v. Iowa Mut. Ins. Co., 82 S.D. 104, 109, 141 N.W.2d 913, 916 (1966)).
305. *Id.*
306. *Id.* at 58-59.
307. *Id.* at 59.
308. *Id.*; *see also* W. KEETON, *supra* note 13 at 656-57.
309. W. KEETON, *supra* note 13, at 657.

promise to the other which induces reasonable reliance, the promisor is under a duty to prevent foreseeable harm to the promisee as a result of that reliance.[310] This duty to prevent reliance damages is in addition to the promissor's contractual obligation to perform on the promise and creates tort liability.[311]

The principle of reliance fits well with the concept of lender liability. Where a lender has promised to advance funds, it is foreseeable that the borrower will rely on that promise. That reliance may result in injury to the borrower (and possibly third parties) if the lender breaches its promise to provide funds. Accordingly, the lender has both a contractual obligation to lend money and a tort duty to prevent reliance damages. Therefore, the breach of the duty to prevent reliance damages should be actionable in tort.[312]

V. Summary of Theories of Recovery

Although a borrower in a lender liability action has a plethora of causes of action potentially available, the following offer the best possibilities of recovery in Wyoming: breach of contract, breach of the implied covenant of good faith and fair dealing, intentional interference with contract or prospective advantage, negligent misrepresentation and negligent advising.

An action for breach of contract depends on the existence of an agreement to loan money, either written or oral. If the agreement is in writing and is unambiguous, it is likely to be upheld, and extraneous evidence of the parties' intent will not be admitted to contradict the written agreement. An ambiguous or incomplete agreement, by contrast, presents the opportunity for the plaintiff to submit evidence of the course of dealing between the parties to show the parties' intent. Such evidence is often critical to show that the borrower's understanding and expectations were reasonable.

An action for breach of the covenant of good faith and fair dealing goes hand in glove with an action for breach of contract. The covenant is implied in all agreements, including agreements to lend money, and acts as a limitation on the otherwise unambiguous con-

310. *Id.* at 658.
311. *Id.*
312. An action for negligent breach of contract as a result of reliance damages may be asserted as a claim of negligent misrepresentation. The difference between an action for negligent breach of contract and negligent misrepresentation as discussed above, *see supra* notes 274-285 and accompanying text, is the source of the duty. In the former case, the duty arises from the contractual relationship. In the latter, the duty arises because of some special relationship.

There is no conceptual reason that an action for negligent breach of contract cannot be based on the breach of an unwritten provision of a loan agreement. Therefore, it can be argued that the negligent breach of the implied covenant of good faith and fair dealing should be actionable in tort, notwithstanding the apparent absence of an independent tort of breach of the duty of good faith and fair dealing.

tractual or statutory rights of a lender.

There are few commercial borrowers that do not have existing or prospective contracts with third parties. Accordingly, any action by a lender to foreclose will invariably interfere with such rights. If that interference is improper for any reason, such as the breach of a contract with the borrower, an action for intentional interference will exist. Because existing or prospective contractual rights are pervasive in the commercial world, there is almost inevitably a potential claim for intentional interference in a lender liability suit.

Although the scope of conduct actionable as negligent misrepresentation is narrow, it encompasses several fairly common types of activities. For example, errors in loan documents and documentation, if prepared by the lender, may qualify as negligent misrepresentations. It is difficult for a lender to assert that it does not have a duty to prepare and maintain accurate records. If those inaccuracies are material, and are relied upon by the borrower, there may be a negligent misrepresentation.

Negligent advising, as negligent misrepresentation, depends on the existence of a special relationship between the borrower and the seller. A duty to disclose information or to give advice is most likely to exist because the lender has assumed that duty, either expressly or impliedly. It is difficult, if not impossible, for a lender not to offer financial or business advice, particularly when a borrower starts to have financial problems. There may be no other way for the lender to try to protect its investment. The lender thus faces the choice of offering advice, and assuming the potential liability for rendering unsound advice, or standing by and watching the business and the lender's money go down the drain.

VI. DAMAGES

Contract damages and tort damages vary. That variance makes the borrower's decision of whether to proceed in contract or in tort a very important one.

A. *Contract Damages*

The general rule for contract damages is that the plaintiff may recover "reasonably foreseeable damages that directly resulted from the breach - that is, such an amount as would place him in the condition he would have been in if the other party had adequately performed the contract."[313] The nonbreaching party has the obligation, of

313. Wyoming Civil Pattern Jury Instructions 15.02; *see also* Robert W. Anderson Housewrecking & Excavating, Inc. v. Board of Trustees, 681 P.2d 1326, 1333 (Wyo. 1984).

course, to mitigate damages.[314] Damages for the breach of a contract to lend money are, in most cases, limited to the additional costs incurred by the borrower in obtaining a similar loan from another lender.[315] There is an important exception.

Where a lender "has reason to foresee" that the borrower will be unable to obtain alternative financing, the lender may be liable for lost opportunity costs, loss of security, or postponement of a profitable project caused by the breach of an agreement to lend money.[316] The exception will apply in many lender liability cases since a lender's decision not to advance funds is often based on a determination that the borrower is in precarious financial condition. The lender knows very well that the borrower is a poor financial risk and will be unable to obtain alternative financing. Therefore, the exception to the general limit on damages will often apply, assuming an enforceable contract. In addition, contract damages may include lost profits[317] and loss of the use of property, provided such loss was foreseeable.[318]

Contract damages do not end with recovery for pecuniary loss. Damages for "emotional distress" may also be recoverable.[319] Emotional distress damages may be recovered in a contract action if the breach also caused bodily harm,[320] if the contract is of such a kind that severe emotional disturbance was a "particularly likely" result of a breach,[321] or if the breach is accompanied by willful and wanton conduct.[322] "Bodily harm" means "any impairment of the physical condition."[323] Emotional disturbance is mental suffering or emotional distress, including fear, anxiety or humiliation.[324]

Recovery for emotional distress resulting from the breach of a contract which causes bankruptcy or "sudden impoverishment" of the borrower is not compensable unless the lender knew such distress to be a "particularly likely risk" of the breach.[325] It is not difficult to argue, however, that emotional distress is a particularly likely risk of terminating financing for a sole proprietorship or family business, es-

314. Wyoming Civil Pattern Jury Instruction 15.02.

315. RESTATEMENT (SECOND) OF CONTRACTS § 351 comment e (1979).

316. *Id.*; Order on Motion to Amend, *Puryear, supra* note 62, at 17.

317. RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1979) (court may exclude damages for lost profits if "justice so requires in order to avoid disproportionate compensation").

318. *Id.*

319. Emotional distress damages should not be confused with damages for intentional infliction of emotional distress. The former are parasitic to general contract damages. The latter are based on the independent tort of intentional infliction of emotional distress and may be recovered in the absence of any other claim.

320. RESTATEMENT (SECOND) OF CONTRACTS § 353 (1979).

321. *Id.*; Order on Motion to Amend, *Puryear, supra* note 62, at 18.

322. Smith v. Hoyer, 697 P.2d 761, 764 (Colo. Ct. App. 1984).

323. RESTATEMENT (SECOND) OF CONTRACTS § 353 (1979) (requirement of bodily harm to recover for emotional disturbance); RESTATEMENT (SECOND) OF TORTS § 905 comments b-e (1977) (definition and discussion of bodily harm).

324. RESTATEMENT (SECOND) OF TORTS § 905 comments b-e (1979).

325. RESTATEMENT (SECOND) OF CONTRACTS § 353 comment a (1977).

pecially where the person or family has devoted a lifetime to the business.

Similarly, emotional distress damages may be recovered for breach of the implied covenant of good faith and fair dealing.[326] In the absence of physical injuries, recovery is limited to severe emotional distress which is "substantial or enduring as distinguished from trivial or transitory."[327]

The Wyoming Supreme Court has not considered the recovery of emotional distress damages as an element of contract damages. Such a result does not seem unlikely, however, since the court has often adopted the views of the Restatements,[328] and Judge Brimmer[329] has permitted the issue of emotional distress damages arising out of breach of contract and breach of the implied covenant of good faith and fair dealing to go to the jury.[330]

The recovery of punitive damages in a contract action is difficult. Such damages are recoverable only if there was fraud in the inducement of the contract.[331] Punitive damages are not available for an unjustified breach of contract.[332] In addition, a lender that acts in good faith under the advice of counsel is not subject to punitive damages.[333] Since most contract actions only involve a breach of the contract or breach of the implied covenant of good faith and fair dealing, not fraudulent inducement, punitive damages will generally not be available.

B. *Tort Damages*

A successful plaintiff in a tort action not involving personal injury is entitled to recover such damages as will reasonably compensate him for all damages proximately caused by the defendant.[334] Tort damages need not be proved with absolute certainty; the evidence need only be sufficient to allow the jury to determine damages with "reasonable

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326. Order on Motion to Amend, *Puryear*, *supra* note 62, at 17-18; Commercial Cotton Co., Inc. v. United California Bank, 163 Cal. App. 3d 511, 517, 209 Cal. Rptr. 551, 555 (1985) (damages for emotional distress unaccompanied by physical injury may be recovered in a tort action for breach of the covenant of good faith and fair dealing).

327. *Commercial Cotton*, 163 Cal. App. 3d 517, 209 Cal. Rptr. at 555 (defining transitory as that which occurs only briefly).

328. *See, e.g., Leithead*, 721 P.2d at 1065-66 (adopting RESTATEMENT (SECOND) OF TORTS § 46 (1964) (intentional infliction of emotional distress)); *Mudge*, 748 P.2d at 715 (adopting RESTATEMENT (SECOND) OF TORTS § 766 (1977) (intentional interference with contract)); and *Martin*, 667 P.2d at 1162 (adopting RESTATEMENT (SECOND) OF TORTS § 766B (1977) (intentional interference with prospective contractual advantage)).

329. Chief Judge, United States District Court for the District of Wyoming.

330. Order on Motion to Amend, *Puryear*, *supra* note 62, at 17-18.

331. United States v. Redland, 695 P.2d 1031, 1039 (Wyo. 1985).

332. *Id.*

333. *Id.*

334. Atlas Const. Co. v. Slater, 746 P.2d 352, 359 (Wyo. 1987).

probability."[335] The major sources of tort damages in a lender liability case are likely to be loss of use of the collateral and lost profits.[336]

The loss of use of real or personal property is compensable.[337] The measure of damages is the amount sufficient to compensate the plaintiff for the loss of use of the property, but only for such time as is reasonably required to obtain replacement property.[338] The borrower must, in other words, mitigate damages.

Lost profits are recoverable if "proved by the evidence."[339] Lost profits must be proved with "reasonable probability."[340] The evidence required to prove lost profits with reasonable probability will depend on the facts of each case.[341] The court should require the plaintiff to furnish "the best proof available."[342] Lost profits will not be denied merely because a business is new, but the plaintiff must provide some evidentiary basis for the computation of probable lost profits.[343] Finally, the plaintiff is entitled only to the present value of future losses.[344]

The plaintiff in a lender liability case may also be allowed to recover for bodily harm or emotional distress which results from negligence[345] or negligent misrepresentation.[346] Bodily harm is "any impairment of the physical condition of the body, including illness or physical pain."[347] Bodily harm is compensable even in the absence of pecuniary loss.[348] Emotional distress need not be severe; it encom-

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335. In Hashimoto v. Marathon Pipe Line Co., 767 P.2d 158, 165 (Wyo. 1989), the court adopted "reasonable probability," rather than "reasonable certainty," as the standard for proving damages in a personal injury case. Although the court has expressed no opinion on the appropriate standard for a non-personal injury tort case, the rationale of the holding in *Hashimoto* appears to apply to all tort cases, not just personal injury cases.

336. The plaintiff, of course, must take reasonable steps to mitigate damages. The failure to do so will preclude recovery for those damages which could have been avoided. Wyoming Civil Pattern Jury Instruction 4.08.

337. Wyoming Civil Pattern Jury Instruction 5.02.

338. *Id.*

339. Wyoming Civil Pattern Jury Instruction 4.07.

340. In Wyoming Bancorporation v. Bonham, 563 P.2d 1382, 1385 (Wyo. 1977), *reh'g denied*, 566 P.2d 219 (1977), the court held that future losses must be proved with reasonable certainty. In *Hashimoto*, the court altered the standard in a personal injury case to reasonable probability. *Hashimoto*, 767 P.2d at 167. The court's rationale, that "none of us can see into the future," applies with equal force to proving future lost profits. *Id.*

341. *Bonham*, 563 P.2d at 1385.

342. *Id.*

343. Wyoming Civil Pattern Jury Instruction 4.07.

344. Wyoming Civil Pattern Jury Instruction 4.05.

345. RESTATEMENT (SECOND) OF TORTS § 905 (1977); Order on Motion to Amend, *Puryear*, *supra* note 62, at 17.

346. RESTATEMENT (SECOND) OF TORTS § 905 (1977); Order on Motion to Amend, *Puryear*, *supra* note 62, at 18; *see also* Little v. York County Earned Income Tax Bureau, 481 A.2d 1194, 1201-02 (Pa. Super. Ct. 1984).

347. RESTATEMENT (SECOND) OF TORTS § 905 comment b (1977).

348. *Id.*

passes fear, anxiety or humiliation.[349] The recovery of emotional distress damages as part of a negligence claim should not be confused with recovery of damages caused by the intentional infliction of emotional distress.[350]

Although the Wyoming Supreme Court has not expressly considered the recovery of emotional distress damages in a lender liability action based on negligence, the concept of recovery for emotional distress has long been recognized in Wyoming.[351] Such damages are permitted by the Restatement (Second) of Torts section 905, which the court has already adopted regarding emotional distress caused by false imprisonment.[352] Finally, Judge Brimmer has permitted a jury to consider emotional distress damages caused by a lender's negligence and negligent misrepresentation.[353]

Punitive damages are recoverable in tort for "willful and wanton conduct" by the defendant.[354] Willful and wanton conduct is an intentional act or omission done with "reckless disregard" of the consequences under such circumstances that the defendant knew or should have known would "in a high degree of probability" cause harm to the plaintiff.[355] The measure of punitive damages is left to the jury, which may consider the defendant's financial condition in fixing the amount of damages.[356] An award of punitive damages which "punishes unjustly or excessively" will not be upheld.[357]

Finally, the Internal Revenue Code permits the exclusion from gross income of "the amount of any damages received . . . on account of personal injuries or sickness."[358] Damages recovered for "tort or tort type" claims are excludable; damages based on breach of contract

349. *Id.* comments d, e.
350. *See supra* notes 227-239 and accompanying text.
351. *See, e.g.*, Consolidated Freightways v. Drake, 678 P.2d 874 (Wyo. 1984) (permitting recovery for work-related stress under Workers' Compensation); Cates v. Eddy, 669 P.2d 912 (Wyo. 1983) (allowing recovery for emotional distress caused by malicious prosecution); Waters v. Brand, 497 P.2d 875 (Wyo. 1972) (permitting the recovery for emotional distress caused by false imprisonment).
352. *Waters*, 497 P.2d at 877-78.
353. Order on Motion to Amend, *Puryear*, *supra* note 62, at 17.
354. *McCullough*, 789 P.2d at 860 n.11; Wyoming Civil Pattern Jury Instruction 4.06.
355. Wyoming Civil Pattern Jury Instruction 4.06.
356. *Id.*
357. Campen v. Stone, 635 P.2d 1121, 1123 (Wyo. 1981). A plaintiff seeking to recover punitive damages faced a bifurcated trial. The court held that the plaintiff must first make a prima facie case for punitive damages, which is submitted to the jury. If the jury decides that punitive damages should be awarded, the plaintiff may then present evidence of the defendant's financial status, after which the jury returns a separate verdict awarding punitive damages. *Id.* at 1132.

In *Meyers* (Civ. No. 10147), *supra* note 2, the jury was asked to consider the appropriateness of punitive damages. The jury determined that punitive damages should be awarded. Before evidence was presented on the defendant's financial condition, the case was settled.
358. 26 U.S.C. § 104(a)(2) (1989).

or injury to business or property are not.[359] "Personal injuries" include both physical and nonphysical injuries.[360] Accordingly, damages received as compensation for emotional distress or bodily injury may not be taxable. In addition, "personal injuries" has been defined to include injuries to one's personal or business reputation.[361] It is not clear whether punitive damages fall within the purview of section 104(a)(2).[362]

VII. DEFENSES

The defenses generally available in contract or tort actions apply in lender liability cases as well. Two defenses deserve particular attention.

A. *Default*

Most lender liability cases arise either as counterclaims in a foreclosure action or as independent actions filed after a loan has been accelerated and foreclosed. In either event, one of the first questions will be whether there was a default.

Default is not defined by law. Instead, whether there has been a default depends solely on the agreement between the parties. A typical security agreement defines default to include: failure to make timely loan payments; failure to timely pay taxes or assessments on the collateral; failure to keep the collateral adequately insured; failure to keep the collateral free from liens or other encumbrances; or the reasonable belief of the secured party that the prospect of payment of any indebtedness secured by the collateral or the performance of the security agreement is impaired.[363] The mortgage or security agreement invariably provides that the occurrence of any of the specified events of default entitles the lender to accelerate the note and declare the entire amount of the debt due and payable. The lender may then elect[364] and pursue its remedies.[365]

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359. Morgan, *Old Torts, New Torts and Taxes: The Still Uncertain Scope of Section 104(a)(2)*, 48 LA. L. REV. 875, 882 (1988). It has been be argued that damages resulting from actions such as tortious breach of contract are excludable from income. *Id.* at 881.

360. *Id.* at 877.

361. Threlkeld v. Commissioner, 87 T.C. 1294 (1986). There remains, however, significant disagreement about the applicability of section 104(a)(2) to damages recovered for damage to one's business reputation. *See, e.g.*, Morgan, *supra* note 359, at 901-03.

362. Morgan, *supra* note 359, at 918-30.

363. 19 AM JUR LEGAL FORMS 2D § 253:3411.

364. A lender often has more than one remedy, and is free to choose among them. *Foothill*, 623 P.2d at 755-56. If, however, the collateral is real property, the lender may not retain the property and seek a deficiency judgment. The lender is not entitled to a deficiency until after the property has been sold, thereby fixing the amount, if any, of the deficiency. Wagner v. Wyoming Production Credit Ass'n, 773 P.2d 927, 931 (Wyo. 1989).

If a borrower is in default and the loan agreement so provides, the lender is entitled to accelerate the loan and foreclose unless the lender has waived the default. In the absence of a waiver, the only questions which remain are whether the lender acted in good faith, in accordance with the loan agreement, and pursuant to applicable laws. If the default has been waived, the lender must cure the waiver before proceeding.[366]

B. Comparative Negligence

The Wyoming comparative negligence statute applies to any action "to recover damages for negligence resulting . . . in injury to person or property."[367] The statute's applicability to a negligence action is apparent. The question arises, however, of whether the plaintiff's conduct will reduce recovery in non-negligence cases or in an action based on both negligence and non-negligence claims.

Wyoming's comparative negligence statute has been narrowly construed. It "applies only to causes of action arising out of appellee's negligence."[368] The statute does not reduce the plaintiff's recovery where recovery is based on an intentional tort[369] or willful and wanton misconduct[370] since both involve conduct fundamentally different than negligent conduct. Furthermore, comparative negligence does not apply to claims based on strict liability or breach of warranty, whether express or implied.[371]

Since the statute specifically refers to actions for "negligence," comparative negligence principles do not apply to a recovery which is based on both negligence and non-negligence claims where there is a general verdict and the non-negligence claims will support the entire

365. If the collateral consists of real property, the lender may foreclose the mortgage pursuant to a judicial foreclosure or, if the mortgage so provides, foreclose by advertisement and sale. If the collateral consists of personal property, the lender's remedies are specified by the U.C.C. If the collateral is both real property and personal property, the lender may foreclose the personal property pursuant to the U.C.C. and proceed against the realty pursuant to the real estate mortgage foreclosure procedures, or foreclose both the personalty and realty pursuant to the real estate mortgage foreclosure procedures. WYO. STAT. § 34.1-9-501(d) (1990).

366. *See infra* note 376 and accompanying text.

367. WYO. STAT. § 1-1-109(a) (1988) (amended 1986). The statute diminishes the plaintiff's recovery in proportion to the plaintiff's percentage of negligence unless the plaintiff is more than fifty percent negligent, in which case the plaintiff recovers nothing. In addition, the 1986 amendments abolished joint and several liability. Therefore, each defendant is liable only for its percentage of negligence. *Id.* at (d).

368. Phillips v. Duro-Last Roofing, Inc., No. 90-161, slip op. at 5 (Wyo. Feb. 21, 1991).

369. Bell v. Mickelsen, 710 F.2d 611, 617 (10th Cir. 1983).

370. Danculovich v. Brown, 593 P.2d 187, 194 (Wyo. 1979).

371. *Phillips* (No. 90-161), *supra* note 368 at 3. *Contra* Sheldon v. Unit Rig & Equip. Co., 797 F.2d 883, 885-87 (10th Cir. 1986) (holding it is appropriate to apply the Wyoming comparative negligence statute to reduce damages awarded for breach of warranty).

verdict.[372] Accordingly, if both negligence and non-negligence claims are submitted to a jury, the lender ought to consider requesting a special verdict, requiring the jury to specify whether the damages are based on negligence or non-negligence claims. Otherwise, it will be difficult to argue for any reduction in damages because of the plaintiff's comparative negligence.

VIII. PREVENTION

Although the lender liability pendulum may now be swinging back toward lenders,[373] it is unlikely, and undesirable, that it should ever swing back to the days when a lender was a mere provider of money that owed only contractual duties to borrowers. Accordingly, lenders should increase, not decrease their vigilance. As in every area of law, a lender controls its susceptibility to liability through its practices and procedures. There are many common-sense steps which lenders can take to reduce, if not totally eliminate, potential liability.

A. *Written Agreements*

The era of doing business on a handshake is, and should be, gone. Many lender liability cases have their genesis in differences of perception caused by the absence of written agreements. Without appropriate writings, the borrower's and lender's understanding of their loan agreement will never be the same. The only questions are the degree of difference and the reasonableness of those understandings. To avoid creating misunderstandings which may lead to liability, the complete loan agreement, not simply the loan documents, should be in writing and signed by the parties. If there is an expectation that annual notes will be renewed provided certain criteria are met, there should be an agreement setting forth the understanding and specifying the criteria. If there is nothing more than a one-year note which will not be renewed, that, too, should be specified.

Loan officers have long had the practice of making notations of significant conversations or contacts with borrowers, which are subsequently offered into evidence to prove the parties' understanding.

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372. Order on Motion to Amend, *Puryear* at 3.

373. *See, e.g.*, Kham & Nates Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351 (7th Cir. 1990) (upholding the right of lenders to enforce the terms of a loan agreement even where the action will force the borrower out of business); Penthouse Int'l Ltd. v. Dominion Fed. Sav. & Loan, 855 F.2d 963 (2d Cir. 1988) (reversing a $128.7 million verdict against a Virginia savings and loan for anticipatory breach of an agreement to lend money to a hotel-casino project); Kruse v. Bank of America, 248 Cal. Rptr. 217, 235, 202 Cal. App. 3d 38, 67, *reh'g denied, review denied, cert. denied*, 109 S. Ct. 870 (1988) (reversing a jury verdict of $47 million in compensatory and punitive damages).

The news for lenders is not, however, all good. *See, e.g.*, THE NAT'L L.J., March 18, 1991, at 3, col. 1, at 32, col. 4 (jury verdict of $41.8 million compensatory damages and $23.6 million punitive damages in favor of real estate developer and against Mellon Bank for fraud).

Often, however, the loan officer's entries are not shown to the borrower and may be self-serving. A lender has everything to gain, and nothing to lose, by showing such notations to a borrower and obtaining the borrower's concurrence and a signature so indicating. Similarly, a lender has everything to lose by not disclosing such notations.

B. *Course of Dealing*

The course of dealing between the parties is crucial. While the Wyoming Supreme Court has, thus far, upheld the exclusion of evidence of the parties' conduct where the documents are unambiguous, it is a simple matter for a court to find that the written agreement is ambiguous or incomplete, thereby permitting the introduction of evidence of course of conduct. Just as the Wyoming Supreme Court has upheld trial courts' discretion to exclude such evidence, it is likely to uphold their discretion to receive such evidence. A lender is ill-advised to bank on the continued exclusion of evidence of course of dealing in the face of unambiguous documents.

Lenders ought not to be permitted to hide behind written loan documents when the parties' reasonable understanding, based on their course of conduct, is contradictory. While commercial lenders do, in fact, generally write operational loans on an annual basis, there may well be a long-term relationship between the borrower and lender which gives rise to a reasonable expectation by the borrower of continued financing. Evidence of conduct which modifies a written agreement has been permitted in contract disputes;[374] it ought to be admissible in lender liability cases.

This is not to suggest that a lender cannot terminate a long-term relationship with a borrower. It may. Where that is going to happen, however, each party must have a clear understanding of the other's intentions, and the borrower must have a reasonable opportunity to obtain alternative financing. Therefore, if only to protect itself, a lender should provide reasonable notice of intent not to continue financing.

C. *Accuracy*

In addition to the written loan agreement, lenders maintain voluminous records on each loan. Errors in loan documentation are a gold mine for plaintiffs' attorneys, particularly when the borrower is not financially sophisticated and is relying on a lender's presumed expertise to prepare loan documentation. Such errors are evidence of negligence and will destroy the favorable image that jurors may have of a

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374. *See, e.g.*, Huang Int'l, Inc. v. Foose Constr. Co., 734 P.2d 975, 978 (Wyo. 1987) (permitting the introduction of evidence that the parties to a written contract had "habitually" disregarded its provisions, thereby resulting in a waiver of certain provisions).

lender, particularly a local lender, as a competent, secure repository of their life savings.

Lenders must also carefully identify and bind the borrower, as well as any guarantors. Many small businesses are incorporated, meaning that the borrower is the corporation, not the individual who acts on behalf of the entity. That individual may be an officer, director and the sole shareholder of the corporation. Nevertheless, the corporation, not the individual, is the borrower. While the loan to the corporation may be contingent on a personal guaranty of the corporate obligation by the individual(s) that make up the corporation, the lender must carefully document the identity of the borrower, the individual acting on behalf of the borrower, that such individual is authorized to bind the corporation,[375] and that the loan is guaranteed by certain individuals in their individual capacities, not in their capacities as principals of the corporation. Having an individual sign a corporate obligation when he or she is not authorized to do so may relieve the corporation of liability, as will having that person sign in his individual capacity. Similarly, a corporate officer or director who signs a promissory note in his official capacity is not individually liable for that obligation unless he also executes a personal guaranty. All loan documentation, including security agreements, mortgages, workout agreements and promissory notes, must be carefully drafted to accurately reflect which entity or individual is liable for what and in which capacity. Furthermore, the collateral securing the loan must be accurately described and the security instruments filed promptly and properly to preserve the lender's relative priority with respect to other lienors.

D. *Reasonable Expectations*

Lenders must be aware of how they hold themselves out to the public. A lender which advertises itself as an expert in some area of lending is likely to be, and ought to be, held to the standard of the expert it purports to be. If a lender does not possess expertise or does not intend to be held to an expert standard, it must take care not to create expectations of expertise on which borrowers may reasonably rely. Similarly, a lender may advertise that it will stick with borrowers through good times and bad, creating the perception that it will not terminate financing when the borrower has financial difficulties. That perception may result in reasonable reliance by a borrower, and liability for the lender.

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375. A lender should not enter into a loan agreement with a corporation until the lender has received a certified copy of a corporate authorization to borrow which identifies the individual(s) authorized to borrow money on behalf of the corporation. There is no other method for a lender to ensure that the individual who purports to have authority to borrow actually has such authority.

E. Borrower's Sophistication

Lenders must be aware of and take into consideration each borrower's financial sophistication. It is only good business not to lend money to a borrower without knowing enough about that borrower to form an opinion about his or her relative financial sophistication. Having acquired that information, however, the lender must adjust its conduct accordingly.

A lender which decides to extend credit to a financially unsophisticated borrower should know from the beginning that it may have to offer advice or become involved in the borrower's business simply to safeguard its investment. A well-timed piece of advice may save the business—and the loan. By offering advice, however, the lender assumes the obligation to exercise reasonable care in rendering advice. The failure to exercise such care may lead to liability.

A lender ought to encourage all borrowers to be represented by counsel or other appropriate professionals. A lender ought to consider not becoming involved with unsophisticated borrowers when there is no one to look after the borrower's interests, unless the lender is prepared to enter into a special relationship with that borrower.

Finally, a lender which takes advantage of its attorneys or other professionals in its dealings with an unsophisticated borrower is opening wide the door to a later claim of overreaching. It is simple, and appealing, for a plaintiff's attorney to argue that the lender was so concerned about its legal rights that it consulted counsel, but cared so little for the rights of an unsophisticated borrower who placed his economic life in the bank's hands that it did not bother to advise the borrower to retain an attorney. Accordingly, the lender should advise the customer that he ought to obtain independent counsel. If the customer retains an attorney, the loan documentation should reflect that involvement. If the borrower elects to proceed without representation despite the lender's advice to retain counsel, and the lender decides to proceed with the loan, the documentation should prominently state that the lender has advised the borrower to retain counsel and that the borrower has elected to proceed without an attorney.

F. Full Disclosure

Disclosure is a two way street. Just as lenders expect, and deserve complete disclosure from their customers, lenders must fully disclose their intentions. A lender should have a clear, reasonable plan of how it expects each loan to be repaid. It may be that the lender anticipates that the loan will be renewed, rather than repaid, and has specific goals for the borrower to achieve as a prerequisite to continued financing. The borrower should be fully apprised in writing of those expectations. If the repayment or renewal plan is not made known to the borrower, he or she may have a totally different, and totally reasonable perception of the lender's expectations and intentions.

A lender's failure to fully disclose its intentions and expectations may not only mislead the borrower into believing that all is well when it is not, but later on force the lender to defend against the argument that the lender had a secret plan to protect its interests at the borrower's expense. Complete, written disclosure will eliminate misperceptions on both sides.

If the borrower is not an individual, the lender must be careful to deal with the appropriate individual(s). If the borrower is a corporation, the lender should communicate with the individual authorized by the corporation to do business with the lender. If the borrower is a partnership, the lender must not favor one partner over the other(s) or deal with one partner to the exclusion of the other(s). Similarly, if money is lent to more than one individual, the lender should keep all joint obligors informed of the lender's intentions and expectations.

G. Workout Plans

When a loan becomes a problem loan, the lender must have reasonable policies and procedures for developing a workout plan with the borrower. Such a plan will not lead to liability provided it is developed in a timely, responsible manner.

A workout plan should be in writing and ought to contain specific, achievable goals and objectives, developed in consultation with the borrower. The achievement or non-achievement of those goals and objectives should lead to predetermined results. The only feasible workout plan may be calling the loan when it is due and foreclosing the collateral. That need not lead to liability. If the plan contemplates the termination or nonrenewal of credit and the foreclosure of the collateral, the lender will not be liable provided the plan is developed in sufficient time to allow the borrower a reasonable opportunity to seek alternative financing.

H. Cure Potential Waiver of Default

Lender liability claims based on the lender's waiver of the borrower's default are common.[376] They are also easily prevented. Curing the waiver is a simple procedure which will eliminate the lender's potential liability for breaching a contract which has been modified by the waiver.

Where a lender has not insisted on strict compliance with the loan agreement from day one, the lender can cure any potential waiver by providing notice to the borrower that the borrower is in default, that the default must be cured within a reasonable, specified

376. *See supra* notes 139-142 and accompanying text.

time, that the failure to cure the default will result in acceleration and foreclosure, and that if the borrower cures the default, the lender will insist on strict compliance henceforth. If the borrower fails to cure the default, the lender may then proceed to accelerate the debt and foreclose at the expiration of the period specified in the notice. If the borrower does cure, the lender may not continue with the foreclosure, but may insist on strict compliance henceforth.

The cost, to the lender, of curing a waiver is minimal; the lender must wait until the end of the specified period before taking further action. The cost of failing to do so may be significant.

IX. CONCLUSION

Lender liability is here to stay. It has changed the way lenders do business. Lenders, as doctors and lawyers, must, to some degree, practice preventive banking, with one eye on the potential for a lender liability lawsuit. To some, that change has sounded the death knell of banking as a profession, and the rise of banking as a business. To others, the change is a badly needed realignment of the respective economic clout of borrowers and lenders. The truth lies somewhere in between. Lenders should be aware of the long-term ramifications of their actions. If those actions may lead to a lender liability suit, the lender ought to adjust its conduct and practices accordingly, both for its benefit and that of its borrowers.

Attorneys that represent borrowers now have at their disposal an arsenal of powerful legal theories and precedents to take into battle. Yet lenders in Wyoming should find solace in the Wyoming Supreme Court's lender liability decisions. Those decisions do not provide a reason for a well-advised lender to fear making loans. There is ample protection for lenders that make loans prudently and pursue their remedies reasonably. Only those lenders that do not act prudently and reasonably need to worry about lender liability.