https://www.nhregister.com/business/article/Market-Matters-Lender-liability-in-the-time-15303310.php

New Haven Register

https://www.ctpost.com/business/article/Market-Matters-Lender-liability-in-the-time-15303310.php

CONNECTICUT POST

https://www.thehour.com/business/article/Market-Matters-Lender-liability-in-the-time-15303310.php

The Hour

https://www.stamfordadvocate.com/business/article/Market-Matters-Lender-liability-in-the-time-15303310.php

sa stamford advocate

https://www.greenwichtime.com/business/article/Market-Matters-Lender-liability-in-the-time-15303310.php

GREENWICH TIME

https://www.newstimes.com/business/article/Market-Matters-Lender-liability-in-the-time-15303310.php

newstimes.com

https://www.middletownpress.com/business/article/Market-Matters-Lender-liability-in-the-time-15303310.php

THE MIDDLETOWN PRESS

https://www.registercitizen.com/business/article/Market-Matters-Lender-liability-in-the-time-15303310.php

THE REGISTER CITIZEN

Market Matters: Lender liability in the time COVID-19

By David A. Slossberg
Published on the Internet Friday, May 29 and in print on My 31, 2020

Photo: Contributed Photo; David A. Slossberg

In times of economic stress, as we now are experiencing during the COVID-19 pandemic, relationships between borrowers and lenders are put to the test. Many businesses have had to close their doors. Others are experiencing a sharp decline in revenue due to reduced demand. These hardships directly affect the ability of businesses to pay their mortgages, construction loans and lines of credit in a timely fashion.

History tells us that in times of financial crisis lenders seek to control their risks, which may lead to more aggressive enforcement of loan provisions through notices of default or foreclosure litigation. Lenders also may seek to extract concessions in exchange for delaying enforcement through the negotiation of forbearance agreements. While lenders typically hold most of the cards in the relationship, the law of lender liability provides certain remedies when lenders overreach, breach their contractual obligations or otherwise do not deal honestly or in good faith with their borrowers.

Lender liability generally refers to a broad range of remedies available to borrowers arising in contract, tort, or statute. These remedies can be used offensively by borrowers to recover damages flowing from a lender's improper conduct, or defensively in response to enforcement litigation, such as commercial foreclosure actions. In foreclosure actions, any defense must relate to the making, validity, or enforcement of the note. While there are circumstances when a lender's simple breach of its contractual obligations precludes enforcement of a note or otherwise warrants damages, most of the lender liability cases arise from circumstances in which the lender takes unfair advantage of the power it has over the borrower, or otherwise engages in dishonest conduct to the borrower's detriment.

An example: When negotiating for forbearance, lenders may make promises that they subsequently don't keep. In exchange for such promises, a borrower may have agreed to pay down a portion of the principal of the loan, or to otherwise cede greater control over its business operations. Such conduct can give rise to a legal defense known as equitable estoppel.
When coercion is used to force a borrower into accepting unfavorable terms because of the inequality of bargaining power, leaving little choice but to acquiesce to the lender's demands, the borrower may be able to assert a defense of economic duress, precluding enforcement of the loan agreement.

Of course, a lender's fraud or misrepresentation is ripe for the bringing of a lender liability claim. A borrower may be able to recover damages where a lender makes a false statement of fact that was untrue and known to be untrue, which was made to induce and did in fact induce reliance, to the borrower's injury. This type of deceptive conduct may also give rise to claims under the Connecticut Unfair Trade Practices Act (CUTPA), which would make possible the recovery of attorneys' fees and punitive damages. CUTPA also may cover a broader array of claims. For example, where a lender's conduct violates a regulatory statute governing its underwriting or enforcement practices, this may constitute an actionable violation of public policy under CUTPA.

One issue that will be playing out over the coming months and years is the interaction between lender liability precedent and the forbearance provisions of the recently enacted CARES Act, which, due to the pandemic, offers borrowers the opportunity to delay payments for up to 180 days on federally-backed mortgages. During the forbearance period, lenders cannot assess fees, penalties or interest for the delay in payments. Congress and the courts will be sorting out whether borrowers have a private right of action for violations of the Act, or will otherwise be able to avail themselves of established lender liability remedies under common law and statute.

While the relationship between borrowers and lenders will certainly be challenged during the pandemic and its aftermath, just as in other difficult economic times, the law of lender liability will more prominently serve to balance the rights of the parties.

Attorney David A. Slossberg leads the business litigation practice at Hurwitz, Sagarin, Slossberg &Knuff. He is an editor of the definitive treatise on unfair trade practices in Connecticut. He can be reached at dslossberg@hssklaw.com.