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Lawyer Up Before Signing That Loan Commitment by Anthony J. Vizzoni, Esq.

Livingston, N.J., May 2014 - It is not uncommon for a commercial borrower to quickly sign a loan commitment presented by a lender, especially when the borrower may feel that the business terms are favorable or when expiration of the loan commitment is fast approaching. As a result, counsel for the borrower typically sees the loan commitment for the first time after execution, as the parties prepare to move towards closing of the financing.

In over twenty years of representing commercial borrowers, only a handful of my new clients thought to engage me to review a loan commitment prior to acceptance. Although my regular clients now make it a practice of providing me with term sheets and loan commitments before the commitments are indeed accepted, most new clients come to me with a signed loan commitment only when it's time to close the loan transaction.

With an accepted loan commitment in hand, the focus of the client and the lender is to close the financing and negotiate the operative loan and closing documents. With a final and accepted loan commitment, lender's counsel often resists many comments and changes to the proposed loan documents and commonly (and rightfully) points out that certain changes to the documents cannot be made because "*that's what the loan commitment says and the borrower already agreed to it.*" [1] This puts the borrower, and the borrower's counsel, at a clear disadvantage.

This disadvantage can be avoided by seeking advice of counsel early and prior to acceptance of the loan commitment. The costs of such review may be significantly offset by future gains in the financing terms and by avoiding substantial future negotiations and changes to loan documents. Gains can be achieved on behalf of the borrower in several forms. Some examples through which borrower's counsel may achieve significant gains for the client include the following:

- Consideration of loan-to-value and debt service coverage ratios or other financial conditions and the effect of changes in such conditions, which may at a future point, severely limit the borrower's rights in connection with any changes to such financial conditions.

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[1] Although material terms of the loan commitment may not necessarily be revised after approval by the lender's board or other lender officials, the borrower's loan officer may have discretion to approve changes that do not affect the basic loan terms, or may even go back informally to obtain approval on items that the borrower is requesting in order to accept the loan commitment. This will never happen, however, if the requested changes are not actually requested by the borrower.

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Lawyer Up *continued…*

- Minimizing personal guarantees based on factors such as ownership interests in the borrowing entity, environmental conditions, or malfeasance on the part of lender's employees.
- Minimizing the impact of engineering or environmental studies that the lender may wish to undertake, especially regarding hiring professionals that may have regulatory reporting requirements as part of their licensing requirements.
- Minimizing insurance coverage requirements that may be overbearing or not applicable to the financing in question.
- Addressing overly burdensome closing requirements that may be difficult or even impossible to meet.
- Dealing with building compliance or zoning issues as a condition to closing.
- Avoiding cross default provisions with other debt, especially when ownership interests in the borrower and other entities may differ.
- Consideration of consequences of financing as to future sale of the property, such as addition of debt assumability provisions, especially if the debt provides for very favorable terms.
- Recognizing transfers to family members for estate purposes or other purposes without such transfers triggering default provisions.

Several lenders also provide term sheets, which describe the terms of financing that a lender may have in mind prior to obtaining formal lender approval and issuing a loan commitment. Term sheets provide an excellent opportunity to negotiate terms as the term sheet is issued prior to the lender's official approving body signing off on the loan, thus providing a window of opportunity to get the borrower's counsel's comments in front of the approving body and ultimately in the final loan commitment.

In sum, it is never too early to engage counsel when pursuing commercial debt financing. With the benefit of counsel such as Becker Meisel LLC, the borrower should be able to achieve solid gains in negotiating favorable loan terms that can help avoid potentially disastrous consequences for the borrower.

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