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**Lender Liability: Yes, That's Still a Thing**

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## I. General Overview of Lender Liability

### A. What is "Lender Liability"?

"Lender liability" is an umbrella term used to describe various causes of action borrowers may assert to impose liability (or a remedy) against lenders who overstep their boundaries in enforcing a loan. It traditionally encompasses contractual and tort-based theories of liability, as well as bankruptcy-based theories, such as violation of the automatic stay and equitable subordination. Although lender liability claims have historically been difficult to sustain, the most commonly asserted causes of action are outlined below.

#### 1. Breach of Contract

Under Texas law, the essential elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 892 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

It is clear that a credit agreement, or a loan agreement, is simply a contract, and can be breached by a lender. See *Credit Suisse AG v. Claymore Holdings, LLC*, 610 S.W.3d 808, 818 (Tex. 2020).

#### 2. Duress

In *Housing Authority of City of Dallas v. Hubbell*, 325 S.W.2d 880, 902 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.), the court stated:

Duress is a tort. It often arises in connection with breach of contract, but it is nevertheless a tort, and it is not necessary that there should have been privity of contract between the parties as a prerequisite for such a tort action. One who sustains damage as a result of being subjected to duress may sue as plaintiff against the wrongdoer. 'Economic coercion', the basis of [the] cause of action, is generally considered a form of duress.

Duress can be predicated upon the acts and conduct of the lenders and the ramifications carried by their threats. See *Sanders v. Republic Nat'l Bank of Dallas*, 389 S.W.2d 551, 554 (Tex. Civ. App.—Tyler 1965, no writ).

"It has been held that threatening to do that which a party has a legal right to do cannot form the basis of a claim of duress by business compulsion. The vice arises only when he employs extortive measures, or when, lacking good faith, he makes improper demands." *State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W.2d 661, 684 (Tex. Ct. App. 1984, writ dismiss. by agr.) (also citing elements of duress); see also *First Texas Savings Association of Dallas v. Dicker Center, Inc.*, 631 S.W.2d 179, 185 (Tex. App.—Tyler 1982, no writ), and cases cited therein. In *First Texas*, the court stated:

It seems to be a settled principle of law that economic duress may be claimed only when the party against whom it is claimed was responsible for claimant's financial distress. . . . A charge of economic duress or business compulsion must be based on the acts or conduct of the opposite party and not merely on the necessities of the purported victim, or in his fear of what a third person might do[.]

*Id.* (citing 17 C.J.S. § 177 (1963) (internal quotation marks omitted).

### 3. Fraud

To establish a claim for fraud, the plaintiff must prove the following elements: (1) defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when defendant made the representation, it either knew the representation was false or positively asserted the representation recklessly and without knowledge of whether it was true; (5) defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff's injury. See *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011); *Italian Cowboy Partners v. Prudential Ins.*, 341 S.W.3d 323, 337 (Tex. 2011).

Further:

Texas case law also makes clear that a representation consists of **words or other conduct manifesting to another the existence of a fact**, including a state of mind. It may be made directly to the plaintiff or by a manifestation to other persons intended to reach the plaintiff. A misrepresentation is a representation which, under the circumstances, amounts to an assertion not in accordance with the facts.

*Bailey Tool & Mfg. Co. v. Republic Bus. Credit, LLC (In re Bailey Tool & Mfg. Co.)*, 2021 WL 6101847, at \*45 (Bankr. N.D. Tex. Dec. 23, 2021) (citing *Custom Leasing, Inc. v. Texas Bank & Trust Co. of Dallas*, 516 S.W.2d 138, 142-43 (Tex.1974)) (emphasis in original).

### 4. Breach of Fiduciary Duty

A viable breach of fiduciary duty claim requires: (1) a fiduciary relationship between the plaintiff and defendant; (2) a breach of the fiduciary duty to the plaintiff; and (3) injury to the plaintiff (or benefit to the defendant) as a result of the breach. *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied).

Fiduciary duties arise either from certain formal relationships that are recognized as fiduciary as a matter of law, or from the existence of an informal, "confidential" relationship between the parties. *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). The existence of a confidential or fiduciary relationship is ordinarily a question of fact, and the issue only becomes a question of law when it is one of no evidence. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). A party asserting breach of fiduciary duty must establish the existence of a confidential or similar relationship giving rise to a fiduciary duty. See *Bado*

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