

# **BUSINESS LAW BASICS AND** **LENDER LIABILITY**

**Presented by: Osburn & Associates, LLC**

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# Business Law Basics and Lender Liability

## I. What is Law?

That which is laid down, ordained or established. A rule or method according to which phenomena or actions coexist or follow one another.

### Black's Law Dictionary

A binding custom or practice of a community.

### Webster's Third New International Dictionary

## II. What is Ethics?

**Ethics:** A field of philosophy that examines motives and actions from the perspective of moral principles.

## III. Law versus Ethics

Is there a conflict between the two?

#### **IV. Business Law & Ethics:**

- a. The Importance of ethical practices in banking.**
- b. The nature and elements of ethical dilemmas.**
- c. Codes of conduct.**
- d. Regulations prohibiting unethical practices.**
- e. Appropriate actions to ethical situations.**

## **V. Theory of Utilitarianism:**

### **Utilitarianism Defined:**

- a. Idea that the moral worth of an action is determined solely by its contribution to overall utility- that is, its contribution to happiness or pleasure as summed among all people i.e. The moral worth of an action is determined by its outcome!**
  
- b. Utilitarianism is described by the phrase “the greatest good for the greatest number of people.”**

## **VI. Ethics in Western Civilization:**

**Greek philosophers (Plato and Aristotle), early Christian thought during the medieval period, and Modern European scholarship**

## **VII. Positive Laws vs. Natural Laws:**

- a. Natural Laws: Laws laid down by God to govern the behavior of man.**
  
- b. Positive Laws: Laws that are established by men.**

**VIII. Values: Things that are worthwhile or important to you.**

**Principles: Allow you to put your values into action. They guide the decisions and actions through which you live out your values.**

**IX. How do you know “Right” from “Wrong”?**

**What are your “core” values?**

**Who taught you your “core” values?**

**What are some of the principles that you live by? (At work, at home).**

## **X. Codes of Conduct:**

### **a. Conflicts of interest**

### **b. Business community relationships: Treatment of employees, customers, and vendors.**

**1. Drug use (What about “legal” use of marijuana?)**

**2. Racial or gender-bias jokes**

**3. Employee intimidation (including sexual harassment)**

### **c. Reaffirmation Statement (annual)**



## **XI. Negotiations and the Law:**

**a. Communications Process**

**b. Sender/Receiver- Static**

**c. Dealing in Fairness**

## **XII. The Judicial Process**

### **Stages of the Litigation Process**

- a. Pre-litigation concerns**
- b. Pleadings stage**
- c. Pretrial activities**
- d. Trial procedures**
- e. Post-judgment concerns**
- f. Appellate process**

## **XII. The Judicial Process (Continued):**

### **Judgment**

#### **a. Obtaining an Judgment**

#### **b. Perfecting a Judgment**

### **XIII. Alternatives to Litigation:**

**a. Arbitration**

**b. Mediation**

## **XIV. Contract Law (Promissory Note):**

### **Components:**

**a. Genuine mutual assent (Offer & Acceptance)**

**b. Legal contractual capacity**

**1. Minors**

**2. Drunken/drugged individuals**

**3. Insane persons**

**c. Consideration (of value) (20% rule!)**

**d. Must be legal (ex. marijuana)**

**e. Must be in writing (sale of land, guarantee other's debts, more than one year, over \$500)**

#### **XIV. Collections (How Hard Can You Push?):**

##### **Fair Debt Collections Practices Act: (Consumer Lending +Third Party Collection Agency)**

- a. Postcard**
- b. Represented by an attorney**
- c. Time: 8am-9pm**
- d. Place of Employment**
- e. Not communicate with other parties**
- f. Refuses to pay, cease to communicate**
- g. No harassment**

## **XIV. Collections (Continued):**

### **Repossession**

### **Foreclosure**

#### **1. Fee Simple Foreclosure**

#### **2. Judicial Foreclosure (Single Form of Action Rule)**

## **XVI. Other Business Law Issues**

### **Business Structure**

### **Entity**

### **Tax**

### **Legal**

**a. Sole Proprietor**

**b. Partnership**

**c. C Corporation**

**d. S Corporation**

**e. LLC**

**f. Other: Series LLC**



## **XVI. Other Business Law Issues (Continued):**

### **Tort**

#### **a. What is a tort?**

**Imposes duties on people to act in a reasonable manner toward others and to refrain from intentionally causing others to be injured.**

#### **b. Types of tort:**

**1. Intentional tort**

**2. Negligent tort**

**3. Strict liability in tort (defective products, causes injury, etc.)**

#### **c. Why tort reform?**

**1. Medical community**

**2. Construction defect litigation**

## **XVII. Lender Liability:**

### **Lender Liability Defined:**

**Lender's exposure to financial compensation claims relating directly or indirectly to actions taken by the lender. Lender liability is a complex topic and can include the following:**

- a. Conflicts of Interest**
- b. Misrepresentations**
- c. Inappropriate Control**
- d. Failure to Fund Commitment**
- e. Inappropriate Behavior by Lender**
- f. Etc.**

## **XVII. Lender Liability- Recent Industry:**

**Examples:**

**a. Lender has Tortiously Breached the Implied Covenant of Good Faith and Fair Dealing**

**In determining whether or not there has been a breach of the duty of good faith and fair dealing, the basic test is whether the lender's conduct frustrates the borrower's contractual expectations and whether the lender's conduct includes an element of unreasonableness or recklessness.**

**XVII. Lender Liability- Recent Industry Trends (Continued):**

- b. Intentionally Misrepresented that Borrower would be entitled to additional loan modifications or extensions before disengaging**

**Lender misleads the Borrower into believing their statements to be true even though the lender never intended to follow through with a real loan modification (versus a simple extension).**

## **XVII. Lender Liability- Recent Industry Trends (Continued):**

### **c. Borrower is entitled to Declaratory Relief under the Doctrines of Impossibility and Impracticability (Commercial Frustration, Supervening, Temporary, or Partial)**

**To establish impossibility or commercial impracticability, as grounds for excusing performance under a contract, a party must show:**

- (1) the unexpected occurrence of an intervening act**
- (2) the risk of the unexpected occurrence was not allocated by agreement or custom; and**
- (3) the occurrence made performance impractical, and unless the court finds these three requirements satisfied, the plea of impossibility must fail.**

## **XVII. Technical Aspects of Lender Liability:**

**a. Every word you say may be used against you in a court of law, in a deposition, etc.**

**b. Referrals vs. Endorsements**

**c. File Maintenance: Too much, too little!**

**d. Technical Abilities?**

**e. Memory: Fuzzy or Clear?**

## **XVIII. How to Avoid Expensive Bank Litigation**

## **XIX. Ethical Behavior and the Banker**