

WORKOUT LESSON #1: Demand a Release of Claims!



Eric Jensen

Foreclosing on commercial loans can be a dicey proposition these days, with banks often being greeted by lender-liability counterclaims alleging that borrowers and guarantors were fraudulently induced into executing loan documents and otherwise treated unfairly along the way by their lenders.

A recent, exhaustive ruling by the U.S. District Court in Louisville shows a potential way out of such quagmires. In a 58-page opinion issued this past July, Senior District Judge Charles R. Simpson III in *PNC v. Seminary Woods, LLC, et al.*, Case No. 3:13-cv-297, dismissed all but one of the borrower's and guarantors' numerous claims. In many respects, this result was made possible by the bank's inclusion of comprehensive release language in each of several amendments to the original loan documents.

Releases executed by sophisticated business entities and individuals in subsequent loan modification documents have the very real potential of blocking claims based on matters as simple as alleged breaches of contract and/or breaches of the duty of good faith and fair dealing, as well as more problematic claims based upon alleged fraudulent inducement, fraudulent omission, negligent misrepresentation, and ECOA violations.

In the case before Judge Simpson, the original loan was documented in April 2006, and as subsequent amendments/modifications to the original terms were agreed upon, the bank included boldfaced release language (drafted by Morgan & Pottinger) in the documentation. As pointed out by Judge Simpson early in his opinion, "[t]he contracting parties...clearly acknowledged and affirmed for the third time in July of 2010 their respective obligations under the note and guaranties, and fully released any and all claims... in connection with the financial transactions relating to the project [up to that point]."



Importantly, Judge Simpson also concluded that comprehensive release language in loan amendments was sufficient to find that several guarantors had waived claims under the Equal Credit Opportunity Act and Regulation B. In those instances, the bank was alleged to have required spouses of guarantors to sign separate guaranties in 2006 without determining if the husbands' assets "alone sufficed to support their limited guaranty obligations." The Court also emphasized that the bank's waiver of loan defaults when it negotiated modifications in 2009 and 2010 was sufficient consideration for the all-encompassing release of any ECOA/Reg B claim flowing from original execution of guaranties in 2006.

Negotiating a comprehensive release in amendment/modification documentation – as a quid pro quo for granting a borrower additional time and/or means to meet its obligations – obviously cannot prevent the filing of a vexatious counterclaim in a bank initiated foreclosure action, but doing so is nevertheless highly advisable because the presence of release language can only help any effort mounted to obtain summary dismissal of such a counterclaim.

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Awards & Recognitions



Morgan & Pottinger
ATTORNEYS

M&P received a **Metro Tier 1** ranking in the 2016 Edition of *U.S. News – Best Lawyers “Best Law Firms”* for Litigation-Banking & Finance in Louisville.



John McGarvey

Best Lawyers in America® recently named **John McGarvey** the “**Lawyer of the Year**” for Banking and Finance Law in Louisville. Only one lawyer per practice area is honored in each community. McGarvey was also selected by his peers for inclusion in the 22nd Edition of *Best Lawyers in America*® in the practice areas of: Banking and Finance Law and Litigation – Banking and Finance.



Scott Rickman

Scott Rickman was also selected by his peers for inclusion in the 22nd Edition of *Best Lawyers in America*® in the practice areas of: Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Mortgage Banking Foreclosure Law.

Several of the firm’s attorneys have been named **2015-2016 Kentucky Super Lawyers**®, recognizing excellence in several practice areas. The following M&P attorneys were recognized:



Eric Jensen –
Business Litigation



John McGarvey –
Banking



Thurman Senn –
Business Litigation



Melinda Sunderland –
Banking



Scott White –
General Litigation

Six of the firm’s attorneys have been named “**Kentucky Rising Stars**” by **Super Lawyers**® for 2015-2016. They are:



Thomas Coffey –
Civil Litigation:
Plaintiff



Branden Gross –
Real Estate



Taylor Hamilton –
Real Estate



Morgan McGarvey –
Business Litigation



Bradley Salyer –
Bankruptcy: Business



Tim Schenk –
Banking

FirmNews

Morgan & Pottinger was recently a sponsor of the March of Dimes Signature Chefs Auction in Louisville, Ky. The event took place at the Marriott Louisville Downtown and featured an evening of fabulous food and entertainment. More than 500 guests were treated to an incredible sampling of gourmet foods prepared by Louisville's finest chefs. Attendees also participated in a live auction of dining packages and a silent auction of 150+ spectacular items.



M&P is Pleased to Welcome Benjamin Crittenden and Laura Crittenden Tipton



Ben Crittenden

Benjamin Crittenden has joined the firm as a Member. Ben received his B.A. in History from Transylvania University in 1999 and his J.D. from the University of Kentucky, College of Law in 2002. Prior to joining M&P, Ben clerked for Chief Judge Karl S. Forester of the U.S. District Court for the Eastern District of Kentucky and later worked in the government and regulatory affairs practice group of one of Kentucky's largest law firms. Ben's areas of practice include commercial litigation, administrative law, government and regulatory litigation, appellate law and energy and utilities law. Ben works in M&P's Lexington office and can be reached at rbc@morganandpottinger.com.



Laura Crittenden
Tipton

Laura Crittenden Tipton has joined the firm as an Associate. Laura received her B.A. in English from Transylvania University in 2004, graduating from the University of Kentucky College of Law in 2008. She clerked for two federal judges, United States District Judge Gregory F. Van Tatenhove and United States Magistrate Judge Robert E. Wier, before serving in her most recent position as Assistant Attorney General in the Kentucky Office of the Attorney General, practicing in the Civil and Environmental Division. Laura works in M&P's Lexington office and can be reached at lct@morganandpottinger.com.

McGarvey Appointed Division Chair for Uniform Law Commission and to Permanent Editorial Board for the UCC

After serving for two years as chair of the Uniform Law Commission Legislative Council, **John McGarvey** has been appointed to serve as Chair of Division E of the Uniform Law Commission. Among his new duties will be serving on the UCC Committee and the Permanent Editorial Board of the Uniform Commercial Code. John's practice concentrates on secured transactions, municipal law, the representation of banks and other lenders in litigation, and matters under the Uniform Commercial Code.

Branden Gross Sworn into the LFUCG Board of Adjustment

Branden Gross was sworn into the Lexington-Fayette Urban County Government Board of Adjustment on July 31, 2015. The Board performs a number of decision-making activities associated with land use and regulations in Lexington and Fayette County, Kentucky. Branden will hear cases and appeals regarding zoning variances, conditional use permits, and code and planning enforcement actions. His term ends July 9, 2019.

New Members

M&P has named **Branden Gross, Tom Volk** and **Morgan McGarvey** as Members of the firm.



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Morgan & Pottinger's Louisville office will be moving on January 25, 2016, to its new location:

Morgan & Pottinger, P.S.C.
401 South Fourth Street, Suite 1200
Louisville, KY 40202

Wishing you a happy and prosperous New Year!



If you would like to receive future editions of M&P InBrief electronically, please e-mail us at newsletter@morganandpottinger.com.

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