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Welcome to another issue of the *Commercial Lending Bulletin*, a newsletter published monthly by the Commercial Lending Group at Lerch, Early & Brewer as a service to our clients. Here, you will find articles written by our attorneys covering a variety of current legal issues as they affect lending law. We publish the *Bulletin* as part of our ongoing efforts to provide our clients with responsive service and practical advice when needed.

This newsletter is sent via email in HTML format. If you wish to print a copy of the newsletter, you may access a .pdf version by following the "Printer-Friendly version" link below.

We appreciate any feedback and invite you to contact us with any questions. If you do not want to receive any further newsletters from us, follow the link at the bottom of this email to be removed from our list of recipients.

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**In This Issue:****Forged Signatures on Multiple Payee Check Does Not Invalidate Legitimate Endorsement**

Banks must pay special attention to the form of checks with multiple payees. A Connecticut Court found that an ambiguously worded payee clause on a check could be properly endorsed in the alternative (listing several payees but requiring only one payee's endorsement for payment) by any of the listed payees and the forged signatures of some payees did not invalidate the sole legitimate endorsement.

**Contribution Is Assumed Between Guarantors**

Payment in full to a bank by a guarantor does not release co-guarantors of their liability to one another. A federal Court in Pennsylvania determined that a guarantor is entitled to contribution from a co-guarantor whether or not there was any agreement between them regarding their respective liabilities for the underlying debt.

**Lender's Damages Limited Due to Failure to Mitigate Damages**

A Federal Court in Arkansas determined that a floor plan lender was unable to collect its full damages because it did not assist the borrower in its refinance efforts and it failed to act in a timely manner.

**Did You Know?** Collaborative Law – A Different Way to Divorce

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## **Forged Signatures on Multiple Payee Check Does Not Invalidate Legitimate Endorsement**

**Banks must pay special attention to the form of checks with multiple payees. A Connecticut Court found that an ambiguously worded payee clause on a check could be properly endorsed in the alternative (listing several payees but requiring only one payee's endorsement for payment) by any of the listed payees and the forged signatures of some payees did not invalidate the sole legitimate endorsement.**



Joseph Walton was a student at West Feliciana High School when he sustained an injury while at school. Mr. Walton, together with his mother and attorney Trudy Avants, pursued a personal injury action against the school. The school's insurance carrier Coregis Insurance Company agreed to settle the claim for \$50,000. Under the settlement agreement, Coregis issued a check payable to "Trudy Avants Attorney for Minor Child Joseph Walton, Mother Delores Carpenter."

The check was endorsed by Avants and two unknown individuals who fraudulently endorsed the check on behalf of Walton and Carpenter. The check was deposited at Hibernia Bank and forwarded to Fleet National Bank for payment. Upon presentment, Fleet paid the check and charged the Coregis account. Coregis discovered the check was paid over forged endorsement and sued Fleet to recover its loss. The trial Court found in favor of Coregis and Fleet appealed.

On appeal, Coregis argued that the check was not properly payable because it was paid over the two forged signatures. Coregis further argued that these forgeries invalidated Avant's proper endorsement. Fleet argued that the check's payment provision was ambiguous and any one of the named payees could endorse it for payment. Fleet also stated that anomalous endorsements (endorsements made by parties who are not holders of the instrument) as defined by the UCC (Uniform Commercial Code) and did not destroy the negotiability of the check.

The Court stated that the first decision it must make is whether the check presented was payable in the alternative to one of several payees. If so, the valid endorsement by one of the payees would be sufficient to render the check payable. The Court reviewed the check to determine whether the payee clause was ambiguous as to whether it was jointly payable or payable in the alternative and found that due to the ambiguity, the check had to be treated as payable in the alternative. The Court found that the two forgeries fell within the UCC definition of anomalous endorsements. The Court found that neither forgery affected the negotiability of the check nor did they deprive Fleet of its authority to pay on the check. The Court reversed the trial court's decision and entered judgment in favor of Fleet.

Depository banks should review their procedures and make sure they have proper policies when multiple payee checks are presented. Bank employees must determine whether the checks are: (1) joint payee checks, which would include the word "and" between the individual parties and require each parties signature for payment or (2) alternative payee checks, which lists several payees but requires only one payee's endorsement for payment. Ambiguous statements regarding the payee may lead to liability if the court finds that a check was honored without the signature of one of the necessary parties.

The case above is cited as *Coregis Insurance Company v. Fleet National Bank*, 793 A.2d 254 (Conn. 2002).

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## **Contribution Is Assumed Between Guarantors**

**Payment in full to a bank by a guarantor does not release co-guarantors of their liability to one another. A federal Court in Pennsylvania determined that a guarantor is entitled to contribution from a co-guarantor whether or not there was any agreement between them regarding their respective liabilities for the underlying debt.**



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**Our Services**

Providing lenders with only the highest and most knowledgeable levels of lending counsel in all phases of commercial lending transactions.

Justin Korn and Emery Kertesz owned and operated General Video Corporation, which designed, manufactured and sold specialized audio and video equipment. In 1997, General Video took out a \$2 million secured credit line from Lafayette Ambassador Bank of Lehigh Valley, Pennsylvania. Korn and Kertesz, together with Kertesz’s wife, each personally guaranteed the indebtedness up to \$500,000. The line was modified in early 1998 to increase the line by \$250,000 and then increased again a month later up to a total of \$3 million. The parties again signed guaranty agreements for the first increase in 1998. In November, 1998, Korn and Kertesz signed a letter of indemnity in which General Video and Korn agreed to indemnify Kertesz for all amounts paid under the 1998 guaranty. In 2000, the line was extended to December 31 of that year, and Korn increased the limit of his guaranty up to \$800,000. Later, the bank declared the line in default and began pursuing its remedies.

In connection with work-out efforts in 2002, Korn paid the bank \$150,000, paid \$20,132.36 in real estate taxes and agreed not to contest the validity of his guaranty up to \$400,000. The parties reached a settlement in 2003 in which the bank agreed to consider the debt satisfied and release the guaranties after a sheriff’s sale of the collateral. In 2006, however, Korn filed suit against Kertesz for contribution for the amounts he paid in 2002, plus interest. Kertesz filed a motion for summary judgment, indicating that the 1998 indemnification agreement eliminated Kertesz’s obligation to reimburse Korn for sums paid.

The U.S. District Court for the District of Pennsylvania determined that under Pennsylvania law, general principles of equity require contribution among guarantors even if they have not agreed among themselves regarding indemnifications or contributions. The Court stated that the right to contribution is 1) implied, 2) arises when one payor has contributed more than his proportionate share of the debt, and 3) is limited to the proportionate share that the other should have paid.

Further, the Court disagreed with Kertesz that Korn’s “unilateral modification” of the loan discharged his liability, providing that in order for such discharge to be effective, 1) the discharged guarantor must have been a gratuitous surety, 2) the modification must have been made without the guarantor’s consent, and 3) the modification must have substantially increased the guarantor’s risk. Since the modification did not increase Kertesz’s risk, he was not discharged. The Court did, however, agree that Korn was not entitled to contribution for the real estate taxes he paid on behalf of General Video. The Court stated that the “right of contribution requires that the plaintiffs must have been legally liable to pay, and must have actually paid under compulsion and obligation, that for which both plaintiffs and defendant were equally liable.” A payment is only compulsory if there is a “clear legal duty to pay which might have been enforced by judgment and execution.” Here, neither Korn nor Kertesz had a legal duty to personally pay the taxes owed by General Video.

Guarantors should be mindful of their obligations to their co-guarantors in connection with their guaranty of a loan. Even though a bank may be paid in full by one guarantor, this does not relieve the other guarantor(s) of liability to the guarantor who paid the debt.

This case cited as *Korn v. Kertesz*, 2007 WL 3071625 (E.D.Pa.).

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**Lender’s Damages Limited Due to Failure to Mitigate Damages**

**A Federal Court in Arkansas determined that a floor plan lender was unable to collect its full damages because it failed to assist the borrower in its refinance efforts and did not act in a timely manner. McKay Motors obtained its floor plan financing from Hyundai Motor Finance Company in January, 2005. On July 19, 2006, Hyundai discovered that McKay failed to repay a portion of its debt whenever it sold a vehicle as required under the loan agreement, and sent a demand letter for immediate payment of \$228,246.00. On receipt of the demand letter, McKay informed Hyundai that it could not make the required payment because its assets were tied up in real estate financing with the Bank of Little Rock.**

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**Elder Law**

**Employment and Labor**

**Estate Planning**

McKay asked Hyundai for assistance in paying off an interim loan so that it could obtain an additional \$500,000 line of credit from the Bank. Hyundai refused, and in December, 2006, filed suit against John McKay and McKay Motors for \$1,456,353.85, the full amount owing at that time. Eventually, McKay Motors was required to liquidate its inventory and personal property to pay off the Hyundai loan. After liquidation, a deficiency of \$819,156.81 remained. At trial, the jury awarded Hyundai \$276,000 for its damages, which is the originally requested default balance with interest. Hyundai appealed and asked the Court to override the jury's determination of damages so that it could collect the full \$819,156.81.

A court is allowed to enter judgment notwithstanding the jury verdict when "the evidence, viewed in the light most favorable to the verdict, was such that no reasonable juror could have returned" the awarded verdict. Here, Hyundai's credit manager testified that they could have required the borrower to repay the amounts due for the sale of vehicles to date (the original \$228,246.00 demanded) at any time, but that they delayed the demand until the bank real estate financing was closed. Further, the record revealed that McKay Motors could have paid the \$228,246.00 as of July 19, 2006 when the demand was first made, but that they fell deeply into debt when the bank real estate financing failed. The Court determined from the record that if Hyundai had helped McKay obtain further funding from the bank, as McKay had requested, or if Hyundai had demanded their past due balance in July, McKay Motors would have been able to pay off its outstanding debt. Accordingly, because Hyundai failed to act, the Court agreed that "a reasonable juror could have returned damages for an amount less than Hyundai demanded." As a result, the Court allowed the jury's verdict to stand.

This case is cited as *Hyundai Motor Finance Company v. McKay Motors I, LLC and John P. McKay, Jr.*, 2008 WL 4137983 (E.D.Ark.).

## Did You Know? Collaborative Law – A Different Way to Divorce



***From time to time, we provide information on subjects outside the commercial lending field that may be of interest.***

When people decide to leave a marriage, they have to decide how to handle the breakup – do they try to reach agreement themselves, see a mediator, or hire lawyers who may lead them to court, with escalating hostility and fees? Now an entirely different process is available to those who want to keep the relationship amicable but also want lawyers to help them, and the assistance of neutral experts on financial, tax, or child-related matters. This process is called collaborative law.

Available in D.C. and Maryland since 2004, collaborative divorce is a process where the parties and their lawyers sign a contract stating that: 1) they will not go to court, 2) both parties will provide all documents and fully disclose all property (called "transparency"), and 3) the team (lawyers, parties, and any neutrals as needed) will work together in group meetings, to find solutions that address the concerns of both parties and any children, rather than each party trying to get the most he or she can. Communication may be facilitated by divorce coaches, who keep both parties focused on the collaborative process. In team meetings the parties work together within the team to identify all issues, provide all needed information, and then brainstorm to find mutually-advantageous solutions. Children's needs are prioritized. As needed, neutral experts are consulted. Once consensus on all issues is reached, a final settlement agreement is signed, enabling the parties to then obtain an uncontested divorce.

For more information, see the firm's [Family Law](#) practice group page.

## We'd Like To Hear From You

We publish this newsletter as a service to our clients as a means to make them aware of certain aspects of the law. As always, we would like to hear feedback from our readers regarding the content of the newsletter. If there are items or topics you would like to see covered in future issues, or you have a

and Probate

Family Law

Health Care

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Real Estate  
Transactions

suggestion concerning the newsletter itself, please send them to Anne Core at [ascore@lerchearly.com](mailto:ascore@lerchearly.com), or via phone at 301-961-6096.

Additionally, a number of the Firm's other departments periodically issue highly informative newsletters on a variety of other subjects, including Real Estate, Community Associations, and Employment and Labor. If you would like to receive one or more of these newsletters, you may access them through our website, [www.lerchearly.com](http://www.lerchearly.com).

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