

**SYNDICATED LENDING BULLETIN**

*April 2004*

**CONTRACTUAL DISCLAIMERS OF AGENT BANK'S LIABILITY TOWARD PARTICIPANT BANKS IN SYNDICATED LOAN AGREEMENTS UPHeld IN US**

In a rare judicial interpretation of the agency provisions in a syndicated loan facility, a recent decision of the US District Court for the Southern District of New York (*UniCredito v. J.P. Morgan et al*, 2003) has upheld contractual disclaimers designed to protect administrative agents from liability due to misrepresentations by a borrower or any implied obligation to inform lenders of information with respect to the borrower's financial or business affairs.

Two lenders in a syndicate led by J.P. Morgan and Citibank claimed that they were defrauded by the administrative agents, alleging that these agent banks knew that the disclosures of the borrower, Enron Corporation, were materially misleading, and that lending banks would rely on such disclosures. The agent banks claimed that provisions of the syndicated loan facilities and related documentation freed them from any duty to inform the lenders of the financial condition of Enron. The court agreed, and dismissed the claims of these lenders. The syndicated loan facilities and related documentation considered by the court contained disclaimer provisions typical of such agreements in both the US and Canada. The provisions included: an acknowledgement that no fiduciary relationship is created between the agent bank and lender; a disclaimer by the agent bank for the accuracy of any statements, warranties or representations made by the borrower; an acknowledgement that each bank has made its own credit analysis and decision to enter the agreement, without reliance on the agent bank; and, an acknowledgement that the agent bank has no responsibility to provide any lender with credit or other information about the borrower. Furthermore, the borrower had separately agreed to provide financial statements and other information to lenders and each lender had a right to examine the borrower's books and records.

In finding that the disclaimer clauses precluded lending banks from pursuing a claim for damages, the court held that "in transactions between sophisticated financial institutions, no extra-contractual duty of disclosure exists" and, "no obligation can be implied that would be inconsistent with other terms of the contractual relationship". Although this is an unsettled area of the law in Canada, this case should have persuasive value in Canadian courts and the results are encouraging for Canadian administrative agents who have relied on documentation using similar disclaimer clauses.

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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