

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



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WAIT. WHAT? NC Business Court Throws A Wrench Into Settlement Discussions

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Contracts are just agreements, typically in writing. Contracts keep the business world humming along like a well-oiled machine. Unless one party seeks help, courts don't butt in. But, what about pending contracts or agreements awaiting further input or final approval? What about settlements reached, but not yet documented?

In the June 9, 2015 decision by Judge Gregory P. McGuire of the North Carolina Business Court, the court was faced with contentions by the obligors that a bank had acted in bad faith. Citing the 2014 NC Supreme Court *Dallaire* decision, the court acknowledged "ordinary borrower-lender transactions...do not typically give rise to fiduciary duties" and dismissed the bad faith and breach of fiduciary duty claims against the bank.

Then it happened. The court determined that although the bank had no fiduciary duty to the obligors, the bank may have acted in bad faith *during the settlement negotiations*

THIS IS NEW. THIS IS BIG.

For context, most business cases settle because it usually comes down to money and little else. Money gets paid; both sides walk away. Where settlements between lenders and borrowers include a *continuation* of the relationship, the settlements are more complicated. Restructured loans, for example, often contain different terms, additional collateral, or more obligors. Operating in a highly regulated industry, a bank's decisions are subject to audit. Some of this oversight is designed to ensure Joe Banker doesn't cut a slick deal with his good buddy and maybe get a new car on the side. Banks usually have an extensive approval process, required *before* a settlement is deemed reached. Some settlements may require committee approvals or even board approvals.

In this Business Court case, the settlement negotiations involved two loans, one for a million dollars and the other for over \$4 million. The loans had been extended several times, but the bank gave written notice that it did not intend to renew. At a meeting attended by counsel for both sides, settlement terms were discussed, and the bank agreed to not take action on the loans for 60 days. The bank's lawyer then sent the other lawyer draft forbearance agreements regarding the 60-day period. Typical terms: you

owe it, you release any claims, let's wait and see what happens with a pending case involving your other businesses. The obligors didn't sign the forbearance agreements, but for several months the parties discussed restructure terms. A proposal was made by the obligors, the bank required financial information, and then the bank sent a term sheet. The bank's terms contained standard language stating that any agreement was subject to further approval. The borrowers, through their lawyer, "countered" the bank's terms by removing the wife's name from the obligations and replacing the building permit requirement with their "best efforts" to obtain it. Pretty major changes. The bank chose to move on, selling the loans to an affiliated company. Here's what the NC Business Court said about the surviving bad faith claim against the bank:

*A jury could conclude that while the parties did not reach a final agreement on all of the material terms..., their words and conduct established **an agreement to continue negotiating** in an attempt to finalize the terms of the agreement and close on a restructure agreement before the end of 2012.*

*A jury also could find that **BB&T's failure to notify Defendants that the November 1, 2012 term sheet was its best and final offer** after months of negotiations, and **BB&T's decision to cease communications with Defendants after Defendants responded to the term sheet, were not "fair dealing" or "in good faith."***

Maybe the bank should have played the country song "What Part of 'No' Don't You Understand?" or The Madden Brothers' "We Are Done." Stay tuned. Perhaps the NC Supreme Court will restore the hum.

Find the case at the ncbusinesscourt.net under its Recent Opinions. You might find other aspects of it interesting. RREF BB Acquisitions, LLC v. MAS Props., LLC, Mark A. Saunders and Sibyl H. Saunders v. BB&T, 2015 NCBC 58.

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