

## PEASE MEANS NO PEACE FOR MARYLAND LENDERS

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A very recent decision of the Maryland Court of Appeals in the case of *Pease v. Wachovia SBA Lending, Inc.* may ignite a resurgence in lender-liability actions, which were thought to have been effectively shut down in 1989 by the Maryland Credit Agreement Act (“MCAA”). The MCAA bars the enforcement of an alleged promise to lend money or to modify a credit agreement unless there is a document signed by the lender setting forth the terms of the alleged promise.

In the *Pease* case, Wachovia Bank loaned money to a corporate borrower to purchase a plumbing company. The loan was personally guaranteed by the Peases. When the borrower defaulted, Wachovia confessed judgment against the Peases under their Guaranty. The Peases claimed that Wachovia misrepresented certain facts to them concerning Wachovia’s right to foreclose on the Peases’ residence and failed to timely disclose to the Peases certain negative information concerning the plumbing company that was available to the Bank. The Peases filed a Motion to Vacate the judgments on the grounds of negligence, fraud and breach of fiduciary duty. There was no document signed by the Bank that supported the Peases’ claims. The trial judge denied the Motion to Vacate, relying on an earlier decision of the Court of Special Appeals, *ST Systems Corporation v. Maryland National Bank (“ST Systems”)*, which held that, in a case involving an oral loan commitment, borrowers could not circumvent the effect of the MCAA by attempting to turn ordinary breach of contract claims into tort claims.

The Peases appealed the lower court’s decision. The Court of Appeals granted certiorari and decided two issues: (i) Does the MCAA bar the Peases from relying upon tort claims as the basis for their Motion to Vacate<sup>1</sup>; and (ii) does the MCAA bar the Peases from arguing that the loan agreement was void. Answering the first question in the negative, the Court held that the legislative intent

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<sup>1</sup> The Maryland Rules prohibit using a counterclaim as the basis for a motion to vacate, although if the motion to vacate is granted, a counterclaim may be filed.

behind the MCAA was to prevent borrowers from relying upon an oral agreement to enforce or modify a credit agreement. The statute: (a) was not intended to prevent a borrower from claiming that the lender committed a tort in connection with a credit agreement, as long as the borrower was not claiming that the tort prevented the lender from enforcing the credit agreement; (b) would not be construed to prevent a borrower from proving that it had sustained damages caused by the lender's tortious acts that can be used as a setoff against the amount claimed by the lender; but (c) can be relied upon by the lender to bar a borrower from alleging that the lender's tortious acts rendered the loan agreement void.

In a separate opinion, partially concurring and partially dissenting with the decision, a number of judges commented that attempting to have a loan agreement declared to be void does not violate the MCAA because it is not an attempt to enforce a loan agreement. It is simply an effort to use the common law principle that a contract that is fraudulently induced is voidable at the election of the defrauded party.

One of the more interesting aspects of the Court's decision in the Pease case, not addressed by any judge, is that although the Court rejected the Peases' contention that the loan was unenforceable, the same result could potentially be achieved by the Peases' claim of set-off. At trial, they are likely to argue that, if Wachovia had informed the Peases of the damaging information concerning the business, they would not have agreed to guaranty the loan. As a result, the Peases would claim that their damages from Wachovia's failure to disclose such material information are equal to the amount of the loan balance.

The most significant aspect of the Court's ruling is that it opens a door to challenging confessed judgments that the MCAA was thought to have closed. Borrowers and Guarantors will be able to allege that misrepresentations made by a loan officer, which caused them damages, result in a set-off claim. Once the confessed judgment is vacated, a counterclaim can then be filed, thereby opening the floodgates to a variety of legal actions that were thought to have been barred by the MCAA and, for attorneys of a certain age, it will be like the "early eighties once again."

An important practice pointer for lenders is that lender's counsel should respond to a Motion to Vacate by requesting the Court to rule that, even if the facts alleged by a borrower or guarantor present a meritorious defense, because the loan is still enforceable, the judgment should not be vacated, but rather "opened" to permit the defendant to present evidence of its damages, before the final entry of a judgment for a specific dollar amount. This procedure will at least provide the benefit of preventing a judgment subsequently entered against the same defendant(s) in favor of another judgment creditor from "leapfrogging" the lien priority of the lender's judgment that is being challenged, with respect to real estate owned by the borrower or guarantor.

If you have any questions about this case or any matter related to creditors' rights matters, please contact Lou Ebert at (410) 727-6600 or [lebert@rosenbergmartin.com](mailto:lebert@rosenbergmartin.com). In addition, if you require any assistance, please contact Lou or any of the other attorneys in Rosenberg | Martin | Greenberg's creditors' rights practice area and in our lending practice area:

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