Declaration of an Insecurity Default as an Opportunistic "Exploitation of Changing Economic Conditions": Toward a Pragmatic Framework for Analyzing a Lender's "Good Faith" in a Climate of Insecurity

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"Anyone can loan money; the secret is getting it back."[1]

I. Introduction

Your author could hear the despair and desperation in John's voice: "They froze my bank accounts -- my wife can't even go to the grocery store." I've known John, a Romanian immigrant, for over thirty-five years. Through hard work and frugal living, he and his wife Lidia accumulated enough money to purchase a couple of apartment buildings that he manages and maintains, that provide their primary source of income.

After reviewing the pleadings with which he was served, I determined that the privately-owned community bank that held the mortgage on one of his buildings had accelerated the mortgage note and confessed judgment on it -- not through a cumbersome and lengthy foreclosure, but by means of a simple and routine confession of judgment action.

Without demand or notice, the bank had obtained an ex-parte judgment and frozen John's personal bank accounts. The event of default alleged in the Complaint was not a monetary default, but rather was based solely and entirely upon the bank's alleged "insecurity." I knew that "insecurity" clauses are ubiquitous in commercial loan documents, but had never been called upon to defend an actual declaration of a default based on one. Surely what the bank had perpetrated, essentially destroying my clients' lives in the process, could not possibly be upheld by a court. I flashed back to what my Negotiable Instruments professor in law school used to say – "the bankers wrote the Uniform Commercial Code (UCC) – the bank always wins."[2]

John was current on the mortgage, had never missed a payment, and in recent months had been depleting his own personal retirement funds to make the mortgage payments. His loan officer had approached him out of the blue several months earlier, suggesting that he might be able to reduce John's interest rate and monthly payments by refinancing the loan. John dutifully turned over his personal tax returns, income and expense statements and rent rolls for the building, and authorized an appraisal of the property. But now John's building was a prototype for the "tanking" market in Chicago, reflective of a nationwide phenomenon. Several tenants had either been evicted or had abandoned the premises, and others were chronically delinquent; moreover, the plethora of foreclosures and distressed sales in the neighborhood had pushed property values way down.

Since 2006 – 2007, the economic landscape for people like John has continuously endured an unprecedented and

1. Solar Motors, Inc. v. First National Bank of Chadron, 4 Neb. App. 1, 12, 537 N.W. 2d 527 (Neb. App., 1995).

2. Bankers might well respond: "If only that were true!" *See, e.g.*, Alvin C. Harrell, Book Review and Commentary, *James Steven Rogers*, *The End of Negotiable Instruments*, 66 Consumer Fin. L.Q. Rep. 220, 238 - 42 (2012) ("The Bank Always Loses"). *See also*, *e.g.*, Emily Glazer & Katie Martin, *Big Banks Brace for Another Legal Hit*, Wall Str. J., Oct. 15, 2014, at A1.

perhaps unforseeable "perfect storm,"[3] including: a bursting of the housing bubble and the collapse of private mortgage finance; massive spikes in evictions, foreclosures and bankruptcies; bank failures and consolidations; frozen credit markets; increased unemployment; losses of millions of dollars in individuals' and businesses' net worth; and a substantial diminution in the value of collateral, both real and personal.[4] As a result, commercial mortgage lenders have begun to realize that their commercial borrowers may be heading down a path on which it will be more difficult or even impossible for the lender to recoup the borrowed funds. The myriad of adverse economic forces impacting the commercial lending relationship has been described as a "*climate of insecurity*."[5]

The current state of intense regulation of commercial and consumer lenders has turned up the thermostat on this climate of insecurity. Dozens of local banks are shut down by federal regulators each year, and many others face the prospect of enormous civil penalties and fines.[6] Those who "make the cut" find themselves under tremendous regulatory pressure to bring in more "conservative" property appraisals, reduce the number of "troubled" properties in their portfolio, maintain adequate capital reserves, and increase their liquidity.[7]

Shortly before confessing judgment against John, John's lender had entered into an Agreement with the Federal Reserve Bank of Chicago and the Illinois Department of Professional and Financial Regulation (the agencies). Pursuant to the terms of that Agreement, the lender was prohibited from renewing or restructuring any credit to any borrower that was on its "problem loan" list, created as a result of a prior bank examination, without first demonstrating to the agencies that it had "performed a comprehensive credit analysis indicating that the borrower has the willingness and ability to repay the debt," and that it is "adequately secured."

The bank further agreed to charge off all assets classified as a "loss" unless otherwise approved in writing by the agencies. With the stroke of a pen, John's fate, and the fate of countless other borrowers on an internal bank list, had been sealed. The bank's gratuitous offer to reduce John's loan payments was a Trojan horse, designed to serve no other purpose than to document compliance with its contractual obligations to the agencies, in order to secure its own survival.

In the current economic and regulatory climate, traditional legal analysis provides an inadequate framework for evaluating the propriety of a lender's declaration of an insecurity default. We must re-examine whether the UCC standards provide a sufficiently adaptive vehicle for regulating a lender's exercise of its discretion.[8] Bear in mind that the issue at hand focuses on the discretionary declaration of a default based solely on the lender's insecurity, where there is no payment default.[9]

II. The Traditional Subjective Versus Objective Approach

Traditionally, the primary judicial limitation on a lender's discretion and potentially abusive conduct in declaring an "insecurity" default has been the duty of "good faith": broadly defined in original UCC section 1-201(19) (now in revised Article 1 at section 1-201(b)(20)); imposed in any transaction governed by the UCC by 1-203 (now section 1-304); and applied to insecurity defaults in original section 1-208 (now section 1-309).

Scholars have long debated the very essence of the chameleon-like concept of "good faith" under the UCC.[10] As one court observed: "Just what the term [good faith] means…remains somewhat of a mystery. Its meaning, moreover, may change, depending upon the context in which it is used."[11] Courts have grappled with the issue for decades by applying two traditional yet seemingly contradictory approaches to analyzing a lender's good faith in electing to declare an insecurity default. A 1990 New Mexico Supreme Court opinion attempted to distinguish between an objective and a subjective standard in the following manner:

> There are two schools of thought and corresponding lines of cases addressing the standard of good faith under section 1-208 of the UCC. The first requires only that a creditor genuinely believe the prospect for payment is impaired; he need not be reasonable in that belief. This standard is purely subjective and had been described as "the pure heart and the empty head standard." (Citations omitted). The second standard includes an objective element of whether the creditor was reasonable under the circumstances in believing that the prospect for payment was impaired.[12]

Courts, struggling to reconcile these traditional tests for determining

3. *See, e.g.*, Alvin C. Harrell, Commentary, *The Subprime Lending Crisis – The Perfect Credit Storm?*, 61 Consumer Fin. L.Q. Rep. 626 (2007).

4. Eight years after the credit markets began to teeter in late 2006, these conditions are still with us, worldwide. *See, e.g.*, Jon Hilsenrath & Brian Blackstone, *Risk of Deflation Feeds Global Fears*, Wall Str. J., Oct. 16, 2014, at A1; Kathleen Madigan, *Housing, Consumer Numbers Down*, Wall Str. J., Oct. 1, 2014, at A2. As from the beginning, and despite unprecedented policies from the Federal Reserve Board designed to facilitate a monetary expansion, restraints on private credit are at the heart of the matter. *See, e.g.*, Peter Eavis, *Wells Fargo Still Wary of Home Loans*, N.Y. Times, Oct. 15, 2014, at B2.

5. Frontenac Bank v. T.R. Hughes, Inc., 404 S.W. 3d 272, 281 (Mo. App. 2012).

6. *See, e.g.*, Ryan Tracy, *Senators Put Heat on Banks*, Wall Str. J., Sept. 10, 2014, at C3; Kevin McCoy, *Largest U.S. Corporate Penalty – yet no villains*, USA Today, Aug. 22 - 24, 2014, at 1A.

7. *See generally* Christina Scharar, Comment: *Creating Insecurity: The Interpretation of Insecurity Clauses Triggered by Reappraisals Ordered by Commercial Mortgage Lenders*; 2012 Mich. St. L. Rev. 211.

8. UCC Article 3 often applies by reason of the mortgage note being a negotiable instrument under UCC Article 3. *See* UCC § 3-104.

9. *See* UCC § 1-309 (current uniform text) (exercise of acceleration clause based on lender's insecurity can only be exercised upon a good faith belief that the prospect of payment is impaired).

10. *See generally*, Susan A.Wegner, Comment: *Section 1-208: Good Faith and the Need for a Uniform Standard*, 73 Marquette L. Rev. 639 (1990).

11. Watseka First National Bank v. Ruda, 135 Ill. 2D 140,149, 552 N.E. 2d 775 (Ill. Sup. Ct., 1990).

12. J.R. Hale Contracting Co., Inc. v. United New Mexico Bank at Albuquerque, 110 N.M. 712, 721, 799 P. 2d 581 (Sup. Ct. N.M, 1990).

a lender's good faith in the declaration of an insecurity default have pleaded for legislative clarification. In a 1990 Illinois Supreme Court opinion, the Court essentially threw up its hands and lamented:

> …(T)here is no question that the Code drafters could have done a better job composing section 1-208 [now section 1-309]. In fact, the entire concept of good faith as it appears in the U.C.C. is in need of clarification. The fact that courts and commentators have strikingly divergent views of what the term "good faith" means in section 1-208 and in other parts of the Code, is "antithetical to the idea of a uniform commercial code"…Inconsistency and lack of clarity may unfortunately be the inevitable consequence of a statute that was the subject of extreme lobbying efforts and was the result of political compromise. Reform, however, will have to come from the legislature, not this court.[13]

The National Conference of Commissioners on Uniform State Laws (NCCUSL or ULC) attempted to answer the call. In 2001, NCCUSL approved revisions to Article 1 of the UCC, which included an expanded, "hybrid" definition of "good faith," intended to apply uniformly to all UCC Articles except Article 5. The revised definition, contained in newly-numbered section 1-201(b)(20), expanded the scope from the narrow "honesty in fact" standard which had characterized the subjective analysis, to include "the observance of reasonable commercial standards of fair dealing."[14] Thus, the new definition requires courts to apply both a subjective and objective standard in determining a lender's good faith.[15]

U.S. Legislatures have not unanimously adopted the broader definition of good faith enumerated in revised Article 1.[16] Professor Rowley reported that, as of July 1, 2011, only twenty-nine of the forty states that had codified revised Article 1 had enacted the new expanded and bifurcated standard of good faith, while eleven retained the pre-revised definition that requires only "honesty-in-fact," under which mere honesty is required from non-merchants, while merchants in sales of goods bear the additional burden of observing reasonable commercial standards of fair dealing.[17]

By definition, lenders are not "merchants." Courts in those states which have not enacted the newer, second prong of the "good faith" standard under revised section 1-201(b)(20) must adhere to the distinction between merchants and non-merchants, and impose a less stringent standard of good faith on lenders. Consequently, borrowers who contend that a lender has declared an insecurity default in bad faith may face a heavier burden of proving bad faith in those states that have not enacted the more expansive definition.

It may be premature to evaluate whether the revisions to the definition of "good faith" will dictate a significant shift in standards of judicial interpretation on the issue of "insecurity" clauses. In the interim, interested parties are essentially left with a legislative hodgepodge that calls out for a standard that is actually uniform, and is not subject to abuses of discretion by the lender. Long before the 2001 revisions to the uniform text of Article 1, courts recognized the potential for arbitrary abuse and unfair advantage by lenders who are required only to adhere to the amorphous UCC standard. A 1989 Tennessee Supreme Court opinion articulated that concern:

> We construe sections 1-203 and 1-208 to require that in the acceleration of a debt pursuant to an insecurity clause, the party exercising that option must act out of an honest belief the other party's ability to perform has deteriorated since the time of contracting, and must not use it as an instrument of abuse. Any evidence that the belief was not rational or that the party accelerating the debt took unconscientious advantage of the other or resorted to this severe remedy for other reasons is material.[18]

The *Lane* case observed that the subjective test, which at the time (1990) was the majority view, "…would allow a creditor to be unreasonable and place the debtor in an unjust position since the creditor might at any time call the entire debt and require the debtor to prove the non-existent state of mind of the creditor. Thus, under this interpretation, the UCC would permit a creditor to destroy a viable contractual relationship without requiring it to objectively justify the action."[19]

This dictum illuminates, in the most basic terms, the inherent flaws with the application of the traditional UCC doctrine of good faith in this context. The borrower is legislatively compelled under section 1-309 to bear the burden of proving the lender's bad faith animus, and of establishing that the lender's "insecurity" was not merely an after-the-fact pretext formulated to justify its self-serving motives. In practicality, this onus becomes even more inequitable if one considers that, at the time a borrower is required to prove the negative, its borrowing power and ability to finance litigation have effectively been shut off by a lender that may have abused its control of the debtor's financial resources.

The aforementioned judicial forewarnings from three-to-four decades ago have become a reality. In today's overall climate of economic and regulatory insecurity, nervous lenders, armed with virtually unfettered contractual discretion to declare a default, and likely

13. *Watseka First National Bank*, 552 N.E. 2d at 782. *See supra* note 11.

14. *See*: Contracts Prof Blog, lawprofessors.typepad.com (June 4, 2010); and ucclaw.blogspot.com (Mar. 2, 2010).

15. *See generally* Margaret L. Moses, *The New Definition of Good Faith in Revised Article 1*, 35 UCC L. J. 47 (2002).

16. For a current scorecard, *see* Professor Rowley's website and series of papers, www.law.unlv.edu/faculty/rowley/ra1_updates.

17. *See id. See also*: UCC § 2-103(1)(b) (good faith in the case of a merchant); *id.* § 2-104(1) (definition of "Merchant").

18. Lane v. John Deere Company, 767 S.W. 2d 138, 142, 8 UCC Rep.Serv. 609 (Sup. Ct. Tenn., 1989).

19. *J.R. Hale*, 799 P.2d at 590. *See supra* note 12.

under severe regulatory pressure, are incentivized to call-in their under-performing loans, thereby testing the limits of good faith. As the limits have been pushed, at least one appellate court in Missouri has clearly pushed back.

Some courts have abandoned the UCC definition of good faith altogether. Liberated from the UCC standards, these cases have relied instead on the common law implied covenant of good faith and fair dealing. This covenant, finding its foundation in section 205 of the *Second Restatement of Contracts*, recognizes a duty of good faith in the performance and enforcement of every contract, not only those governed by the UCC, and has been recognized by courts in virtually every state (possible exceptions include Maine, Virginia, and Indiana).[20]

The drafters of the *Second Restatement* did not attempt to define good faith, instead stating that good faith "emphasizes faithfulness to an agreed common purpose, and consistency with the justified expectations of the other party."[21] As noted below, this focus on the "justified expectations" of the parties, as opposed to "honesty in fact," is a thread running through some recent cases applying the common law implied duty of good faith to insecurity clauses. Allowing stricter scrutiny than under UCC standards, the evolving common law implied duty can be more flexibly adapted and applied to a lender's conduct in the current financial environment.

III. Recent Case Law Applying Implied Duty of Good Faith Standard to Insecurity Clauses

A 2006 Rhode Island trial court case illustrates this trend. In *Gillette of Kingston, Inc. v. Bank Rhode Island*,[22] the borrower alleged that the lender breached the implied covenant of good faith and fair dealing by declaring a default and accelerating the borrower's business loans, at a time when the borrower was current on its monthly payments. The lender contended that its actions were justified and reasonable, based upon its determination that the borrower's financial statements were in noncompliance with the minimum debt service coverage and tangible net worth covenants contained in the Loan Agreement.

The *Gillette* court concluded that genuine issues of material fact existed as to the borrower's financial condition and liquidity, and denied the lender's motion for summary judgment. The court held that the "exercise of a discretionary right under an agreement when used as a pretext for an effort to gain an improper advantage, or to thwart the reasonable expectations of the parties" may constitute a breach of the implied covenant of good faith.[23] Applying the *Second Restatement* standard, the *Gillette* case is notable for the court's citation, in a footnote, of dictum from a 2005 First Circuit United States Court of Appeals decision, observing that ceding discretion in a contract is tantamount to subjecting oneself to "legalized tyranny."[24] "Legalized tyranny" is a powerful phrase used metaphorically by the court to describe the potential effects of a lender's bad faith exercise of discretion in declaring an insecurity default.

IV. The *Frontenac* Case

In 2012, a Missouri appellate court imposed an arguably unprecedented degree of scrutiny of the lender's conduct in declaring an insecurity default. Expressly recognizing the changing economic conditions that had become the norm at the time of the declaration of the insecurity default, the court in *Frontenac Bank v. T.R. Hughes, Inc.*[25] departed from the traditional good faith approaches, moving toward a more pragmatic analysis based on concepts of "opportunism" and "exploitation." In *Frontenac*, the borrowers argued that the lender breached the terms of the promissory notes (Notes) based on an improper declaration of insecurity resulting in a breach of the lender's implied duty of good faith and fair dealing.

The evidence showed that the lender had previously renewed several of the Notes before declaring a default, without any material changes taking place in the interim. Additionally, the borrowers were current on all payments then due under all of the outstanding Notes, and the lenders had not declared a default thereunder. The lender countered with the argument that it was entitled to refuse further draws under the loan agreement on the basis of insecurity, due to an unforseeable economic crisis.

The lender further contended that it was entitled to refuse the borrower's draw requests because it believed in good faith that one of the borrowers was "insolvent" based upon evidence regarding its financial condition. The lender's chief executive officer testified that the borrower was facing "material, adverse changes," *i.e.*, the borrower's liquidity had been exhausted and the value of the collateral had continued to deteriorate, thereby generating a "whole climate of insecurity."[26]

The *Frontenac* court found genuine issues of material fact, namely what standard of good faith was required of the lender, and whether the borrowers were in fact creating insecurity under the provisions of the Notes. The court remanded the case for trial on those factual issues, and went on to observe:

> Despite evidence on the record of Defendants' financial struggles, [the lender] was under the "good faith" obligation to avoid exploiting the changing economic conditions to make gains in excess of those reasonably expected at the time of contracting.[27]

20. *See* William A. Walsh, Jr., Essay: Good Faith and Fair Dealing: New issues and Nagging Concerns at 5 (2001).

21. *Id.*

22. No. WC 05-0601 (unpublished) (R.I. Sup. Ct. 2006).

23. *Id.* at 12.

24. *Id* at 8.

25. *Frontenac*, 404 S.W. 3d 272. *See supra* note 5.

26. *Id.* at 281.

27. *Id.*

While the *Frontenac* court did not expressly hold that the lender acted unreasonably or in bad faith, the court sent a clear signal that the lender's actions, on the facts presented, could be scrutinized for evidence of bad faith. The lender's duty of good faith was not defined by grappling with the application of an objective versus subjective standard, or by analyzing whether the prospect of payment had been impaired. Instead, the court stated that the duty of good faith imposes on lenders an obligation to "prevent opportunistic behavior." In a clear departure from earlier judicial parameters, the court defined the duty of good faith in terms of preventing a lender's "exploitation" of "changing economic conditions" for the sole purpose of preventing windfall gains for the lender, based upon what the lender could have "reasonably expected" at the time of contracting.

While innovative, the stringent standard for evaluating good faith applied by the court in *Frontenac* is neither unique nor groundbreaking. With respect to contracts for sales of goods (most frequently output and requirement contacts, where the price and quantity terms are left open), courts have essentially scrutinized a party's actions to the extent that they seek to "exploit changing financial conditions to secure gains that exceed those reasonably expected at the time of contracting."[28]

Although it did not deal with the invocation of an insecurity clause, in *Citimortgage, Inc. v. Mason Dixon Funding, Inc*.[29] the court applied a similar framework to a case involving Citimortgage's purchase of residential mortgage loans on the secondary market. The defendant argued that Citimortgage breached the covenant of good faith and fair dealing in its unilateral decision to arbitrarily demand the cure or repurchase of allegedly defective loans. The court endorsed the proposition that good faith enforcement of a contract "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."[30]

The *Frontenac* decision represents a bold and decisive departure from the traditional standards of judicial review of a lender's good faith, as the basis for declaring an insecurity default. The *Frontenac* court curbed the lender's potentially overzealous utilization of an insecurity clause, by suggesting that its conduct could amount to "opportunistic exploitation" of a commercial borrower in order to unjustly enrich the lender.

Curious as to whether the bank had petitioned for a "transfer" of the case to the Missouri Supreme Court, your author contacted Tom Avery, attorney for the prevailing borrowers. He candidly cautioned that: "[t]he banking industry here is completely up in arms over this decision. We have a very conservative pro-banking industry Supreme Court – I don't see how they will let this decision stand." He further related that the Missouri Supreme Court had taken the unprecedented step of inviting amicus briefs from banks in St. Louis and from the Missouri Bankers Association. Weeks later, however, I received a call from Tom advising that the Missouri Supreme Court denied the motion for transfer.

V. Conclusion

Changing economic and regulatory conditions have altered the delicate balance between the competing economic interests of lenders and borrowers. The bank-customer relationship is no longer a matter between private parties; instead, the bank has become an administrator of federal regulatory policy. Lenders must respond to changing regulatory initiatives in order to protect and preserve their rights, often by insisting upon the borrower's strict compliance with the terms of its loan documents.

This results in a new emphasis on the ability to fluidly and expeditiously invoke contractual remedies for default, in order to maintain regulatory compliance while earning a competitive rate of interest and insuring full repayment of the loan. The importance of regulatory and contractual compliance has increased relative to the needs of customer relations and satisfaction. In effect, the financial system has become more regulatory and far less user-friendly.

Yet, borrowers' financial needs also have increased. More than ever, borrowers need to have reliable access to cash in order to finance the day-to-day operation and expansion of their businesses, and have an interest in operating their businesses with reasonable confidence, based on the expectation that their lender will act in good faith in exercising its contractual remedies. Traditional means, by which courts have construed the declaration of insecurity defaults based on the UCC good faith requirement in the context of private party transactions, are arguably obsolete, vague, and difficult to apply with consistency. The absence of concise uniform legislative standards, the new and expanded role of regulatory considerations, and the patchwork of case law call out for a new approach, based upon clearly-defined, pragmatic factors, to enable both lenders and borrowers to document and conduct their loan transactions in a climate of certainty, consistency, and confidence.

The *Frontenac* decision may be an anomaly limited to its facts, and may not be followed by other courts evaluating a lender's good faith in the future. However, the *Frontenac* opinion articulates a borrower-protective means of scrutinizing a lender's exercise of an insecurity default in the context of the common law implied covenant of good faith and fair dealing. Rather than examining the reasonableness of the lender's beliefs relating to the borrower's financial viability or a decline in value of the collateral, the *Frontenac* court imposed that duty through the lens of preserving the "reasonable expectations" of the parties at the time of contracting. Whether the decision signals a new trend of heightened judicial scrutiny designed to curtail a lender's arbitrary exploitation of its borrower, as an "opportunistic means of achieving financial gains," remains to be seen.

28. *See, e.g.*, Allapattah Services, Inc. v. Exxon Corp., 61 F. Supp 2d 1308, 1319 (S.D. Fla. 1999).

29. No. 4:09cv1997 TCM (unpublished) (E.D. Mo. 2011).

30. *Id.*

In a recessionary or at best sluggish economy, where regulatory pressure and lender insecurity as to repayment are palpable, the arbitrary and unchecked use of insecurity clauses can potentially lead to abuse, exploitation, or other opportunistic behavior, resulting in excessive protection for lenders and disastrous outcomes for borrowers. Without clearly-defined, uniformly and consistently-enforced legal constraints, the playing field will tilt against borrowers. From a broader perspective, that shift may exacerbate the economic conditions that generated the current malaise.

Where abuse of discretion, exploitation, or other opportunistic behavior designed to gain an unfair advantage in declaring a default can be inferred from the facts, courts should consider the more adaptable vehicle of the common law implied duty of good faith.[31] In this context, courts should consider the lead of the Missouri court in *Frontenac*.

Consistent with the purposes of the UCC,[32] courts must stridently preserve the rights of lenders to proactively and preemptively insulate themselves from losses where there is competent evidence that their prospects for payment have become significantly impaired. On the other hand, it is equally as fair and equitable that a good faith standard for evaluating the declaration of an insecurity default should entail close scrutiny of the reasons underlying the exercise of the lender's discretion, to avoid the adverse effects of a regulatory overreaction or a lender's opportunistic exploitation of the borrower.

These factors should include an analysis of the expectations of the parties at the time of contracting, in the context of the economic conditions existing at the time of the declaration of default that may have contributed, in whole or in part, to the lender's insecurity. By striking this balance, commercial lenders will not be discouraged from lending in a recessionary economy, yet may be less likely to engage in "legalized tyranny" by exercising their discretion in bad faith, in the interests of securing unjust financial gains.

VI. Epilogue

The reader may be interested to know the outcome of the bank's confession of judgment against John, as recited at Part I. above. Rather than investing dozens of uncollectable attorney hours challenging the bank's actions in court, a meeting was convened with the bank's chairman, the loan officer, and its legal counsel. As a result of that meeting, John and Lidia were forced to surrender the deed to the property and the keys to the building, and to liquidate and hand over all of the $50,000 in their retirement accounts. Several months later, a reliable source reported to your author that, shortly after acquiring title, the bank sold the property to an investor in a pre-packaged deal, for a sizable profit. Your author does not suggest that this is a representative result -- obviously lenders have suffered their share of losses, and it would be relevant to know what marketing and rehabiliation costs the bank incurred. But sometimes it does seem that my law school professor was right -- in the real world, the bank always wins.[33]

31. In the context of a negotiable promissory note, this requires a holding that the common law implied duty of good faith, at least as interpreted by the *Frontenac* court, is consistent with or otherwise not displaced by the UCC definition of good faith. *See* UCC § 1-103 (contract law supplements the UCC unless displaced).

32. *Id.*

33. *But see supra* note 2. For an interesting case where the bank (and FDIC) did *not* win on this issue, *see* ABI Investments, LLC v. FSG Bank N.A., 756 S.E. 2d 606 (Ga. Ct. App. 2014) (failure of the bank that held the loan did not create insecurity as to the borrower's ability to repay, despite some common members and directors).