

REAL ESTATE PRACTICE GROUP

OTTEN JOHNSON ALERT: LENDERS WAIVING COUNSEL IN EXCHANGE FOR USING FORM LOAN DOCUMENTS

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Some lenders have recently started offering to prospective borrowers of commercial real estate loans not to engage an attorney to represent the lender if the borrower agrees not to negotiate the lender's standard, but often short, forms of loan documents. This appeals to commercial borrowers because the borrower typically pays all costs associated with the loan, including the lender's legal fees incurred in preparing and negotiating loan documents and in reviewing due diligence matters. Also, borrowers often feel that, by taking lenders' attorneys out of the mix, transactions will close more quickly.

This may be a good idea for some borrowers. If the lender does not use an attorney, the lender also may not require a legal opinion regarding the borrower's good standing, the authority of the borrower's signatory and the execution and enforceability of loan documents, choosing instead to internally review the borrower's organizational documents. This also saves legal fees which would be charged by the borrower's attorney in preparing the opinion and by both attorneys in negotiating the opinion's language.

However, the borrower may have to agree to potentially problematic terms in the lender's form loan documents. The terms of the form documents tend to be very favorable to lenders and may be especially ill-suited to projects that are unusual in any respect. Some lenders are equipped to discuss a few commonly negotiated points and, perhaps, to modify them by addenda to the loan documents. Other concerns raised by a borrower, though, might prompt the lender to enlist an attorney, eliminating or reducing the cost savings. A borrower should carefully consider the risks of living with loan document provisions which it might normally choose to negotiate.

Borrowers should also keep in mind that some lenders may already have had the assistance of their counsel in preparing the lender's forms of loan documents. Accordingly, a borrower might want to have its counsel review the lender's form documents before agreeing to the proposal.

The attorneys in our Real Estate practice group can help you understand and navigate issues involving loan documents and financing transactions. For more information on this Alert or for help evaluating your current situation, contact any of the attorneys in the Real Estate practice group ([click here](#)).

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