

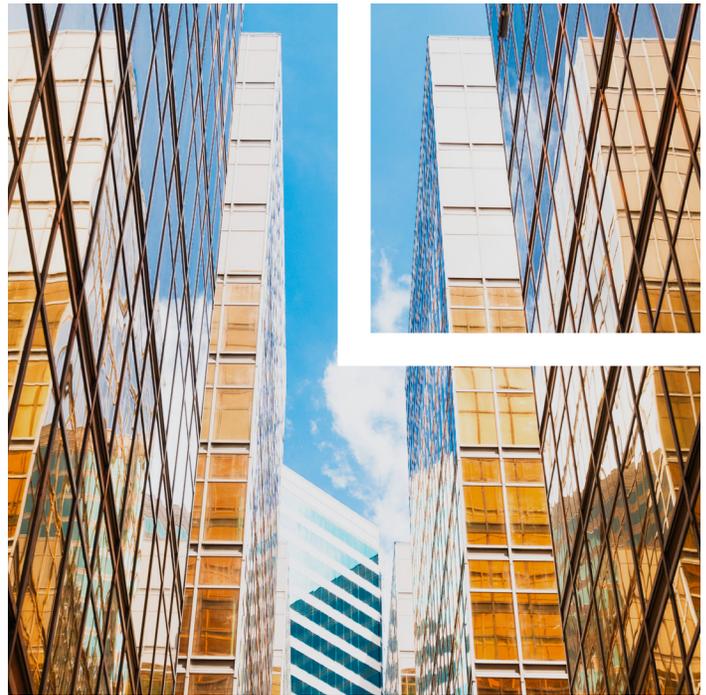
New Agency Language Reduces Risk of Costly Errors

As many of our clients know, acting as administrative agent under a syndicated facility can be a laborious and fraught process. And, despite strong internal controls and policies, errors can occur.

One potential—and costly—error is the incorrect distribution of payments to the syndicate of lenders, whether because the amounts are incorrect or because the payment is due on a different date. To counteract that potential, and in response to a recent court decision that is currently on appeal in which the lower court ruled that lenders did not need to return erroneously distributed funds, we have been assisting administrative agents in revising language in the agency provisions of their credit agreements.

Typically, the new language accomplishes several objectives:

- The lenders acknowledge that the administrative agent may inform them of an erroneous payment and may request return of erroneous payments.
- The lenders waive any and all rights to assert any claim or right to the erroneous payment, including any defense based on “discharge for value.”
- The lenders are required to promptly return erroneous payments, together with interest.
- The lenders are required to notify the administrative agent of any payments the lenders receive that are either in an amount or on a date different from that included in a payment notice or if a payment notice does not precede such payment.
- The borrowers acknowledge that the rights of the administrative agent are subrogated to the rights of the lenders with respect to an erroneous payment and that the erroneous payment does not discharge any amounts due from the borrowers.
- The foregoing rights survive the termination of the credit agreement and the resignation or replacement of the administrative agent.



We expect this language to become commonplace in the syndicated loan market and have seen similar provisions begin to appear in a variety of syndicated loan transactions. We also understand that the Loan Syndications and Trading Association (LSTA) is drafting standardized language for its model credit agreement. In the interim, we are able to assist in the formulation of bespoke language and urge administrative agents to consider including this language in their syndicated credit agreements, in all new deals and in any amendments to existing deals.

Related Professionals

Anthony Pirraglia apirraglia@loeb.com
Peter Beardsley pbeardsley@loeb.com

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