Questions Clients Are Asking About COVID-19

Questions for Borrowers and Lenders Amid Coronavirus Outbreak

1) **What Loan Provisions Are Relevant to Assessing Lenders' Obligations to Extend (or Continue to Extend) Credit, and What Are Some Defenses That May Be Available to Borrowers if Lenders Refuse to Lend? 1**

2) **What Are the Consequences to a Lender that Prefers Breaching an Obligation to Lend to Proceeding With a Transaction? 5**

   2A) **Can a Borrower Collect Consequential Damages in the Event of a Failure to Lend? 5**

   2B) **Are There Any Consequences to Intentionally Breaching a Lending Agreement? 6**

   2C) **Can Parties to a Lending Agreement Ask a Court for Specific Performance? 7**

3) **What is an Anticipatory Breach or Repudiation of a Lending Agreement and How Would that Impact Liability? 8**

4) **Can a Lender Face Liability for Renegotiating Loan Terms Where It Knows a Borrower Faces Dire Circumstances? 9**

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As borrowers and lenders grapple with a new economic landscape in the wake of COVID-19, borrowers are faced with the need to secure sufficient liquidity in the event of an extended recession that could have long-term effects on credit markets. To that end, companies may try to draw on all credit lines currently available to them (including outstanding revolvers). At the same time, lenders may be hesitant to extend credit in a market where there is substantial uncertainty about their ability to be repaid. The operative provisions of each borrower's loan agreements will be key to determining if and to what extent lenders must provide additional credit. The same provisions may also have other significant consequences for borrowers and lenders, such as determining whether the change in economic circumstances can be a basis for claiming loan breaches and the acceleration of debt. This article outlines important considerations for borrowers and lenders in determining the availability of credit, the risks associated with breaching existing funding agreements, and some of the potential defenses available in these circumstances.

1) What Loan Provisions Are Relevant to Assessing Lenders' Obligations to Extend (or Continue to Extend) Credit, and What Are Some Defenses That May Be Available to Borrowers if Lenders Refuse to Lend?

Lending agreements generally fall into two categories: (i) discretionary loans that can be discharged or accelerated "at will," and (ii) loans involving a commitment to provide a particular amount of capital for a certain period of time, subject to certain contractual conditions or covenants. As discussed in greater depth below, lenders' obligations to extend credit may vary depending on which of the two types of loans are at issue.

Discretionary Loans

Courts have held that absent a clear contractual provision to the contrary, lenders are not obligated to fund a discretionary loan.[1] However, there may be certain legal principles that provide borrowers with remedies from overreaching lenders. For example, the implied covenant of good faith and fair dealing may act as a limitation and potentially curtail a lender's ability to act unilaterally. The good faith obligation does not prevent a lender from enforcing the terms of the contract, but requires that it do so in good faith. Courts will look to the parties' course of conduct to help guide that determination.[2] For example, in *K.M.C. Co. v. Irving Trust Co.*, a lender who terminated a loan without violating the provisions of a loan agreement was nevertheless subject to a suit for lack of good faith for failing to notify the borrower prior to termination.[3] It should be noted, however, that the Sixth Circuit's decision in *K.M.C.* has been criticized by various courts for penalizing a party for exercising privileges "expressly reserved" in the document.[4]

Similarly, the Uniform Commercial Code may also limit a lender's ability to accelerate a loan or demand additional capital, where applicable. For example, Section 1-309 of the New York Uniform Commercial Code states that even when a lending agreement provides that a lender can "accelerate payment or performance or require collateral or additional collateral 'at will' or when the party 'deems itself insecure,' or words of similar import," the lender can only do so if the lender "in good faith believes that the prospect of payment or performance is impaired."[5] Most courts have found that this provision of the UCC only applies when underlying contracts specifically permit acceleration either "at will" or if the lender feels "insecure," and not in other circumstances.[6] However, some courts appear to view Section 1-309 more expansively.[7]

Loans with Obligations to Lend

Even for non-discretionary loans, the obligation to lend is usually contingent on certain conditions being met. For example, some loans may contain provisions that obligate the borrower to meet certain loan covenants as a pre-condition to the availability of capital. Other loans—such as those "secured" by securities or assets—may contain provisions tying the obligation to lend to the underlying value of the assets secured by the loan. These conditions to lending are explored in greater depth below.

Financial covenants

Many funding agreements contain financial covenants that must be met or maintained in order for the funds to be available (or remain available) to borrowers. Common covenants may include:

- Debt to EBITDA ratios (notably, some agreements may have carve-outs from the definition of EBITDA for "extraordinary gains and losses")
- Debt service coverage ratios (e.g., income divided by total debt service)
- Interest coverage ratios (e.g., ratio between EBITDA or EBIT and interest)
- Debt to equity ratios
- Debt to asset ratios
- Total assets
- Tangible net worth
- Dividend payout ratio
- Fixed charge coverage ratio

Financial covenants are likely to be tailored to the specifics of the business in which a borrower is engaged; the metrics most likely to appear in a lending agreement are those that most accurately capture the health of the borrower and its ability to eventually repay the debt. However, changed economic terrain given recent supply chain issues, government orders limiting production and operations, as well as other issues may have drastically altered borrowers' ability to meet these metrics. A borrower assessing its ability to draw on existing credit lines should carefully evaluate the metrics outlined in its funding agreement and its ability to meet those metrics.

Other covenants

Loan agreements may also contain non-financial covenants that are likely to come into play when borrowers seek additional draws. Many loans contain provisions requiring the following, all of which may be affected by current economic conditions:

- ***Continuation of key customer contracts.*** This type of covenant may become important as customers attempt to avoid their contractual obligations due to restructuring or by invoking legal doctrines such as force majeure.
- ***Maintenance of a specified credit rating.*** COVID-19 may have broad-ranging impacts on companies' credit-ratings worldwide. While an economic downturn is generally not a basis to avoid compliance with a credit-rating requirement, at least one court has allowed a party to temporarily do so, on the basis of impracticability, showing that there is some precedent for these types of legal arguments.[8]

- ***Accurate and up-to-date SEC disclosures.*** COVID-19 also implicates companies' disclosure obligations regarding the risks relating to coronavirus. The SEC Chairman released a press release on March 4, 2020 stating: "We also remind all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge companies to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements. Companies providing forward-looking information in an effort to keep investors informed about material developments, including known trends or uncertainties regarding coronavirus, can take steps to avail themselves of the safe harbor in Section 21E of the Exchange Act for forward-looking statements."[9]
- ***Pro forma projections.*** Coronavirus and the lack of certainty regarding its potential effects and duration have the potential to impact required pro forma projections. Loan agreements may require borrowers to deliver accurate pro forma projections prepared by management in "good faith," demonstrating that a borrower can fulfill its obligations under the lending agreements.

Potential Defenses to Covenant Breaches

Lenders unwilling to extend credit may cite violations of financial and non-financial covenants as a basis to either deny financing or claim a breach. As a consequence of such breaches, lenders may be able to accelerate debt and/or terminate the agreement. The most obvious defense available to a borrower confronted with claims of a breach is to contest that one has actually occurred. However, where there is no dispute that a borrower has breached a covenant, courts will typically permit a lender to enforce agreements as written, viewing the covenants as bargained for terms.[10] Additionally, courts have historically been reluctant to excuse these types of breaches based on common law doctrines such as impossibility, primarily because the inclusion of a covenant in an agreement suggests that the contracting parties foresaw the possibility of a borrower breaching the covenant. For example, in *Mellon Bank v. United Bank Corp.*, a borrower defaulted on a bad loan ratio covenant, but raised an impossibility defense based on "the general decline of the economy affecting the banking industry."[11] The court rejected this defense because the inclusion of the covenant in "the contract leads inexorably to the conclusion that [the lender] thought it necessary to protect itself from the very contingency that occurred."[12] On the other hand, at least one court has applied the concept of "temporary commercial impracticability" where a temporary credit crisis rendered compliance with a financial covenant nearly impossible.[13] Going forward, litigants are likely to cite the unprecedented circumstances caused by coronavirus as reason to apply equitable doctrines such as impossibility and impracticability to excuse defaults.

Solvency requirements/certificates

Financing agreements typically also have requirements that ensure that the borrowing entity is solvent. Tests of insolvency include: (1) comparing assets to liabilities; (2) measuring the ability of the borrower to pay its current obligations or debt in the ordinary course of business; and (3) assessing whether the borrower has "unreasonably small capital." A lender may require an attestation by an officer of the borrower, an evaluation by a third party that the borrower is solvent, or both of the foregoing items.

The timing of the solvency test designated in a given agreement may be critical and potentially outcome-determinative in assessing the availability of credit. Some funding agreements may only require a solvency check at signing, while others assess solvency at closing or upon each draw of funds. A rapid drop of asset values due to COVID-19 may have caused insolvency in a company that was solvent several weeks ago. Therefore, companies seeking to draw additional funds on existing credit should be mindful of the point at which their credit arrangements assess solvency. Changes in a company's finances that result in the inability to satisfy solvency covenants may also result in the acceleration of debt or termination of the agreement.

Material Adverse Change ("MAC") clauses

Loan agreements often contain material adverse change or material adverse effect clauses that provide that, as a condition to drawing on a loan, the borrower must represent that there has been no material adverse event or circumstance. Whether or not a MAC has occurred may also trigger acceleration of debt or an event of default under a lending agreement, depending on its terms. Courts may consider some of the following factors to determine whether the COVID-19 outbreak constitutes a material adverse event: (1) whether the conditions underlying the material adverse event were known or foreseeable at the time of contracting; (2) the expected duration of the downturn; (3) whether the event affects the parties more than their peers; and (4) whether there is a direct link between the material adverse event and downturn of the borrower's performance.[14]

MAC clauses are typical in standard credit agreements. In the absence of ambiguity, courts enforce these clauses as written, without resorting to extrinsic evidence. However, courts have at times found ambiguity in determining what constitutes a material adverse change, and in such cases, have considered extrinsic evidence.[15]

There have been several recent cases where MAC clauses have been litigated in the context of a loan agreement.

For example, in *In re Lyondell Chem. Co.*,[16] a private equity firm invoked a MAC clause in a revolving credit facility when it declined to fund a company's $750 million draw request, because the requesting company had already commenced preparation for its bankruptcy filing. The MAC clause required the company to represent that "there has been no event or circumstance that could, either individually or in the aggregate, reasonably be expected to have a Material Adverse Effect," and "Material Adverse Effect" was defined to include, among other things, "a material adverse effect on the business, operations, assets, liabilities (actual or contingent) or financial condition of the Company."[17] Considering "the entirety of the agreement to discern the parties' intent, rather than reading the MAC clause in isolation," the Court agreed with the company that insolvency did not constitute a MAC because the parties specifically bargained for a solvency provision at closing and could have—but did not—negotiate a provision requiring solvency following closing.[18] Notably, however, the plaintiff's recovery for defendant's failure to fund the revolver was limited to restitution for the loan commitment fees paid by the plaintiff—a small fraction of the total amount of the credit facility.

In *Capitol Justice LLC v. Wachovia Bank, N.A.*,[19] Wachovia Bank invoked a MAC clause to terminate a loan commitment agreement ("LCA"), pursuant to which it would lend the American Association of Justice ("AAJ") $89.5 million, which Wachovia would then securitize and sell.[20] The LCA contained a MAC clause that provided that "Lender may, at its option, terminate its agreement

to make the Loan … in the event of any material adverse change in the financial, banking or capital market conditions that could impair the sale of the Loan by Lender as contemplated in the Term Sheet."[21] Wachovia attempted to invoke the MAC clause and terminate the LCA due to the "turbulence" in the mortgage backed security market during the global financial crisis. The Court concluded that the MAC clause was ambiguous as to whether it included any meaningful or significant change in market conditions regardless of foreseeability.[22] The Court further concluded that there were genuine issues of material fact regarding whether subsequent events were foreseeable and whether they impaired the value of the loan, and as such, the Court denied Wachovia's motion for summary judgment that it did not breach the LCA in light of the MAC clause.[23]

As these cases make clear, although changed economic circumstances in light of COVID-19 may, practically speaking, effect a significant change in a company's current condition, as a legal matter that may not trigger a MAC clause. Instead, the determination of whether or not coronavirus-related events give rise to a MAC is a highly context-specific inquiry.

Loans Secured by Illiquid Assets

In certain types of loans that are secured by assets, a drop in value of those assets might trigger a "margin call" from the lender. Margin calls require a borrower to either repay some portion of the loaned amounts (i.e., reduce lending capacity) or post additional collateral with the lender. These type of lending arrangements may raise a whole host of additional legal issues, including, but not limited to, a requirement that the lender value the assets in good faith.[24] Another memorandum published by Quinn Emanuel, titled "Top Questions About Margin Calls," addresses these issues in more depth.

2) <u>What Are the Consequences to a Lender that Prefers Breaching an Obligation to Lend to Proceeding With a Transaction?</u>

The current economic climate may also present situations where a party may prefer breaching an obligation to lend to proceeding with a transaction that it can no longer afford. Unless a contract provides otherwise, it is well established under the doctrine of efficient breach that a party to a contract can chose to breach and pay damages due as a result of that breach in lieu of performance, if such a decision promotes its legitimate economic interests.[25] This gives rise to three questions discussed below:

(1) Can a borrower collect consequential damages in the event of a breach?

(2) Do intentional breaches give rise to additional damages beyond those specified in the contract?

(3) Can a borrower compel specific performance of the financing commitment?

2A) <u>Can a Borrower Collect Consequential Damages in the Event of a Failure to Lend?</u>

Where a company is forced to file for bankruptcy due to liquidity constraints, a borrower may argue that the lender's failure to lend caused the borrower's collapse. Such claims may entitle a borrower to consequential damages, including the profits the company would have achieved but-for the breach of contract that caused its bankruptcy.[26] In response to such claims, lenders may have certain arguments available to them, including challenges to claims that the failure to lend caused the borrower's damages. Borrowers' entitlement to consequential damages are generally also contingent

upon proving (1) the "alleged loss with reasonable certainty,"[27] without the use of any "speculation" or "conjecture" and (2) that such damages were "foreseeable and contemplated by the parties before or at the time of the agreement's formation."[28]

Loans may also contain waiver provisions foreclosing the availability of "special, indirect, consequential, or punitive damages." These waiver of damages provisions are common and are often upheld by courts. If a lending agreement contains this type of waiver provision, then upon breach for failure to lend, borrowers are generally limited to two types of remedies: (1) direct (or actual) damages and (2) restitution. Often, direct damages will equal the difference between the interest rate contained in the loan document and the prevailing market interest rates for the duration of the loan. Restitution—the form of damages awarded in *Lyondell*—restores the borrower to the position it occupied prior to entering into the loan agreement (for example, by returning commitment fees and other amounts already paid). In addition, many waiver of damages clauses contain language limiting liability "whether in contract, tort, or otherwise." Absent such language, specific performance may also be an available remedy, although its practical utility may be limited where a borrower requires immediate access to capital. (For more on specific performance, see pages 7-8 below).

2B) <u>Are There Any Consequences to Intentionally Breaching a Lending Agreement?</u>

Absent specific language in a contract, the law usually does not impose additional damages for a "willful," "knowing," or "intentional" breach of a lending agreement.[29] For example, in *Five Star Dev. Resort Communities, LLC v. iStar RC Paradise Valley, LLC*, the defendant, iStar, refused to fund further outlays under a loan agreement. The contract contained a limitation of liability provision barring special, consequential, indirect or punitive damages. Nevertheless, Five Star sought to recover special damages for iStar's intentional breach by alleging that iStar's breach was willful and malicious and thus fell within a public policy exception prohibiting enforcement of such liability limiting provisions. The court disagreed with Five Star's contention and found that the intentional breach was consistent with iStar's economic interests and thus did not "as a matter of law, rise to the level required to trigger the public policy exception to the enforcement of liability limitations."[30] This case demonstrates that courts will typically enforce such limitation of liability provisions unless there is evidence of economic duress (i.e., a threat not to provide an essential good or service unless the other party provides concessions), fraudulent inducement, or conduct "smack[ing] of intentional wrongdoing."[31]

However, many lending agreements separately address "willful," "knowing," or "intentional" breaches. For example, a loan agreement may state that liquidated damages can be available to the non-breaching party in the event of a knowing or intentional breach. Before taking action under a lending agreement, it is important to understand how a "willful," "knowing," or "intentional" breach can impact obligations under the agreement.

In addition to facing exposure for breach of contract, a lender may also face liability or financial exposure where it facilitates a knowing breach by a borrower of the borrower's contractual obligations to third parties. For example, in *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, Hexion entered into an agreement to purchase Huntsman.[32] The contract stated that in the event of a breach of the agreement by Hexion, Huntsman would only be able to receive a maximum of $325 million in liquidated damages. However, the agreement also stated that in the event Hexion "knowingly and intentionally" breached the agreement, Huntsman would be able to collect full contractual damages above and beyond the $325 million amount. The court found that Hexion had engaged in a knowing

and intentional breach of numerous provisions of the merger agreement, including acting "affirmatively … to scuttle the financing" by, among other things, filing a public lawsuit which stated that the company would be insolvent, making it almost certain that Hexion's lenders, Credit Suisse and Deutsche Bank, would not provide financing for the merger.[33] Because of this intentional breach, the court found that the liquidated damages cap was inapplicable. The court explained that a "'knowing and intentional' breach is a deliberate one—a breach that is a direct consequence of a deliberate act undertaken by the breaching party, rather than one which results indirectly, or as a result of the breaching party's negligence or unforeseeable misadventure."[34] Notably, Huntsman also sued Deutsche Bank and Credit Suisse for civil conspiracy, fraud, and tortious interference for their role in the failed merger. Deutsche Bank and Credit Suisse ultimately settled with Huntsman, each agreeing to pay Huntsman $316 million in cash and $550 million in senior debt financing on favorable terms.

Additionally, to the extent that a lender's intentional misconduct is found "egregious" or "severely unfair" to other creditors, and the borrower ultimately files for bankruptcy, the lender may have their claims "equitably subordinated" in bankruptcy.[35] Equitably subordinating a claim in bankruptcy may result in the loss of a lien or in the lender's claims being subordinated to claims of other creditors. For example, in *Shubert v. Lucent Techs. Inc.*, Lucent used its position as Winstar's lender to "bull[y] and threaten[]" Winstar into taking actions that were designed to benefit the lender.[36] The court held that the lender's conduct would result in the subordination of its claims to those of other creditors in bankruptcy.

2C) Can Parties to a Lending Agreement Ask a Court for Specific Performance?

Courts are generally disinclined to enforce specific performance as a remedy for breach of a loan agreement, in the absence of a contractual provision to the contrary.[37] Courts' general reluctance to require specific performance is amplified in situations where the contemplated performance involves the payment of money (as is the case in a typical loan agreement).[38]

However, some loan agreements may have "specific performance" clauses, which require performance of the underlying lending obligations as an alternative to monetary damages. Courts have upheld specific performance as a possible remedy in a loan agreement where the parties have contractually provided for this relief.[39] In the absence of a contractual provision requiring specific performance, such a remedy is generally available only in narrow circumstances, such as in the case of loans provided in connection with the sale of real property.[40]

Certain courts, however, have created even broader exceptions to the general prohibition against specific performance. For example, in *Destiny USA Holdings, LLC v. Citigroup Glob. Markets Realty Corp*,[41] Citigroup agreed to lend Destiny USA Holdings LLC ("Destiny") $155 million to finance a novel real estate project. Citigroup declared the loan in default and Destiny sought, among other things, injunctive relief and an order of specific performance requiring Citigroup to finance the loan. While the court recognized that specific performance would ordinarily be unavailable because "a party seeking enforcement of an agreement to lend money would be expected to borrow money elsewhere and recover damages based on the higher costs associated with the replacement loan,"[42] the court found an exception to the rule should apply because the subject matter of the contract was "unique and ha[d] no established market value."[43] The court held that specific performance was appropriate because: (1) the law regards land as unique; (2) it would be difficult to calculate damages given the project's unique and groundbreaking character; and (3) Destiny had established an enormous potential for harm. Additionally, the court took judicial notice of the economic conditions and found that

Destiny had demonstrated that it was likely "that funds to replace the loan proceeds were not available elsewhere".[44] Thus, the court suggested that the plaintiff's inability to find replacement financing due to the economic crises contributed to its willingness to award specific performance.

This case gives rise to a question on the minds of lenders and borrowers alike: if credit markets are completely frozen and a borrower cannot find any alternative funding, is a court likely to force a lender to specifically perform its loan obligations in the absence of a clause requiring it to do so? On one hand, it may be the case that because the credit markets are frozen, monetary damages likely will not make the borrower whole.[45] On the other hand, a court may not believe that the borrower can perform under the agreement, which is a precondition to specific performance.[46] Furthermore, such relief may be improbable where a contract includes a consequential damages waiver, which may be construed as a waiver of specific performance as a remedy.[47] While courts will make such evaluations on a case-by-case basis, unless a contract provides otherwise, it may be difficult to obtain specific performance in a loan agreement.

3) What is an Anticipatory Breach or Repudiation of a Lending Agreement and How Would that Impact Liability?

Given current economic uncertainty, lenders might chose to: (1) take a "wait and see" approach and assess how economic conditions play out before agreeing to fund commitments pursuant to a funding agreement; (2) demand additional collateral and assurances before agreeing to lend further; or (3) anticipatorily send letters to their borrowers warning that funding may not be available and reserving their rights. Lenders weighing these options should be mindful of the risks that they may be deemed to have "anticipatorily breached" or "repudiated" their contracts by advising borrowers that they might not fulfill loan obligations, subjecting them to potential claims for full contractual damages, as well as consequential damages.[48]

In *River Terrace Assoc., LLC. v. Bank of N.Y.*, for example, River Terrace and the Bank of New York ("BNY") entered into several agreements through which BNY and other principals would provide $83 million to fund the development and construction of a rental building in Battery Park near the World Trade Center.[49] The construction project was interrupted by the tragedy of 9/11, and reports indicated that the market value of the proposed building subsequently decreased significantly. After River Terrace resumed construction following a brief pause, it sought confirmation from BNY that the bank would commit to funding the original loan amount. BNY responded that the projected rents were no longer adequate to support the original loan amount and proposed reducing the amount by $13 million. BNY subsequently updated its response to add an additional justification for reducing funding: that 9/11 caused a material adverse change. The parties continued to negotiate before BNY again decided to fund the full loan amount because of the "surprisingly rapid clean-up of the WTC site, government incentives, improved transportation and concessions that River Terrace had obtained."[50] River Terrace subsequently moved to rescind the agreement and recover fees on the ground that BNY had anticipatorily repudiated the contract. At summary judgment, the Court deemed the question of whether BNY may have anticipatorily repudiated its contract a fact dispute to be resolved at trial.[51]

River Terrace serves as a useful reminder for parties that are discussing or renegotiating a loan agreement: be wary of any "definite and final indication[s] of non-performance," or any statements that can be construed as such, including demonstrations of hesitancy to fund or attempts to modify the financing agreement.

4) Can a Lender Face Liability for Renegotiating Loan Terms Where It Knows a Borrower Faces Dire Circumstances?

A company may be able to assert a claim for "economic distress" where a lender attempts to renegotiate loan terms in exchange for funding an existing commitment, depending on the circumstances and provisions of the loan in question.

Generally, where an agreement explicitly provides a lender with discretion to determine whether to lend, courts are not inclined to find that the decision not to lend constitutes economic distress, absent some demonstration of fraud or tortious conduct. For example, in *Interpharm Inc., v. Wells Fargo Bank, National Association*, the court noted that a mere demonstration of financial pressure will not by itself establish economic duress.[52] In *Interpharm*, the plaintiff defaulted on its obligations under a loan and Wells Fargo nevertheless offered to extend credit but did so through a series of forbearance agreements with stricter conditions than had been originally agreed upon. The court found that demanding the borrower adhere to these stricter conditions did not constitute economic duress because "demands by a lender otherwise under no obligation to continue extending credit cannot constitute the 'wrongful threat' required to establish economic duress under New York law".[53]

However, where there is an obligation to fund capital, attempting to renegotiate the terms of a funding arrangement may be interpreted as constituting economic duress. For example, in *Sosnoff v. Carter*, the plaintiff committed to participate in a $20 million bridge loan, as part of a larger financing, to build a large residential project in Manhattan.[54] The plaintiff subsequently tried to back out of participating in the bridge loan unless the defendant agreed to significant concessions in the overall economic partnership between the two parties. The defendant claimed to be unable to obtain alternate financing and faced a default on the project without the plaintiff's participation. The court found that these facts were sufficient for the defendant to plead an economic duress claim under New York law.[55]

Additionally, where a lender has an obligation to fund a loan yet demands additional concessions to follow through with its obligation, a court may be able to later void the updated agreement for lack of consideration under the "pre-existing duty" rule.[56]

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COVID-19 promises to give rise to novel legal issues for borrowers and lenders in a quickly evolving financial climate. Careful attention to the foregoing express and implied obligations will best allow borrowers and lenders to navigate the new terrain wrought by the COVID-19 pandemic.

[1] *See, e.g., HSH Nordbank AG v. Street*, 421 F. App'x 70, 73-74 (2d Cir. 2011) (rejecting implied covenant claim against bank for refusal to fund draw request, even though that refusal led to borrower's default, because bank had "no obligation to fund" under "express terms of the [l]oan").
[2] *See* 23 Williston on Contracts § 63:22 (4th ed. 2006) ("In determining whether a party has breached the obligation or covenant of good faith and fair dealing, a court must examine not only the express language of the parties' contract, but also any course of performance or course of dealing that may exist between the parties.").
[3] *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985).
[4] *See, e.g., In re Lehman Bros. Holdings v. JPMorgan Chase Bank, N.A.,* 541 B.R. 551, 569 (S.D.N.Y. 2015) ("Although courts often refer to the obligation of good faith that exists in every contractual relation, this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document").
[5] N.Y. U.C.C. Law § 1-309 (McKinney).
[6] *See, e.g.*, *Howard v CitiMortgage, Inc*., 2011 WL 7025340, *14-15 (Sup. Ct. N.Y. Cty. 2011).
[7] *See, e.g*., *Norstar Leasing Servs. v Colonie Coliseum Enters.*, 145 Misc 2d 388, 392 (Sup. Ct. Albany Cty. 1989) ("The UCC generally permits acceleration clauses in agreements provided that the party having power to accelerate payments exercises that power in the good-faith belief that the prospect of repayment or performance is impaired.").
[8] *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co*., 588 F. Supp. 2d 919, 933 (S.D. Ind. 2008), *aff'd but criticized*, 582 F.3d 721 (7th Cir. 2009).
[9] Securities and Exchange Commission, Press Release, *SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19)* (Mar. 4, 2020), *available at* sec.gov/news/press-release/2020-53.
[10] *In re Musicland Holdings Corp.,* 386 B.R. 428 (2008) *aff'd*, 318 F. App'x 36 (2d Cir. 2009) ("[c]ourts have generally been reluctant to find a breach of the implied covenant of good faith when doing so reads so much into the contract as to create a new term or when alleged misconduct is expressly allowed by the contract.")
[11] *Mellon Bank, N.A. v. United Bank Corp. of New York,* 1993 WL 489679, at *8 (N.D.N.Y. Nov. 18, 1993), *rev'd on other grounds*, 31 F.3d 113 (2d Cir. 1994).
[12] *Id*. at *9.
[13] *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co*., 588 F. Supp. 2d 919, 933 (S.D. Ind. 2008), *aff'd but criticized*, 582 F.3d 721 (7th Cir. 2009).
[14] *See, e.g., Akorn, Inc. v. Fresenius Kabi AG,* 2018 WL 4719347 (Del. Ch. Oct. 1, 2018); *In re IBP, Inc. Shareholders Litig.,* 789 A.2d 14 (Del. Ch. 2001).
[15] *See Newmont Mining Corporation v. AngloGold Ashanti Limited,* 2020 WL 1285543, at *17 (S.D.N.Y. Mar. 18, 2020) ("New York courts interpret MA[C] provisions in the context of the entire agreement, and in conjunction with other evidence of the parties' intent including separately executed and/or contemporaneous other documents"); *Capitol Justice LLC v. Wachovia Bank, N.A.*, 706 F. Supp. 2d 23 (D.D.C. 2009) (finding that extrinsic evidence should be allowed in determining what constitutes a MAC "because there is more than one interpretation that a reasonable person could give to the MAC clause, when viewing the contract in the context and circumstances surrounding the agreement").
[16] 567 B.R. 55 (Bankr. S.D.N.Y. 2017)
[17] *In re Lyondell Chem. Co.*, 567 B.R. 55, 85 (Bankr. S.D.N.Y. 2017).
[18] *Id*. at 150.
[19] 706 F. Supp. 2d 23 (D.D.C. 2009).
[20] *Capitol Justice LLC v. Wachovia Bank, N.A.*, 706 F. Supp. 2d 23, 25-26 (D.D.C. 2009).
[21] *Id*. at 26.
[22] *Id*. at 29.
[23] *Id*. at 30-31.
[24] *Highland CDO* Opportunity *Master Fund v. Citibank, N.A.*, No. 12-cv-2827, 2013 WL 1191895, (S.D.N.Y. Mar. 22, 2013).

[25] *See U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc*., 822 F.3d 650, 661 (2d Cir. 2016) (Noting that courts view "contracts as simply a set of alternative promises either to perform or to pay damages for nonperformance" and emphasizing "the common law's tolerance for, even encouragement of, so-called 'efficient breaches' that increase overall wealth").
[26] *See Point Prods. A.G. v. Sony Music Entm't, Inc*., 215 F. Supp. 2d 336, 344 (S.D.N.Y. 2002) (noting that to recover lost profits post-bankruptcy, the Plaintiff would have to demonstrate that the Defendant's "breach alone would have been sufficient to force the company to declare bankruptcy or that [Plaintiff] would not have had to declare bankruptcy but for [Defendant's] breach").
[27] *Dantzig v. ORIX AM Holdings*, LLC, 2019 WL 5067936 (Sup. Ct. N.Y. Cty. Oct. 9, 2019).
[28] *ERC 16W Ltd. P'ship v. Xanadu Mezz Holdings LLC*, 133 A.D.3d 444, 444 (1 Dep't 2015); *see also, e.g., Universidad De Las Californias, S.C. v. Mayfair Advisors, Ltd*., 2007 WL 2591228, at *2 (S.D.N.Y. Sept. 7, 2007) ("[i]n order to recover consequential damages, plaintiff is required to plead that those damages were the natural and probable consequences of the breach, and were contemplated by the parties at the time the contract was executed").
[29] *See Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.,* 84 N.Y.2d 430, 435 (1994) ("[g]enerally in the law of contract damages, as contrasted with damages in tort, whether the breaching party deliberately rather than inadvertently failed to perform contractual obligations should not affect the measure of damages").
[30] *Five Star Dev. Resort Communities, LLC v. iStar RC Paradise Valley, LLC,* 2012 WL 4119561, at *5 (S.D.N.Y. Sept. 18, 2012).
[31] *See, e.g., Banc of Am. Sec. LLC v. Solow Bldg. Co. II, L.L.C.*, 47 A.D.3d 239, 250 (1st Dep't 2007) (refusing to dismiss "cause of action for consequential damages" based on exculpatory provision in contract where defendant demanded "additional exorbitant payment for services it was obligated to provide"); *Atari, Inc. v. Carlyle Trading Corp.*, 2012 WL 3541165 (Sup. Ct. N.Y. Cty. June 21, 2012) (holding it is improper to enforce a damages limitation clause where a trier of fact could find an attempt of economic duress, i.e., "withholding performance unless another party agrees to some further demand").
[32] *Hexion Specialty Chemicals, Inc. v. Huntsman Corp*., 965 A.2d 715 (Del. Ch. 2008).
[33] *Id.* at 751.
[34] *Id.* at 748.
[35] *Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co.* (*In re Sunbeam Corp.)*, 284 B.R. 355, 364 (Bankr. S.D.N.Y. 2002)
[36] *Shubert v. Lucent Techs. Inc (In re Winstar Communs., Inc.),* 554 F.3d 382 (3d Cir. 2009).
[37] *See, e.g.,* Restatement (Second) of Contracts § 359 (1981) ("Specific performance…will not be ordered if damages would be adequate to protect the expectation interest of the injured party); *In re Town Bd. of Town of Brighton ex rel. Town of Brighton v. W. Brighton Fire Dep't, Inc.,* 126 A.D.3d 1433, 1435–36 (4th Dep't 2015) ("specific performance is a discretionary remedy which is an alternative to the award of damages as a means of enforcing the contract ... [t]he right to specific performance is not automatic").
[38] *See, e.g., BT Triple Crown Merger Co. v. Citigroup Glob. Markets Inc*., 19 Misc. 3d 1129(A) (Sup. Ct. N.Y. Cty. 2008) ("Ordinarily, the New York courts will not order specific performance of a contract to lend money to a plaintiff, on the ground that money is fungible, and an injured party can borrow funds elsewhere and recover damages based on the higher costs it was forced to pay to the replacement lender").
[39] *See Wells Fargo Bank, N.A. v. Bank of Am., N.A.*, 2013 WL 372149, at *9 (S.D.N.Y. Jan. 31, 2013) (holding that "specific performance is the appropriate remedy" in a beach of loan agreement dispute where the contract stipulated this relief).
[40] *See e.g., Bregman v. Meehan*, 125 Misc. 2d 332, 346-47, 479 N.Y.S.2d 422, 432 (Sup. Ct. Nassau Cty. 1984) ("[I]n recent years, there has been a noticeable erosion of the rule that a borrower cannot obtain specific performance on an agreement to lend money…particularly when the loan relates to the sale of real property.").
[41] *Destiny USA Holdings, LLC v. Citigroup Glob. Markets Realty Corp.,* 69 A.D.3d 212 (4th Dep't 2009).
[42] *Id.* at 217.
[43] *Id.*
[44] *Id.* at 223.

[45] *See Cho v. 401-403 57th St. Realty Corp.*, 300 A.D.2d 174, 175 (1st Dep't 2002) ("In general, specific performance is appropriate when money damages would be inadequate to protect the expectation interest of the injured party").

[46] *See, e.g., Edge Grp. WAICCS LLC v. Sapir Grp. LLC*, 705 F. Supp. 2d 304, 319 (S.D.N.Y. 2010) ("if a party cannot perform at the time of the application for specific performance, that fact will preclude the grant of specific performance.")

[47] *See L.K. Station Grp., LLC v. Quantek Media, LLC*, 62 A.D.3d 487, 493 (1st Dep't 2009) (holding that a contract which circumscribes remedies available "curtails the availability of specific performance as a remedy.").

[48] *See, e.g., Rachmani Corp. v. 9 E. 96th St. Apartment Corp.*, 211 A.D.2d 262, 266 (1st Dep't 1995) ("Where there has been an anticipatory breach of a contract by one party, the other party may treat the entire contract as broken and may sue immediately for the breach").

[49] *River Terrace Assocs., LLC v. Bank of New York*, 10 Misc. 3d 1052(A) (Sup. Ct. N.Y. Cty.), *aff'd*, 23 A.D.3d 308 (1st Dep't 2005).

[50] *Id.* at *3

[51] *Id.* at *6.

[52] *Interpharm, Inc. v. Wells Fargo Bank, Nat. Ass'n,* 655 F.3d 136, 142 (2d Cir. 2011).

[53] *Id.* at 148.

[54] *Sosnoff v. Carter*, 165 A.D.2d 486 (1st Dep't 1991).

[55] *Id.* at 491 ("A demonstration of economic duress can be made by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand"); *See also Austin Instrument v. Loral Corp.*, 29 N.Y.2d 124 (1971) (holding that economic duress occurs where one company intentionally withholds needed goods from another company in breach of a contract, and the threatened company is unable to obtain those goods from another source).

[56] *See, e.g., Bobrow Palumbo Sales, Inc. v. Broan-Nutone, LLC*, 549 F. Supp. 2d 249, 268 (E.D.N.Y. 2007) ("The pre-existing duty rule states that promising to perform a duty that already is owed under an existing contract is not consideration, and thus, a modification to the contract is unenforceable").