



In *Fontainebleau* Appeal, Eleventh Circuit Confirms That Term Lenders Lack Standing To Enforce Revolving Lenders' Commitments

Last week, the Eleventh Circuit Court of Appeals held that lenders in syndicated credit facilities do not have standing to enforce the funding commitment that other lenders owe to the borrower in the absence of specific contractual provisions.¹ In a case that emerged from the failed Fontainebleau resort and casino project in Las Vegas, the Eleventh Circuit affirmed decisions denying summary judgment to Fontainebleau and dismissing claims brought by a group of term lenders against revolving lenders for lack of standing under Article III of the United States Constitution.

Fontainebleau was the borrower under a June 2007 Credit Agreement, which provided three separate facilities: an initial term loan, a delay draw term loan and a revolving credit facility. Under the terms of the Credit Agreement, the revolving lenders were not obligated to advance funds in excess of \$150 million unless the entire amount of the delay draw term loan had been “fully drawn.” On March 2, 2009, Fontainebleau submitted a borrowing notice² to the administrative agent, requesting over \$1 billion simultaneously from the delay draw term loan and the revolver. The administrative agent, citing the provision in the Credit Agreement that full funding under the revolver was not available until after the delay draw term loan had been “fully drawn,” rejected Fontainebleau’s borrowing notice. On March 9, 2009, Fontainebleau issued another borrowing notice, requesting only funds from the delay draw term loan, which the term lenders funded.

¹ The case is *Avenue CLO Fund, Ltd., et al. v. Bank of America, NA, et al.*, No. 11-10468 (11th Cir. Feb. 20, 2013).

² Fontainebleau submitted two borrowing notices, one on March 2, 2009 and the other on March 3, 2009. The March 3rd notice corrected a “scrivener’s error” in the borrowing notice submitted the previous day, and they were treated by the District Court and Court of Appeals as a single request for funding. In both notices, Fontainebleau requested funds under the delay draw term loan and the revolver simultaneously.

After financial and other defaults became apparent with the casino project,³ the revolving lenders terminated their commitments on April 20, 2009 in accordance with the Credit Agreement. In June 2009, Fontainebleau filed for Chapter 11 bankruptcy protection in the Southern District of Florida and immediately commenced an action against the administrative agent and the revolving lenders, seeking over \$1 billion in damages and an order directing that the revolving lenders turn over the unfunded portion of their commitments. The term lenders and certain of their assignees separately brought actions against the administrative agent and the revolving lenders, asserting that they were intended beneficiaries under the Credit Agreement and had been harmed by the revolving lenders' refusal to fund Fontainebleau's borrowing request. The actions were ultimately combined into a single proceeding in the Southern District of Florida before Judge Alan S. Gold.

The dispute turned on whether a simultaneous borrowing request under both the delay draw term and revolving facilities satisfied the Credit Agreement's requirement that the term loan be "fully drawn," language that the plaintiffs interpreted as "fully requested" and the revolving lenders maintained meant "fully funded." In an August 26, 2009 order denying Fontainebleau's motion for summary judgment, the District Court held that "fully drawn" in the context of the entire agreement unambiguously meant "fully funded" under the Credit Agreement, and that, in the alternative, the revolving lenders' interpretation of the phrase was reasonable and warranted further discovery, precluding a grant of Fontainebleau's summary judgment motion. The District Court determined that the Credit Agreement provided for a sequential borrowing procedure to protect the revolving lenders, as any delay draw term loans were to be applied first toward repayment of the revolving lenders. Therefore, the simultaneous borrowing notice under both facilities was not a valid borrowing request and consequently did not trigger the revolving lenders' obligation to fund. The District Court also declined to grant Fontainebleau's summary judgment motion because issues of material fact existed as to whether there had been events of default under the Credit Agreement, which would have excused the revolving lenders' funding obligation.

³ Fontainebleau disclosed in April 2009 that "one or more events, occurrences or circumstances have occurred which reasonably could be expected to cause the In-Balance Test to fail to be satisfied", and that it was unable to deliver audited financial statements for the prior year on the date required by the Credit Agreement.

The District Court further granted the revolving lenders' motion to dismiss the term lenders' claims on two alternative bases: first, the term lenders lacked standing because the revolving lenders' commitments in favor of Fontainebleau did not extend to the term lenders; and second, under the plain language of the Credit Agreement, "fully drawn" means "fully funded" as a matter of law.

On February 20, 2013, the Court of Appeals affirmed the District Court's decisions upon a *de novo* review. The Court of Appeals affirmed the denial of summary judgment in favor of Fontainebleau, holding that summary judgment was inappropriate because the term "fully drawn" was ambiguous and that, in the alternative, Fontainebleau's purported failure to disclose any events of default presented a triable issue of material fact about whether the revolving lenders breached their obligations under the Credit Agreement. In adopting this narrow reasoning, the Court of Appeals failed to address the lower court's ruling that "fully drawn" means "fully funded."⁴

The Court of Appeals also rejected the term lenders' arguments regarding Article III standing for their claims against the revolving lenders. The Court of Appeals affirmed that the term lenders could not have suffered any injury-in-fact – a prerequisite for standing – if they were not owed a duty by the revolving lenders. Reviewing the language of the Credit Agreement, the Court of Appeals found only a promise to advance funds for the benefit of Fontainebleau, not the term lenders. The Court of Appeals consequently rejected the term lenders' argument that they were intended beneficiaries of the revolving lenders' commitments. The Court of Appeals found that even if the term lenders were "incidental" beneficiaries of the revolving lenders' commitments, they lacked standing to sue because Fontainebleau was a party to the action and could enforce the revolving lenders' funding obligation.

In affirming that the term lenders lacked standing, the Court of Appeals implicitly rejected their argument that a case arising out of the bankruptcy of Genuity, Inc.⁵ established a right under New York law for co-lenders in syndicated loans to assert claims against other lenders who refuse to lend. In fact,

⁴ The District Court left intact separate claims against the administrative agent under the Credit Agreement and related Disbursement Agreement, which alleged that the administrative agent was aware of events of default and yet failed to stop the disbursement of the term lenders' funds. However, the District Court later granted the administrative agent's motion for summary judgment and dismissed Fontainebleau's claim. See *In re Fontainebleau Las Vegas Contract Litig.*, No. 09-CV-23835-ASG, 10-CV-20236-ASG, 2012 U.S. Dist. LEXIS 38690 (S.D. Fla. Mar. 19, 2012). This issue was not before the Eleventh Circuit on appeal.

⁵ The case is *Deutsche Bank AG v. JPMorgan Chase Bank*, No. 04 Civ. 7192, 2007 U.S. Dist. LEXIS 71933 (S.D.N.Y. Sept. 27, 2007) (*aff'd*, 331 Fed. Appx. 39 (2d Cir. 2009)).

as the revolving lenders argued, the *Genuity* case did not address standing and merely involved claims for declaratory judgment concerning the ability of the administrative agent under a credit agreement to distribute recovered funds held in escrow and to withhold disbursements from a bank that had wrongfully rejected a borrowing request. Following the opinion of the Eleventh Circuit in *Fontainebleau*, it remains clear that under New York law – absent a contractual provision to the contrary – the commitment of a lender in a syndicated credit facility is enforceable only by the borrower and not other lenders.

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