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# The Commercial Litigator and His Client's Information Management Systems

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It takes many systems (hardware, software and employee activities) to operate a modern lending institution. Because these systems weren't necessarily engineered with litigation in mind, it's important for commercial loan litigators to understand how their lender clients' systems are configured and suggest minimally disruptive ways for improving the configuration in order to save time and money in the event that litigation is initiated.

The purpose of this blog post is to discuss my more frequent experiences with some of those systems and their impact on certain aspects of commercial loan collection litigation. There are several recommendations below, but they do not represent an exhaustive list. If you have any questions, feel free to contact me, [Vincent E. Mauer](#).

## Loan Documentation in the Age of Predictive Coding

My wife is a commercial lawyer. I know that when drafting loan documents (the front end of a lender-borrower relationship), she considers her lender clients' information systems. In this day of artificial intelligence and predictive coding, no one wants to manually calculate interest owed or personally calendar future dates when a borrower is to provide financial information. Similarly, commercial collection lawyers litigating to collect loans (the back end of some lender-borrower relationships) must understand and consider their lender clients' information systems.

Business software must be planned and used first to facilitate the business' operations—in this case, commercial lending. An important secondary motivation for software implementation impacting commercial loans is to facilitate tasks that are not required for daily operations but are critical nonetheless: financial reporting and regulatory compliance.

Commercial loan litigators who care about their clients should understand that their clients' information management systems are not designed and implemented with litigation in mind; after all, our clients always intend and hope that borrowers will pay their debts, making collection litigation rare. So, litigators must adapt their client communications and court filings to obtain and use the information that lender clients can provide.

## Interest Rate Calculations and Other Financial Information

Most, if not all borrower relationship software calculates the current principal balance, accrued interest on the loan balance, and the daily interest accrual. Counsel need that information in all litigation scenarios. Often, lenders provide this information to counsel via a "screenshot" from the computer used by the lender's collection-responsible employee. This information is routinely the subject of a lender's affidavit in support of a requested judgment. Those affidavits include an assertion that the affiant has personal knowledge of the facts and the accuracy of the statements—an assertion that collection counsel includes because it is required. See, for example, the Texas requirement in *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 373–4 (Tex. App–Dallas 2011) or the Ohio requirement that an affidavit be "made on personal knowledge" (Ohio Rule of Civil Procedure 56(E)).

I want to provide a detailed example of when a simple affidavit relying on "screenshot" information may not suffice. I have seen many commercial loan documents with a clause like this: "All interest calculated under this Note shall be computed on the basis of a year consisting of a 360-day year but applied to the actual number of days elapsed." This clause is so common that it is often referred to by the understood shorthand "360/actual." The undeniable math is that this clause means the loan's printed annual percentage rate is slightly understated. This is easiest shown by an example:

Consider a loan of \$100,000 with a stated 10% APR that was outstanding for a year. A simple calculation using the APR would lead to the belief that \$10,000 in interest was accrued in the year

that the loan was outstanding. If, however, we use 360/actual, then the interest is calculated at a daily rate of 0.000277777% (10% divided by 365), creating a daily accrual of \$2.78. [i] Then, the daily accrual is multiplied by the actual number of days the loan was outstanding (365). We thus get the actual interest charged: \$10,014.70 (365 times 2.78).

The extra interest generated by 360/actual compared to the true 10% APR is \$14.70 in this example. This amount could be substantial when the loan amount increases. The impact of 360/actual is adequately disclosed in most commercial loan documents I have seen. This is particularly true since the impact of 360/actual is widely discussed in public. See, for example, <https://www.adventuresincredit.com/lenders-calcs/>. [ii] When properly disclosed, these provisions should be enforceable. According to *Kreisler & Kreisler v. National City Bank*, 657 F.3d 729, 732–3 (8<sup>th</sup> Cir. 2011), “The payment provision of the promissory note clearly sets out the time factor and the method for calculating interest, which the Bank followed. The description of the annual interest rate is comprised of two independent clauses. The first states that ‘annual interest rate for the Note is computed on a 365/360 basis.’ The second clause specifies exactly how a ‘365/360 basis’ works: by calculating a daily rate using the annual rate divided by a 360-day year and then multiplying the daily rate by the number of days the balance was outstanding and by the balance itself.”

For current purposes, the questions at hand are (1) how does the lender’s software handle interest calculations and (2) can the lender employee affiant explain what happens if the court filed affidavit is challenged? The answers to these questions should be known before counsel files an affidavit that purports to accurately state the accrued interest owed and the daily accrual going forward. I usually do not include this type of detail in my initial affidavit filed in support of a dispositive motion. It is important to know, however, that your witness has the requisite knowledge when the affidavit is executed. Otherwise, opposing counsel’s successful demonstration that the affiant, in fact, does not have personal knowledge of the facts makes all of your factual assertions suspect.

This level of detail seems like the province of the lender's IT department, and I am not suggesting that every collection responsible bank officer needs to know these details. But the information needs to be available and explainable to judges who are not computer programmers. In addition to interest rate issues, my experiences have revealed the same need to explain what otherwise appears to be "black box" calculations that appear on a loan summary screen apply to (1) the timing and accrual of late fees, (2) the timing of default interest assertions, (3) the application of all funds credited against the loan, and (4) escrow account activity.

If they can do so consistent with operating their business, lenders should ensure that at least one loan-collection employee can explain how the computer system used to maintain and calculate amounts owed was installed and how it is maintained and operated.

## Who Has Knowledge

Perhaps the most common substantive interrogatory [\[iii\]](#) litigators prepare, or answer, is: "who at the lender has knowledge of the lender's dealings with the borrower" or some version thereof. The focused flipside of that question for lender's counsel is which of lender's employees can provide information and are possible witnesses. Beyond (a) the lender employee who has current responsibility for the lending relationship now that it is in trouble, and (b) the probably different employee who initiated the lender-borrower relationship, the potential universe of employees with knowledge could include every lender employee with access to information and contact with the borrower.

Every lender client I work for has a customer relationship management (CRM) system. Typically, the CRM system permits the lender to control who can access information, records when information is accessed, and offers an opportunity to capture information on every lender-borrower communication, although it may require users to record notes concerning oral communications. Hopefully, these features are used, and the lender's employees record any appropriate information that is not captured automatically by the CRM system.

In my experience, a good CRM system, which is used as intended, can both (1) limit the universe of lender's employees who might have knowledge about the borrower and, therefore, limit the scope of interrogatory responses; and (2) easily identify employees involved with the borrower before the loan was transferred to the client's collection-responsible employee, who is usually my client contact. The latter of those two groups makes it easy to identify your client's information sources and witnesses.

If litigation goes smoothly, it will never matter which lender employees accessed information or communicated with the borrower. But it can be important to know who accessed borrower information when the borrower alleges that some unknown lender employee "told me I did not have to make a payment that day."

## A Litigation Hold Is Required and Information Must be Accessible

CRM and other information management systems delete old data in the ordinary course of business. In integrated environments, any data elimination feature is set according to a company-wide information-retention plan. Hopefully, information relevant to any particular loan or borrower is never eliminated while that loan is outstanding or that borrower continues to have a relationship with the lender. There are two relevant points I want to discuss concerning information retention: (1) instituting a "litigation hold" to prevent the destruction of information; and (2) ensuring that all relevant information is available.

A "litigation hold" preventing the destruction of potentially relevant information is required once litigation is reasonably anticipated. See *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (NY 2012) and 49A Mass. Prac. Discovery Section 7.8, titled "Electronic discovery – preliminary considerations – the Litigation Hold." If lender's document-retention plan controls all the relevant systems and does not eliminate any data while a particular loan is unpaid, then a litigation hold is most probably effectively in place when commercial collection litigation is contemplated. Collection counsel should still remind the client not to destroy information, but the danger is reduced. The point is that counsel should know how

the client's CRM and other relevant technologies are used for information retention.

The second information storage issue that arises often is ensuring that all relevant information is available to counsel as required. [\[iv\]](#)

The issue here is not just information that counsel needs to litigate the claim to successful collection, but also information that must be produced to opposing counsel. In document discovery situations, counsel and perhaps the client is routinely required to verify that all relevant information was produced to opposing counsel. This is hard to do if counsel does not understand the client's information-retention system and the steps required to access all stored information.

## Conclusion

Frost Brown Todd's commercial lending counsel regularly assist clients by producing forms that clients can use internally to produce loan documents in situations that need, (1) more uniqueness than commercially produced forms available industry-wide but (2) less than unique, situation-specific documents prepared by counsel. This is proactive work in which commercial lending counsel coordinate with the lender's loan document-generating personnel and technologies in order to help lender clients conduct their business.

Litigation counsel, too, can advise clients on how certain personnel and technologies can be used and configured to make collection litigation less painful. Experienced counsel who understand the client and its current systems can make suggestions that are minimally disruptive, but which should save time and money in multiple future litigation situations.

For more information, please contact [Vincent E. Mauer](#). Mr. Mauer has 30+ years of commercial litigation experience and often uses the knowledge he obtained earning his MBA and passing the CPA examination.

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[\[i\]](#) As a check, we see that \$2.78 times 360 equals \$1,000.80 or almost exactly the expected amount.

[ii] I am not a consumer loan specialist. I am told, however, that it is a violation of certain federal and state consumer laws to disclose a stated APR that is inaccurate because of how the interest due is calculated. See, *Chern v. Bank of America*, 15 Cal.3d 866, 544 P.2d 1310 (1976) (“We agree with plaintiff that the practice of computing interest quoted as a ‘per annum’ rate on the basis of a 360-day year is likely to deceive the public. ‘Per annum’ means literally ‘by the year.’”)

[iii] An “interrogatory” is a written request for information that parties serve on their opponents during litigation.

[iv] I never ask clients to provide copious amounts of information until we know the litigation process will require that activity lest that activity prove a waste of the client’s time and money.

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