

# Recognizing When to Engage Counsel in Commercial Lending Transactions

## Banking Brief: Financial Services Insights

By Keith Mundrick on February 10, 2025

Automated loan software can be effective for documenting consumer loans and some basic low-value commercial loans. However, most commercial transactions require greater attention on the front end than simple form generation. It is critical for commercial lenders and credit officers to recognize when the risk and complexity of a loan transaction exceeds the capability or intent of automated lending software. Careful planning will ensure a much smoother experience in the event of a workout.

Here are five common triggers for when lenders should consider involving their counsel in all or part of a commercial lending transaction.

1. **Real estate collateral.** Real estate presents a unique set of risks and challenges as collateral. The borrower's real estate issues (title, easements, encroachments, tenant rights, zoning, environmental, etc.) can always become the lender's problems, either by jeopardizing cash flow or reducing the value and marketability of the property in a foreclosure. For this reason, counsel should always be involved in the due diligence process even if a loan is being documented internally.

Review and negotiation of title and survey issues, including requesting the appropriate modifications to the title commitment and identifying the correct title endorsements for each transaction, are critical on any commercial real estate loan. In leased properties, unique tenant subordination matters must also be considered.

2. **Larger loans.** Internal documentation puts the risk on bank employees to document the deal with precision, identifying the proper structure, verifying the necessary documents and authorized signers, and perfecting liens properly. Each lender will have its own risk tolerance, but once the total credit facilities exceed \$1 million, this is a lot of risk to hold internally.
3. **Too many moving parts.** Examples include when the borrower has a complex ownership structure, there are multiple guarantors, or the credit facilities are made to related business entities that are cross-collateralized and cross-defaulted. Each lender should always be represented by counsel in any syndication or participation.

4. **Specialized collateral.** Specialized collateral such as pledged securities, aircraft, and pledged contracts require special attention for documentation and perfection of the bank's lien.
5. **Customized covenants.** Counsel-prepared documents allow for customization of financial and other covenants, representations and warranties, and events of default to match the unique contours of each transaction.

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