

Hamborsky and Rendon in ABA Journal: Implied Fiduciary Duty and the Potential for Increased Lender Liability

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Haynes Boone Associates Chris Hamborsky and Carlos Rendon authored an article for *ABA Journal* discussing how recent developments in the law raise the possibility of additional liability for commercial lenders.

Read an excerpt below.

Consider the following questions: Does a debt or equity investor typically owe a fiduciary duty to other shareholders or to the entity itself? Is a debt investor liable for anything beyond breach of contract and running afoul of a smattering of commercial lending laws? If you answered no, you would be correct—in most cases. Despite your good intuition, recent developments in the law raise the possibility of additional liability for commercial lenders.

Furthermore, consider that the profile of a commercial lender has changed. In days past, this was likely a traditional bank. However, as borrowers look for more options in accessing capital, private credit funds have become a viable alternative to banks. In an industry that has undergone substantial transformation, navigating the intricacies of lender liability in different jurisdictions is crucial.

In Delaware, a loan is typically seen as an arm's length transaction with no fiduciary duties attached. Likewise, shareholders generally do not owe such duty to each other or to the entity in which they have invested. Yet in [Skye Mineral Investors, LLC v. DXS Capital \(U.S.\) Limited](#), 2020 WL 881544 (Del.Ch., 2020), the court notes that even a minority shareholder, with only a 27 percent stake in the business, can be a fiduciary if it possesses sufficient control. In this case the minority shareholder was able to block new security interests, issuances of shares, mergers, and other substantial transactions. Ultimately, the lesson arising from the case is that when blocking rights allow even a minority investor to channel the corporation into a particular decision, these blocking rights may contribute to an inference of control. Other Delaware cases suggest that lenders need to avoid "stacking" no more controls than necessary and be mindful of how much control they exercise.

To read the full article in *ABA Journal*, click [here](#).