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Fund Finance Friday

An Interpretation of 'Discharge for Value'

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By **Jeffrey Nagle**
Partner | Finance

As most in the loan market are by now aware, the United States District Court in the Southern District of New York issued a decision on February 16, 2021 *In Re Citibank August 11, 2020 Wire Transfers* that certain lenders were entitled to retain approximately $500 million in funds erroneously sent by the administrative agent under a credit facility to Revlon, Inc. The court's decision came as a shock to many in the lending community. However, it is based on an interpretation of the "discharge for value" doctrine, and stands for the fact that payors are in the best position to avoid errors in payments and are the appropriate party to bear the risk of any associated losses.

What does this mean for agent banks? As a first principle, institutions should redouble efforts to ensure that mistaken payments are not made in the first place. In addition, many agents have begun incorporating "clawback" language into the agency provisions in new deals so that, contractually, they have recourse to recipients in the event that an erroneous payment is made. The Loan Syndications and Trading Association (LSTA) has launched a project to standardize clawback language that, when finalized, will likely be included in many credit agreements.

It is often wondered why credit agreements are so long – the answer is that many provisions in each agreement are addressing court decisions, default rules, situations or outcomes that parties desire to contractually modify. At least for some time, most of us will be able to remember why the "if you erroneously receive payment you must return it" provision is included in the agency section.

*For a more in-depth discussion of the case, click **here** for the Cadwalader Clients & Friends Memo by partners Steve Herman and Chris Dickson.*