THE LENDER'S
Perspective
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This newsletter is designed to address legal issues that impact lending in Florida.
Whether making loans or collecting bad loans, *The Lender's Perspective* will provide timely and valuable insight to the creditor.

Keeping the Lid On Litigation Cost

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The mantra in special assets these days is "cost control". This issue of *The Lender's Perspective* looks at ways to manage the high cost of litigation.

Is there a choice?

The easiest way to manage litigation costs is to avoid litigation! Many bankers have discovered this simple fact after an initial strategy of filing suit in most, if not all, of their defaulted loan cases. If the borrower will engage in settlement dialogue and you believe that the borrower is acting in good faith, it may be best to continue discussions in an effort to reach a resolution. You should also carefully consider whether to bring suit at all in certain situations such as unsecured loans or credits with collateral having little value.

Ultimately, you may have to resort to litigation in order to enforce the loan documents. In those cases, recognize that litigation costs include not only legal fees and court costs, but also the opportunity cost to the bank of its employees' time and effort in preparing for and participating in a lawsuit. Once the decision to litigate is made, move ahead and file the suit. You can always pursue settlement discussions during the pending case.

Litigation Cost Control

Filing fees, service of process fees and other costs of a lawsuit are not generally subject to control. In Florida, filing fees for foreclosure cases have increased dramatically in the past few years, largely in response to the strain on judicial resources brought about by the volume of new cases. There are opportunities though to achieve savings. For example, a bank holding both a first and second mortgage on the same property can foreclose both in a single action and thus minimize filing fees. Actions against guarantors can be brought along with suit against the borrower and the collateral.

The biggest cost component is, of course, legal fees. Unfortunately, the reality is that litigation is expensive. In today's environment, borrowers frequently defend cases by strategies of delay. This can hinder the bank's ability to resolve cases quickly by means of summary judgment resulting in higher overall costs.

There are, however, a few guidelines that banks can consider in order to help minimize costs:

- **Present your counsel with a well organized file.** Take the time to make copies of the loan documents, correspondence, loan approvals and other relevant documents. Then, organize them by type and present them in chronological order. You may also want to provide a list of persons within the bank who have knowledge of the particular matter along with their contact information. Finally, provide a summary of any bank mergers and name changes along with supporting documentation. If the loan has been assigned from one lender to another, make certain to highlight the assignment documents so the ownership of the loan can be traced.

- **Review the bank's records to make sure you have the original promissory note.** In Florida, the original note must be presented to the court at the time a judgment enforcing it is granted. If the original is lost, a count can be added to the lawsuit to reestablish the instrument. However, if this is not known upfront, significant delay can result and that means extra expense.
- **Discuss with your counsel the need to file certain motions such as a motion to strike an affirmative defense or a motion to dismiss a counterclaim.** While these motions may sometimes be advisable, there are many instances where the issues may be resolved between the attorneys without the need for a motion and hearing. In most cases, the opposing party will be allowed to amend its pleadings anyway.
- **Pick your battles carefully.** For example, when faced with motions for extension of time, consider stipulating to the requested extension. It is often not possible to get a hearing date in less time than that requested by the extension.
- **Give careful consideration to the use of certain discovery methods.** Requests to produce documents and interrogatories, while sometimes useful, are often dispatched without serious cost/benefit analysis and frequently produce little information of value. In some cases, it may be best to omit these preliminary discovery methods and, instead, simply take the depositions of key witnesses.
- **Be realistic about summary judgment motions.** These motions can save money if successful but the standard for granting these motions is a fairly stringent one. You should discuss with your counsel the likelihood of prevailing prior to preparing and filing a motion for summary judgment. If you do file the motion, make certain that the bank employee who is signing the necessary affidavits in support of the motion carefully reviews the file and has the actual knowledge called for in the affidavits. Foreclosure defense attorneys have been successful recently in preventing summary judgment and delaying cases based on arguments that the bank employees are signing affidavits without actually having knowledge of the matters being attested to.

Final Thoughts

Sometimes unavoidable, always costly. That is litigation in a nutshell. The trick is deciding which cases have to be litigated and taking an active role in managing the case. Don't be afraid to ask questions about the process and the need to take certain steps as the case progresses.

Mr. Waldorf is a Board Certified Real Estate Lawyer whose practice focuses on banking industry clients. He represents lenders in commercial and residential loan transactions, mortgage foreclosures, deeds in lieu of foreclosure, forbearance agreements, and defaulted loan workouts. He can be reached at 239.344.1213 or douglas.waldorf@henlaw.com

As always, thanks for reading and watch for the next issue of The Lender's Perspective.
This newsletter is written quarterly and back issues are available at henlaw.com.

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