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How to Write an Effective SBA Litigation Plan

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October 16, 2019

When an SBA loan goes into default, the SBA requires a lender to commence litigation when the lender concludes that (1) defensive action is necessary to protect the collateral or ability to collect from the obligor or (2) recovery of the debt can best be achieved through affirmative litigation or foreclosure.

Absent emergency circumstances, a lender must submit a Litigation Plan to the SBA before commencing "non-routine" litigation. Lenders should prepare the Litigation Plan with their attorneys' assistance because, when properly-prepared, the SBA will approve the Litigation Plan as "cost-effective, necessary, reasonable, and customary." And this will expedite the SBA's approval and reimbursement of litigation expenses.

Non-routine litigation refers to cases where legal fees will exceed $10,000, cases where a court must adjudicate disputed factual or legal issues, cases involving potential or actual conflicts of interest with the SBA, cases where a lender has additional non-SBA loans with the borrower, and receivership actions.

The SBA provides a three-page template for Litigation Plans. It is divided into nine sections: (1) Lender Information, (2) Loan Information, (3) Critical Information, (4) Attorney Information, (5) Recovery Analysis, (6) Litigation Synopsis, and (7) Narrative, (8) Attorney Fees and Litigation Costs Approved/Incurred to Date, and (9) Proposed Litigation Budget.

Some of the Litigation Plan requires basic information that a lender can complete with no or minimal attorney involvement. But lenders should rely on their attorneys to answer the Critical Information, Recovery Analysis, Litigation Synopsis, Narrative, and Litigation Budget sections. For example, the Critical Information section asks these yes-or-no questions and requires a narrative explanation in Section (7) for each "yes" answer:

1. Is urgent action required due to extraordinary circumstances?
2. Have workout options been explored?
3. Is a trial expected?
4. Has a judgment for attorney fees and costs been requested?
5. Is an SBA witness required?
6. Is the appointment of a Receiver being requested?
7. Are attorney travel expenses being requested?

8. Are there any environmental concerns?
9. Are damages sought for alleged Lender misconduct?
10. Are there novel, unsettled, or potentially precedent-setting legal issues?

Your attorney can advise you on these questions. For instance, you might need to take urgent action through injunctive relief or pre-judgment attachment to protect your collateral from loss or dissipation. This might mean seizure of equipment or vehicles or freezing or set-off of bank accounts. If your borrower has sued you, they may be seeking an emergency remedy that requires an immediate response.

On whether a trial is expected, your counsel should have the expertise to advise you on the likelihood of resolving the case by the summary judgment stage, or if the matter involves factual questions that must be decided by a jury. Your counsel should be well-versed in creditor rights laws and statutes, so they can also advise on novel, unsettled, or potentially precedent-setting legal issues, and any lender liability exposure. Lenders should not only turn to counsel to help them answer these questions, but they should also have them assist in drafting the final narrative explanations.

The Recovery Analysis section requires the lender to list the (1) Borrower, Guarantor or Property Type, (2) Cause of Action, (3) State and Court, and (4) Estimated Recovery. Your attorney can tell you if you must sue or commence a foreclosure, or both. If you must sue, your attorney can advise on whether it should be in state or federal court. Your attorney also can counsel you on the estimated recovery, factoring in projected expenses.

In the Litigation Synopsis section, the lender must provide the legal action taken, proposed legal action going forward, anticipated defenses or counterclaims, and estimated litigation completion date. This information often depends on the local jurisdiction and the attorney representing the obligors. For example, if your borrower retains counsel, your attorney can advise you on whether he or she is reasonable and will be interested in a negotiated resolution, or if he or she is difficult to deal with, will send mountains of discovery requests, will assert counterclaims, and will try to drag out litigation as long as possible. Your attorney can also give you a general sense of how fast or slow cases move in the state or federal jurisdiction where you sue.

The Narrative section provides the lender with the opportunity to describe why the legal action proposed in the Plan and any legal action already taken on the Loan is necessary, reasonable and customary for the locality. It is also the place to explain the other answers in the Plan. Since you rely on your attorney for written advocacy inside or outside the courts, there is no reason you cannot use their skills in crafting a clear and persuasive narrative section that will result in SBA approval.

Finally, a lender's collaboration with its counsel on the above sections will inform the proposed litigation budget. Experienced lawyers will be fluent in drafting litigation budgets since they are often expected from clients in all industries. Your attorney should be able to provide you with a reasonably-accurate estimate of your legal fees and litigation costs for litigation or foreclosure – and the factors that might affect those numbers.

For lenders, the SBA 504 and 7(a) business loan programs have the advantage of offering reimbursement of recoverable legal expenses incurred to enforce and collect on defaulted loans and preserve, recover, and liquidate collateral. But to obtain reimbursement, the SBA imposes mandatory requirements on lenders. A well-prepared and well-documents Litigation Plan is one requirement, and lenders would be wise to involve counsel in its preparation.

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