



Top Business Loan Mistakes to Avoid

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SW&M 2022 Legal Update Seminar – 2/17/2022

1



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2

2

1) Read Leases

For CRE Loans:

- Not only important for calculating debt service coverage
- Early termination clauses
- Option to purchase
- Material incomplete construction obligations by landlord
- Tenant consent required for landlord's financing

For C&I Loans:

- Borrower's continuity of operations on site interrupted by lease maturity
- Material rent increase at lease extension or renewal
- Landlord's lien over same personal property and equipment

2) Get SNDAs & Estoppels

- Should get SNDAs & Estoppels from every important tenant
- Estoppels often reveal problems with the landlord-tenant relationship that impacts credit
- SNDAs ensure continuity of landlord-tenant relationship post-foreclosure and provide important protections for subsequent owner:
 - Limits liability of new owner for prior owner's acts and omissions
 - Tenant agrees not to prepay lease for more than 30 days
 - Tenant agrees to give notice to lender for landlord's breach of lease
- Get full Subordination instead of SNDA for tenants affiliated with landlord

3) Don't Lose Collateral to Criminal Activity

- Civil asset forfeiture laws allow government to seize property involved in criminal activity
- Examples:
 - Illegal marijuana grow operations at the collateral property
 - EB-5 visa program investments in collateral property where foreign investors are defrauded

5

5

3) Don't Lose Collateral to Criminal Activity (cont.)

- “Innocent owner defense” under 18 USC 983(d):
 - “Owner” is defined to include secured lender
 - Government’s burden is to show that property was used in connection with criminal offense
 - Burden then shifts to owner and lender to show they’re an “innocent owner”
 - To prove innocence when criminal activity started after interest in property was taken, must show:
 - Did not know of criminal activity; or
 - Upon learning of the conduct giving rise of the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property
 - To prove innocence when criminal activity started before interest in property was taken, must show:
 - Bona fide purchaser or seller for value; and
 - Did not know and was reasonably without cause to believe that the property was subjected to forfeiture.

6

6

3) Don't Lose Collateral to Criminal Activity (cont.)

- Tips for management:
 - If criminal activity, even if its only alleged, is disclosed before the loan is consummated, seek independent counsel that reports to senior executive management and/or legal department
 - Opinion letters from borrower's counsel
 - Opinion letters from lead lender in loan participation
 - Opinion letters from outside counsel engaged directly by relationship managers.
 - Avoid making the loan
 - If criminal activity discovered after consummation, act in accordance with the statute establishing "innocent owner" defense

7

7

4) Ask For & Evaluate Trust Information

- Guarantors sometimes conveniently fail to disclose they hold their assets through trusts
- If revocable trust holds assets and individual guarantor passes, all of the assets in the trust pass to the beneficiaries, unless Trust provided a guaranty
- If trust is irrevocable, beneficiaries already have a vested interest in assets and can challenge any guaranty provided by the trust
- For testamentary trusts, the trust becomes operational as irrevocable trust upon death of settlor

8

8

5) Don't Accept Payments from Non-obligors

- Lenders should avoid accepting loan payments from anyone not obligated on the debt (i.e., borrower or guarantor)
- May need to return all payments received to a bankruptcy trustee or receiver of any non-obligated individual or entity that made payments.

9

9

6) Be Careful When Enforcing Non-Monetary Defaults

- Non-monetary defaults should be material
- If only basis is “insecurity” without substantiation, lender could face liability
- Recent Texas bankruptcy case awarded borrower \$17 million in damages after lender’s default enforcement action severely damaged borrower’s business
 - Cite: In re BaileyTool & Manufacturing Co., 16-03125 (Bankr.N.D. Tex. Dec. 23, 2021)

10

10

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11



Thank you!

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12

12