

Stein's Law

Cost Control in Loan Closings: A Second Look

Last month, I suggested that if a borrower wants to control the cost of loan closings, the borrower might ask their counsel to follow three specific strategies in reviewing and responding to the lender's documents. Loan documents and loan closings do, of course, involve much more than these three strategies—both to do the job right and to control the cost of doing it. After reading last month's piece, my old friend Andy Herz of Patterson Belknap reminded me of that, suggesting that I should have covered a number of other important points. He was right, of course, but I can't say everything in 800 words. On the other hand, a monthly column allows me 800 more words a month later, though I still can't say everything.

One of the best cost control techniques for any borrower consists of involving counsel at the term sheet stage, rather than negotiating the term sheet without counsel, then telling counsel to "go close it." At the term sheet stage, the lender may still approach the loan as a competition against other lenders, and will more likely accommodate reasonable requests from the borrower. At that stage, counsel can help the borrower head off burdensome provisions that may otherwise run up significant legal fees to trim back

when they rear their head for the first time in the loan documents.

Equally important, counsel can help identify borrower-friendly additions that the borrower might not otherwise think of at the term sheet stage—improvements that will come much more easily and inexpensively early in the process. For example, for a successful leasing program the borrower will often

need assurances about the lease approval process and the borrower's ability to obtain nondisturbance agreements from the lender. If the borrower figures out what it needs at the term sheet stage—for example, no need to obtain lender's approval for leases that meet a certain test—the borrower can save time and money by dealing with that issue in the term sheet.

As the loan closing process moves forward, a borrower that wants to control costs should think about maintaining responsibility for parts of the closing process that don't really require legal expertise but that the lawyers sometimes handle. At the top of that list, the process of dealing with tenants can run up a lot of time, but most of it doesn't require legal skills. Preparing, circulating and responding to estoppel certificates, and sometimes nondisturbance agreements, can easily

be handled at least in the first instance by nonlawyers once counsel has worked out the basic documentation requirements with the lender.

Dealing with the lender's due diligence process can also consume significant amounts of legal time, at least if the borrower uses counsel as a conduit to deliver wave after wave of disorganized information. To avoid that cost, the borrower should, perhaps with help from counsel, anticipate exactly what the lender will want to see, then organize everything and deliver a single package. Counsel doesn't need to take the laboring oar in that process.

Counsel will, of course, take the lead in dealing with the loan documents themselves, perhaps applying the three strategies suggested in my previous column. As part of making those strategies work, a borrower should make sure their counsel understands what the borrower cares about—the borrower's priorities—and what the borrower plans to do with the property. For example, if the financing consists of a construction loan, the borrower should make sure counsel understands the project and issues it may raise, to make sure the disbursement process, the main event, will give the borrower the money the borrower needs, when the borrower needs it, without spurious issues that forethought might have prevented.

Even if a borrower might be willing to cut some "minor" corners to save costs, at the risk of possible problems later, any careful borrower should still recognize that competent counsel often acts as "the voice of the future"—someone who will identify and try to deal with bad things that might in fact happen, even if they seem unlikely. In addition to trying to save money and to get the deal done as quickly as possible, the borrower should step back and recognize that there is value in listening to and considering that "voice of the future." The last five years of real estate history, and multiple cycles before that, demonstrate that sometimes bad things do happen to good real estate.

Returning to the details of the closing process, once the loan is ready to close, the mechanical process of preparing the closing statement (or "sources and uses") for the loan will often land on the lawyers. When that happens, it not only interferes with and delays the "legal" part of the closing process, but it also runs up legal fees for time spent collecting numbers from other people and doing essentially spreadsheet work. Again, it's not a great use of legal time for a cost-conscious borrower.

Ultimately, it's up to the borrower to work with counsel to figure out what type of closing process makes sense—economically and otherwise—for each particular transaction. I'm sure I've still missed something...

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