

M|J|B BANKING LAW TODAY

10 Things Every Banker Should do to Deal with the Coming Commercial Crisis

Entering 2020 the last thing I thought I would be writing about was how to deal with a major crisis involving general commercial loan customers. Then, COVID-19 hit and everything changed. Now, for the first time since 2008, bankers are facing the sobering reality of potentially needing to exit numerous commercial credits that would have seemed rock solid only 6 months ago.

Below is a list of 10 things that every banker should do to successfully navigate through these challenging times:

- ❖ **Look forward, not backwards.** In traditional financial analysis, historical performance is given very strong weight. In today's environment, entire industries have been either destroyed or fundamentally altered in the blink of an eye. As such, bankers today need to be far more forward looking than ever before.
- ❖ **Avoid Paralysis.** In times of major change, it is very easy for paralysis to set in. Payment deferrals or informal forbearances may be granted simply because a banker does not want to deal with the problem and is hoping that it will go away. This approach rarely works. Bankers always need a comprehensive plan for workout and, if necessary, liquidation.

- ❖ **Properly Document All Deals.** Having a plan is only step one; the plan needs to be properly documented. Whether the bank is deferring, forbearing or liquidating, proper documentation is critical. Properly documented workouts proceed quicker, smoother and almost always do more to maximize net recovery.
- ❖ **Maintain Open Borrower Communication.** Maintaining a clear and frank line of communication with your borrowers is absolutely critical. Once that breaks down, the credit is typically irredeemable and will need to be pushed through liquidation as quickly as possible.
- ❖ **Carefully Monitor Deposit Account Records.** Monitoring deposit account records not only provides a snapshot into the Borrower's liquidity, it also reveals improper asset conversion, fraudulent transfers and changes in account activity that signal that the borrower has opened a new primary bank account at a different bank to conceal the borrower's financial activities.
- ❖ **Respond Decisively to Improper Asset Transfers.** Once the borrower takes the step of attempting to defraud the bank, the relationship is fundamentally ruined and the

bank is well advised to liquidate as expeditiously as possible.

- ❖ **Run Periodic UCC and Court Record Searches.** Even when other financial metrics look ok, UCC and court records searches can be the canary in the coal mine when it comes to borrower financial strain. Unexpected new encumbrances and lawsuits should always be immediately addressed with the borrower.
- ❖ **Utilize Forbearance Agreements with Expedited Enforcement Mechanisms.** In connection to forbearances and forbearance agreements, bankers can request that borrower execute various types of expedited enforcement agreements that speed up the liquidation process. The main types are: (1) confessions of judgment; (2) deeds in lieu of foreclosure; (3) voluntary foreclosure agreements; (4) stipulations for claim and

delivery of personal property collateral; and (5) stipulations for the appointment of a receiver.

- ❖ **Run Updated Property Reports on Real Property Collateral.** Any time a default occurs and the loan is secured by real property, an updated property report should be run to ascertain new encumbrances and unpaid taxes. Never simply assume that the status quo remains with the property.
- ❖ **Engage Legal Counsel Early.** Bringing in an attorney does not mean that credit is beyond repair and it does not have to be a signal to the borrower that the end is near – the borrower does not even need to know. All early attorney involvement does is ensure that all proper procedures are being followed and that the bank is optimally positioning itself for workout, should that become necessary.

-Matthew J. Bialick, Esq.

3 Early SBA Liquidation Requirements that Bankers Often Violate Without Even Realizing

SBA guaranteed loans are a bit of a double-edged sword when a credit goes into default. On the one hand, if the bank follows the correct procedures, the federal government will compensate it for the majority of any loss it will otherwise suffer. On the other hand, the bank needs to follow a whole host of additional requirements and procedures that are not applicable to liquidating non-SBA guaranteed loans. Below is a list of three early SBA liquidation requirements that bankers often violate without even realizing.

- ❖ **SBA Site Visit Requirement.** Within 60 calendar days of an uncured payment default (or potentially sooner) or 15 days after certain non-monetary defaults, the banker must conduct a site visit which focuses on 8 specifically enumerated areas: (1) inspecting and inventorying collateral; (2) establishing the recoverable value of the collateral; (3)

ascertaining whether real property collateral is occupied; (4) assessing environmental risk; (5) developing a liquidation strategy; (6) ascertaining whether a workout is feasible; (7) repossessing the personal property collateral; and (8) arranging for care and preservation of the collateral.

- ❖ **Recent Appraisal Requirement.** Appraisals should be ordered on all real and personal property collateral prior to the lender conducting a site visit (if possible). Appraisals should generally be less than 120 days old and should never be more than one year old.
- ❖ **Accounts Receivable Collection Requirement.** If the collateral includes the borrower's accounts receivable, the bank must conduct an assessment of the value and

collectability of the accounts receivable as soon as possible, and the bank must take “swift, aggressive action” to collect any recoverable accounts.

Failure of the banker to follow these requirements, or any other applicable SBA requirements, could result in either the

reduction or the outright invalidation of the SBA guarantee, depending on the egregiousness of the violation and the level of monetary harm that resulted from the violation.

-Matthew J. Bialick, Esq.

Video Replay – Successfully Navigating the COVID-19 Deferral Dilemma

The COVID-19 pandemic has prompted many lenders to grant payment deferrals to their borrowers. Many of those payment deferrals expire at the end of June, leaving lenders to grapple with the question "what do I do when the deferral period ends and my borrowers still can't make their payments?" This webinar seeks to provide a practical, step-by-step approach to working through this very challenging, delicate and sensitive dilemma.

Viewing Link: <https://attendee.gotowebinar.com/register/4624909152572482576>



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