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Top Five Ways to Lower Your Litigation Fees

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In today's economic climate, servicers and other clients in the mortgage industry are facing enough challenges without having to tolerate attorneys' fees that exceed budget. Here are five ways to keep those fees in line and thereby predict future litigation expenses with greater accuracy.

1. Remove the case to federal court. Clients understandably desire to restrain costs at the commencement of litigation and therefore ask their attorneys to avoid any additional tasks that would increase fees. Especially in fee-sensitive arenas such as the mortgage industry, litigation is expensive enough considering the cost of filing an answer, attending initial court conferences and beginning discovery. Early in a case, however, there are several investments that a client can make to reduce the cost of litigation in the long run. One such investment is removal. The federal rules of civil procedure present defendants with numerous procedural safeguards that ensure fairness in litigation. The deadline for removing a case to federal court is 30 days after service of process (or less, depending on various jurisdiction-specific issues), so quick action is required. Of course, some state courts contain equally effective procedural safeguards, so removal to federal court is not always necessary. Generally, however, the federal system is a far superior venue for the efficient resolution of civil actions.
2. Set a realistic budget. The full list of tasks that arise in the course of a lawsuit is notoriously difficult to foresee. Moreover, in the mortgage litigation arena, a common strategy employed by opposing counsel is to multiply the complexity of a case, thus protracting the litigation and providing the borrower with a mortgage-free residence as long as possible. In spite of such difficulties, clients should require their attorneys to realistically forecast the tasks that will be required in a matter and then submit a budget based on that forecast. A reasonable deadline for setting such a budget is 60 days after commencement of the matter. The budget should provide more information than a general range of total cost. It should be broken down by phase and task. The American Bar Association has devised a litigation code system that provides helpful guidance in the development of a budgetary format.
3. Explore settlement early. Defendants are often reluctant to make settlement offers early in litigation. One concern is that an early settlement offer will signal weakness to opposing counsel and thereby raise expectations of a larger settlement down the road. There is also a concern that an early settlement payment will attract copycat lawsuits, much like blood in shark-infested waters. These concerns are usually unjustified. In reality, plaintiffs often dread litigation as much as defendants, and it is more likely that they will accept a low settlement payment early in litigation than after a year or more of bitter legal wrangling. Therefore, it is imperative that your attorney engage opposing counsel in constructive settlement dialogue early. Such efforts work best when the attorneys stop "playing lawyer" and genuinely work towards resolution. In mortgage litigation, successful resolution often involves loan modification.
4. Ask your lawyer to evaluate liability early. Following up on the last point, the key to settling a case early is a preliminary evaluation of liability, with emphasis on the word "preliminary." In the mortgage litigation arena, your attorney should have immediate access to the "log" and the loan file. With those documents in hand, your attorney should be able to quickly analyze common allegations, such as the allegation that the servicer foreclosed in spite of a pending modification, or that foreclosure was wrongful based on standing issues. In those cases, it is simply unnecessary to engage in expensive

discovery before liability can be evaluated. Of course, if a case presents no liability, your settlement offer should remain low, and you should explain that to opposing counsel, essentially forcing him to prove his case now if he feels the plaintiff is entitled to a higher sum. On the other hand, if the case presents a liability problem, it is best to acknowledge that difficult fact as early as possible and thereby avoid the expense of discovery and an unpleasant surprise at trial.

5. Warn your attorney to avoid waste. Most clients provide their attorneys with written billing guidelines which address important points, such as prohibitions on billing for computer research, attorney-to-attorney conferences and clerical work. Other than these perfunctory written warnings, however, clients and their attorneys rarely discuss billing limitations, almost as if raising the topic would demonstrate mistrust. In reality, however, your attorney would likely appreciate discussing such matters in advance and hopefully avoid an unpleasant telephone call once you have received an invoice that is higher than expected. In mortgage litigation, common topics to discuss are overall fees (see point #2 above), number of attorneys on the file (one or two at most), and the extent of discovery and motion practice (keeping such efforts focused, not far-flung).