

## Designating an Agent for Service of Process

September 27, 2019 | Issue No. 4

So your loan has gone bad, you and your borrower have been unable to work out a deal, you have determined that you need to begin enforcing remedies and your litigators put together a summons and complaint. Now it's time to serve your borrower and/or sponsor.

In the U.S., service of process rules vary from state to state and under Federal law. In New York, service of process on a domestic or foreign limited liability company may be made by personally delivering a copy of the summons to a member of the limited liability company (if the management is vested with the members), to a manager of the limited liability company (if the management is vested with the managers) or to any agent authorized or other person designated by the limited liability company to receive process. Service of process on a limited partnership may be made in a similar manner. Additionally, any entity that is qualified to do business in New York may be served at the New York Secretary of State.

While the LSTA Model Credit Agreement provides for each party to consent to service of process in the manner provided for notices in the applicable section of the credit agreement, it is customary in loan agreements for real estate loans for the borrower to designate and appoint an entity to serve as its authorized agent to accept service of process. Requiring the borrower to designate an agent for service of process provides a lender with certainty that they will be able to effectively and properly serve their borrower, sponsor or other potential defendant and prevents the potential defendant from evading service.

Designating an agent for service seems like it should be a simple task – the borrower provides the name of a person or entity who they agree can accept service of their behalf – but there are potential pitfalls to be aware of and best practices to which a prudent lender should try to adhere. Ideally, an authorized agent for service will be a nationally recognized corporate service company with an address in New York (or the jurisdiction the lender is located in and has elected as its governing law and jurisdiction for lawsuits) or the Secretary of State of the applicable jurisdiction. If the underlying property is located in New York or the borrower is otherwise qualified to do business in New York, this is generally uncontroversial – entities formed in New York and most types of entities that are qualified to do business in New York are required to have a registered agent in New York. If the property is located outside of New York and the borrower is not otherwise required to be qualified to do business in New York, the borrower may object to engaging a service company solely to act as a registered agent for service. A potential fallback – assuming the facts are right – is to have either the borrower's law firm or a sponsor entity, if they are located in New York, serve as the agent for service. In that case, it is very important to ensure that the agent for service is not an individual and, if there is an attention party, it is to a generic type name such as "general counsel." While the law provides for alternatives if an individual is no longer with an organization or is evading service, having to pursue those alternatives can increase the costs and delay service (and therefore enforcement). In the event that none of the borrower, sponsor, their attorneys or the property have any relationship to New York, it is possible to face objections to the requirement that the borrower designate an agent in New York at all. In that case, the next best option is to have a nationally recognized service company in the entity's state of formation designated.

Having an agent for service in New York has a couple of advantages – namely, it subjects an entity to venue in Federal courts in New York and provides a measure of convenience for a lender trying to serve a summons on a borrower. Additionally, a lender should avoid having an individual named as an agent for service to prevent the need to track down a single person to serve who may be incentivized to evade service.