

Is There a Receiver in Your Life?

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As a commercial property owner, a tenant therein or a lender secured by such collateral, the economic downturn may have resulted in a receiver being appointed to manage your asset, your tenancy or your collateral. You are not alone, and with the widely-reported tsunami of commercial CMBS defaults on the horizon, there is potential for many more receiverships to come. What can you expect as a result of this turn of events?

THE BASICS

The most common type of receiver is a Rents, Issues and Profits Receiver ("Receiver"), appointed by a Court pursuant to California Code of Civil Procedure Section 564. By statute, a Receiver must be an individual, not an entity. The receivership is established pursuant to an Order Appointing Receiver issued by the Court (the "Order"). The Order is often similar to one of the versions promulgated by the Judicial Council, and binds the defendant (typically the owner/borrower), the plaintiff (typically the lender) and the Receiver.

The Receiver is neither owner nor lender. The Receiver does not take title to the asset, but acts at the direction of the Court to manage it, usually hiring a property management company to collect rents, manage the vendors and pay the associated expenses. The Receiver is generally given the right to hire a leasing agent and to negotiate and execute leases. The Receiver does not step into the shoes of the lender and thus does not automatically take over any reserves that may have been established to fund any expenses or improvements of the asset. If in need of funds, however, the Receiver may be authorized to issue receiver's certificates, thus potentially increasing the amount of the secured debt (and possibly a guarantor's liability) if the lender agrees to advance money requested by the Receiver. The Receiver must also periodically file accountings with the Court as prescribed in the Order.

THE LENDER

The lender usually seeks the receivership after a borrower default, as a mechanism to maximize and preserve the income from the collateral, either by an ex parte application, a noticed motion or by agreeing with the borrower/owner regarding the receivership terms and then obtaining Court approval. The latter, a "stipulated order," may be narrow or may include agreements regarding receivership duration, payment of pre-receivership expenses and liability for certain actions, provisions rarely found in non-consensual Orders. While lenders may desire to establish prolonged receiverships in the hope of permitting the market time to recover and the value of the asset to increase, an extended receivership runs counter to the Courts' general view that receiverships should last only long enough for a resolution—generally, either a cure, a foreclosure or a deed in lieu of foreclosure.



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THE OWNER

The owner may object to a proposed order if it binds more than the loan collateral. Once issued, the Order typically requires the owner to transfer to the Receiver all funds in the asset's property management account, security deposits and certain documentation. Leases and vendor contracts in process cannot be completed without the Receiver's action. Owner's pending reimbursements from loan reserves for expenses are likely in jeopardy as are reimbursements of other expenditures which would have been paid from future rent. The owner may have liability to vendors seeking payment as Receivers generally only pay for expenses incurred after the establishment of the receivership.

THE TENANTS

Once appointed, the Receiver usually communicates promptly with the affected tenants. The Receiver will direct how tenants should remit rent and may also determine if there are any legitimate landlord breaches claimed. If a tenant is advised that a receivership has been established with respect to its space, and that rent should no longer be paid to the owner (or to the lender if a lockbox is in place), the tenant should ask for a copy of the Order and verify the Receiver's authority. Leases continue in effect following the establishment of a receivership, unlike in a bankruptcy context wherein a lease may be accepted or rejected. Because a Receiver may elect to replace the vendors that had been servicing the asset and/or because vendors may not have been paid in the days preceding the Receiver's appointment, it is not unusual for some disruption of services to occur, so tenants should obtain the Receiver's contact information in order to report issues. Also, if an existing tenant wishes to modify or renew its lease or a potential tenant of the asset desires a new lease, it should review the Order to determine what power the Receiver has in such matters. Sometimes, for example, Orders prohibit the Receiver from entering into leases with a duration in excess of one year without Court approval. Finally, if a leasehold is terminating, the Receiver is typically the party that will control the refund of any security deposit, so long as the owner has previously transferred the security deposits to the Receiver.

In sum, after the appointment of a Receiver, each affected party should evaluate the Order and its effect, as it can significantly alter the previous relationship among the parties.

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