



Managing Workouts – Why Timing is Everything *“Benefits of Receivership”*

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John Connolly
John Connolly Partners
125 East Sir Francis Drake Blvd., Suite 300
Larkspur, California 94939
www.connollypartners.com
john@connollypartners.com



What is a Receiver

- Receiver is an Officer of the Court
- Receiver is a Fiduciary
- Receiver Does Not Work for the Borrower or Lender
- Receiver Owes Same Fiduciary Duty to Borrower and Lender
- Receiver is a Neutral Independent Third Party
- Receiver Assumes the Decisions, Duties, Risks and Responsibilities of a Prudent Owner
- Receiver is Completely Transparent
- Receiver Reports Directly to the Court



Receivership Procedural Issues

- Receiver Must Take an Oath Under Penalty of Perjury
- Receiver Must Make a Declaration of No Conflicts
- Receiver Must Post a Surety Bond
- Court Must Sign Order for Appointment of Receiver and TRO
- Appointment by Ex Parte Emergency Application
- Appointment by Noticed Motion
- Court Order Describes the Receivership Scope of Duties....Job Description
- Receiver may Petition Court for Additional Instructions
- Receiver has Limited Liability for Actions, Except Negligence



Different Reasons for Receiverships

- Deed of Trust-Rents and Profits Receivership
- Misappropriation of Funds, Rents, Deposits, Reserves
- Department of Corporations, SEC Investigations, Ponzi Schemes
- Building Code Violations, Health and Safety Codes Issues
- Serious Deferred Maintenance, Waste, Theft and Abandonment Issues
- Dangerous and Abandoned Properties or Construction Projects
- Cancellation of Insurance, Non Payment of Real Estate Taxes
- Hazardous Materials, Environmental, SWPPP Compliance
- Partnership Disputes, Business Operations Disputes, Liquidation, Dissolution, Partition, Divorce, Enforcement of Judgments and Collections Process



Potential Scope of Receiverships

- All-Inclusive or limited in Scope
- Collect and Reconcile Income and Rents, Lock Box Agreements
- Forensic Review of Income, Expenses, Books and Records
- Forensic Analysis and Review of Management and Operations
- Receivership may Facilitate Discovery for Potential Litigation
- Implement Controls, Reporting, Checks and Balances for Operations and Day to Day Management
- Strategic Property and Collateral Sale Considerations
- Strategic Lender Loan Sale Considerations



When to Appoint a Receiver

- Lenders Need a Strategic Work Out Play Book – Play Offense Not Defense
- Each Loan Default Needs a Game Plan – Gather Facts ASAP – Script Your First Five Internal Decisions Based on Facts
- Borrower, Personal Guarantee, Collateral Value, Cross Collateral, Cash Flow, Equity, Exit Strategy
- Borrower’s Initial Responses, Delay Tactics, Disclosures and Negotiations to Your Requests Will Forecast Future Cooperation
- What are Your Minimum Requirements For Negotiations? Some Suggestions
- Pre-Negotiation Agreement, Property Access, Inspections, Appraisal, Physical Needs Assessment, Current Certified Borrower and Property Financials, Current Rent Roll, Income and Expense Verification, Certified Operating Statements, Lock Box Agreement For Collections, Turnover all Rents, Verify Reserves, Insurance and Taxes Paid, Require Complete Transparency and Reporting
- If You Do Not Receive Cooperation Within 30 Days of Demand Letter, Appointment of Receiver Will Create Structure, Focus and Level The Playing Field By Taking Control of the Property, Rent, Income and Decisions Away from the Borrower
- Each Month That Your Borrower Collects Rent and Income and Does Not Pay Lender is Lost Forever



First Day of a Typical Receivership

- File Surety Bond with the Court
- Deliver Court Order and Instructions to Borrower
- Request Borrower Meeting and Cooperation
- Demand Access, Keys, Turnover of Rents, Income, Deposits, Reserves
- Take Possession and Control of All Cash, Property and Collateral
- Instruct Borrower to Stop Operations
- Takeover Management, Operations and Replace Management as Necessary
- Demand Turnover of Rent, Income, Property, Leases, Files, Books, Records, Reports, Mail



First Thirty Days of a Receivership

- Identify and Collect all Income, Rents, Revenue, Deposits, Reserves
- Take Control of Existing Cash on Hand and Relevant Bank Accounts
- Set Up New Receivership Bank Accounts, Books, Records
- Set Up Day to Day Management, Financial Reporting, Systems, Operations and Controls
- Meet Tenants, Employees, Staff, Vendors and Trades
- Review Insurance, Health and Safety and Environmental Issues
- Take Inventory of All Property and Prepare First Monthly Receivership Report
- Start Forensic Analysis of Income, Expenses, Books and Records



Next Thirty Days

- Continue to Assess and Gather Information
- Review Existing Business Plans, Budgets, and Cash Flow Forecasts
- Generate New Budgets, Business Plans, Budgets and Cash Flow Forecasts
- Implement Income, Expense and Operations Decisions
- Collect Income and Pay Receivership Operations
- Prepare Monthly Report to the Court, Borrower and Lender
- Stabilize, Protect and Preserve Value
- Make Decisions to the Reasonable and Prudent Owner-Manager Standard



How Does a Receivership End

- Borrower and Lender have a Number of Negotiation Choices
- Each Loan Default Situation Requires a Series of Decisions
- Loan Modification, Forbearance Reinstatement, Refinancing
- Termination by Deed in Lieu, Property Sale, Short Sale, Loan Sale
- Termination by Foreclosure, Judicial or Non Judicial
- Termination by Bankruptcy filed by Borrower
- Termination by Mutual Agreement or Stipulation



Lifecycle of a Receivership

- Few Days to Months
- Monthly Financials and Operations Reports Filed with Court
- Final Accounting and Final Report Filed with Court
- Notice of Termination of Receivership to All Interested Parties
- Receivership Fees and Expenses Must be Approved by the Court
- Distribution of Funds According to the Court Order Only
- Final Court Order for Termination of Receivership
- Final Court Order Exonerates the Receiver's Surety Bond
- Post Receivership Expenses and Accounting Adjustments



Receivership Working Capital

- Cash Flow Positive-Recurring Income From Operations
- Negative Cash Flow Issues-Vacancy, New Construction
- How a Receiver Manages the Income and Expense Process
- Receivership Certificates, Super Priority, Process for Issuance
- If Shortfall, Lender May Advance Receiver Working Capital
- Lender May Have an Obligation to Pay Receivership Expenses
- Court May Surcharge the Party who Requests the Appointment of a Receiver for Costs of Receivership if the Receivership Estate Does Not Have Sufficient Funds From Operations



Receivership, Bankruptcy and Foreclosure

- Receivership Before and During Bankruptcy
- Appointment of Receiver is in State Court
- Receiver May Remain in Possession and Control During Bankruptcy With Court Approval
- Receiver as Custodian in Bankruptcy Court Issues
- Receiver May Collect Rent and Income During Bankruptcy With Court Approval
- Receiver in Bankruptcy May Stop Debtor's Use of Lender's Cash Collateral (Rent, Reserves, Other Income)
- Relief from Automatic Stay in Bankruptcy and Foreclosure Process
- Lender's Bid at Foreclosure Sale must Consider Cash Held by Receiver



Lender Loan Default Management Issues

- Lender/Borrower Customer Relationship Issues
- Lender Senior Management and Workout Team Experience
- Capacity-How Many Loan Defaults can One Person Manage Effectively
- Information, Communication and Decision Overload
- Hundreds of Discussions and Decisions Per Loan Default
- Third Party Management, Reporting and Regulatory Compliance
- Outside Attorney and In House Attorney Receivership Experience
- Outside Consultants, Contractors, Appraisers, Environmental, Brokers, etc...
- How To Consider Leverage for Your Team



Loan Default Management Process

- Loan Default and Lender Decision Process and Discipline
- Negotiations Timeline Management and Critical Path
- Loan Default Cost Benefit Analysis and Budget Process
- Loan Default Management and Loan Recovery Modeling
- Credit Quality Analysis and Problem Asset Reporting
- Best Case, Worst Case, Middle Case Recovery Analysis
- How to Manage Expectations, Measure Progress and Define Success for your Team
- Complete the Loan Work Out Process



Borrower Lender Communications Challenge

- Borrower Lender Loan Origination Culture
- Borrower Lender Friendship Issues During Loan Default Process
- Uncomfortable Discussions and Communications
- Potential Challenges for Friendship Management During Default
- Do Borrower Friendship Expectations During a Loan Default Cost You Time and Money
- Who is Best Prepared To Manage The Loan Default Negotiations Process in Your Organization
- The Independent Role of Receiver as a Tool or a Weapon



How to Assess Borrower Cooperation

- Limited Cooperation and Threats of Bankruptcy Filing
- Limited or No Turnover of Past Rents, Current Rents and Collections
- No Verification of Cash On Hand, Security Deposits and Reserves
- Refusal to Lender's Request for Rent and Income Lock Box
- Incomplete and Outdated YTD Borrower and Property Financials, Rent Rolls, Income and Expense Reports
- Incomplete Tax Returns and Reporting
- Unrealistic, Incomplete, Outdated Business Plans, Budgets and Forecasts
- Lack of Third Party Verification of Rents, Income, Expenses, Physical Condition, Leases, Concessions, Vacancy, Insurance
- Limited Access for Third Party Verifications, Reviews, Inspections, Analysis, Valuation, Environmental



Potential Disadvantages of a Receiver

- Request for Receiver May Upset the Borrower
- Request for Receiver May Accelerate Decisions for Lender and Borrower
- Request for Receiver May Require Lender to Retain Specialized Receivership Legal Counsel
- Request for Receiver Will Require Lender to Budget and Manage Receivership Legal Counsel
- Request for Receiver May Accelerate Borrower's Bankruptcy Filing Decision
- Receiver May Mis-Manage the Collateral or Make Poor Decisions
- Lender Must Fund Receivership if Negative Cash Flow or No Income
- Lender Weigh the Advantages and Disadvantages on a Case By Case Basis



Potential Advantages of a Receivership

- Receivership Creates a More Level Playing Field During Negotiations for the Lender
- Receiver Collects 100% of Rent During Negotiations.....No Lost Income
- Lender's Rent Collateral Not Available to Fund Borrower's Financial or Legal Needs
- Parties Negotiate while Receiver is in Possession and Control of Asset
- Parties Negotiate With Complete Access to Verified Independent Property Information
- Lender Explore Options...Forbearance, Short Sale, Deed in Lieu, Loan Sale, Foreclosure
- Receiver May Sell Property and Convey Title During Receivership, No Lender Liability
- Lender May Avoid Ten Year Litigation Tail for Potential REO Construction Claims
- Lender May Reduce Potential Lender Liability and Bad Faith Claims During Negotiations
- Lender in Stronger Position to Collect Income in Case of Bankruptcy Filing
- Receivership Provides 100% Transparency Under Court Supervision



Summary

- Lender's Have Tough Choices and Borrower's Have Even Tougher Choices
- Tough Decisions Often Delay Lender's Decisions and Cost More Money
- Put Together a Lender and Professional Team with Real Estate Work Out Experience
- Interview a Receiver with Experience Relevant to Your Troubled Asset
- Require Other Lender and Legal References for Receiver
- Learn How to Effectively Manage Your Professional Team to Define the Finish Line and Cross It
- Define What Success means for Each Loan Default – Be Realistic
- Create Internal Discipline, Strategies, Business Plans and Timelines to Define and Measure Your Performance
- Work Outs is a Tough Job – Reward Your Team For Making Difficult Decisions
- Loan Defaults May be a Cost Center, but Done Right May Save You Millions of Dollars