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THE BENEFITS OF APPOINTING A RECEIVER IN TODAY'S FORECLOSURE CRISES

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Nearly 1.7 million homes entered into foreclosure in 2007, and another nearly 2.2 million homes in 2008. One major investor predicts that in the next four years, approximately 8.1 million homes will be in foreclosure. In response, and fueled by the outcry from homeowners, tenants, and organizations advocating for relief from foreclosure, Federal and state legislatures have passed laws and regulations that substantially prolong the foreclosure process. An unintentional by-product of these new laws may be an increase in the appointment of a receiver to manage tenant-occupied single-family residential properties from the time of a borrower's default until possession of the property is secured.

The right of lenders and servicers to seek a receiver to take possession of a property is created by the terms of a deed of trust. Most California deeds of trust or their riders contain a covenant for the assignment of rents, including authority to appoint a receiver pursuant to *Code of Civil Procedure* § 564(b)(2).

Traditionally, this provision has been used for income-producing properties, such as commercial, mixed-use, and multi-tenant properties, where the receiver would collect rents and maintain the properties. However, receivers were rarely appointed to collect rents on tenant-occupied single-family residential properties. Why? Because the rent recovered in a traditional 112-day nonjudicial foreclosure was seldom worth the cost of appointing the receiver, \$2,000 - \$3,000 or more.

However, in the current foreclosure environment, lenders and servicers should reconsider the value of a receivership to hold and manage their tenant-occupied residential properties. Federal and California laws are being introduced and passed that directly or indirectly lengthen the foreclosure process. Instead of foreclosing in less than 120 days in California, a

nonjudicial foreclosure can now take over seven months. Add 6 to 9 months of pre-foreclosure delinquency, the new Federal laws giving tenants 90 days, and the entire foreclosure process, from default to possession, could take 16 to 19 months.¹ Therefore, it may now be cost-effective to appoint a receiver to manage tenant-occupied residential properties throughout the foreclosure process in order to collect rents, as well as maintain the property and avoid abatement issues.

THE BENEFITS OF APPOINTING A RECEIVER

A court-appointed receiver can provide many benefits. First, collection of over a year of rents can provide a significant offset for the losses lenders and servicers are currently experiencing.

This is particularly true in California, where rents are often as high as mortgage payments. Collecting rent will also deter rent-skimming and other foreclosure delay schemes. What incentive do owners or fraudsters have to delay the foreclosure by filing bankruptcy or a lawsuit if they cannot collect rents during the delay? None!

A court-appointed receiver may also help the servicer maintain the property, avoiding waste and proactively addressing code violations. Lastly, in certain situations, and with borrower cooperation, the receiver could help orchestrate a short sale or deed in lieu.

THE PROCESS

Appointing a receiver is relatively simple. A receiver can be appointed on an ex parte basis (24 hours notice) or via a noticed motion (21 court days' notice). In either instance, your counsel must file a lawsuit, i.e., a complaint, along with the receivership application. Most courts will grant the application and appoint a receiver on a noticed motion. Some courts will require a

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showing of an emergency to appoint a receiver on an ex parte basis. Once the receiver is appointed and the tenants notified, he or she can begin collecting rents.

Determining which loans to appoint a receiver on is a bit trickier. First, is the property tenant occupied? Second, does the deed of trust or rider at issue have the assignment of rents clause? If the answer to both questions is yes, then the loan is ripe for appointing a receiver. The key is to make this determination as early in the default process as possible to maximize the amount of rent that can be potentially collected.²

CONCLUSION

Appointing a receiver is not appropriate or even possible on every loan. The key for the loan servicer is to design an internal process to identify receivership worthy loans as early in the default process as possible. If you need assistance putting a process together, please feel free to contact us.

- 1 In 2008, California enacted *Civil Code* 2923.5, which requires that the lender reach out to the borrower regarding loan modification options at least 30 days before initiating foreclosure. In 2009, *Civil Code* 2923.52 added another 3 months to the foreclosure process for non-exempt servicers. In 2009, Congress enacted the Protecting Tenants at Foreclosure Act ("PTFA"), which give tenants at least 90 days notice before being evicted. And, in 2010, California can expect a mandatory foreclosure mediation program akin to Nevada's (Sec AD 1588).
- 2 In some instances, i.e., waste or code violations, a receiver may make sense even if the property is owner-occupied or vacant.



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