Lessons Learned: Receiverships

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The COVID-19 pandemic may lead to a new round of distressed real estate and, consequently, a need for court-appointed receiverships. Below is a quick overview of some helpful reminders and lessons learned from the Great Recession, which saw an unprecedented surge in commercial real estate-related receiverships.

Goals of a Receiver

1. Obtain immediate control of collateral (including rents).
2. Stop the bleeding and gain control over "rogue" borrowers and property managers.
3. Prevent waste and/or prevent the risk of significant loss at the collateral.
4. Prevent fraud.
5. Cover the "gap period" between filing the foreclosure complaint and the foreclosure sale.

How Is a Receiver Appointed

1. By court order and usually after a hearing.
2. The party seeking the receiver usually recommends a receiver, but keep in mind the receiver is an arm of the court.
3. Receiver must be an individual but is permitted to hire his/her management company.
4. Receiver typically must file a receiver's bond and an oath to perform the official duties faithfully.

Order Appointing Receiver

1. Having a good order appointing receiver is the key to a successful receivership!
2. The order contains all the powers and responsibilities of the receiver. If a right to do something is not in the order, you should not do it. That order is essentially the receiver's constitution/guiding post.
3. Many states do not have statutes that define what powers a court-appointed receiver may have. Instead, courts usually craft those powers themselves in the receivership order.
4. Ideally, the proposed receiver will receive a copy of the proposed order in advance, and the receiver's counsel should review and provide comments to the order before the proposed order is submitted to the court.
5. Putting the time and effort into making sure the order contains the necessary powers and protections goes a long way toward avoiding disputes and liability later.

Key Provisions in an Order Appointing Receiver

1. Provides discretion to the receiver.
2. Provides power to manage and control collateral property.
3. Provides the power, subject to the availability of funds, to pay all expenses incurred with managing the property and those incurred with the appointment of the receiver.
4. Provides judicial immunity to the receiver, his/her attorneys, and agents.

1. Receiver will not be liable to anyone for his/her good faith compliance with his/her duties and responsibilities as a receiver.
2. Receiver will not be liable for acts or omissions except acts or omissions outside the scope of his/her duties, gross negligence, or intentional fraud.
3. Persons dealing with the receiver shall only look to the receivership estate assets and bond posted by the receiver to satisfy any liability.
4. Receiver is not liable for any acts of the borrower corporation or for acts that took place before the appointment order is entered.
5. Provides the receiver with the right to employ independent legal counsel and other third-party professionals.
6. Allows the receiver the power to delegate and hire a management company.
7. States that the receiver can hire the management company as:
   1. The exclusive leasing agent to procure tenants for the collateral in accordance with the terms of any exclusive leasing agreement and schedule of sale and lease commissions;
   2. The exclusive sales agent for the collateral; and
   3. The manager of the collateral, and to pay commissions, fees, or other compensation in accordance therewith without further court order.
8. Provides that the plaintiff must pay all the receiver's compensation without further court order.
9. Provides the receiver with the right to initiate legal action in his/her capacity as the receiver (usually to collect rents from a tenant).
10. Allows the receiver to enter, terminate, or modify contracts impacting the collateral.

Other Key Takeaways

1. Receiver should sign everything "solely in his/her capacity as court-appointed receiver."
2. A receiver is responsible for the collateral of the defendant. The receiver is usually not the receiver over the corporate entity itself.
3. Get a good bond.
4. Have a good motion and order discharging you of responsibilities and blessing all your actions and your final report.
5. If the order provides the receiver the right to sell the collateral, the receiver should be very cautious, as this will only be permitted by the court in extreme situations. Seek a court sale order when in doubt and confirm a title company will insure the sale.
6. Do not do anything the plaintiff asks you to do if you feel it will go beyond what you should do. Too often we have seen plaintiffs use a receiver to take acts the plaintiff itself will not do.
7. When in doubt about the proper action to take concerning receivership property, the receiver is entitled to petition the court for instruction. A court order approving certain act goes a long way in terms of providing protection to a receiver.
8. It should be noted that the Florida Legislature recently enacted a version of the Uniform Commercial Real Estate Receivership Act (UCRERA) with an effective date of July 1, 2020. The Florida UCRERA will provide consistency, uniformity, and guidance to the courts throughout the state with respect to when a receiver should be appointed and will standardize the receiver's powers and duties.
9. The Florida UCRERA will also permit the receiver, **before** judgment and with court approval, to sell or otherwise transfer receivership property if (a) the owner of the property expressly consents or fails to object before or at a hearing after the receiver has provided reasonable advance notice of the transfer to all interested parties, including lienholders; and (b) the receiver establishes that the property is subject to waste, loss, dissipation, or substantial diminution in value.