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When Your Bank Tenant Fails: Understanding the Pitfalls of FDIC Receivership

With bank analysts predicting even more bank failures in 2011 than in 2010, landlords of bank tenants may likely feel nervous. Unlike other commercial tenants, failing banks are not subject to the provisions of the Bankruptcy Code. Instead, they are subject to the FDIC receivership process, which affords far fewer protections to landlords. Understanding the basics of the FDIC receivership process is the first step for landlords in proactively dealing with this difficult situation.

When the FDIC steps in as receiver, it typically prearranges a sale of the failed bank (or portions of the failed bank) to another bank. The purchasing bank and FDIC enter into a purchase and assumption agreement under which the purchasing bank agrees to buy the failing bank, but not necessarily all of the assets of the failing bank. This may include the lease between the landlord and failing bank.

Even if the purchasing bank does not immediately decide to include or exclude the lease from the sale, the FDIC as receiver has the unilateral power to repudiate the lease. In other words, the FDIC can terminate the lease without the consent of the landlord or anyone else. To make it more unsettling, there is no guaranty that the landlord will receive payment for rent accruing from the date of the filing of the receivership through the date of the rejection. Faced with these obstacles, there are several things a landlord of a struggling bank tenant can do to protect itself.

Monitor the Health of Your Bank Tenant

Access to information during the FDIC receivership process is limited. In fact, the landlord may not even receive a notice that its tenant has been taken over by the FDIC. To combat this lack of information, landlords need to search for the information themselves. The FDIC's website is updated weekly with names of failed banks. Knowing that a bank tenant is on the list will not stop the process, but it will enable the landlord to plan its next steps. For instance, a landlord of a failed bank can contact the FDIC to find out who purchased the failing bank to begin discussions with the purchasing bank.

Communicate with the Purchasing Bank

The FDIC has a reasonable time in which to decide to accept or reject the lease. A reasonable time can be anywhere from 90 to 180 days.

During this time, a landlord can reach out to the purchasing bank to find out if it plans to assume the lease. The landlord may be able to negotiate with the purchasing bank or restructure the terms of the lease to encourage the purchasing bank to assume the lease. Alternatively, learning that the purchasing bank does not intend to assume the lease is also valuable information for the landlord from a planning perspective.

File an Administrative Claim with the FDIC for Accrued Rent

Expenses considered administrative by the FDIC are given payment priority. Rent payments owed after the filing of the receivership and before repudiation, however, are not automatically considered an administrative expense.

Administrative expenses of the receiver include only those that the receiver determines are necessary to facilitate the smooth liquidation or resolution of the bank. In cases where the lease is part of a valuable bank branch network or the rent is below market, keeping rent current would likely be viewed as necessary to accomplish these goals.

It is wise for a landlord to file an administrative claim to increase its chances of payment. Accrued rent that is not characterized as an administrative expense becomes an unsecured claim that will be paid only after all depositors receive payment.

In the current economic climate, it is important for landlords to maintain an awareness of their bank tenant's financial health. Although facing the FDIC receivership process may be daunting, knowledge of the process will empower landlords to plan in a way that minimizes losses and maximizes recovery.

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