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Goldfisher of Henley Group: 2011 CMBS holiday advice

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Tis the holiday season and the don of the checklist, who gets the iPad2 and who gets two pads of coal; who gets an open-armed welcome and who gets checked for arms at the door; with whom will you clink glasses and celebrate the spirit of the season, and from whom must you hide the spirits in your liquor cabinet? Ahh.... the holidays.

Time to beware of the things you may have done over the past year to "tick off" your servicer and to prepare for the New Year enlightened. Perhaps, you have some atoning to do before getting onto your servicer's "nice" list. Given that traditionally those are the borrowers who find loan modifications and debt restructuring packages under their Xmas tree or Hanukkah bush, it seems worth considering.

The servicer negotiation process is long and wrought with pivotal choices. Should a borrower comply with all servicer requests? The borrower's decisions on these issues impacts whether or not the servicer continues to work with him or decides to work against him. Unfortunately, with no printed playbook, the borrower must rely on instinct and experience. A borrower must make these decisions with the awareness of how these strategies play into his overall game plan. That being said, when the borrower doesn't like what he is seeing on the other side of the ball, his only option may be an audible.

Take a case whereby an early 2000 CMBS loan went into monetary default after losing a 50% tenant. After paying the property's operating expenses, the borrower's cashflow covered 1/3 of its debt service obligations. The borrower wanted to retain the 33% of residual cashflow and build up the property's operating account. The servicer wanted the excess cashflow to be remitted and to be held by the lender. In addition, the servicer was unwilling to release TI/LC monies from the borrower's escrow account to fund tenant improvement work required by the tenant to renew their lease.

If you were the defaulted borrower would you: 1) remit the excess cashflow to the servicer or hold it 2) fund the TI/LC costs out of the property's cashflow or out of your own pocket or risk losing the tenant 3) pay the monthly property management fee to your affiliated management company even though the lender views this fee as subordinate to their mortgage payment 4) pay personal consulting/legal costs to battle the servicer with the property funds he considers to be his/trusts?

It is not simply a question of being "naughty or nice." In this case, the borrower did not remit the excess cashflow to the lender and did elect to take an additional \$150,000 of the property's cashflow to absorb the TI/LC costs. Neither decision was popular with the lender. However, given the borrower's continued credibility with the servicer and the good-natured tenor of the dialogue to date, the advisory team and borrower agreed that keeping the cash and keeping the tenant were more critical than satisfying the servicer's requests.

At the end of this holiday tale, the servicer eventually prevailed and the borrower did re-pay the

\$150,000 of tenant improvement money. It felt like a small price to pay, however, given that the servicer had left a priceless gift for the borrower - his property - wrapped in a 40% plus discounted payoff.

Around this magical time of year, look deep into your soul and acknowledge those CMBS mistakes you've made. Be aware of the pitfalls suffered by many a CMBS borrower before you. Remember, every holiday gathering has at least one "crazy aunt or uncle" and perhaps, if you can't identify who that person is, it's YOU.

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