

Attornment and Non-Disturbance Agreements

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Attornment grants authority or jurisdiction to a party even if no legal right exists. It is a legal device that is comparable to an assignment. Attornment may occur when a tenant acknowledges a new owner of the property as their new landlord. An example of attornment is if A owes a sum of money to B, B agrees that A pay the money to C and A agrees. A is said to have attorned to C and C can sue A for the debt. In a lending context, when a mortgagor/landlord defaults on its mortgage, a lender who enforces its remedies by realizing on the mortgaged property may seek to enjoy the benefits created after the mortgage, for example, from the property's tenants.

The Ontario Court of Appeal has held that absent an attornment agreement, pursuant to which the tenant has attorned to the lender, a lender has no grounds to compel a tenant to fulfill obligations under a subordinate lease. Subordination occurs when a lease is entered into after a mortgage has been granted or alternatively, the lease is postponed to the mortgage once granted. As the lease was either established second or postponed to the mortgage once the mortgage was granted, the lease becomes subordinate. If both a mortgage and lease are registered on title, the ranking will be determined by the date of registration. A tenant may agree to subordinate its lease to any subsequent mortgage. If the mortgage pre-exists, the lease entered into thereafter becomes subordinate to the mortgage.

A non-disturbance agreement ("**NDA**") is an agreement between the lender and tenant that the rental agreement between the tenant and landlord will continue under any circumstances. An NDA ensures that, notwithstanding the priority of the mortgage to the lease, the lender cannot realize on the security that was granted by the mortgagor in the event of foreclosing the equity redemption held by the mortgagor to terminate the lease. An NDA will confirm that in consideration of the tenant attorning to the lender in the event of foreclosure or enforcement of security, the lender will not terminate the lease held by the tenant. The main purpose of the NDA is to ensure that if the mortgaged property changes hands through the enforcement of the lender, the tenant will not be deprived of the lease that it bargained for.

An attornment provision is a basic term of an NDA. A lender should enter into an NDA if it intends to enjoy the benefit of a tenancy that is subordinate to the mortgage. An NDA establishes privity of contract between the tenant and lender.

For any related questions, please contact the writer. To see my previous 1-Minute Reads for Commercial Mortgage Lenders, please visit the Blog portion of my profile at <https://grllp.com/zzlotnick#media-insights>. A PDF version is available for download [here](#).

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