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# Receivership 101: Real Estate / The Basics

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If you're a lender or creditor's rights lawyer, chances are you may not have needed a receiver in connection with the workout of a nonperforming loan – or at least haven't needed a receiver for a very long time. So here are the basics of receivership with a focus on real estate, including construction loans.

As they say, the devil is in the details and details do matter. However, the basics of real estate receivership are generally the same across all 50 states and in both state and federal courts. For specific matters, it's important to consult experienced legal counsel for advice.

Receiverships are strictly a pre-foreclosure remedy, usually in connection with a pending foreclosure or other related lender/borrower litigation concerning a nonperforming real estate loan. Importantly, it is not necessary for a lender to complete the foreclosure for the lender to resolve a nonperforming loan. With the proper orders, a receiver can, among other things, sell the property without the lender taking ownership. And a receiver can usually be promptly dismissed in the case of a successful loan workout.

The primary reason for the appointment of a receiver is that a lender can't operate or control a borrower's real estate loan collateral until the foreclosure is completed (with certain limited exceptions). If a lender does try to take control of the borrower's property prior to foreclosure, the lender can lose its special statutory protections from property operating liability and related claims, or worse, may have their loan involuntarily converted to an equity interest in the property. A receiver is also typically needed to complete a judicial foreclosure in one-action states, where the lender seeks to recover loan proceeds from both the sale of the property and the borrower.

The primary benefit of a receiver is their ability to, among many other things, control, protect, investigate, complete,

operate, and sell a borrower's property prior to and without completing the foreclosure, and insulates the lender from the liability typically associated with these activities.

Two more notes. Where the borrowing entity is placed into receivership, it is often possible to have the receivership order grant the receiver sole authority to file bankruptcy. Where the lender seeks to have the receiver sell the property in receivership, it is important to confirm that the receiver's title insurance company is ready, willing, and able to provide title insurance for the sale of the property at closing without waiting for the sale order appeal period to expire.

## 1. Why Does a Lender Need a Receiver?

- Lender can't operate or control borrower's property pre-foreclosure \*
  - Usually at least four months to foreclose in California (each state is different)
  - Receiver helps insulate lender from risk of loan being converted to equity
  - Some states allow lenders to take limited measures to protect property pre-foreclosure \*
- Receiver can inspect, protect, maintain, complete, operate, lease, and sell property
  - Receiver can obtain property information
  - Receiver can perform or provide access for testing and inspection
  - Receiver can help insulate the lender from pre-foreclosure claims via receiver sale mechanics liens (but not stop notices)
  - Long-term liability for construction defects on pre-foreclosure construction
  - Potential environmental liability
  - Helps a lender remain a 'lender' and not become an 'owner' prior to foreclosure



## 2. What is a Receiver?

- Receiver is an agent of the state or federal court
  - Not a bankruptcy trustee
  - Doesn't work for lender or borrower
  - Reports to all parties and the court
- Anyone can be a receiver in California – there is no “list” in most states
  - New York requires certification
  - Some states prefer ‘local’ receivers
  - Receiver can't be related to the lender, borrower, or other receivership party
- Typical types of receivers
  - Asset manager
  - Property manager
  - Lawyer
  - Accountant
  - General ‘all-purpose’ receiver

## 3. What Does the Receiver Do?

- Receiver becomes the de facto “owner” of the property via court orders
  - Borrower remains the owner
  - Receiver responsible for property or for borrowing entity
- Receiver can only do what's provided for in the order
  - Protect and operate
  - Gather project documentation and permits
  - Take control of bank accounts

- Maintain insurance
- Entitle / complete
- Borrow / lease / sell
- Receiver can only do what there's money to pay for
  - Cash from the property
  - Cash borrowed from the lender
  - Cash borrowed from a third-party lender by priority lien – typically paid via sale

## 4. What Does the Lender's Counsel Do?

- Lender's counsel prepares and files the initial motions
  - Motion for judicial foreclosure
  - Motion for appointment of receiver and receivership order
  - Plaintiff's bond
  - Ex parte vs. Noticed motion
- Lender's counsel represents the lender, not the receiver
- Receiver's often have their own legal counsel
- Receiver can make motions directly to the court

## 5. The Receivership Order

- The receivership order:
  - Form receivership order / California judicial council form order
  - Custom ‘long form’ receivership order
  - Consult the prospective receiver about the proposed order





- Adding authority to the initial order typically requires additional time and court hearings
  - Obtain stipulated order if possible (i.e., agreed to by borrower)
  - Consult counsel regarding best strategy and approach
  - Venue may be important
- Title insurance company must waive appeal period to avoid delays
- Many title insurance sales reps unaware of issue – typically requires underwriter legal approval

- Receivership of real property (rent, issues and profits) vs. property ownership entity (equity)
  - With equity receivership, court may grant receiver sole authority to file bankruptcy
  - Equity receiverships are typically more complex ▪

## 6. Other Receivership Issues

- Different courts, different results
- Incomplete construction and for-sale housing doesn't generate cash flow until sold
- Borrower bankruptcy – receiver must turn over property, unless:
  - Receiver isn't served with notice of bankruptcy
  - Lender's counsel promptly pursues relief from stay
  - Bankruptcy court allows receiver to remain in place as custodian
- Expiring entitlements – now you see them, now you don't
  - Public agency approvals may expire if building permit not pulled
  - Tentative tract maps may expire if not extended
  - Building permits may expire if construction stops
- Title insurance for receiver's real property sales
  - Receivership orders subject to appeal