

Frequently Asked Questions About Receiverships

The following is a primer on the general treatment of receiverships by the courts. It is not specific to any one state, but explains the typical practice of appointment, qualification, and operation of receiverships by the courts.

I. How is a receiver appointed?

In general, a receiver is appointed by the court, either in response to an application for a receivership by a party with an interest in property or, in rarer cases, by the court's own motion. A receiver may be appointed at any time during the litigation, even while a plea or trial is pending or after a judgment has been entered. Receivers can also be appointed by a government official who possesses the right of appointment, or they can be provided for by a contract in the event of certain circumstances occurring. The authority to appoint a receiver is granted by statute in some jurisdictions.

Some states, such as Florida, require that a party who moves for appointment of a receiver must show that they have title to or a lien on the property in question, and that a receiver is necessary to preserve the property. It can also be required that the defendant be permitted to be heard by the court before the appointment is made, unless the necessity is very stringent.

Many states require that notice be given to all parties prior to the appointment of a receiver, although the court usually has discretion to waive notice if extraordinary or emergency circumstances exist.

A receiver will generally not be appointed, however, where every purpose of the receivership can be effectively accomplished—namely the maintenance and protection of the property in question—and the rights of the parties protected, by a bond furnished by the adverse party.

The party applying for the appointment of a receiver carries a burden of proof: the party must show by clear and convincing evidence the "necessity and propriety" of appointing a receiver, including a showing of some danger that the property in question will be lost or injured in some fashion without a receiver.

II. What are a receiver's qualifications?

A receiver should be "impartial and disinterested," so that his or her personal interests do not conflict with unbiased judgment and duties as a receiver. Ordinarily, therefore, the receiver will not be a party to the case. Some states have statutes that control the prerequisite qualifications of a receiver, or in other instances, list specific disqualifications of certain individuals from appointment as receivers.

A receiver is considered an officer of the court, and although he or she "stands in the position of a representative and protector of the interests of creditors, shareholders, and depositors in the property in receivership," he or she is not an agent or fiduciary exclusive to either party. He or she must be an indifferent person, acting in good faith to and for the benefit of all parties interested in the property.

III. What type of bond must be posted by the receiver?

Generally, a receiver's bond is required, and in some states it is a condition precedent on the receiver's appointment. The purpose of the bond is generally understood to be to insure the receiver's obligations and to secure payment of any costs or damages that might result from the appointment. The amount of the bond is required to be sufficient to protect an opposing party from any losses sustained if the appointment of the receiver is ultimately shown to have been detrimental to the property.

In Florida, the moving party must furnish the bond in favor of the party whose property is placed in receivership, conditioned to pay all costs and damages that might be sustained if the

receiver's appointment proves wrongful. The receiver must also furnish a bond himself, conditioned for faithful performance of his duties, in favor of the State.

IV. What are the receiver's powers and duties?

In some states, the receiver's powers exist pursuant to that state's Rules of Civil Procedure, while other states have specific statutes on receivers' rights and obligations. In still other states, the receiver and his or her duties are entirely creatures of the court.

Generally, the powers of a receiver are not fixed solely by law. The court's "order of appointment" for the receiver often sets out the majority of the receiver's powers, although in some states the court may give other orders that further define the powers' scope. Also, although the receiver's powers do not extend beyond the authority granted to the receiver by the court, it is often implied that the receiver possesses the implied authority necessary to implement the court's orders.

The "basic purpose" of a receivership is the conservation of property pending a decision by the court regarding that property (usually an ultimate disposition). The receiver must exercise "ordinary care and prudence" in handling the property or assets in his or her custody—the same care and diligence that an ordinary prudent person would exercise in managing their own property or assets. If the receiver is uncertain how to preserve the property, he or she should petition the court for instructions.

The receiver of real property "stands in the shoes of the owner," and must keep the property in the same manner of repair that he or she received it. This includes incurring reasonable expenses to maintain the property, and a receiver may be liable in his or her official capacity for failing to exercise ordinary care. Ordinary care must be exercised by a receiver in depositing assets in a bank as well.

A receiver generally has no authority to borrow or lend money unless specifically authorized by the court who appointed him or her. The court has the power to authorize the receiver to pledge the assets or property as collateral for the loan, conditioned on precedents such as notice to the parties with an interest in the property, depending on the state. A petition to the court is also required for the receiver to abandon title of a worthless asset, in which case the asset's title reverts back to the debtor. The receiver can, however, usually incur essential expenses without specific direction from the court.

Duties of a receiver also include collecting and receiving assets or rents of the property, and in some cases, maintaining legal collection proceedings. Some state statutes dealing with receiverships specifically authorize the receiver to collect and sell debts or claims, although he or she is generally not required by law to sue tenants if the condition of the property when it came into his or her hands was not habitable or substantially violated codes. A receiver may be directed by the court to institute suit on an existing claim, and some states will allow the receiver to compromise claims of the debtor against third persons. Other state courts have specifically found that the receiver has no power to make a binding compromise of a claim without approval of the court in advance.

The receiver may be appointed to operate an ongoing business or complete the affairs of a going corporation. Generally, courts are more cautious about appointing this "operating receivership" than a receivership that merely takes charge of property and collects rents, as the receiver operating a business must necessarily have broader powers. In these cases, all possession and control of the business is transferred from the owner of the business to the receiver, who becomes responsible for its continued management. If the business is insolvent and/or at a continuing loss, the general rule is that the receiver should discontinue it, unless the

expenses of the business are guaranteed. In this instance, the receiver should report the continuing loss or insolvency to the court for instructions.

On the whole, the general rule is that the receiver may take any actions necessary for the preservation or benefit of the property, and whether the action requires prior court approval depends upon the extent or long-term impact of the action upon the property.

Does a receiver have the power to liquidate the property?

Generally, a court can order its receiver to make a sale or disposition of the property, for the purpose of paying creditors, liquidation, or ending a long-term receivership whose principal asset is real estate.

To sell the property free from liens, there must be a petition stating a case to the court. A judgment is not necessary before the receiver's sale can be decreed, but an order or some other action from the court authorizing the sale is required, preferably stating the time and place for bids.

The sale may be of real and personal property, but the receiver has no authority to sell real estate except upon the court's order, and then only as the court directs. The receiver of an insolvent corporation may be authorized by the court to sell the corporation's right to redeem, or the receiver of a leasehold may be directed to sell the option to purchase the property, even notwithstanding a lease provision which prohibits assignment.

A receiver's sale is a judicial sale, since the receiver is acting as an agent of the court, and the property in his or her hands is actually under the control and supervision of the court. The statutory provisions governing mortgage disclosures or sales on execution do not apply to a receiver's sale.

The court has a number of options in directing the receiver to sell the property: publicly, at a private sale, by accepting an offer made directly to the court, or by ratifying a sale already

made. The manner of sale depends on what the court deems expedient for the welfare of the parties and the property. A mortgagor is not deprived of his or her rights under laws relating to judicial sales if the receiver is authorized by the court to dispose of the property at a private sale after advertising and filing of bids, so long as full consideration is given by the court to questions of necessity and the time, place, and manner of the sale, if the mortgagor cannot show that an injustice has been done.

If the state has no statute governing what type of notice will be given for the sale, the court may direct the receiver as to what notice to give. Failure to give the notice required by the court or the law will ordinarily render the sale invalid.

A receiver has an affirmative duty to obtain the largest amount possible from the sale, as does the court in confirming a proposed sale. The trial judge has discretion on whether to hold a hearing to set a minimum price, as well as discretion whether to order the sale for cash or for credit (or for a combination of cash and credit).

Because a receiver's sale of property is effectively made by the court, the court's confirmation is required for the sale to be valid, and the creditor acquires no rights until the sale is confirmed. The court has discretion to confirm or refuse to confirm, or to set an additional condition that the prospective purchaser must meet before the sale can be confirmed, including an increased bid. The court may exercise independent judgment in these decisions, and is not confined to weighing evidence produced by the interested parties.

If a protest is filed against the sale, the court must generally grant a hearing before confirming the sale. Mere inadequacy of the price is usually not a ground for objection to the sale's confirmation, unless the price is so inadequate as to "shock the conscience." After confirmation, a sale will rarely be set aside except for grounds such as fraud or mistake.

If the purchaser fails to make payment in complete accordance with the terms of the sale, the receiver normally has the right to demand or accept payment later, if the rights of other parties are not injured by the delay.

Proceeds of the sale are subject to disposition as decreed by the court. If the property is sold free of liens, any liens attach to the proceeds. The trial court may direct the payment of proceeds to the mortgagee who holds the first lien. A landlord's lien for rent on a tenant's merchandise or fixtures does not attach to the proceeds of a receiver's sale, even though the purchaser removed the merchandise or fixtures from the premises.

If the purchaser refuses to pay the agreed-upon price, the receiver must report the default to the court, who in turn may order the purchaser to complete payment, hold him or her in contempt, or order a resale, charging the original purchaser with any deficiency in the original sale price that arises. A bidder in a receiver's sale submits to the jurisdiction of the court for enforcement, and specific performance may be ordered even if the notice of the sale provides for liquidated damages.

The fees and expenses of the receiver in administering the property may be charged against the owner of the property or the proceeds of the sale. The court in granting leave for the receiver to sell can fix their compensation at the amount allowed by law for a master in a foreclosure sale.