

# **Making the Case:**

## *Using a Receiver to Sell Real Property to Satisfy a Judgment*

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### **Introduction**

The statutory remedy of selling real property under a writ of execution provides a strict but orderly process that a judgment creditor may follow toward satisfaction of the judgment. However, judgment creditors may consider the process to be too complex and the cost prohibitive in light of the nebulous results attendant to the statutory procedure.

This article discusses use of a court appointed receiver to sell real property as an alternative to the statutory execution sale. Using a court appointed receiver to sell real property offers a number of distinct advantages over an execution sale:

- There is a greater degree of certainty that the property will sell under an order appointing a receiver—often in the same amount of time (or less) as a creditor’s first run through an execution sale (i.e., about five months);
- Once the receiver is appointed, he handles all of the procedures necessary to complete the sale with very little effort needed from the creditor; and
- The receiver can sell the property on the open market, through a real estate agent, to realize the highest return possible.

Despite the obvious advantages, appointment of a receiver is considered a “drastic remedy” and many courts will not grant an order to appoint a receiver unless there are extenuating circumstances and “good cause”, such as:

- A previous execution sale against the property was unsuccessful;
- The net amount expected from an execution sale will not satisfy the judgment in full;
- Non-debtor third parties own an interest in the subject property;

- The property includes a resident business that is also subject to execution against an interest of the judgment debtor;
- The judgment debtor stipulates to appointment of the receiver in order to get the greatest value for the property applied toward the judgment; or
- A fraudulent transfer of the property has been made or threatened, or there are other circumstances indicating fraud or dissipation of the asset.

In the most general terms, the moving party should be prepared to show:

- That the other less drastic remedies provided by statute are inadequate AND that appointment of the receiver will substantially improve the outcome; OR
- That the receiver is necessary to preserve the interests of all concerned, particularly if outside third parties have an interest in the property or there are “badges of fraud” present.

The purpose of this article is to help you “make the case” for appointment of a receiver under your particular circumstances. The tips provided here are designed to help you establish the requisite “good cause” to convince the court that this otherwise “drastic remedy” is necessary and appropriate in your particular judgment enforcement case.

### **The Realities of Execution Sales**

California provides a distinct and orderly process to sell real property under a writ of execution. Code of Civil Procedure §§701.510, *et. seq.* This method has a number of important safeguards for the debtor built in. These include:

- Personal service of notice on the debtor;
- An opportunity for the debtor to respond;
- Title report or equivalent is obtained and reviewed;
- Fair Market Value and homestead exemptions are determined;
- Debtor given minimum 120 days from notice to sale; and

- Homestead Property must sell for at least 90% of determined Fair Market Value.

Due to the strictures of this process, there are a number of reasons why a judgment creditor might not obtain satisfaction in the end. Consider these common issues:

- The execution method requires cash on sale or within 10 days and these days, buyers with cash are looking for a better deal than 10% under fair market value
- Buyers are not able to walk through and inspect the property before buying resulting in a lower bid price, especially on questionable properties
- A mistake is made in the process, where the process must begin again
- The sale lacks the benefit of common open market sales like listings on the Multiple Listing Service, aggressive marketing by a licensed real estate agent, ability for buyers to obtain financing, inspections and repairs, etc.
- The sheriff or levying officer has numerous responsibilities and cannot devote any significant amount of time toward insuring completion of the sale or other “special attention”

If you are in a situation where you have gone through an execution sale without success, appointment of a receiver may well provide some satisfaction in your case.

**A Real World Case-in-Point:** *The author was appointed as a receiver in a case to sell a single-family home that was purchased using \$40,000.00 in proceeds from a fraudulent transfer. The home was appraised for \$241,000.00, which means it could have sold for as little as \$216,900.00 at an execution sale (\$241,000.00 x 90%). The house actually sold for \$259,000.00 in a private open market sale, well over the appraised value. The difference was enough to entirely cover the receiver’s fees and expenses, the real estate agents’ commissions, and some minor repairs to the property so it would pass pest inspection. With the \$40,000.00 paid to the creditor, the homeowner was entitled to the remaining proceeds. Including costs, the owner could have lost over \$25,000.00 in equity if the house had sold at an execution sale. It was also a winning situation for the creditor, who had cash-in-hand within five months of the property being listed for sale while avoiding the rigors of an execution sale.*

## **Planning and Evaluation**

**First Step:** *Call an experienced receiver to discuss your case*

As discussed above, nearly every case requiring appointment of a receiver will involve extraordinary circumstances that warrant special attention. An informal discussion with an experienced receiver will:

- Confirm whether or not appointment of a receiver is appropriate based on the facts of your specific case
- Reveal important points and provisions that must be included in your application and order
- Help you plan the timeline for applying for appointment of the receiver, commencement of the receiver's duties and obtaining the goals of the receivership

## **Making the Case for Appointment of Receiver**

So we've got it all put together: the circumstances show that the property will be more likely to sell, sooner, and for more money, if we appoint a receiver. The judge will sign the order, right?

*Probably not.* The court will most likely find that the statutory method for forcing a sale of real property provides an "adequate remedy". When this is compared with the "drastic remedy" that receivership is considered to be, the moving party must make a showing that the statutory method is "inadequate" or that a "drastic remedy" is warranted and necessary.

### **Make Your Case Unique**

The statutory "adequate remedy" is meant to cover, in theory, all situations where real property is to be sold to satisfy a judgment. In reality, arguments can be made under certain circumstances that the statutory method is "inadequate". It is therefore important to show that your case is unique; unlike all of the other cases where the statutory remedy is supposed to be "adequate". You're now at the point where you've evaluated the case and determined that some special circumstance applies to warrant appointment of a receiver.

### *A Previous Execution Sale Against The Property Was Unsuccessful*

The most obvious way to demonstrate that the statutory remedy is inadequate is to show that it was tried and unsuccessful. If you can make this showing, be sure to fully brief the court on the facts. Show costs expended. Show dates and calculate the delay. If there are other circumstances affecting the viability of the Sheriff's sale, such as an understaffed Sheriff's department or previous error, those should be tactfully addressed as well.

### *The Net Amount From An Execution Sale Will Not Satisfy The Judgment In Full*

In the previous real world example, the receiver was able to sell the property for \$18,000.00 more than the appraised value, and over \$40,000.00 more than the minimum execution sale price at 90%. Using the same figure from the previous example (\$241,000.00 appraised value), consider the difference if the judgment is for \$240,000.00 or more: Through the statutory execution sale at 90%, you may only net around \$215,000.00—not enough to satisfy your judgment, the debtor walks with nothing and you have a \$25,000.00 remainder due, probably unsecured. Using a receiver, there is a greater chance of selling the property at or above appraised fair market value. The end result is increased satisfaction of the judgment, possibly full satisfaction, and the possibility of the debtor walking with some money.

### *Non-Debtor Third Parties Own An Interest In The Subject Property*

Infrequently, a situation will arise where a judgment debtor owns homestead property jointly with another person who is not liable for the debt. In addition to the debtor's and creditor's interests, the court must now be concerned with the interests of an innocent third party. While 90% of fair market value may be legal and acceptable for the sale of the debtor's property, the third party should not be required to live with such a heavy discount on their property. A receiver can get the best possible price for the property, thus insuring that the third party is fairly compensated for their interest.

### *The Real Property Includes A Resident Business Subject To Execution*

In cases where there is a particularly large judgment against a business located on owned real property, a receiver may be appointed to manage orderly sale of the business and property together as a going concern to maximize value and protect against fraud.

### *The Judgment Debtor Stipulates To Appointment Of The Receiver*

As discussed previously, a receiver is likely to produce a greater net return from the sale of property than through an execution sale. Of course, it may be possible to simply negotiate that the debtor will sell the house and pay the judgment with the proceeds. But stipulated appointment of a receiver may be possible where it can be shown to be of benefit to the debtor.

### *A Fraudulent Transfer Of The Property Has Been Made Or Threatened*

Appointment of a receiver in a fraudulent transfer case is expressly provided for under California law. Civil Code §3439.07(a)(3)(B). In practical terms, use of a receiver as a remedy for fraudulently transferred real property is viable in cases where income is generated from the property, maintenance is required or there is danger of waste—situations where the property requires *protection*. Of course, if the primary goal is to liquidate the property, receivership may be an option based on the points discussed elsewhere in this article. The main goal is safe and successful liquidation of the property for the greatest net return.

### **Show Authority For Private Open Market Sale By Receiver**

At first look, it may appear that there is no authority for a court appointed receiver to sell real property to satisfy a judgment. Indeed, Code of Civil Procedure §568.5, the only statutory authority that addresses the sale of real or personal property by a court appointed receiver, states that the receiver *may* sell property under court order utilizing the execution sale method set forth in Code of Civil Procedure §§701.510, *et. seq.*

Starting from the beginning, we know that a receiver can be appointed to enforce a judgment based on the clearly stated authorities in Code of Civil Procedure §§564(b)(3) and 708.620.

Next, Legislative Committee Comments to Code of Civil Procedure §568.5 and certain case authorities, namely *People v. Riverside University* (1973) 35 Cal. App. 3d 572, 111 Cal. Rptr. 68 (The court may authorize a receiver to sell property at either a private or public sale.) and *Cal-American Income Property Fund VII v. Brown Development Corp.* (1982) 138 Cal. App. 3d 268, 187 Cal. Rptr. 703 (If a court orders the sale of receivership property, the receiver has the affirmative duty to endeavor to realize the largest amount from the sale. Judicial confirmation of a receiver's sale rests on the appointing court's sound discretion exercised in view of all the surrounding facts and circumstances and in the interest of fairness, justice, and the rights of the respective parties.), show that the court may order the form of sale that most adequately comports with the interests of all of the parties. Code of Civil Procedure §568.5 means merely that unless the court prescribes a different mode of sale, a receiver, when authorized, must sell property in the manner provided for sales on execution.

Thus, if you can make a showing that appointment of the receiver is the remedy that will serve the best interests of the parties, the foregoing authorities will provide your legal basis and allow for a private open market sale by a receiver. The court can then specifically order that the property shall be sold through a private open market sale utilizing a licensed real estate agent.

### **Show Facts To Meet The Necessary Elements**

Your motion to appoint a receiver must be supported by an evidentiary showing of the necessary elements. Usually, this evidence is submitted in the form of declarations, but other admissible evidence, such as subpoenaed documents and testimony obtained through deposition, post-judgment examination, hearing or trial may be used.

As discussed at the outset of this article, receivership is a drastic remedy, to be applied with caution, only in cases of apparent necessity where other remedies would be inadequate. *Morand v. Superior Court* (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281. Therefore, submit evidence showing that the other less drastic remedies provided by statute are inadequate and that appointment of the receiver will substantially improve the outcome.

We've also discussed that a receiver may be appointed to aid in execution when it is in the best interests of all of the parties. Code of Civil Procedure §708.620. Obviously, one of the main focuses of this article is that argument that a private open market sale by a receiver is likely to produce a greater net return, providing the judgment creditor with greater satisfaction of the judgment, perhaps full satisfaction, with residual money available to the debtor. If circumstances indicate that the debtor may damage or dissipate the property, appointment of a receiver is also prudent to protect the creditor's secured interest in the property pending sale.

As a matter of strategy, it is important to consider that the debtor may oppose appointment of a receiver and attempt to argue that receivership is not in their best interests. Most likely, this is simply due to the debtor's resistance to *any* execution against their property in general, rather than the specific remedy of receivership. For these reasons, it is important to submit evidence and argument showing objectively the best interests of all parties. For example, if you can show that a greater net return will be realized through appointment of the receiver, this is objectively in the best interests of both parties—it leaves the debtor with less remaining liability following the sale, and may even provide the debtor with residual cash. If possible, obtain comparable sales figures for similar properties. A supporting declaration by a qualified local real estate agent is ideal.

Be sure your supporting declaration includes a brief narrative of any previous unsuccessful attempts at execution with supporting documents attached as exhibits. Additionally, be sure to set forth the basic facts regarding status of the judgment, such as when it was entered and the amount remaining due.

Lastly, be sure to include any evidence relating to fraud, waste, evasion and previous attempts to thwart execution by the debtor.

## **Conclusion**

In certain instances, appointment of a receiver to sell real property in aid of execution may be the preferred method for a creditor due to its increased likelihood of success and greater net return. When all factors are considered, it may also be shown the appointment of a receiver is in the best interests of all parties involved, including the debtor and even third parties holding a partial interest in the property. Use of a court appointed receiver might also be indicated if there is a credible threat to damage, waste, dissipate or fraudulently transfer the property pending sale.

Of course, a receiver is not an appropriate remedy for all circumstances and the main goal of this article is to assist you in preliminary evaluation for use of a receiver in your particular case. If you've read through this article and believe that your judgment enforcement case may warrant appointment of a receiver, your next step should be to discuss the matter with a competent attorney. If your attorney agrees that appointment of a receiver is appropriate, arrange for a telephone conference with your attorney and the receiver you intend to nominate. This way, you can utilize the receiver's experience to help draft an effective order and the receiver can also prepare to engage in his duties promptly upon entry of the order.

### ***About the Author***

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