

Receivership Myths

“It's better to wait until you own the property before taking steps to preserve it”

FALSE - The execution sale takes a minimum of 120 days from notice to sale. Four months can make a significant difference in the recovery, especially for incomplete construction projects, projects with tentative approvals, and property that is an attractive nuisance. During the process, the creditor's ability to protect the collateral is limited. If installed before or during the foreclosure process, the receiver can preserve the collateral in ways unavailable to the creditor. With approval from the court, he can finalize approvals prior to expiration, complete unfinished construction, sell the property, and more.

“It takes too long to install a receiver”

FALSE - In the case of a showing of special circumstances, lender's counsel may seek an ex parte hearing, which shortens the notice period to 24 hours. A creditor seeking to appoint a receiver hopes to do so on very short notice, usually because circumstances may threaten a creditor's secured position

“Appointing a receiver is expensive”

FALSE - The fees paid to a receiver can seem expensive if the fees charged are not commensurate with the receiver's scope of work. The cost of the receiver is paid through the receivership estate which includes cash accounts, cash flow from the estate, and the sale of property. However, the plaintiff/lender may need to advance the costs necessary to maintain the assets of the receivership estate. The court appoints the receiver and approves the hourly rate for his services. In addition, the creditor's motion typically includes the receiver's hourly rate., which is typically known to the creditor prior to the appointment.

“A receiver only helps if a creditor and debtor disagree”

FALSE - A receiver provides the creditor with more options that are only available when a receiver is in place. A receiver may also be appointed by way of a stipulation between the parties, which makes the court's action most predictable. A stipulated appointment often occurs when the borrower is willing to walk away and the lender does not want a deed in lieu of foreclosure, or to ever take title, for whatever reason.

“The requirement to show good cause to install a receiver is a burden on the creditor”

FALSE - Appointing a receiver requires “good cause.” In the current market, most distressed real property exhibits one or more of these characteristics today. Good can be a failed execution sale, a significant anticipated deficiency created by a sale, complex non-debtor ownership, owner-user situations, a fraudulent transfer of the property has been made or threatened, or circumstances indicating fraud or dissipation of the asset.

“Appointing a receiver will eventually require the lender to take title to the property”

FALSE - The appointment of receiver does not necessarily end in foreclosure. A receiver may be authorized to finalize approvals, complete unfinished construction, and even sell the property. If these are duties carried out by the receiver at the direction of the court, the lender may never take title to the property. This may occur in a standard receivership or a stipulated appointment when the borrower is willing to walk away and the lender does not want a deed in lieu of foreclosure for whatever reason.

“A execution sale is fast and simple”

FALSE - California provides a distinct and orderly process to sell real property under a writ of execution. This method requires personal service of notice on the debtor, an opportunity for the debtor to respond, a determination of fair market value, and a minimum of 120 days from notice to sale. A mistake can make the process longer and expose the creditor to unnecessary lender liability. Even if the process is executed perfectly, the debtor can prolong the process by filing for bankruptcy protection just prior to the sale.

“An execution sale exposes the property adequately to potential qualified buyers”

FALSE - An execution sale does NOT generate the level of interest that a receiver can achieve and often results in a price significantly below market.

“Anyone can buy property at an execution sale”

TRUE - However, the process is not setup to generate the highest price. For instance, the sale requires cash on sale or within 10 days and no time for financing. Buyers are not able to walk through and inspect the property before the sale. The officer responsible for the sale has numerous responsibilities and cannot devote any significant amount of time toward insuring completion of the sale. So, yes, anyone can buy but the price is discounted to account for the process.

“The debtor will probably file for bankruptcy so installing a receiver won't improve the creditor's position”

FALSE - If a receiver is appointed prior to bankruptcy, the receiver remains in place and navigates the bankruptcy process which may include requesting relief from stay. The most common argument for removing a property from the bankruptcy estate is the lack of any equity beyond the lender's security and therefore the absence of any value to remaining creditors. It is very difficult to install a receiver after a bankruptcy filing. The creditor can also petition to have the receiver appointed as a trustee in the bankruptcy.

“Receivership is the same as bankruptcy”

FALSE - Confusion between bankruptcy and receivership is very common. A bankruptcy is an action filed in federal court to protect a borrower/debtor from collection actions by creditors using an automatic stay. Bankruptcy courts and rules are primarily aimed at protecting the borrower, not the lender. A receivership is an action in which the lender seeks to protect its security by having an independent third party take possession. Receivership is a remedy lenders can use to protect their interests in the borrower's secured assets.

“The receiver cannot be the asset manager”

FALSE - The receiver may hire a management company or other professionals to assist in the operation. The court's order will usually grant authority to hire a management company, including a company in which the receiver is a principal, employee, etc. This is often the most cost-efficient solution.