

PUBLIC AND PRIVATE SALES OF REAL PROPERTY BY FEDERAL COURT RECEIVERS – OUTLINE¹

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I. Advantages of Federal Receivership Actions (including Sale of Assets) for Lenders

- Saves time and money; greater efficiency.
- Express federal statutory authority for sale exists.
- District Court judges may be open to procedural guidance; although there are strict time and notice requirements.
- May mitigate lender-liability and ownership claims.
 - Property sold “as is.”
 - No representations or warranties.
 - Reduced likelihood of environmental liability or construction-defects liability.
- Bankruptcy alternative.
- May be advantageous for operation of special-purpose properties (e.g., hotels, gas stations, amusement parks, marinas).
- Can maintain collateral value.
- Can complete unfinished buildings.
- Allows for professional management, operation and marketing of property.
- Consolidation of several properties in one jurisdiction (nationwide jurisdiction).
- Property can be sold in whole or in parcels.

- Flexibility in procedures; these cases are often referred to magistrates.
- No statutory automatic stay in federal receivership proceeding, but federal court has authority to impose broad stay of all actions against entities in receivership. See *S.E.C. v. Wencke*, 622 F.2d 1363 (9th Cir. 1980).

II. Use of Receivers in CMBS Foreclosure Actions

- Advantages under IRS tax rules as opposed to foreclosure.
- Original loan can be kept in place and modified and preservation of Real Estate Mortgage Investment Conduit (“REMIC”) status thereby maintained.
- Purchaser can assume debt.
- Depends on REMIC and Pooling and Servicing Agreement (“PSA”).
- Higher net present value of REMIC trust (vs. cash sale).

III. Appointment of Receiver by Federal Court

- Generally considered an extraordinary remedy and is granted only where plaintiff can establish clear necessity of protecting its interest in the property pending final disposition.
- Federal common law applies; can incorporate state law.
- Need more than just borrower default under loan documents:
 - Fraud; danger of loss of value.
 - Valid claim by lender.
 - Probable success of action.
 - Irreparable harm to property.
 - Greater harm to creditor by not having receiver appointed than harm to borrower by having receiver appointed.

- But not all factors listed above need be present.
- Secured creditor may have flexibility in choosing receiver as long as receiver is experienced and disinterested party.
- Interference with right of redemption; clog on equity of redemption? (Provide redemption rights or have all parties waive such rights.)
- Receiver may not be clerk or deputy of court, federal employee, or person related to judge.
- Federal law and equitable principles govern grounds for appointment; discretion of court (evidentiary hearing if borrower objects?).

IV. Federal v. State Receivership Sales

- Not permitted in many states; or no mention of such right in state statutes.
- Federal court has uniform statutes (including ability of receiver to sell property); not so with states.
- Some state statutes are unclear and/or no case law exists.
- No reported Illinois case law authorizing sale of real property by receiver.
- Receiver may be able to sell property in Michigan, Indiana, Ohio (and perhaps a few other states). Easier if all parties consent and waive redemption rights.

V. Applicable Federal Statutes (and Federal Rules)

- As an appointed officer of federal court, receiver is authorized, in accordance with 28 U.S.C. § 959, to manage and operate the property in accordance with laws of state where the property is located, to extent that such laws do not conflict with federal statutes or place an undue burden on federal receiverships.

- Under 28 U.S.C. § 754, receiver is vested with complete jurisdiction, possession and control of all property of defendant - - even in foreign country.
- See *S.E.C. v. American Capital Investments*, 98 F.3d 1133, 1144 (9th Cir. 1996) (“we conclude that the power of sale is within the scope of a receiver’s ‘complete control’ of receivership assets under sec. 754, a conclusion firmly rooted in the common law of equity receiverships”).
- Sec. 754 further provides that receiver must post bond in an amount set by the court.
- Receiver must comply with, e.g., state and local zoning laws, relevant ordinances, and environmental rules.
- Sales of real property and other assets by federally appointed receivers are based on and governed by specific federal statutes, as well as federal common law. But federal common law can incorporate state law.
- 28 U.S.C. §§ 2001, 2002 and 2004 govern sales of property by receiver appointed in federal court action.
- Receiver has fiduciary duty to court to act for all parties (not just lender or any other claimant).
- Federal court will appoint receiver in equity only if appointment is ancillary to some form of final relief which is appropriate for equity to give (e.g., foreclosure or contract action). See, e.g., *Gordon v. Washington*, 295 U.S. 30 (1935).
- Under FRCP 66, federal law governs with respect to appointment of receiver and as to where receiver sues or is sued; must accord with historical practice in federal courts or local rule (not a substantive right to appointment of receiver); appointment is pursuant to federal standards.
- Under 28 U.S.C. § 1692, process may issue for property located in different districts in any district as if property lay wholly in one district; orders affecting property shall be entered of record in each such district.
- Pursuant to 28 U.S.C. § 2001, property in possession of receiver may be sold at either public sale or private sale.

- Preference for public sale? (More stringent requirements for private sale.)
- Applicable federal statute concerning private sales by federal receivers is 28 U.S.C. § 2001(b).
 - At hearing for private sale plaintiff must show that (unlike public sale) best interests of receivership estate and conservation of receivership are served by private sale.
 - Court must appoint three independent appraisers to establish value of property for purposes of minimum sales price.
 - Price must be at least 2/3 of appraised value.
 - If 10% greater bid over offered price, it must be accepted.
 - Before confirmation of private sale, terms of the sale must be published in such newspaper or newspapers of general circulation as the court directs at least 10 days before sale.
 - Purchase Agreement should be executed by borrower “by and through receiver” (or similar language as authorized and approved by court).
- 28 U.S.C. §§ 2001(a) and 2002 govern public sales by receivers.
 - Public sale of real property by federally appointed receiver must be conducted in district where receiver was first appointed, unless otherwise ordered by court.
 - Notice of such sale must be published once a week for at least four weeks prior to sale in at least one newspaper in county, state, or judicial district where subject real estate is located.
 - 28 U.S.C. §§ 2001 and 2002 are attached hereto as Exhibit A and Exhibit B, respectively.
- 28 U.S.C. § 2004 (sales of personal property); “shall be sold in accordance with § 2001, unless court orders otherwise.”

- Article 9 also governs sales of personal property as well as rules for sale of real property, unless court orders otherwise. See notice requirements of §§ 9-611, *et seq.*, of UCC. Under 28 U.S.C. § 2004, the court has discretion as to whether appraisals are required to sell personal property.
 - 28 U.S.C. § 2004 is attached hereto as Exhibit C.
- 28 U.S.C. § 1292(a)(2) governs the types of orders entered in receivership proceedings that are appealable (strictly interpreted). Order appointing receiver is appealable, as is an order directing sale of receivership assets, and order confirming sale.
- Under the following statutes, certain parties are ineligible to act as federal receiver: 28 U.S.C. § 458 (relative of justice or judge); § 957 (clerk of court or any of his or her deputies); and § 958 (a person holding any civil or military office or employment under the United States or employed by any justice or judge of the United States).
- There is some flexibility in connection with procedures under federal statutes, as district court has broad powers in fashioning relief in an equity receivership proceeding.
- Motion to authorize sale by federal receiver could be made by: 1) lender concurrently with motion to appoint receiver; 2) lender after appointment of receiver; or 3) counsel for receiver seeking to expand receiver's authority.

VI. Jurisdiction of Federal Court

- Diversity of Citizenship.
 - Determined at time of filing complaint.
 - Must be diversity between plaintiff creditor and debtor and each holder of subordinate lien and interest.
 - If unknown owners and non-record claimants, can diversity be destroyed? (Just don't refer to them in complaint?)

- National bank is citizen only of state where main office is located. *Wachovia Bank v. Schmidt*, 126 S.Ct. 941 (2006).
- Amount in Controversy must be in excess of \$75,000. (Not an issue in connection with virtually all commercial real-estate federal foreclosure proceedings.)
- Diversity and minimum amount in controversy must be established under 28 U.S.C. § 1332 in order for federal court to obtain jurisdiction over matter.
 - Appointment of receiver is ancillary to another action; subject matter jurisdiction on independent basis (e.g., money judgment, action on note, or foreclosure).
 - “Federal question” jurisdiction – e.g., Securities and Exchange Commission (“SEC”), Resolution Trust Corp. (“RTC”), Federal Home Loan Mortgage Corp (“FHLMC”); violation of federal law (not an action between private parties).
 - Complaint should contain a count for action on note or foreclosure.

VII. Right of Redemption

- Although there is no federal statutory post-sale right of redemption, federal courts may (and often do) permit a foreclosure redemption period (either pre- or post-sale) under equitable principles and federal common law.
- May include state redemption rights where foreclosure actions involve private parties.
- Federal courts can grant (and have granted) “equitable and common law redemption” (e.g., 7 days; 30 days; 180 days; one year; or rely on state law redemption period).
- Expectations of parties; applicable law specified in mortgage; private parties (but may even be granted by court in connection with sales involving federal parties, e.g., SEC, RTC, FHLMC).
- Waiver of redemption by all interested parties? (See Exhibit D attached hereto for sample form of waiver of redemption rights,

which form may vary depending on law of state where property is located and approval by federal court.)

VIII. Required Motions to and Orders by Federal Court

- Motion for Order Appointing Receiver
 - Are best interests of parties served (private sale)?
 - Request appointment of three independent appraisers (private sale).
 - Request appointment of capable and experienced property-management company as receiver.
 - Request authority for receiver to market property and negotiate sale contract, and deliver deed.
 - State that borrower is in default of loan obligations and set forth amount of debt outstanding.
 - Unless waived by borrower in writing, request redemption period.
 - Request, if there are subordinate liens, that property be sold free and clear (or escrow proceeds) and request redemption period for such liens.
 - Include Affidavit of lender alleging basis for relief.

- Order Appointing Receiver
 - Proper jurisdiction was obtained.
 - All defendants received notice of Motion to Appoint Receiver.
 - Borrower is in default of its obligations and lender is entitled to foreclosure decree.
 - Lender is granted relief requested in Motion to Appoint Receiver.

- Receiver is not connected with or related to appointing judge or a federal employee.
 - Set forth amount or method for calculating receiver's compensation.
 - Set forth receiver's reporting responsibilities.
 - State amount of bond that receiver must post.
 - Provide description of receivership property.
 - Refer specifically to applicable federal statute(s) and court rules permitting appointment of receiver.
- Motion for Order Confirming Sale by Receiver
 - All defendants received notice of Motion.
 - Sale is in the best interest of the parties (private sale).
 - Property was marketed in commercially reasonable manner.
 - Private sale is specifically authorized under applicable federal statutes and rules of civil procedure.
 - Borrower and all lienholders have consented to sale, or have been provided an adequate redemption period and borrower's and lienholders' rights of redemption are foreclosed (or have been waived, if permissible under applicable state law).
 - State whether sale is to be subject to lender's mortgage.
 - If there are contested liens, provide that property is to be sold free and clear of such liens, which will attach to sale proceeds. Proceeds will be held in escrow by specifically designated person or entity and priority of such liens will be determined by further order of court.
- Confirmation Order

- Statements of fact in Motion for Order Confirming Sale must be included in Confirmation Order as findings of court.
- Proper jurisdiction was obtained.
- If Confirmation Order provides that sale will be subject to foreclosing lender's mortgage, borrower must be released from its obligation at time of assumption by purchaser or its obligation must be reduced by net proceeds of sale (or borrower must be provided with covenant not to sue).
- Direction to receiver to convey pursuant to specific contract with all material terms of sale, including parties, sale price, broker's commissions, disposition of liens (including foreclosing lender's lien) and closing date.
- Upon delivery of receiver's deed, sale will stand as final and confirmed. (See Exhibit E attached hereto for sample form of receiver's deed; form will differ depending on location of the property and facts of the transaction.)
- Statement that Confirmation Order is a final order and shall not be stayed unless (a) timely motion for rehearing or timely appeal as of right is filed and (b) court issues stay within such period upon posting of bond in amount of purchase price and upon such other conditions as are deemed appropriate by court in accordance with applicable statutes and court rules.
- Purchaser is not related to receiver by blood or marriage or any employment or ownership interest.

IX. Effect of Borrower Bankruptcy

- Pending federal receivership stayed on commencement of bankruptcy proceeding by or against borrower.
- Bankruptcy court has exclusive jurisdiction of property of estate under Bankruptcy Code (28 U.S.C. § 1334(e)).
- Receiver must cease all actions.

- See 28 U.S.C. § 543 and Bankruptcy Rule 6002 (turnover by receiver as “custodian” of debtor’s property).
- But receiver could file motion with bankruptcy court to abstain from case and allow receivership to continue instead of bankruptcy.
- No authority for receiver to recover preferential transfers.
- No availability of Bankruptcy Code § 544 “strong arm” powers, but receiver can assert state-law fraudulent-conveyance theories to recover property for estate.
- Sec. 362 automatic stay prevents continuance of receivership proceeding.
- Appointment of receiver does not prevent defendant debtor from filing petition for voluntary relief (or involuntary petition filed against debtor) under Bankruptcy Code.

EXHIBIT A

28 U.S.C.A. § 2001

§ 2001. Sale of realty generally

(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

(c) This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

EXHIBIT B

28 U.S.C.A. § 2002

§ 2002. Notice of sale of realty

A public sale of realty or interest therein under any order, judgment or decree of any court of the United States shall not be made without notice published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States wherein the realty is situated.

If such realty is situated in more than one county, state, district or circuit, such notice shall be published in one or more of the counties, states, or districts wherein it is situated, as the court directs. The notice shall be substantially in such form and contain such description of the property by reference or otherwise as the court approves. The court may direct that the publication be made in other newspapers.

This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

EXHIBIT C

28 U.S.C.A. § 2004

§ 2004. Sale of personalty generally

Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise.

This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

EXHIBIT D

**ACKNOWLEDGMENT OF WAIVER OF REDEMPTION RIGHTS
AND CONSENT TO SALE BY RECEIVER***

This Acknowledgment of Waiver of Redemption Rights and Consent to Sale by Receiver (the "Waiver and Consent") dated as of _____, 20__ is executed by _____ [Borrower], a _____ company, whose address is _____, c/o _____, in favor of _____ ["Lender"], and its successors and assigns, whose address is _____.

Recitals:

A. This Waiver and Consent pertains to certain real estate located in _____, _____ County, _____, being more particularly described on Exhibit 1 attached hereto (the "Real Estate").

B. Borrower granted Lender [Lender's predecessor in interest] a mortgage lien against the Real Estate by virtue of a certain *Mortgage* ("Mortgage"), dated _____, and recorded _____, at [Book] [Liber] _____, Page _____, _____ County Records Office. [The Mortgage was subsequently assigned to Lender.]

C. Borrower acknowledges that it is in default of the Mortgage and the loan documents.

D. Due to Borrower's default, the Lender filed pleadings with the _____ Court at Case No. _____, seeking to, among other things, foreclose the Mortgage and have a receiver appointed over the Real Estate.

E. On _____, the Court entered an Order Appointing Receiver.

F. On _____, the Court entered a Supplemental Order Granting Receiver Authority to Sell the Receivership Property (the "Supplemental Order") which granted the receiver the authority to sell the Real Estate subject to certain conditions.

* This form was supplied by James L. Allen, Esq., a partner in the Miller, Canfield, Paddock & Stone law firm in Troy, Michigan.

In consideration of the payment of \$10.00 and for other good and valuable consideration, the receipt and adequacy of which are acknowledged, IT IS AGREED:

Agreements:

1. Borrower absolutely, unconditionally and irrevocably waives any and all equitable and statutory rights of redemption with respect to the Real Estate.

2. Borrower consents to the provisions of the Order Appointing Receiver and the Supplemental Order. Borrower agrees that the Real Estate may be sold in accordance with the terms of these Orders.

3. Borrower was not acting under any misapprehension as to the effect of this Waiver and Consent and acted freely and voluntarily and was not acting under coercion or duress.

4. Borrower was represented by counsel of its own choice with respect to this Waiver and Consent and the transaction described in this Waiver and Consent.

5. The undersigned is an authorized signatory of Borrower and has full and complete authority to execute this Waiver and Consent on Borrower's behalf.

6. This Waiver and Consent is binding upon Borrower and its successors and assigns and for the benefit of the Lender and its successors and assigns.

Executed as of the date first stated above.

Borrower:

[Signature Block]

STATE OF _____)
)
COUNTY OF _____)

Before me, a Notary Public in and for the State of _____ and a resident of _____ County, _____, personally appeared the _____, of _____, and acknowledged execution of the foregoing Acknowledgment of Waiver of Redemption Rights and Consent to Sale by Receiver.

Witness my hand and Notarial Seal this _____, 20__.

Signature

My Commission Expires: _____
_____, Notary Public
(print name)

This instrument was prepared by and return to:

Exhibit 1

Real estate located in _____, _____ County, _____, described more particularly as:

EXHIBIT E

QUITCLAIM DEED WITH COVENANT (SAMPLE)

Space Above This Line for Recording Data

KNOW ALL BY THESE PRESENTS, that _____, not individually but solely as Receiver of the certain assets of _____ pursuant to Case No. _____, United States District Court, _____, whose address is _____, for consideration paid, GRANTS to _____, whose address is _____, with QUITCLAIM COVENANT, certain real estate located in City of _____, County of _____, and State of _____, which is more particularly described in Exhibit A attached hereto and made a part hereof.

This conveyance is made SUBJECT, HOWEVER, to those matters set forth on Exhibit B attached, and to real estate taxes which are not yet due and payable, which, by acceptance hereof, Grantee assumes and agrees to pay.

The Property conveyed herein is conveyed pursuant to the Order Approving Sale and Granting Other Relief entered _____, 20__, by the United States District Court, _____, in Case No. _____, a certified copy of which is attached hereto as Exhibit C.

A copy of the Assignment of Real Estate Purchase Agreement between _____ and Grantee is attached hereto as Exhibit D.

IN WITNESS WHEREOF, _____, not individually but solely as Receiver of the assets of _____, has caused this instrument to be executed on its behalf by its duly authorized representative, this ____ day of _____, 20__.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Witness

_____,
_____, not individually but solely
as Receiver of the assets of
_____, and pursuant to Court
Order entered in Case No.
_____, United States District
Court, _____.

STATE OF _____
County of _____ SS.

_____, 20__

Then personally appeared the above-named _____, not individually but solely as Receiver of the assets of _____ and acknowledged the foregoing instrument to be his free act and deed in his said capacity.

Before me,

Notary Public
Printed Name: _____

Commission Expires: _____

This instrument was prepared by and return to:

Exhibit A

Legal Description

Exhibit B

Permitted Exceptions

Exhibit C

Certified Copy of Order Approving Sale and Granting Other Relief

Exhibit D

Assignment of Real Estate Purchase Agreement

¹ Nothing contained in this Outline is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This Outline is intended for educational and informational purposes only. The views and opinions expressed in this Outline are solely those of the Author, and do not necessarily reflect the views, opinions, or policies of the Author's employer, First American Title Insurance Company.

² John C. Murray is Vice President and Special Counsel for the First American Title Insurance Company, National Commercial Services, in Chicago, Illinois.