




# Sales During Receiverships

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Lynnwood, Washington  
October 20, 2018

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## Outline for Today's Discussion:

- **What is a Receivership?**
- **What are the risks assumed by a title company insuring a sale "free and clear of liens?"**
- **What prudent risk reduction steps can be taken to reduce the title company risks?**

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## Bankruptcy vs Receivership

- **Bankruptcy is entirely Federal law**
- **The goal of a bankruptcy is to relieve the Debtor of unsecured debts, administer the rights of the secured creditors and distribute the non-exempt property among unsecured creditors.**
- **Receivership is usually State law**
- **The goal of a receivership is to enforce the rights of the particular party that initiated the petition and administer the rights of the owner and other creditors.**

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## WA Receivers Have Broad Powers

- When is a Receiver appointed?  
"On application of any party, when the party is determined to have a probable right to or interest in property that is a subject of the action and in the possession of an adverse party, or when the property or its revenue-producing potential is in danger of being lost or materially injured or impaired.
- **Receivers can be used related to foreclosures, entity and marriage dissolutions, t-i-c partitions, an action to set aside a fraudulent conveyance, etc.**
- **An Order is required for sale of real property, unless it was held by the debtor for sale in its ordinary course of business.**
- **If the real property is homestead of the debtors, their consent is required if the sale will not pay all secured creditors.**



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## WA Receivers Have Broad Powers

- The requirements for a Receivership sale free and clear of liens are far less technical than the requirements for such a sale under the Bankruptcy Code.
- **A sale by a Receiver may be "free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property."**
- All liens encumbering the property transfer and attach to the proceeds of the sale, net of reasonable expenses incurred in the disposition of the property, in the same order, priority, and validity as the liens had with respect to the property immediately before the conveyance.
- The Receiver may choose to pay one or more creditors, and not others "if the interest of any other creditor having a lien against the proceeds of the sale would not be impaired."



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## When is Property Affected by Receivership?

- Receivership affects property when a state court Orders that **all property owned by the designated person is within the authority of the designated General Receiver.**
- An alternative Order can designate a **Custodial Receiver** to have **authority affecting a specified property.**
- If the Superior Court is in a different county, a Lis Pendens or a copy of the Order Appointing must be recorded.

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### Orders Allowing Sale

- An Order Authorizing Sale merely authorizes the sale to close as a normal sale. No liens are removed.
- Orders Authorizing Sale do not authorize or require a short payoff to a secured creditor.
- **All Orders of Sale could be appealed. There is no shortened appeal time, so it is 30 days for receivership Orders.**
- "The reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal."



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### First Chance to Win Raffle Tickets

- **A Receiver was appointed to assume all property owned by Jay Debtor. Our title report shows a lease previously granted by Jay Debtor to Tenant Business. After Motion for Sale Free and Clear, with proper notice given to Tenant Business, the Order authorized the sale.**



The Receiver and the purchaser say that the Receiver's sale terminated the rights of Tenant Business.

**Are they correct that the leasehold is terminated?**



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**Nope! The WA statute allows the sale to be free of only liens.**



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## Any Questions?

In the second section we will focus on the risks assumed by the title company if it insures a purchaser from a Receiver.



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## The WA statutes are clear and easy. What could go wrong to cause a title claim?

- A person aggrieved [prejudiced, damaged or unhappy] could later petition to set aside the sale based upon various theories:
  - The petitioner was not entitled to commence a Receivership
  - The WA statute itself is in conflict with the Federal bankruptcy laws that provide rights and procedures that are better for the aggrieved
  - The Receiver was not required to sell the property
  - The Receiver failed to obtain a full value price
- A lienholder could later petition to assert its lien against the purchaser based upon various theories:
  - Lack of jurisdiction due to lack of statutory notice
  - The Receiver failed to obtain a full value price
  - The closing was not done with disbursements according to the Order

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## Lack of jurisdiction



- No court order is binding upon a party that was not joined in the proceeding. Courts will require "due process" and will be sympathetic to parties who were not given notice.
- When notice is not given, the rights of that party are not affected by the Order.
- Even an Order of Default can easily be set aside for up to one year after its entry, based on excusable neglect, but not limited if the party proves lack of notice and a basis for objection.



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## Protection Against Jurisdiction Challenges



- The WA Receivership statute does not require persons who have interests in the real property to be joined as parties.
- The WA Receivership statute only requires publication of the Motion to Appoint a Receiver.
- The WA Receivership statute only requires notice of a Motion for Sale Free and Clear to be mailed to all known creditors and other known parties in interest within thirty days after the date
- Orders are effective as to any person who has actual knowledge of the receivership, whether or not the person receives written notice from the receiver and whether or not the person appears or participates in the receivership.



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## Second Chance to Win Raffle Tickets

- Our title report shows an IRS tax lien against the owner, but the IRS is not joined as a party in the case appointing the Receiver. The Motion for an Order of Sale Free and Clear of All Liens was not mailed to the proper local IRS address. An attorney for the IRS filed a notice of appearance, but nothing else.

The Receiver assures you that the IRS lien is cleared by the Order anyway because the IRS was actually aware of the Motion. **Is he correct?**



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Yes! The statute says that the participation in the proceeding by the IRS is sufficient to waive notice.



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## Any Questions?

The last section will be about the steps that should be taken to reduce the risks, what should be given to the underwriter before closing and what should be done at the closing.



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## What We Need From You: Before Closing

### Documents to be provided to the Underwriter:

- Order Appointing Receiver,
- The Motion for the Order of Sale, including the Supporting Affidavit (affidavit of lawyer/client that outlines the facts), and the proposed Order of Sale (usually in the Motion).
- Declaration of mailing and any Affidavit of Service
- Title Report to show what people will be affected by the sale
  - Any person with an ownership interest
  - Liens that will not be paid at closing



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- Declaration of mailing and any Affidavit of Service
- Title Report to show what people will be affected by the sale
  - Any person with an ownership interest
  - Liens that will not be paid at closing
- Later, when the Order of Sale is entered, the underwriter should confirm acceptability of any changes.
- The underwriter should be told about any objections to the sale raised before or at the hearing of the Motion for Sale
  - If an objection was filed, then we might not insure prior to the expiration of the appeals period



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### What We Need From You: Before Closing

For all liens that are not going to be paid, in addition you should have **evidence that actual notice was received**

- An Affidavit of Personal Service filed in the case that shows a copy was actually delivered to the person is much more certain than mailing.
- Mailing to a lawyer that represented a lienholder is trustworthy if within the past one or two years, or you confirm the address for that lawyer remains the correct address.
- Mailing to state agencies or the IRS is trustworthy if you confirm the address is correct
- If that party appeared in the proceeding then we trust they got the notices. For example, if a lawyer for that party filed anything, even a Notice of Appearance.
- Sometimes the Receiver will provide current correspondence from the lienholder or lawyer that confirms they received the notice of sale.



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### What We Need From You: Before Closing

Underwriter will determine:

- Are we willing to rely upon the Order to insure a deed signed by the Receiver to convey the rights of all owners to the new purchaser?
- Are we willing to rely upon the Order to remove liens without payment?
- Are we willing to insure the sale before expiration of the appeal time?



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### What the title officer needs at the closing:

- The underwriter should approve any new or changed Order of Sale
- Direct confirmation from Escrow that they can comply with the Order of Sale
  - **Strict compliance** with the Order is essential
  - Reduction of the proceeds to the Receiver, changes to the amount to be paid to any lienholder, and other terms that could affect the creditors not being paid, may require a revised Order of Sale.
- Receiver (or attorney for Receiver) should be asked to provide a last-minute email confirming that there was no appeal filed



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### Last Chance to Win Raffle Tickets

- At the hearing of the Receiver's motion for sale, the owner objected that the sale price was way too low, and the second lien creditor objected that its lien cannot be cleared without any payment because the property is worth more than the first lien.
- The Judge ruled against both objections and ordered an immediate sale as proposed.



The Receiver assures you that even if those parties file an appeal, the title company could not suffer a loss because the Order states it is immediately effective. **Is he correct?**



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### Last Chance to Win Raffle Tickets

- The second lien creditor objected that its lien cannot be cleared without any payment because the property is worth more than the first lien.



The Receiver says the title company could not suffer a loss because the Order states it is immediately effective.

The Receiver is not correct. The statute says that an appeal does not affect the purchaser, but that Judge's decision is more likely to be reversed, upsetting the unfairly low price. The title company could suffer a loss even if its defense of the attack on the Insured's title succeeds.



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### Any Questions?

**WE NEED A BREAK!**  
Then at 10:00 there are two breakout rooms for either **Title 101** or **Escrow case law update.**



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