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RECEIVERSHIP

NEWS



Judge Jones Named Judicial Editor of Receivership News

BY EDYTHE L. BRONSTON*

Publisher's Note: RN is pleased to announce that LA superior Court Judge Ann I. Jones has agreed to serve as a Judicial Editor for RN. She will comment from time-to-time on topical issues and provide a Judge's perspective. In accepting the appointment, Judge Jones insisted that she will be presenting her views only and not speaking on behalf of the judiciary at large. Following is an interview designed to introduce you to RN's new Judicial Editor. RPM

Judge Ann I. Jones, besides being a delightful conversationalist, has an amazingly varied intellectual, experiential and legal background.

She graduated from Brown University, *magna cum laude* in 1977, with a Bachelor of Arts degree and with honors in American History. While matriculating, she was a National Merit Scholar from 1973 to 1977 and Phi Beta Kappa in 1977. She then went on to obtain a Master's Degree in Public Policy at the Goldman School of Public Policy, University of California at Berkeley in 1984, while concurrently attending Boalt Hall School of Law, University of California at Berkeley, from which she obtained a Juris Doctor degree...also in 1984. While at Boalt, she was Executive Editor and Member of the California Law Review from 1982 to 1984, as well as having won the Thelen, Marrin Prize for the Best Published Article and the Moot Court Prize for Best Oral Argument.



The Honorable Ann I. Jones

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Sales by Rents and Profits Receivers: A Discussion of the Practice and Governing Law

BY JOSHUA A. DEL CASTILLO AND STEPHEN J. DONELL*

Recently, the arguments presented in *Wachovia Bank, NA v. Downtown Sunnyvale Residential, LLC, et al.* and a Fall 2011 Receivership News article titled *The Ten Commandments of a Rents and Profits Receiver* (the "Article") have resulted in a renewed focus on the ability of a receiver, particularly a so-called rents and profits or rents/issues/profits ("RIP") receiver, to sell real property out of receivership.

In *Downtown Sunnyvale*, the court analogized the proposed receiver's sale of commercial property to a foreclosure and refused to allow the sale on the ground that the sale failed to provide the statutory protections guaranteed to defaulting borrowers under

California law. The Article took the position that "[u]nder the California Code of Civil Procedure, [a] Court does not have authority to order the sale of property in a rents and profits receivership" and that "[s]elling free and clear of all liens is without legal foundation." *Downtown Sunnyvale* and the Article highlight a number of issues at the core of a receiver's authority to sell real property out of receivership in California, including, most importantly: the limits of a court's authority to allow a receiver's sale, including a sale free and clear of existing liens; the steps that a receiver might take to maximize the likelihood of a sale; and the influence that litigants can exert over a proposed receiver's sale.

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The law concerning a receiver's sale of real property is sparse and subject to varied interpretations. Nevertheless, receivers' sales are regularly approved and concluded throughout California. Here, we present a case-based alternative to the positions adopted in *Downtown Sunnyvale* court and the Article. We hope to add worthwhile context to the issue of a receiver's authority to sell real property out of receivership and to the critical role that a receiver can play in a contentious real property dispute.

The appointment of a receiver is an equitable remedy. A receiver's authority is likewise equitable, deriving from the appointing court. See, e.g., *Barclays Bank of California v. Superior Court*, 69 Cal.App.3d 593, 598 (1977). As a court-appointed third party neutral, a receiver's authority is limited by the contents of a court's appointing order, unless amended. In simple terms, if the appointing order does not allow for a receiver's sale (and a receiver's authority is not expanded to allow it), no receiver's sale can be conducted.

Nonetheless, California law does permit the sale of receivership property out of receivership. Specifically, Cal. Code Civ. P. § 568.5 provides that "[a] receiver may, pursuant to an order of the court, sell real or personal property in the

receiver's possession" in a manner consistent with Cal. Code Civ. P. § 701.510, et seq. In turn, Cal. Code Civ. P. § 701.630 (part of the section referenced by the Code of Civil Procedure [the "Code"]) provides that "[i]f property is sold pursuant to this article, the lien under which it is sold, any liens subordinate thereto, and any state tax lien ... on the property sold are extinguished."¹

California courts have likewise recognized the necessity of receivers' sales under certain circumstances. Receivers' attorneys routinely cite to *People v. Riverside Univ.*, 35 Cal.App.3d 572 (1973), and *Cal-American Income Property Fund VII v. Brown Dev. Corp.*, 138 Cal.App.3d 268 (1982), for the proposition that, with court permission, a receiver can not only sell real property out of receivership, but also deviate from the statutory scheme outlined in the Code. In *Riverside University*, the court found that "[g]enerally speaking[,] if no good reason appears for refusing to confirm a receiver's sale ... the sale should be confirmed ... The matter of confirmation rests upon the sound discretion of the appointing court..." 35 Cal.App.3d at 582-83. Likewise, the *Cal-American* court found that "[j]udicial confirmation of a receiver's sale rests upon the appointing court's sound discretion." 138 Cal.App.3d at 274.

Less-cited case law also supports this position. Courts have recognized their "broad" discretion when deciding whether to approve the sale of assets out of receivership, see, e.g., *People v. Stark*, 131 Cal.App.4th 194, 202 (2005), and have held that a receiver's recommendation in favor of a proposed sale is entitled to significant deference, particularly where the proposed sale would yield the highest price possible. See *In re Bank of San Pedro*, 1 Cal.2d 675, 679 (1934) (finding that the fact that a price "on better terms could not be obtained[,] militated in favor of approving a proposed sale); *MacMorris Sales Corp. v. Kozak*, 249 Cal.App.2d 998, 1004 (1967) (affirming order granting receiver's final report and accounting and finding that "[a]ppellants' principal grievance appears to be that the [property] brought too small a price. But there is no evidence that the receiver could have obtained a better price."); *Riverside Univ.*, 35 Cal.App.3d at 582 ("[I]f no good reason appears for refusing to confirm a receiver's sale, such as the chilling of bids or other misconduct or gross inadequacy of price, the sale should be confirmed."). In *City of Santa Monica v. Gonzales*, 43 Cal.4th 905, 931 (2008), the California Supreme Court reaffirmed the deference standard, including in the context of receiver sales, noting that "[s]uch deference is the rule, even where the court confirms extraordinary action by the receiver, such as the sale of real property." (emphasis added.)

An argument in support of receivers' sales, therefore, appears reasonable. But what of the positions reflected in *Downtown Sunnyvale* and the Article? Multiple lessons may be drawn from *Downtown Sunnyvale*, though two warrant special mention. First, while a court may legitimately interpret the law as allowing for receivers' sales, the very same law supports a court's authority to deny a sale when it is not satisfied that certain equitable protections have been afforded to all interested parties.



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Second, and by implication, a receiver must ensure proper notice, of course, but also cooperation among all interested parties, ideally in the form of an agreement to the sale by all parties. Any receiver who has attempted to sell real property over the objections of a second lien holder can appreciate this insight.

The lessons from the Article are equally important. The Article limited itself to RIP receivers² in maintaining that courts do not have authority under the Code to approve a sale. But RIP receivers do not exist in a vacuum, and the interests of the estates they administer are routinely affected by the vagaries of the parties, the financial exigencies of the moment, and a myriad of unforeseen developments. Receiverships are therefore necessarily fluid. A receiver's duties and powers consequently can be – and often are – amended by the appointing court. The Article acknowledged this fact, noting that “[t]he Judge is the final arbiter and has complete discretion to determine issues” in a receivership, and that “[t]he scope of a Receiver’s duties can be amended, expanded, or contracted by the appointing Court.”

A receiver might originally be appointed solely for the purpose of directing an income stream to the benefit of a

receivership estate. However, he or she might later determine that the interests of the estate would best be served by a sale of real property out of receivership, and an appointing court might allow this. One might argue that in approving a sale proposed by a RIP receiver, an appointing court would be altering the nature of the receiver's appointment. Indeed, the nature of the receiver's appointment **would** be expanded beyond the original rents and profits appointment to include the authority to sell.

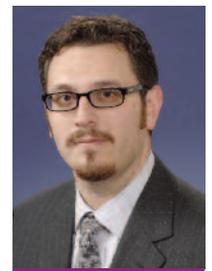
A receiver's ability to evaluate a receivership estate's best interests from an independent, neutral position, and to secure court approval for the proposed administration of the estate, makes a receiver particularly valuable to secured lenders, defaulting borrowers, and courts alike. Receivers should therefore be prepared to adapt to the requirements of the estates they administer and to avail themselves of the benefits that a court-approved and properly conducted receiver's sale can afford – to all parties – when appropriate. This should ultimately inure to the benefit of each estate and should increase both a property's sale price and the likelihood of a positive outcome for a receivership.

¹ Other than the language of the Code itself, which is subject to interpretation and most often applied in the post-foreclosure context, there appears to be no modern case law directly addressing a RIP receiver's ability to sell free and clear of liens under the Code. Nonetheless, receivers routinely seek, and secure, court confirmation of "free and clear" sales. Secured lenders should further take note that a sale of secured property out of receivership might implicate California's "one action rule." This issue merits particular attention in the context of sales implicating the assumption or modification of a CMBS loan, which is, unfortunately, beyond the space limitations and scope of this article. The authors invite further inquiry and discussion regarding this topic.

² Rents and profits receivers are typically appointed in connection with the terms of a relevant deed of trust, or other security instrument, to assume authority and control over real property, and control and divert the income stream from the property during the pendency of litigation.

	
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