



RECEIVERS, RECEIVERSHIPS & REAL PROPERTY



NATIONAL
LAW INSTITUTE
Continuing Legal Education

RECEIVERS, RECEIVERSHIPS & REAL PROPERTY

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RECEIVERS, RECEIVERSHIPS & REAL PROPERTY

TABLE OF CONTENTS

- I. WHO IS A RECEIVER?
- II. DECIDING WHETHER TO ACCEPT A RECEIVERSHIP
- III. ONCE THE RECEIVERSHIP IS ACCEPTED, WHAT SHOULD ONE DO NEXT?
- IV. SECONDARY APPOINTMENTS
- V. OPERATING DURING RECEIVERSHIP
- VI. LIABILITY OF THE RECEIVER
- VII. RECEIVER'S COMMISSIONS
- VIII. INTERIM AND FINAL ACCOUNTING / APPLICATION FOR LEGAL FEES
- IX. FINISHING THE RECEIVERSHIP: GETTING DISCHARGED



WHO IS A RECEIVER?

- **A court-appointed fiduciary who safeguards a property from harm while the underlying dispute is resolved.**
- **An extension or an “arm of the court” subject to control by the court at all times. As a receiver, you are answerable to the judge who appointed you and no one else.**
- **The appointment of a receiver is an extreme or “drastic remedy” to prevent irreparable harm.**
- **Common matters which require receivers:**
 - **Real Estate Foreclosures (usually the best)**
 - **Corporate or partnership dispute (often to be avoided)**
 - **Enforcement of judgments (not especially remunerative)**
 - **Matrimonial cases (could be ok depending on res in the receivership)**

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- Basic principles
- **1. The receiver is an arm of the court. The judge is the boss; you only answer to him/her.**
 - **Your job is to do what the court does not have the time to do.**
 - **You must protect the judge; make him/her look good.**
 - **No unpleasant surprises for the judge.**
 - **Notwithstanding Part 36 rules if the judge blesses what you do, you are protected; transparency of what the receiver does is the touchstone.**

2. The receiver is a fiduciary

A fiduciary is held to the highest standards of honesty and good faith.

Never forget that receivership funds are not your personal funds.

However, you handle receivership funds with same care as if your personal funds.

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- 3. **You may be running a business!**
 - You have to act as a prudent businessman.
 - However, as court appointee you do not have the same freedom of action.

4. **The buck stops with you!**

It is critically important that you make the right hiring decisions for the receivership.

If you choose a secondary appointee (e.g., agent) who does not work out, you just can't fire him/her. You will need to have a new person appointed by court order and explain to the court why your initial hire did not work out.

HOW IS A RECEIVER APPOINTED

By application of a party to the court

By ex parte application to the court if permitted in a mortgage

Division of authority as to whether a court, sua sponte (i.e., on its own motion) can appoint a receiver. The Second Department says no. The Third Department says yes.



DECIDING WHETHER TO ACCEPT A RECEIVERSHIP

- **The appointment does not vest until the appointee accepts it.**
- **Is it a state or federal court appointment? Unlike federal appointments, state appointments have specific restrictions. (Federal appointments are better)**
- **Just because a judge asks to appoint you (could be flattering) this does not mean you should or can accept the appointment**

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- **3 questions need to be answered in order to decide whether or not to accept a state court appointment:**
- **Is one qualified to accept the appointment?**
 - Individuals, not entities, are appointed; must be on court lists of eligible individuals
- **Are there factors disqualifying one from being appointed?**
 - Rules intended to prevent favoritism, nepotism, etc.
- **Should the appointee accept the appointment?**
 - Don't be flattered because a judge offers it to you. You may not want to accept it for a variety of reasons; you could spend a lot of time on a case and not be paid.

DECIDING WHETHER TO ACCEPT A RECEIVERSHIP

QUESTION 1 | Is one qualified to accept the appointment?

- **One must be on the court's list of eligible appointees for the county in which the appointment occurs. Only individuals are appointed. (Judges often ignore the rules and appoint individuals off the lists or entities such as law firms)**

- **Relevant categories requiring appointment:**
 - **Receivers (must take the required training course; don't have to be an attorney)**
 - **Counsel**
 - **Accountants**
 - **Appraisers**
 - **Property managers (must be licensed real estate brokers)**
 - **Licensed real estate brokers**

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- **Becoming eligible to receive appointments**
 - Apply through the Office of Court Administration
 - You can apply through OCA's Fiduciary court website
<https://iapps.courts.state.ny.us/fiduciary/jsp/home.html>
 - The website shows the list of persons eligible for appointment county by county; notices of appointment for the last 12 months; and approved compensation awards
- **Lists of those eligible for appointment are kept for each county**
choose the counties in which you would like to be appointed

The Part 36 mission of curbing corruption does not reflect business realities

Examples: Splitting of brokerage commissions; Attorneys assisting other attorneys; appointing law firms instead of attorneys

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Courts will often tailor their orders to reflect business realities and ignore Part 36's rules.

A judge could appoint “outside the list” or appoint a law firm instead of individual.

In all such situations, notwithstanding what the Part 36 rules state, if a judge approves a non-conforming appointment, it is valid. The underlying purpose of Part 36, i.e., transparency, is served.

DECIDING WHETHER TO ACCEPT A RECEIVERSHIP

QUESTION 2 | Are there factors disqualifying one from being appointed?

- **Persons who can never be appointed by a NYS Court:**
- **Obviously disqualified:**
 - **Judges and their relatives “within the fourth degree” –**
 - **Parents, siblings, children, first cousins, grandparents, great grandparents**
 - **People working for the courts and their relatives**
 - **Miscreants**
 - **(disbarred/suspended attorneys, felons (forever), those convicted of misdemeanors within the last 5 years)**

Restrictions caused political or election activity (no favoritism):

- Relatives of political party leaders (e.g., chairs of county political committees) while the leader is in his/her position plus two years thereafter (if any lawyer in a law firm is a political leader, no one associated with that law firm can be appointed).**
- Persons connected with judicial campaigns cannot be appointed by the candidate judge within 2 years after his/her election (e.g., treasurer, campaign manager)**

DECIDING WHETHER TO ACCEPT A RECEIVERSHIP

Restrictions on receiving appointments because of past compensation awarded or future compensation to be awarded from fiduciary appointments (there are no restrictions on receiving compensation in appointments already received)

- **The “\$15,000 rule”:** no more than one appointment within a calendar year can be accepted for which the *anticipated* compensation exceeds \$15,000.
 - What does *anticipated* mean? Who knows.
 - Can accept smaller appointments, subject to aggregation rules
- **The “\$75,000 rule” or aggregation rule:** being awarded more than \$75,000 in any particular calendar year prevents the appointee from receiving any appointment during the following calendar year.

DECIDING WHETHER TO ACCEPT A RECEIVERSHIP

QUESTION 3 | Should the appointee accept the appointment? This is the most important factor to analyze. As a receiver, you could be running a business, but with restrictions on the ability to act as businessman.

- **Who is the judge?**
 - Helps if you know the judge.
 - Sometimes, if you don't know the judge, a nice surprise can come out of the blue.
 - If you don't know the judge, he/she might be going down the list of potential appointees to hand out something no one wants or that has been rejected. Watch out!

- **Which law firm is seeking your appointment?**
 - Do you know the firm? Occasionally, a firm will recommend a receiver; a judge may or may not listen to the firm's recommendation.

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- **Which bank is seeking your appointment (foreclosures)?**
 - Some banks are cooperative, some are not.
 - Will the bank make protective advances to keep the property viable, e.g., advance money to the receivership to cure violations? This is especially important in residential buildings.

- **What type of receivership is this: Foreclosure? Business dissolution?**
 - Foreclosures are better – commission rate is up to 5% of money passing through the receivership;
 - Be very careful being receiver in business dissolutions or partnership fights – “business matrimonials”; in corporate dissolutions, the commission rate is approximately 1% under the BCL; a receiver’s compensation could be attacked by both sides after the case is finished.

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- **What type of property is the subject? Asset class?**
 - Residential properties are much harder; difficult, complaining tenants.
 - Receiver is responsible for maintaining the habitability of the property and can be surcharged if habitability is not maintained.
- **What are the cash flows?**
 - The more, the better – the larger the potential commission.
 - Is there enough cash flow to run the property?
 - There should be enough cash flow to justify the work you might have to do
- **Are there building violations? Is a lender willing to advance \$ to fix them?**

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- **Is the building completed?**
 - **A building under construction may have no cash flow; so how are you going to be paid?**
 - **A compensation arrangement, e.g., hourly or weekly or monthly flat fee will have to be approved by the court. Such fees are not specifically provided by the statute (CPLR 8004), but if the court approves same, you are protected. Again, transparency is the touchstone that is served by court order.**

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ONCE THE RECEIVERSHIP IS ACCEPTED, WHAT SHOULD ONE DO NEXT?

Make sure the order has all the powers and tools the receiver needs to be effective:

- Many, if not most, orders appointing a receiver are inadequate.
- The appointing order is the receiver's template/bible for exercising his/her powers.
- A receiver can only exercise what his/her appointing order empowers him/her to do.
- If inadequate, you are always free to ask the court to amend the order for more powers.
 - Caveat: if any doubt about the ambit of those powers, you can always ask the court to clarify the extent of those powers.

Powers a receiver should have; not inclusive, and can be tailored to a particular case:

- Manage the property
- Collect rents and funds
- Commence legal proceedings (to protect the property)
- Commence Landlord/Tenant actions

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- Powers a receiver should have (continued)
 - Power to hire “secondary appointees” who must be approved by the court;
 - This power must be exercised very carefully.
 - These appointees must be approved by the court before they can function
 - Unlike a normal business, these appointees cannot be easily removed, e.g., if they turn out to be incompetent.
 - Since a court order was needed to appoint them, a court order is also needed to replace them with a new appointee. This change would have to be explained to a judge (not desirable)
 - Typical secondary appointees a receiver would hire needing court approval
 - Counsel
 - Landlord/Tenant Counsel

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- **Typical secondary appointees a receiver would hire (continued)**
 - **Managing agent (the most important hire)**
 - **Accountant**
 - **Real estate broker; appraiser; etc.**
- **Other powers a receiver should have:**
 - **Enter into leases without court order for one or two years**
 - **Prepare interim accountings at specific time intervals**
 - **Pay real estate and other taxes; bring tax certiorari proceedings**
 - **State how much one can spend without court approval**
 - **State \$ limit for repairs without approval. Has inherent power for emergencies**
 - **Pay ordinary expenses**
 - **Pay municipal assessments**
 - **Allow the receiver to exercise the usual powers not enumerated (catch basin clause.)**

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- **Directions to a property owner that an order appointing a receiver must have**
 - **Cease and desist from operating the property (disobey = contempt of court)**
 - **Property owner is enjoined from collecting rents**
 - **Tenants are enjoined from paying anyone other than the receiver**
 - **Turn over to the receiver all necessary documents, funds, etc. necessary to operate the property, e.g.:**
 - **Rent security**
 - **Keys (metal keys or software codes for electronic keys, e.g., “fob keys.”)**
 - **Leases**
 - **Rent rolls**
 - **Vendor contracts**
 - **List of utilities**
 - **Copies of all insurance policies**
 - **Employee roster**

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- **The receiver should recommend a cooperative and competent bank for the receivership to the judge; a judge usually accepts the recommendation. Judge orders bank appointment.**
- **The receiver must choose his managing agent very carefully.**
 - **The managing agent is the receiver's most important hire.**
 - **The managing agent must be a licensed real estate broker.**
 - **The managing agent can make or break you.**
 - **The managing agent is the receiver's lifeline to the property.**
 - **The receiver is responsible for the managing agent's actions.**
 - **Runs day to day operations.**
 - **Keeps the books – important for accountings.**
 - **Managing agent selects contractors and supervises their work.**
 - **Managing agent supervises and may supply personnel working at the building.**
 - **In a residential building, controls habitability issues.**

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- **Managing agent (continued)**
 - Is a “secondary appointee”; must be on the court’s list of persons eligible to be appointed.
 - May have to testify in court proceedings, e.g., contempt proceedings
- **Typical duties of a managing agent**
 - Send notices to tenants (notices to attorn)
 - Obtain proof of insurance from commercial tenants
 - Compare rent roll to the leases
 - Establish contact with vendors
 - Obtain control of the keys or electronic locks
 - Meet staff
 - Register with the NYC buildings department
 - Review open violations

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- **Typical duties of a managing agent (continued)**
 - **Inspect the building for hazards**
 - **Making sure real estate taxes are paid**
 - **Reporting on financial activity**
 - Monthly property management schedule**
 - Monthly financials**
 - Monthly operations reports**
 - Maintaining records for interim and final accountings**

RECEIVERS, RECEIVERSHIPS & REAL PROPERTY

- **A prospective receiver must make sure that sufficient liability and casualty insurance names him/her as insured or additional insured and loss payee BEFORE he/she qualifies for the appointment**
 - This is critically important. A receiver should *never qualify* until proper insurance coverage is in place.
 - The party seeking the appointment of a receiver pays for the insurance premiums (the prospective receiver never does this)
 - A receiver is not necessarily immune to being sued; that's why you need insurance.
 - In a policy obtained by the receiver, he/she would be the primary insured.
 - Sometimes, a receiver is added to the policy of bank with blanket coverage of all of their collateral. In that case, the receiver would be an additional insured.

- **Insurance (continued)**

- **A mortgagee of a property may insist on being named as an additional insured and/or loss payee of the policy; the mortgagee has an insurable interest.**
- **The managing agent should always be named as additional insured.**
- **The capacities of the receiver and managing agent must be clearly stated in the policies and certificates of insurance (very frequently, insurance companies brokers do not do this correctly; lack of understanding of receiverships)**
- **The receiver has an insurable interest in the property**

RECEIVERS, RECEIVERSHIPS & REAL PROPERTY

- **One must qualify by filing an oath and surety bond**
 - The party seeking the receiver pays for the receiver’s bond.
 - The receiver assumes the power to act after the bond and oath are filed.
 - Again, the bond and oath should never be filed with the court until proper insurance is filed, i.e., the coverages are adequate (liability and casualty) with the capacities of the receiver and his/her managing agent properly identified.
- **Upon qualifying, a receiver must file the OCA UCS “notice of appointment” forms**

SECONDARY APPOINTMENTS

- **Property manager:** the receiver must ask the court to appoint a property manager and should include the agreement with the property manager in the motion to approve.
- **Counsel:** the receiver must appoint counsel. If the receiver is an attorney, the receiver must do the “routine”, “ordinary work” of an attorney.
 - An individual attorney is appointed.
 - But courts will pay for the work of the attorney’s partners and associates.
 - Notwithstanding the rules, courts sometimes appoint law firms.
 - When in doubt whether to use other attorneys, ask the court to approve the retention.
 - If the court approves the retention, you are protected; the touchstone is transparency.
- **Real estate broker:** the receiver cannot hire and pay a broker without court approval. The judge can make exceptions to the approved lists.

OPERATING DURING RECEIVERSHIP

- **Be a hands-on receiver; keep excellent records; the buck stops with you.**
- **Call the managing agent every couple of days.**
- **If possible do not delegate any check signing authority to anyone.**
 - **If it has to be done, e.g., too many checks to sign and a stamped signature is needed (e.g., for payrolls), obtain approval of the court and the bonding company.**
- **The receiver has the power to spend more than the court approval limit for emergencies during the operation of the receivership: e.g., boiler emergencies, floods, fires, roof leaks, etc.**

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- **Keep the parties and especially the judge who appointed you informed as to what is going on with the receivership**
- **Judges do not like surprises. If there is problem that the judge should know about, tell the court as soon as possible.**

LIABILITY OF THE RECEIVER

- **The appointing judge must give permission in order for a lawsuit commenced against a receiver to proceed, but that does not stop someone from suing the receiver.**
 - **There is no jurisdictional prohibition from filing a lawsuit against a receiver**
 - **If someone sues a receiver without court permission, a receiver's motion to dismiss will almost always be granted.**
 - **However, there is always the possibility, albeit remote, that a court could allow a lawsuit to go forward; thus, the need to have insurance in place**
- **A receiver cannot be held personally liable if he acts in good faith within the authority conferred to him by the court.**

RECEIVER'S COMMISSIONS

- **Statutory limits on the amount of commissions awarded.**
- **The general rules are the following:**
 - **The maximum commission amounts are set forth in statutes and the court has the discretion to award lower fees.**
 - **The usual rate of commission is up to 5% of monies received and disbursed by the receiver (no double dipping). Or in other words 5% of the monies passing through the receiver's hands – NOT 5% as it comes in and then other 5% as the funds are disbursed. CPLR 8004(a)**

Other statutes such as the BCL provide for much lower commission rates: 1%

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There are exceptions to the general statutory provisions of a specific commission rate. CPLR 8004(b) – if there is no money left in the receivership to pay fees, the court can fix the amount of the compensation; the party who moved for the appointment of a receiver is responsible for paying those funds.



INTERIM AND FINAL ACCOUNTING / LEGAL FEES

- **General rules:**
 - **An affidavit must be submitted to the court describing all the things one did as a receiver.**
 - **Accounting must be submitted using the “A B C” method:**
 - A. The monies the receiver received during the period**
 - B. The monies disbursed during the period**
 - C. The amount of cash at the end of the period**
- **Interim accounting: for each interim period for which an accounting is approved, the accountings and commission awarded for the period are “inoculated”.**
- **Final accounting: to be submitted at the termination of the receivership**

FINISHING THE RECEIVERSHIP: GETTING DISCHARGED

- **The receiver must prepare a final accounting for approval.**
- **Once approved, the court will file a statement of compensation to the Fiduciary Office.**
- **Once the amounts are disbursed, the receiver must prepare an Ex Parte Discharge Order, which discharges him from receivership and cancels his surety bond.**
 - **It is important to have the bond discharged, otherwise bond premiums will continue to accrue.**
- **Once the receivership is finished, do not discard your records.**

APPENDIX

New York State / Court's Fiduciary website

<https://iapps.court.state.ny.us/fiduciary/jsp/home/html>

List of eligible appointees, notices of appointments, approved compensation awards



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