**What is a Receiver?**

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The appointment of a receiver is grounded in the federal courts’ powers in equity to make determinations based on principles of fairness, as opposed to rigid application of law.

History

-- A receiver is an officer of the court, appointed to manage and protect property and business interests subject to litigation. The role originated in the English Chancery Courts in the 16th century or earlier and has long been used for that purpose in the United States, particularly in bankruptcy proceedings.

-- In the U.S., the appointment of a receiver is grounded in the federal courts’ powers in equity to make determinations based on principles of fairness, as opposed to rigid application of law. When federal courts have determined there is a violation of a federal right, they have broad equitable powers to craft effective remedies. (As the Supreme Court noted in *Brown v. Board of Education*, “equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.” 349 U.S. 294, 300 (1955).)  A receivership allows for creative and responsive problem-solving: for example, the receiver appointed in the Bernie Madoff Ponzi scheme recouped $1 billion for victims in that case.

-- Federal courts in the civil rights era have extended the use of a receiver from corporate governance to public institutions, starting with school desegregation cases where local governments had refused to implement court orders to dismantle racist structures. The remedy is rarely used, but receivers have been appointed to run prisons, jails, and child protective services agencies. These cases are characterized by failed institutions, profound resistance to remedial change, and the failure of other less intrusive efforts.

-- Courts considering the appointment of a receiver employ a balancing test and look at factors such as:

            -- the presence of a grave and immediate threat of harm to the plaintiffs;

            -- the failure of less extreme measures;

            -- limited utility of continuing to insist on compliance with current orders;

            -- lack of effective leadership;

            -- bad faith;

            -- waste of resources; and

            -- likelihood that a receiver will be a timely and effective remedy.

The position and powers of a receiver in institutional reform cases

-- A receiver is an arm of the court, independent of the politics, bureaucracy, and other dysfunctional structures that perpetuate the harm.

-- The extent of a receiver’s powers and authority are established by court order.

-- Unlike a judge, a receiver does not stand back and wait for motions to be filed by the parties, but takes an active role in directing or supervising day-to-day operations.

-- The receiver can ask the court to remove obstacles that stand in the way of reform (and are within the court’s power to address). For example, a receiver could ask the court to waive state laws regarding contracting processes or limitations on salaries.

-- A receiver’s budgeting and financial considerations will necessarily involve some degree of separation and independence from normal state governmental processes, given that the receiver’s powers are grounded in federal court authority and not normal state budgetary rules.

-- However, receivers are not all-powerful: they must work within governmental frameworks and processes (unless those rules are waived by the court). In practical terms, that means that unlike a receiver in a bankruptcy proceeding who has access to income from the company, a receiver appointed to run a government agency depends on the cooperation of the entity that appropriates money to fund the agency’s operations. In the case of a state or municipal agency, the legislature must appropriate the funds that the receiver believes is necessary. If the legislature doesn’t cooperate with the request for funds, there could be a stalemate that would put the court in a very difficult position.

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Choices for the court

 -- Replace current officials or establish parallel governance?

-- Select a receiver who looks like the people currently running the system or someone with different skills and experience? For example, should a receiver for a correctional system be a correctional administrator or expert, or a turnaround or management specialist?

-- Method of selection: nominations from parties or judicial search process?

-- What is the process for return of governance to the defendants?

The California experience

The *Plata v. Brown*lawsuit was brought in 2001 by the Prison Law Office to remedy constitutionally inadequate medical care in the California prison system. The case settled in 2002; in 2005, after three years of remedial efforts, the federal court found that:

“By all accounts, the California prison medical care system is broken beyond repair. The harm already done in this case to California's prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action. The Court has given defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed. Indeed, it is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR’s medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system.”

*Plata v. Schwarzenegger,* No. C-01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005) at \*1.

The court made specific findings as to the State’s incapacity to fix the grave problems:

“In spite of all these efforts by the Court [including soliciting a list of proposed orders the court could issue to overcome their bureaucratic hurdles], defendants have been unwilling or incapable of breaking out of a deeply entrenched bureaucratic mind-set, and have refused or been unable to take the steps necessary to prevent further needless loss of life and suffering among its wards.” *Id.*at\*26.

“State officials have become so inured to erecting barriers to problems that appear to threaten the bureaucracy. . . that the officials have trained themselves into a condition of becoming incapable of recognizing, and acting in response to, true crisis.” *Ibid.*

“[S]pending over one billion dollars annually on a system that far too often neglects, mistreats, and at times literally kills those it is intended to serve is a massive waste of money and, more importantly, life.” *Id.*at 31.

The Receiver holds the power to hire, fire, suspend, transfer, and discipline staff performing services related to medical care, including the power to negotiate and renegotiate contracts with labor unions.

The *Plata*court chose to establish a Receiver with parallel authority, not to replace state officials. The Receiver exercises all powers of the Secretary of Corrections with regard to administration, control, management, operation, and financing of the medical care system; his budget must therefore be included in the Governor’s budget and approved by the Legislature. The Receiver and Secretary are expected to work together and have done so, notably during the pandemic, issuing joint memoranda to staff regarding mandates and operations.

The Receiver holds the power to hire, fire, suspend, transfer, and discipline staff performing services related to medical care, including the power to negotiate and renegotiate contracts with labor unions. In practice, these powers are rarely exercised.

The judge in *Plata*hired a search firm to find a receiver. The first appointment was not entirely successful: reforms were initiated but after a few years the Court changed direction, likely due to the Receiver’s deepening inability to work with state officials or plaintiffs.  The judge then appointed Clark Kelso, a law professor who on multiple occasions had been called in by the State to trouble-shoot or take over troubled non-correctional projects.

Mr. Kelso’s approach has been to work with a small staff of key personnel: a chief clinical officer, several corrections administrators independent of the prison system’s chain of command, data/information management, and communications staff.

These improvements have significantly reduced death and suffering: avoidable deaths due to medical neglect and overdoses have decreased dramatically.

Notable successes include the establishment of electronic records and data collection systems to allow data driven health care; substantially improved vacancy rates among health care staff (in part resulting from substantially increased salaries); extremely successful programs to treat tens of thousands of patients with Hepatitis C and opiate use disorders; and significant building projects, including a new treatment-based prison as well as improved clinical space at older prisons. These improvements have significantly reduced death and suffering: avoidable deaths due to medical neglect and overdoses have decreased dramatically.

The Receiver has undertaken a process to delegate individual prisons back to state control, based on performance metrics and analyses of quality of care. Plaintiffs have the opportunity to oppose individual delegation decisions and have done so successfully several times. More than half of the prisons have been delegated. The Receiver maintains control of systemic matters such as COVID response, building projects, and data management.

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