



**The Association of Insolvency and Restructuring Advisors (AIRA)
and the Georgia Network of the
International Women's Insolvency & Restructuring Confederation (IWIRC)**



Introduction

Federal, State and International Receivership Issues



Panelists

Moderator:

William S. Sugden

Partner, Alston & Bird LLP

Panelists:

Hadley J. Chilton

Head of Restructuring, Baker Tilly (Cayman) Ltd.

Henry F. Sewell, Jr.

Partner, McKenna, Long & Aldridge LLP

S. Gregory Hays

Managing Principal, Hays Financial Consulting



Today's Agenda

We are going to discuss issues concerning:

- Duty, power and authority of receivers
- Insolvent liquidations, particularly offshore liquidations
- Tough issues, particularly related to the interaction of competing regimes
- Strategies for dealing with these issues



Part I

Duty, Power and Authority of a Receiver under State and Federal Law



Receiver Powers

Source of a Receiver's Authority:

- Derived from the Court's inherent equitable powers;
- Federal Case - 28 U.S.C. §754 and 1692 provide the appointing Court with jurisdiction over matters related to receivership regardless of where the property is located;
- State Case – jurisdiction under applicable state laws (O.C.G.A. 9-8-1);
- Order of Appointment:
 - Tailored to specific circumstances;
 - Defines appropriate duties and authority;
 - Provides structure and minimize “chaos”;
 - Discretion of the Court

Statutory Structure:

- With limited exception, there is no federal statutory structure for Equity Receiverships;
- Result?
 - Inconsistent results among appointed Receivers;
 - Relatively little guidance for operating a receivership;
 - Great flexibility.



Receiver Powers

- **A fiduciary must act in the best interests of estate.** See *Shannon v. Superior Court*, 217 Cal.App.3d 986, 266 Cal.Rptr. 242 (holding that the receiver must act in the best interests of all parties involved in the action and is subject to surcharge to the extent that the receiver acts contrary to his responsibilities).
- **A fiduciary shall preserve and protect assets of estate.** See *Georgia Rehabilitation Center, Inc. v. Newnan Hosp.*, 284 Ga. 68 (Ga. 2008) (“A ‘receiver’ is an officer of the court which appoints him, and his duty upon his appointment is to take possession of the assets of the insolvent debtor for the court and to preserve those assets so that upon distribution of the assets to the creditors they will be fully available to pay the claims of the creditors.”).



Receiver Powers

Top Ten Benefits of Appointing a Receiver:

- 1) Typically can be appointed quickly to be able to safeguard and preserve assets;
- 2) Provided with broad powers which allow for potential to institute change quickly;
- 3) Able to operate and stabilize a business in anticipation of a sale and maintain or even increase the value of the underlying collateral;
- 4) Empowered to take control of all assets, books, and records thus allowing for a quick investigation of the company's financial affairs. This information can then be shared with creditors to help determine the best way to dispose of assets;
- 5) Being court appointed provides greater credibility and authority in dealing with employees, customers, vendors, and creditors;



Receiver Powers

- 6) Empowered to institute litigation to recover fraudulently conveyed assets, can freeze and compel the return of collateral and can issue subpoenas to investigate asset transfers;
- 7) Cost effective – receiverships typically cost less than a bankruptcy filing – no committees, extra counsel, trustee, etc.;
- 8) Fewer reporting requirements, hearings, and meetings than a bankruptcy;
- 9) Less publicity – generally not published in the newspaper like all bankruptcy filings;
- 10) The law governing receiverships is often vague and broad, which provides great flexibility.



Receiver Powers

- Disadvantages of Receivership
 - Lack of Section 363 Sale Procedures and Orders
 - No ability to avoid preferential transfers
 - No discharge/limited opportunity for reorganization
 - No automatic stay
 - No rules regarding noticing, filing or claim objections
 - No statutory limits on claims



Part II

Liquidation regimes, both domestically and offshore



Liquidation Regimes

- Various liquidation regimes in different jurisdictions
 - In U.S., federal bankruptcy law, assignments for the benefit of creditors, other state law remedies
 - In the offshore world, appointment of an independent, court supervised liquidator is common in insolvent liquidations



Liquidations Regimes (cont.)

- Offshore liquidations bear many similarities to liquidations under chapter 7 of the US Bankruptcy Code
 - Independent, third party, licensed insolvency practitioners
 - Statutory duties to liquidate assets to cash promptly and in accordance with good market practice
 - Distribute assets in accordance with statutory priorities
 - Statutory duties and powers to investigate and bring claims of the companies over which the liquidator is appointed
 - Liquidator vested with litigation powers similar to a trustee in bankruptcy (e.g., Cayman Companies Law § 146)



Liquidation Regimes (cont.)

- Overlaps with the US system
 - Frequently, an offshore liquidator will have to pursue the collection of assets in assets outside the jurisdiction
 - Requires leave of the appointing court
 - For assets in the US, frequently the liquidator will seek recognition under chapter 15 of the Bankruptcy Code
 - Such recognition is not always required (*see* 15 USC § 1509(f))
 - A creditors or investors committee can be organized
 - Generally plays a purely advisory function, not ordinarily deemed a “party in interest”



Liquidation Regimes (cont.)

- Differences from US proceedings
 - Method of appointment can be different
 - Shareholder resolution
 - Creditor action
 - Order of the court if it is determined to be “just and equitable”
 - Secured creditors are ordinarily not subject to any stay of actions against property in which they have an interest
 - Closer court scrutiny over actions taken outside jurisdiction and claims to be brought by liquidator
 - Company in liquidation can be subject to a “scheme of arrangement” – akin to a chapter 11 plan in a chapter 7 liquidation
 - Treatment of “redemption creditors”



Part III

Issues confronting receiverships and liquidation regimes, both domestically and otherwise



Tough Issues

- Differences in stated scope of jurisdiction
 - “wherever located” jurisdiction is difficult to implement in practice
- Cross-jurisdictional handling of fraud
 - Treatment of corporate separateness and legal priorities
 - The not-so-special cases of competing two competing regimes
- Conflicts regarding international assets and businesses
- Intersection with Bankruptcy Law
- Receiver Standing
- Questions for the Receiver/Liquidator
 - Operating a Business
 - Liquidating Assets
 - Receiver Reporting and Communications



Intersection with Bankruptcy Law

- Can A State Court Receivership Be Used to Prevent a Bankruptcy Filing
- Most Receivership Orders, drafted by the party seeking the Receiver contain broad language prohibiting interference with the Receiver and vesting corporate control with the Receiver.
- Some Orders prohibit the filing of a Voluntary Bankruptcy Petition Outright



Intersection with Bankruptcy Law

In Re Orchards Village Investments LLC, 405 BR 341 (Bankr.D.Or. 2009) and *In Re Corporate and Leisure Event Productions, Inc.*, 351 BR 724 (Bankr.D.Az. 2006) each hold that State Court receiver orders preventing directors or managers from filing Voluntary Bankruptcy Petitions were unenforceable.

However,

In Re El Torero Licores, 2013 WL 6834609 (CD Ca. 2013). Court held that a State Court Receivership Order which vested sole authority to file Bankruptcy Petition for Partnership in a Receiver was enforceable. The State Court Order did not bar a bankruptcy filing, instead it dictated who could make that decision.



Intersection with Bankruptcy Law

Note that these decisions address State Court orders. A Federal District Court may enjoin creditors from commencing involuntary cases against companies in the receivership estate. For example, the Second Circuit in the case of SEC v. Steven Byers, Wextrust Capital, LLC, et al., 609 F.3d 87 (2d Cir. 2010), joined the Ninth and Sixth Circuits in upholding an anti-bankruptcy injunction contained in a receivership order. Although indicating that this power should be used cautiously, the Second Circuit Court of Appeals held that district courts may issue anti-litigation injunctions barring bankruptcy filings as a part of their broad equitable powers in the context of an SEC receivership.

-



Intersection with Bankruptcy Law

What about an Involuntary Petition?

Very recent example in our district of an involuntary petition being filed after the appointment of a receiver by a federal district court. *In re Ply-Marts, Inc.*, Chapter 7 Case No. 08-72687-mgd. Judge Diehl entered several consent orders in the involuntary bankruptcy case that postponed the turnover of assets by the receiver, authorized the secured creditor to extend credit to the receiver following the filing of the involuntary petition for relief and permitted the receiver to sell the Ply-Mart operating divisions as going concerns and to wind down the business in an orderly fashion before turning over assets to Chapter 7 Trustee.



Intersection with Bankruptcy Law

Application of section 363 of the Bankruptcy Code in a chapter 15 proceeding (*In re Fairfield Sentry*)



Receiver Standing

- Critical Question for Receiver is what standing does he/she have to bring claims
- Order may address claims, particularly when acting as a State Court Receiver to liquidate collateral
- *In Pari Delicto* Doctrine bars many claims by Bankruptcy Trustees
- Eleventh Circuit recently addressed issue of Receiver Standing *Wiand v. Lee*, 753 F.3d 1194 (11th Cir. 2014). Eleventh Circuit answered two questions
 - Does the receiver have standing to bring fraudulent transfer claims?
 - Can the receiver recover prejudgment interest if successful on those claims?



Questions for the Receiver/Liquidator

Receiver Reporting and Communications

Receiver reporting can be an expensive process. How do you decide what level of reporting should be included? Should reporting be mandated by the Order?



Questions for the Receiver/Liquidator

Operating a Business

How does the receiver quickly make a determination if the operations are prohibited or illegal? What is some of the evidence used to support your position?



Questions for the Receiver/Liquidator

Operating a Business

When should you ask the court for authority to operate a business?



Questions for the Receiver/Liquidator

Operating a Business

Should you segregate bank accounts by entity when operating or managing multiple receivership entities? What should you do when one receivership entity needs funding from another receivership entity?



Questions for the Receiver/Liquidator

Liquidating Assets

Is it ever appropriate for the receiver to start liquidating assets in pre-judgment situations?
How can the receiver attempt to liquidate assets pre-receivership in a contested case?



Questions for the Receiver/Liquidator

Liquidating Assets

Should the receiver "play the market"? Should the receiver hold assets in a rising market? Should the receiver be analyzing the market in deciding when to liquidate? Should the receiver engage experts to liquidate various assets to maximize value?



Questions for the Receiver/Liquidator

Liquidating Assets

How does the receiver take control of unnamed subsidiaries, affiliates, successors and assigns and liquidate their assets? What steps may be taken to clarify the scope of the receivership?