

Comparison of Liquidations in Bankruptcy, Receivership, and Assignment for the Benefit of Creditors

The following charts are provided as general information regarding liquidations achieved in bankruptcy proceedings and assignments for the benefit of creditors and are not necessarily applicable in all situations. These charts are based on Georgia state laws and may not be applicable in all states. The references to bankruptcy and receivership are general. You should consult with an experienced bankruptcy practitioner or other expert in the insolvency field with regard to these distinct liquidation vehicles.

Assignments can Streamline the Liquidation Process

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Procedures	Detailed “superstructure” code, rules, US Trustee		No formal court rules	Streamlined without court involvement
Publicity	Public forum; filings published in the press. Pleadings & financials readily available on Pacer		Less visible; not listed in paper. Pleadings available.	Publicity minimized; not listed in paper; very quiet, low profile closure
Expense	Can be very expensive	Can be expensive	Less expensive	May be most efficient means to liquidate
Timing	Perceived as slow – possible delays	Perceived as slow – possible delays	Fast	Accelerated process with no court involvement
Flexibility	Formal established laws and procedures		Flexible	Flexible

Assignments Fall Under State Law

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Fiduciary Name	DIP / Trustee	Trustee	Receiver	Assignee
Court	Federal	Federal	Federal or State	State
Judicial/ Non-judicial	Judicial	Judicial	Judicial	Non-judicial procedure
Jurisdiction	Federal authority recognized in all states		State or Federal Court	State action; may limit ability to sell assets in other states and effect liens
Law	Specific/ Detailed	Specific/ Detailed	Vague / Broad	Vague / Broad

Reduced Oversight Layer of Expense

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Additional layer of professionals	Counsel and Financial Consultants to Committee	No committee	No committee	No committee
Oversight / Supervision	US Trustee Judge Creditors' Committee	US Trustee Judge	Judge	None
Fees	Yes, US Trustee	No	No	No

Debtor Chooses Fiduciary Under an Assignment

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Creditor Committee	Yes	Typically No	No	No
Debtor's right to choose fiduciary?	DIP is fiduciary or Trustee appointed by US Trustee	No (panel trustee appointed)	No (creditor generally recommends the receiver)	Yes (debtor chooses fiduciary to serve as assignee)
Creditor's right to choose fiduciary?	No – but Committee may make recommendation to the US Trustee	No (can elect at 341 meeting if claimants representing 20% of \$ claims elect candidate by majority vote)	Yes (subject to court approval)	No (generally selected by debtor)

Maximize Value Under ABC

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Asset yield	Stigma of bankruptcy	Stigma of Chapter 7 liquidation	Assets sold outside of “bankruptcy” may yield higher returns	Assets sold outside of “bankruptcy” may yield higher returns
Maximize asset value	Yes, debtor knows business, though has restraints of time delays and organized creditors committee, which may impact value.	Yes, but panel trustee may not know business and may not move quickly to maximize value	Yes, receiver able to maximize value but may not have same incentive as assignee	Yes, assignee may be more sophisticated and able to move quicker
Retain going concern value	Yes	No	Yes	Yes

ABC Fee Structure Based on Size of Estate

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Fee application procedures	Periodic fee applications	Typically submitted at end of case	Not required unless specified in order; generally served on parties in the case	Not required unless set forth in assignment deed
Fiduciary Fee structure	Trustee commission - Limited by 326(a)	Trustee commission - Limited by 326(a)	Hourly; no cap. May have alternative fee structure	May be combination of fixed fee and percentage of sales

Executory Contracts and Leases Must be Renegotiated

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Assignment of executory contracts	Yes	Yes	No statutory provision	No statutory provision
Rejection of executory contracts	Yes	Yes, automatic after 60 days	No	No
Reject leases	Yes; landlord claim limited pursuant to 502 (b) (6)	Yes; landlord claim limited pursuant to 502 (b) (6)	No	No
Assign IP contracts	Yes	Yes	No	No
Assign software licenses	No, unless sale of company as a whole under a 363 sale		No	No

Established Priority of Claims

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Established Creditor priorities	Yes	Yes	No, but Receiver may look to bankruptcy code for guidance	No, but Assignee may look to bankruptcy code for guidance
Employee claims defined	Yes, priority claims up to maximum of \$10,000 per Section 507(a) (4)		No, but Receiver may borrow from the bankruptcy code	No, but Assignee may look to bankruptcy code for guidance
Benefit plan claims	Yes, provision for priority payments to a benefit plan		No	No

Reporting Minimized Under Assignment

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Financial Reporting	Monthly financial report	Annual financial report	At request of Court or discretion of Receiver	At request of Court or discretion of Receiver
Debtor's schedule of assets & liabilities	Required to be filed with bankruptcy court		Not required	List of assets attached to deed; signed affidavit that all assets turned over to assignee
Bond required	Yes – case specific bond required	Yes – but generally under Chapter 7 trustee general bond	Judge may require, but not always	No, unless any three creditors request bond

Some Tools Not Available Under ABC

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Preference claims	Yes, Section 547 Avoidance Powers		No, Receiver may file petition and pursue preferences	No provision in GA; assignee or creditor may file petition to pursue preferences
Fraudulent conveyances	Yes Bankruptcy laws Section 548	Yes Bankruptcy laws Section 548	Yes State law	Yes State law
Recharacterization of debt to equity	Yes, meet nine Roth Steel Factors	Yes, meet nine Roth Steel Factors	No	No
Equitable Subordination	Subordination pursuant to Section 510 (c)	Subordination pursuant to Section 510 (c)	No specific provision; may be modeled same as bankruptcy	No provision

Debtor Not Involved in Wind Down Under ABC

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Debtor's official involvement	May operate as DIP; must attend 341 hearing and be questioned by creditors	Must attend 341 hearing and be questioned by creditors	None	None, but must sign affidavit attesting to assets
Director liability for continuing to run an insolvent company	Ceases on petition filing	Ceases on petition filing	Ceases on receiver appointment	Ceases on assignment of assets

Debtor Continues to Manage Tax Issues in ABC

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Tax Returns	DIP / Trustee prepares	Trustee prepares	Receiver prepares	Shareholder prepares as they retain right to “shell”; only assets assigned in ABC
Reversion from pension plan	Taxed (50% excise tax)	Exclusion to 50% excise tax	Taxed (50% excise tax)	Taxed (50% excise tax)

Assignee has Rights of Lien Creditor Under ABC

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Meeting of Creditors	Yes 341 meeting	Yes 341 meeting	No	No, but Assignee may arrange
Can creditors file an involuntary petition?	Yes, may have started the process		Yes	Yes
Rights of lien creditors	Yes	Yes	No	Yes, per UCC 9-309
Creditors enjoined from collection efforts	Yes, automatic stay pursuant to Section 362		No, typically a court may enter such an order enjoining action with the same effect as bankruptcy automatic stay	No, but assignee has rights of lien creditor under UCC 9-309 providing benefits of automatic stay

Other Issues for Assignee to Consider

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Environmentally distressed properties	Trustee not on title to property. Estate must deal with claims and effect on value		Receiver not in chain of title	Assignment recorded in deed; assignee may be in chain of title
Continue operations	Yes	Generally no, but may for a short period to preserve value of estate	Yes	Generally no, but may if necessary to preserve value
Management Retention Agreements	No, KERPs Limited	No	Yes, Flexible	Yes, Flexible
Indemnification from creditors	No, not necessary	No, not necessary	No	No, but assignee may seek indemnification if assignee continues to operate business

ABC Provides Distinct Benefits to Secured Creditors

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Advantage to secured creditor	No issues regarding the sale in a commercially unreasonable manner		Sale by receiver or assignee avoids the possible contention by a guarantor that a secured creditor's collateral was liquidated in a commercially unreasonable manner	
Environmental issues: Advantage to secured creditor	Buffer for secured creditor if environmental issues arise	Buffer for secured creditor if environmental issues arise	Buffer for secured creditor if environmental issues arise	Buffer for secured creditor if environmental issues arise
Duty if only benefit is to secured creditor	Bankruptcy court not used if only benefit is to secured creditor	Panel trustee should abandon assets if only benefit is to secured creditor	No duty to abandon assets if only benefit is for secured creditor	No duty to abandon assets if only benefit is for secured creditor

Extended Payments Managed at Lower Cost in ABC

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Benefit if Extended Payment Terms	No, costs continue to accrue	No, costs continue to accrue	No, costs continue to accrue	Yes, no added court cost; less expense than continued court proceedings
Sale to insider	Not prohibited	Not prohibited	Not prohibited	Not prohibited

Other Issues Related to Secured Creditors

<u>Issue</u>	<u>Chapter 11</u>	<u>Chapter 7</u>	<u>Receiver</u>	<u>Assignment</u>
Sale of secured creditor's collateral	May seek action to sell over objection of secured creditor pursuant to Section 363(f)		Must have consent	Must have consent; assignee may seek consent prior to assignment
Use of cash collateral	May use cash collateral over the objections of secured creditor if creditor's interest is adequately protected under Section 361 & Section 363		No provision for use of cash collateral	No provision for use of cash collateral