



Avoiding a Receivership Nightmare[†]

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A properly structured receivership can provide a cost-effective, efficient, and flexible vehicle to protect the assets of a financially distressed or otherwise troubled entity and allow stakeholders to minimize losses and obtain the greatest return from the assets subject to the receivership. As receiverships have become more popular in recent years due to the potential benefits, property managers, accountants, and other parties have increasingly sought to obtain receivership skills¹ and appointments as a receiver in order to acquire new business opportunities. Inexperienced receivers, however, often encounter difficulty in navigating the vague rules and regulations governing receiverships, which can cause various adverse consequences for lenders, creditors, and even the receiver. Such consequences may be magnified in instances where property in receivership is subject to a subsequent bankruptcy case and the receiver is caught between the two proceedings.

This article will discuss selected practices to attempt to avoid adverse consequences in a receivership and the associated potential liability and loss of value. First, this article will examine an example of a nightmare receivership superseded by a bankruptcy case in which creditors incurred additional fees and expenses and the receiver was subject to a finding of contempt and conflicting instructions in the different proceedings. Next, best practices will be recommended for: 1) the preliminary stage of a receivership; 2) the operation of the receivership; and 3) a receivership encountering a subsequently filed bankruptcy case.

1 According to social media web site Linked-In, receiverships skills have a year-to-year growth rate of approximately 60% and are the 15th fastest growing skill set on the Linked-In network with over 5,000 members listing receivership as a skill. See LinkedIn, Skills & Expertise, Receiverships (January 15, 2012), <http://www.linkedin.com/skills/skill/Receiverships?trk=skills-hp-search>.

A RECEIVER'S UNFORTUNATE EXPERIENCE

In *In re Golden Grove Pecan Farm, et al.*, a CPA with little prior receivership experience was appointed as the receiver (the "GG Receiver") of five separate business entities located in different counties in Georgia (collectively, the "GG Receiverships").² While an experienced receiver may have quickly recognized that the businesses were not viable operations, the GG Receiver attempted to operate the businesses and struggled to effectively manage the GG Receiverships.³ At the request of a creditor inquiring as to the status of the GG Receiverships, the supervising court in two of the counties responsible for the GG Receiverships (the "Superior Court") held a status hearing.⁴ Parties present at the status hearing disagreed as to whether the Superior Court dissolved the GG Receiverships at that hearing and no recording, transcript, or other written record of the hearing exists to clarify the oral ruling of the Superior Court.⁵ The confusion that ensued created additional costs for the receivership and (ultimately) the receiver in unpaid fees and defense costs.

After the status hearing with the Superior Court, the GG Receiver relied on authority contained in the order appointing the GG Receiver and filed Chapter 11 petitions for each of the entities in the GG Receiverships (the "GG Bankruptcy Cases") without previously seeking any instruction or guidance from the Superior Court with regard to such action.⁶ The Superior Court subsequently entered written orders several months after the filing of the GG Bankruptcy Cases to: 1) terminate the GG Receiverships; 2) order the GG Receiver to return certain property

2 See *In re Golden Grove Pecan Farm, et al.*, 2010 Bankr. LEXIS 2776 at *2 (Bankr. M.D. Ga. Sept. 2, 2010).

3 See *id.* at 3.

4 See *Newton v. Golden Grove Pecan Farm, et al.*, 711 S.E.2d 351, 352 (Ga.App. 2011).

5 *Id.* at 353; *In re Golden Grove Pecan Farm, et al.*, 2010 Bankr. LEXIS 2776, at *3 (Bankr. M.D. Ga. Sept. 2, 2010).

6 See *Newton*, 711 S.E.2d at 353-54.

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in the GG Receiverships to the defendants in the litigation underlying the GG Receiverships; 3) find the GG Receiver to be in civil and criminal contempt for filing the GG Bankruptcy Cases; and 4) order that the GG Receiver be incarcerated for five (5) days and pay two \$500.00 fines.⁷ Although the orders of the Superior Court conflicted with the duties of the GG Receiver pursuant to the Bankruptcy Code, in order to avoid further sanctions, the GG Receiver filed in the GG Bankruptcy Cases a notice of intent to comply with the orders of the Superior Court.⁸

In response to the notice by the GG Receiver, the bankruptcy court responsible for the GG Bankruptcy Cases (the “Bankruptcy Court”) asserted exclusive jurisdiction over the property of the estates in the GG Bankruptcy Cases and found that the orders of the Superior Court were entered in violation of the automatic stay and therefore of no effect.⁹ The GG Receiver subsequently delivered the property subject to the conflicting orders to an experienced trustee (the “Trustee”) appointed in the GG Bankruptcy Cases who: 1) generated substantial benefit for the estates by quickly liquidating certain property; and 2) evaluated potential claims against the GG Receiver.

Although the GG Receiver avoided: 1) incarceration and sanctions by successfully appealing the finding of contempt by the Superior Court;¹⁰ and 2) extensive litigation with the Trustee, the GG Receiver will likely incur a loss in excess of \$100,000 in lost reimbursement for certain fees and expenses incurred by the GG Receiver. Creditors will also suffer a substantial loss as a result of the cumulative impact of the proceedings due to among other things, the double layer of administrative expenses of both the Trustee and the GG Receiver.

PROCEDURES DURING PRELIMINARY STAGES OF A RECEIVERSHIP

The court appointing a receiver as an equitable form of ancillary relief has wide discretion in selecting, empowering, controlling, and replacing a receiver.¹¹ Few limitations generally restrict a court in selecting a receiver,¹² and the selection of a particular party as a receiver is generally not a basis for appeal where the appointing court had an opportunity to review the purported qualifications of the receiver.¹³ Because the selection and installation of an

appropriate receiver are critical elements to the ultimate success of a receivership, parties-in-interest are encouraged to nominate a receiver and assist in structuring the receivership to be created by the court.¹⁴ During the preliminary stage of a receivership, the party seeking the appointment of a receiver and other stakeholders are best served by performing due diligence and focusing on obtaining: 1) a receiver who is and will remain a neutral third-party; 2) the appointment of the most cost-effective receiver with a sufficient amount of relevant knowledge and experience; and 3) appropriate content, procedures, and liability protections in the order appointing the receiver.

1. Selection of a Neutral Third Party Receiver

The appointment of a receiver who is and will remain a neutral third party is critical to maintaining the integrity of the process and avoiding liability for all involved. A receiver is an officer of the court with the fiduciary responsibility to act in the best interests of all parties involved in the receivership rather than any particular party-in-interest.¹⁵ “A receiver may not subordinate the interest of one creditor in favor of those of another creditor.”¹⁶ Accordingly, a party seeking the appointment of a receiver is generally prohibited from directly or indirectly requiring any understanding or agreement with the potential receiver.¹⁷ To the extent that a receiver acts contrary to the duty of the receiver to act in the best interests of all parties, such receiver may be subject to a surcharge by the court.¹⁸ Similarly, interference by lenders, creditors, and other parties-in-interest with the functions of a receiver is punishable by contempt.¹⁹

In addition to being held in contempt for interfering with the functions of a receiver, a party such as a lender attempting to secretly conspire with or inappropriately control or partner with the receiver may be exposed to additional liability. Lenders seeking to avoid taking title to financially distressed property are increasingly seeking the appointment of a receiver to reduce exposure and preserve collateral; however, lenders new to the receivership process may not fully understand or appreciate the role of a receiver. Some inexperienced lenders incorrectly view the receiver as working for the lender rather than functioning as a fiduciary responsible to the court and not to any particular party. Such lenders may seek to control the conduct of the receiver and an inexperienced receiver may not object to such conduct as a result of not comprehending the gravity of the situation. If the lender inappropriately controls the receiver, the lender may be exposed to potential lender liability claims seeking to hold the lender liable for losses resulting from the enterprise controlled

resolving the parties' dispute”).

7 See *Golden Grove*, 2010 Bankr. LEXIS 2776 at *3.

8 *Id.* at *4-5.

9 *Id.* at *10-14.

10 See *Newton*, 711 S.E.2d 351.

11 See *United States v. Bradley*, 2009 U.S. Dist. LEXIS 36465, at *5-6 (S.D. Ga. Apr. 29, 2009) (removing receiver due to misfeasance, appointing new party as receiver, and ordering that old receiver to retain fiduciary responsibility until the property in receivership is delivered to the new receiver); *Cavanagh v. Cavanagh*, 118 R.I. 608, 375 A.2d 911 (R.I. 1977) (indicating that the selection and removal of a receiver is a matter for the discretion of the court appointing the receiver).

12 See *Dinsmore v. Barker*, 212 P. 1109, 1111 (Utah 1923) (“The court may appoint any proper person not prohibited by law.”).

13 See *Herzfeld v. Herzfeld*, 285 S.W.3d 122, 131 (Tex.App.—Dallas 2009) (finding that the failure to hear appeal regarding appointment of receiver did not result in improper judgment even though receiver had no prior receivership experience, “did not understand the transaction she was to undertake, prepared erroneous documents, improperly joined motions filed by appellee in the trial court, and caused or contributed to delay in

14 See *First American Development Group/Carib, LLC v. WestLB AG*, 2010 WL 1552320, at *13 (V.I.Super. 2010) (indicating an intent to “order the parties to brief the question of who ought to serve as a receiver and what powers that receiver should have”).

15 See *City of Chula Vista v. Gutierrez*, 207 Cal. App. 4th 681, 685 (Cal. App. 4th Dist. 2012) (citations omitted); *Waag v. Hamm*, 10 F. Supp. 2d 1191, 1193 (D. Colo. 1998); *Sec. Pac. Nat'l Bank v. Geernaert*, 199 Cal. App. 3d 1425, 1431-1432 (Cal. App. 5th Dist. 1988).

16 *KeyBank Nat'l Ass'n v. Michael*, 737 N.E.2d 834, 850 (Ind. Ct. App. 2000).

17 See Cal Rules of Court, Rule 3.1179.

18 See *Shannon v. Superior Court*, 217 Cal. App. 3d 986, 998 (Cal. App. 5th Dist. 1990).

19 See *Clear Creek Power & Development Co. v. Cutler*, 79 Colo. 355 (Colo. 1926).

by the lender through the receivership.²⁰ Accordingly, in order to actually reduce and limit exposure in a receivership, a lender and all parties in interest in a receivership should seek to: 1) obtain a neutral receiver; and 2) act throughout the receivership in a manner consistent with the receiver functioning as an independent fiduciary.

2. Selection of a Cost-Effective Receiver

A receiver takes possession of and manages property in receivership as a fiduciary at the direction of the court that appointed the receiver.²¹ As an officer of the court, the receiver answers to the court as an agent of the appointing court.²² A receiver acting within the scope of the authority of the receiver may be protected by judicial immunity for breaches of fiduciary duty arising from omissions or actions during the course of the receivership.²³ Although a receiver may be replaced, the court that appointed the receiver will be the same court that reviews any concerns regarding the ability or conduct of the appointed receiver.²⁴ Given that a receiver may receive limited liability and a potentially favorable disposition by the appointing court, the interests of stakeholders are best served by initially seeking the appointment of a knowledgeable and experienced receiver who will cost the receivership as little as possible within a framework in which the conduct of the receiver may be absolved without recourse. So long as the lender does not assert inappropriate control over the receiver or take other actions that may lead to liability, parties may not generally seek recourse for the selection of the receiver or from a lender for damages caused by the receiver.²⁵

An ideal receiver will have experience managing properties or entities similar to the entity or property in receivership, understand the nuances of receivership law, and have the proper skill set to function as a court-appointed fiduciary administering the receivership for the benefit of all creditors of the receivership estate. While an inexperienced receiver may offer a lower hourly rate than an experienced receiver or even a “free receivership” in exchange for future commissions or other business arrangements,²⁶ such arrangements may be illegal or inappropriate in some states.²⁷

20 See William Hoffman, *Troubled Assets: Commercial Real Estate in Receivership*, *Commercial Lending Review* (Nov-Dec. 2010).

21 See *Hendricks v. Emerson*, 199 Ga. App. 208, 209 (1991).

22 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.”); *Clark v. Clark*, 58 U.S. 315 (1885).

23 See *In re Yellow Cab Co-op. Ass'n*, 185 B.R. 844, 852-53 (Bankr. D.Colo. 1995).

24 See O.C.G.A. § 9-8-8 (“The receiver is an officer and servant of the court appointing him, is responsible to no other tribunal than the court, and must in all things obey its direction.”).

25 See *Wolfe v. Illinois Fed. Sav. & Loan Ass'n*, 158 Ill. App. 3d 321, 323 (Ill. App. Ct. 5th Dist. 1987) (finding that a mortgage holder who commenced a foreclosure action and then obtained the appointment of a receiver was not liable for damage to the property when the receiver subsequently allowed insurance coverage to lapse and the property was damaged).

26 Bill Hoffman, *‘Low or No Charge’ Receiverships: A Very Costly Mistake?*, *California Real Estate Journal* (March 29, 2010).

27 Kirk S. Rense, *Illegal Agreements Between Receivers and Foreclosing*

A novice receiver may: 1) not have the ability to personally perform all functions required of some receivers such as liquidating, preserving, and pursuing assets or pursuing litigation matters; 2) not adequately understand court procedures, legal implications, or tax consequences of particular acts; or 3) experience a learning curve at the expense of the creditors. Ultimately, an inefficient receiver with a lower hourly rate may result in higher costs than a more qualified and efficient receiver with a higher hourly rate. Accordingly, the actual total cost of a receivership is comprised of: 1) the cumulative fees charged by a receiver; 2) the impact of inefficient conduct and lost opportunities to preserve and recover assets; and 3) any losses caused by mistakes generated by the receiver.

Avoiding Inefficient Conduct and Lost Opportunities—

Inefficient conduct and lost opportunities to preserve or recover property can significantly increase the total cost of a receivership, particularly when time is of the essence. The failure of a receiver to timely and efficiently perform tasks not only harms the receivership estate, but may also subject the receiver to potential liability for mismanagement and other claims.²⁸ An experienced receiver will have a better understanding of how to prioritize tasks and focus on the issues that require immediate attention. For example, a receiver with relevant experience will know to, among other tasks, immediately: 1) secure the assets and records of the receivership to prevent the loss or destruction of vital documents and assets; 2) obtain control of the mail to manage deliveries, communications, and mailed payments; 3) identify estate property; 4) recover funds such as security deposits or funds wired out of the company in the days prior to the receivership; 5) coordinate and exchange information with the party seeking the appointment of a receiver; 6) ensure that all assets of the estate are insured; 7) create a database of investors/creditors; 8) communicate with parties-in-interest in the case; and 9) obtain an understanding of the big picture and resolve tasks specific to the property in receivership. Without a prompt response to such tasks, the value of the property in receivership can be harmed and potentially eliminated.

Avoiding Unnecessary Mistakes—

An inexperienced receiver can also generate costly mistakes such as failing to properly preserve and protect property of the estate, recover all potential assets for the benefit of the estate, and maintain necessary licenses.²⁹ Some mistakes may stem from a failure to understand the business or assets in receivership, but other mistakes may stem from taking actions without prior court approval, commingling funds from different entities in receivership, improperly disregarding the separate and distinctive nature of different entities that have not been consolidated, and paying personal or inappropriate expenses out of the receivership estate. Such mistakes could expose the

Lenders, *Receivership News*, page 3 (Fall 2009).

28 See *Complaint, Michael Alonso et al. v. Leslie J. Weiss et al.*, case number 1:12-cv-07373 (N.D. Ill. 2012) (alleging that the receiver and the attorneys for the receiver intentionally breached their fiduciary duties, committed malpractice, were reckless and grossly negligent and intentionally, recklessly or with gross negligence, disregarded their fiduciary duties of care and the best interests of parties in interest).

29 See William Hoffman, *Troubled Assets: Commercial Real Estate in Receivership*, *Commercial Lending Review* (Nov-Dec. 2010).

receiver to liability for improper use of funds³⁰ or subject certain stakeholders to a potentially reduced distribution.³¹ Furthermore, an unprepared receiver may pay certain claims at the expense of claims of higher priority and, after incurring litigation costs and delaying the administration of the estate, have to disgorge windfall payments paid to creditors of lower priority and then properly redistribute the proceeds of the estate.³²

An inexperienced receiver may also negatively impact the value of property in receivership by failing to: 1) properly market and sell property in receivership;³³ 2) adhere to fiduciary duties;³⁴ 3) properly deal with taxing authorities and tax liabilities; 4) conform to the applicable standard of care;³⁵ or 5) properly identify insurable property interests.³⁶ An experienced professional is better able to avoid such mistakes among other minefields and, as a result, prevent the receivership from incurring the losses that may result from such mistakes.

3. Prudently Crafting the Order Appointing a Receiver

After selecting the most cost-effective neutral receiver with a sufficient amount of relevant knowledge and experience, the content of the order appointing the receiver may be the most critical component of a successful receivership. The powers, duties, and scope of the authority of the receiver are defined in the order appointing the receiver.³⁷ Prudent parties will participate

in the drafting of the order appointing the receiver to ensure that the order addresses the concerns of the parties and reduces the need to return to the court to obtain a clarifying order.

The order appointing a receiver empowers a receiver to perform tasks necessary to accomplish the objectives of a receivership and provides an overlying structure for the receivership. One of the most important issues in planning a receivership is determining whether the entire entity or just certain assets owned by an entity will be placed in receivership. In recent years, lenders have more frequently sought to place only the assets of an entity in receivership in order to avoid potential legacy problems associated with the entity. When an entity is placed in receivership, the receiver may potentially have to deal with outstanding income, payroll, and sales tax issues, litigation with third-parties, and other issues that can be avoided if only the assets or property are placed in the receivership. Placing an entire entity in receivership when the only value is in certain assets owned by the entity can result in increased administrative costs and reduced distributions as the receiver is burdened with the issues related to the entity without a corresponding benefit to creditors. In certain circumstances parties-in-interest may consider a receivership related to the individuals who own an entity in order to assist in recoveries related to the entity or assets owned by the entity. If the tax returns and tax payments of the individual are not current; however, incorporating an individual in a receivership may result in devastating tax consequences to the receivership estate that would not otherwise be applicable if only the assets of the entity were included in the receivership. Accordingly, parties-in-interest should carefully consider the structure of the receivership in order to define the property subject to the receivership in the most beneficial manner possible.

In addition to defining the property subject to the receivership, the order should also address the funding of the costs and expenses incurred during the course of a receivership. “Courts generally are vested with large discretion in determining who shall pay the cost and expenses of receiverships. The court may assess the costs of a receivership against the fund or property in receivership or against the applicant for the receivership, or it may apportion the costs among the parties, depending upon circumstances.”³⁸ In instances where funds available in the receivership are insufficient to pay the expenses of the receivership, the party that sought the appointment of a receiver may be required to provide the means for payment.³⁹ In addition to providing that the party

30 See *United States v. Bradley*, 2009 U.S. Dist. LEXIS 36465 at *6 (S.D. Ga. Apr. 29, 2009) (indicating the substitute receiver shall recover all fees accrued due to the misfeasance of the prior receiver).

31 See *In re Charter First Mortg., Inc.*, 56 B.R. 838, 849 (Bankr. D. Or. 1985) (“If the creditor has allowed his proceeds to be commingled in the debtor’s deposit accounts, the creditor may receive only that amount determined under the formula”).

32 See *In re Receivership Estate of Indian Motorcycle Mfg., Inc.*, 2006 U.S. Dist. LEXIS 52182, at *28-29 (D. Colo. 2006) (finding that, to ensure that compromised priority claims against the receivership estate are paid, both law and equity weigh in favor of recovering windfall paid to claimants who received 100% payment ahead of claims of greater priority).

33 See *Ohio Director of Transp. v. Eastlake Land Dev. Co.*, 177 Ohio App. 3d 379 (Ohio Ct. App., Cuyahoga County 2008) (reversing approval of sale by receiver of real property free and clear of liens where receiver did not: 1) present evidence of marketing or sale efforts; 2) provide notice or obtain approval of lien holder; or 3) indicate whether the property would be sold free and clear of the liens of the senior lienholder).

34 See *FTC v. Certified Merch. Servs.*, 126 Fed. Appx. 651 (5th Cir. Tex. 2005) (requiring the receiver to disgorge portion of compensation due to breaches of fiduciary duty by the receiver involving misrepresentation, self-dealing, and causing the company to pay certain fees and expenses incurred by the receiver without first reporting such fees to the court).

35 See *F.T.C. v. Think Achievement Corp.*, 2007 WL 3286802, at *7 (N.D. Ind. 2007) (finding that an inexperienced receiver who failed to procure insurance on an asset that was damaged was entitled to have jury determine whether the receiver was liable for damages for failing to confirm his conduct to the applicable standard of care and recognize that the receivership had an insurable interest in the property that was damaged).

36 *Id.*

37 See O.C.G.A. § 14-2-1432; see also *Federal Home Loan Mortg. Corp. v. Tsinos*, 854 F. Supp. 113, 115 (E.D.N.Y. 1994) (“The court that appoints the receiver determines the scope of that receiver’s authority”).

38 *Handlan v. Handlan*, 360 Mo. 1150, 1169 (Mo. 1950) (quoting 45 Am. Jur. 224, Sec. 290.); See also, *Kawfield Oil Co. v. Illinois Refining Co.*, 169 Okla. 75 (Okla. 1934) (indicating that the court has discretion to order payments to be: a) made from funds available to the estate; or b) divided between parties on equitable principles).

39 See, e.g., *First Nat’l Bank v. Dual*, 392 P.2d 463, 465 (Alaska 1964) (“Although the general rule is that a receiver’s compensation and expenses are payable from the funds in his hands, and are not taxable against the party at whose instance the receiver was appointed, an exception arises when there is no fund out of which the expenses can be paid and such circumstances exist that it would be inequitable not to hold the party responsible who invoked the processes of the court to have the receiver appointed.”) (citations omitted); *Stanton v. Pratt*, 18 Cal. 2d 599, 603 (Cal. 1941) (if funds available to the estate are insufficient, the receiver may look to the party or parties who obtained his

which sought the appointment of a receiver shall be liable for any outstanding administrative expenses of the receivership, the order appointing the receiver should also address the liability of any successor-in-interest to the party appointing the receiver and condition any transfer of any secured interest of the party seeking the appointment of the receiver upon either: 1) the termination of the receivership with payment of all administrative expenses; or 2) the party acquiring the secured interest being responsible for the expenses of the receivership.

In addition to designing the framework for the receivership, an order appointing a receiver can incorporate protections for both the receiver and the receivership estate by clearly defining the duties and responsibilities of a receiver, requiring the receiver to file with the court periodic status reports and other updates regarding activity in the receivership, and including provisions that explicitly limit the liability of a receiver.⁴⁰ The order appointing the receiver can also set forth the basis for calculating the compensation of the receiver and require monthly fee applications and estimates of fees so that all parties are aware of the costs associated with pursuing actions at the time that the work is being done rather than only at the end of the case. The order may also require a receiver to post bond in an amount as determined by the court,⁴¹ which could be important in instances where a receiver may not otherwise have sufficient funds to satisfy a judgment resulting from the misconduct of the receiver. Other protections to limit potential loss of value during the course of a receivership may be available based on the specific circumstances of a particular receivership, such as addressing environmental or regulatory concerns.

PROCEDURES DURING THE COURSE OF A RECEIVERSHIP

Certain procedures, some of which may be established in the order appointing the receiver, during the course of a receivership can assist in limiting liability and loss of value in a receivership. Two helpful procedures are: 1) maintaining and building a record of the activity in the receivership; and 2) requiring the receiver to provide adequate updates to keep the supervising court fully informed until the conclusion of the receivership. A clear record of the conduct during the receivership will be useful in the future should any conduct later be questioned. In the GG Receiverships, the absence of a clear record caused confusion regarding the termination of the receiverships and led to additional expenses as the GG Receiver attempted to avoid liability related to the finding of contempt. To establish a clear record for a reviewing

appointment and “any or all of the parties for whose benefit the receivership was created.” (citations omitted); *Brill v. Southerland*, 14 A.2d 408 (Del. 1940) (“Where there is no fund out of which expenses can be paid, or the fund is insufficient, the usual rule is that the party at whose instance the receiver was appointed should be required to provide the means of payment”) (citations omitted).

40 See *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. Ohio 2006) (“receivership court may issue a blanket injunction, staying litigation against the named receiver and the entities under his control unless leave of that court is first obtained.”).

41 See O.C.G.A. § 14-2-1432(b); Minn. R. Gen. Pract. 137.03 (2011) (requiring a receiver to post a bond); see also *Belk’s Dep’t Store, Miami, Inc. v. Scherman*, 117 So.2d 845 (Fla. 3d DCA 1960) (indicating that a receiver should be required to post a bond).

court, a receivership can maintain procedures pursuant to which conferences and hearings are recorded or transcribed and written orders are issued to document significant events, such as the disposition of property in receivership, a bankruptcy filing for any entities in receivership, and the termination of the receivership.

Just as any employee is wise to update their manager, it is in the best interests of the receiver, and the receivership estate, for the court to have sufficient and current knowledge regarding the conduct of the receiver and the status of the receivership. A receiver can further supplement the record and avoid surprises by filing regular reports, including all required reports,⁴² and having such reports approved by the court. Since receiverships do not generally have routine hearings, regular reports are an important medium to provide adequate disclosure of: 1) the progress of the receivership without having to incur the expense of updating each interested party individually; and 2) proposed future conduct. Effective communication between creditors and the receiver is critical in any successful receivership. To enable ongoing access to receivership activities and to avoid surprises at the end of the case, in addition to filing reports a receiver can also post reports, fee applications and other docket activity on the website of the receiver. Websites maintained by a receiver are especially helpful in the many state court systems that do not have electronic access to dockets like the Pacer system in federal courts.

While prior court approval is not required for every detail in a receivership, a receiver is ultimately responsible to the court and has a duty to keep the court informed and seek the guidance in instances where the appointment order is unclear.⁴³ A receiver has a strong interest in remaining within the scope of the authority granted by the court since a receiver assumes the risk of liability for any act taken without court authority.⁴⁴ Accordingly, an experienced receiver will keep the court fully informed and obtain explicit court approval in instances where authority is unclear or where proposed future conduct may be questioned.⁴⁵

For example, a receiver filing a bankruptcy petition for an entity in receivership without express authority may encounter disputes regarding the authority of the receiver and dismissal of the bankruptcy case resulting in additional expenses for the receivership estate.⁴⁶ If the appointment order empowers the receiver to initiate a bankruptcy case for the entity in receivership,

42 See Mass. R. Civ. P. 66(b).

43 See *Haw. Ventures, LLC v. Otaka, Inc.*, 114 Haw. 438, 468 (Haw. 2007) (citations omitted).

44 See *Interlake Co. v. Von Hake*, 697 P.2d 238, 240 (Utah 1985) (stating that a receiver “has only very limited powers and should apply to the court for advice and directions [since a receiver assumes the risk of liability for]...acts without court authority”).

45 See *Fauci v. Mulready*, 337 Mass. 532, 538, 150 N.E.2d 286, 290 (1958) (“Where his judgment is likely to be questioned by creditors, prudence will dictate recourse to the court for a decree authorizing the particular action which will afford protection against later claim that the action was disadvantageous to the estate or beyond his authority.”).

46 *In re American Marine Holdings, LLC*, et al. Case No. 12-11354-EPK, Doc 72 (Mot. to Dismiss) (S.D. Fla. Feb. 2, 2012); but see *In re Statepark Building Group, Ltd., et al.* Case No. 04-33916-hdh-11 (finding that a state court appointed receiver had authority to initiate a bankruptcy proceeding without an express grant of such authority in the order appointing the receiver).

the receiver may rely on such authority without obtaining additional approval.⁴⁷ Even with such authority, however, the receiver may incur liability, as happened with the GG Receiver. A receiver can avoid potential liability and loss of value to the estate by keeping the court fully informed and obtaining written authorization to proceed with a bankruptcy filing. Under such circumstances, the receiver should also advise the court of the impact of the automatic stay on the receivership assets and document a clear plan of action regarding the termination of the receivership.

PROCEDURES UPON INTERSECTION OF A RECEIVERSHIP AND BANKRUPTCY CASE (SECTION 543)

The filing of a bankruptcy case for an entity in receivership converts the receiver of such entity into a custodian in possession of property of the estate in the bankruptcy case subject to administration at the direction of the bankruptcy court.⁴⁸ Once a receiver has knowledge of a bankruptcy case involving property in the receivership, the receiver is required to comply with the rules and procedures set forth in Section 543 of the Bankruptcy Code. In pertinent part, Section 543 provides that, upon learning of a bankruptcy case, a receiver: 1) may not make disbursements or administer the property of the debtor other than to the extent necessary to preserve such property; and 2) shall file an accounting and deliver property of the estate in the possession of the receiver to the trustee or debtor-in-possession. In the event that the interests of creditors or, if debtor is not insolvent, of equity security holders would be better served by permitting the receiver to remain in possession of certain property, the bankruptcy court may excuse compliance with Section 543 of the Bankruptcy Code and *may* allow a custodian, such as a receiver, “to continue in possession, custody, or control of such property.”⁴⁹

To attempt to avoid conflicting instructions in the receivership and the bankruptcy case, the receiver should confirm that the bankruptcy proceeding was properly initiated and keep all supervising courts up to date and as informed as possible under the circumstances until the termination of the duties of the receiver. Many receivers add specific language in their receiver order to detail procedures to follow in the event of the filing of a subsequent bankruptcy case. Upon notification of the filing of a subsequent bankruptcy case, a receiver is required to comply with Section 543 of the Bankruptcy Code and should be prepared to step aside if the bankruptcy court so orders. Furthermore, the receiver should consider whether to:

1. seek the dismissal of the bankruptcy case;⁵⁰
2. seek to be excused from the turnover provisions set forth in Section 543 of the Bankruptcy Code pursuant to Section 543(d) of the Bankruptcy Code or by seeking abstention,⁵¹ requesting that the bankruptcy court voluntarily refrain from continuing the bankruptcy case;
3. turnover property subject to the bankruptcy case and assist in the bankruptcy case if employment of the receiver in the bankruptcy case is approved by the bankruptcy court; or
4. turnover property subject to the bankruptcy case and pursue other opportunities unrelated to the property.

After the assets of the receivership estate are either fully administered or transferred to a bankruptcy trustee, the receiver should officially resign as receiver and obtain from the court that appointed the receiver the entry of a written order of discharge and termination of the receivership.

CONCLUSION

Although not an exhaustive overview of receiverships or all potential issues that may be encountered in a receivership, this article advances several recommendations to assist parties in avoiding a potential nightmare receivership for creditors, the receiver, and any lenders that may be involved in the case. The rules and regulations governing receiverships are complex, especially in instances where a receivership intersects a bankruptcy case. Since parties unfamiliar with receiverships are more likely to encounter a nightmare scenario like the GG Receiver, the importance of obtaining an experienced, neutral fiduciary who implements proper procedures and is able to properly communicate with all key constituents in the case cannot be understated. In contrast to the results that may be obtained by an inexperienced party, an experienced receiver will be cognizant of potential minefields throughout the course of the receivership and will more readily and cost-effectively be able to navigate around them for the benefit of creditors of the receivership. ■

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47 See Honorable H. DeWayne Hale, et al., *Dueling Proceedings Between Bankruptcy and Receiverships*, The University of Texas' 29th Annual Jay L. Westbrook Bankruptcy Conference (Nov. 19, 2010) (citations omitted); see also *In re Statepark Building Group, Ltd., et al.*, Case No. 04-33916-hdh-11 (holding that a receiver had authority to commence a bankruptcy proceeding even without an express grant of such authority); *Central Mortgage & Trust Inc. v. State of Texas (In re Central Mortgage & Trust Inc.)*, 50 B.R. 1010, 1020 (S.D. Tex. 1985) (finding that “a corporation may not be precluded by state law from availing itself of federal bankruptcy law.”).

48 See *Pimper v. State ex rel. Simpson*, 274 Ga. 624, 626 (Ga. 2001).

49 11 U.S.C. § 543(d).

50 Section 305(a)(1) of the Bankruptcy Code provides that a bankruptcy court may dismiss any bankruptcy case at any time if “the interests of creditors and the debtor would be better served by such dismissal.”

51 See *In re Weldon F. Stump & Co.*, 373 B.R. 823, 828 (Bankr. N.D. Ohio 2007) (exercising permissive abstention under § 305 where a state-court receivership action had already commenced).