AMERICAN BANKRUPTCY INSTITUTE

2020 Central States Virtual Bankruptcy Workshop

CONCURRENT SESSION

Liquidating Assets

Hon. Catherine J. Furay, Moderator
U.S. Bankruptcy Court (W.D. Wis.); Madison

Marc M. Bakst
Bodman PLC; Detroit

Michael E. Deeba
Baker Tilly Virchow Krause, LLP; Oklahoma City

Rebecca R. DeMarb
DeMarb Brophy LLC; Madison, Wis.

2020


AMERICAN BANKRUPTCY INSTITUTE
CENTRAL STATES VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020


CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020
AMERICAN BANKRUPTCY INSTITUTE
LIQUIDATING ASSETS
What
Where
How

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

AMERICAN BANKRUPTCY INSTITUTE

HOW DO YOU START LOOKING FOR THE ASSETS?

- Sources of information
- Kinds of information

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

AMERICAN BANKRUPTCY INSTITUTE

- People
- Industry information
- Dealers
- Public information tools
- Other

WHAT TOOLS ARE AVAILABLE?

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

ARE THE APPROACHES TO IDENTIFYING ASSETS DIFFERENT DEPENDING ON THE PARTY?

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

DISPOSITIONS BY A CREDITOR

Tools include:

- ❑ **Article 9 Dispositions**
- ❑ **Appointment of a Receiver – Judicial and non-Judicial**
- ❑ **Other Judicial Methods**

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

AMERICAN BANKRUPTCY INSTITUTE

PROS

CONS

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

AMERICAN BANKRUPTCY INSTITUTE

ARE THERE OTHER METHODS THAT A DEBTOR MIGHT CONSIDER WHEN LIQUIDATING ASSETS?

- Outside of Bankruptcy

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

ANY CONSIDERATIONS TO THINK ABOUT FOR A BUYER OF ASSETS?

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

AMERICAN BANKRUPTCY INSTITUTE

SECTION 363 SALE

- **Debtor Perspective: Pros and Cons**
- **Creditor Perspective: Pros and Cons**
- **Buyer Perspective: Pros and Cons**

CENTRAL STATES
VIRTUAL BANKRUPTCY WORKSHOP
JUNE 25-26, 2020

AMERICAN BANKRUPTCY INSTITUTE

SUBCHAPTER V OF TITLE 11

Does the new Subchapter V potentially change the use of bankruptcy as a tool?

LIQUIDATING ASSETS

Marc Bakst

Rebecca DeMarb

Judge Cate Furay

Anne Vanderkamp

ABI CENTRAL STATES

June 25, 2020

Debtors and their creditors face various issues and considerations when pursuing the liquidation of assets. The process begins by determining the assets to be liquidated. Once the assets are identified decisions are made regarding the means to liquidate the assets. This outline is a brief description of some of the methods to be considered. While it addresses processes in Michigan and Wisconsin as well as under the Bankruptcy Code, there are similar methods available in every state. For provisions under Article 9, we have provided citations to the UCC rather than specific state statutes. It is important to check state law to determine the precise requirements. Nonetheless, the pros and cons of the various methods are fairly consistent regardless of jurisdiction.

I. WORKOUTS

A. Forbearance Agreements.

In general, forbearance agreements are used when the borrower is in default and the lender has agreed to concessions, which typically include the agreement not to immediately exercise all of its rights, including its collection remedies. The primary objectives are to control cash flow, reduce exposure, improve the lender's position and obtain repayment.

1. Preliminary Work.

    a. Review existing loan documents and collateral files to identify any problems such as defective security agreements or security interests that were not properly perfected;

    b. Review history between lender and borrower to identify any liability issues; and

    c. Gather information about the value of the collateral and the potential difficulties in liquidation.

2. Typical Provisions in a Forbearance Agreement.

    a. Identification of liabilities;

    b. Borrower's and guarantor's acknowledgments of the current loan balance, the events of default and the lender's perfected position as to the collateral;

    c. Maximum lending limits under revolving credit lines and on aggregated credit obligations;

    d. Cancellation of any accommodations, such as stand-by letters of credit availability and automatic clearing house services that could increase credit exposure;

e. Agreements to allow and pay for audits, appraisals and attorney's fees;

f. Delivery of financial statements, budget reporting and additional loan documents or deeds-in-lieu of foreclosure;

g. Releases of all the borrowers' and guarantors' claims or causes of action against the lender;

h. Imposition of a default interest rate or increase in non-default rate;

i. Jury waiver;

j. Arbitration clause; and

k. Assignment of rents and/or appointment of receiver.

Note that the Uniform Commercial Code limits the lender's ability to obtain certain types of waivers in terms of the sale of collateral securing a loan. UCC 9-602. However, after a default, the Code does allow a borrower to enter into agreements waiving certain rights, such as the right to notification of the collateral's disposition. UCC 9-624.

B. Deeds in Lieu of Foreclosure ("DIL").

The borrower of the property conveys the encumbered property to the lender in full or partial satisfaction of the debt.

The terms and conditions are highly negotiable.

1. Advantages.

a. The lender becomes the owner of the property, allowing it to control it, take immediate steps to maximize its value and, in some cases, collect income;

b. The publicity, time and expense of a foreclosure can be avoided; and

c. If there is no equity in the property, the transaction is not susceptible to being set aside by a bankruptcy trustee or on the grounds of conversion.

2. Disadvantages.

a. If there are junior liens or encumbrances, the lender will still have to foreclose; and

b. Caution must be taken not to "merge" title in order to allow the lender to foreclose on junior liens to clear title.

3. Documenting a DIL transaction.

   a. Obtain a title commitment to determine the existence of any liens and any title company requirements for such transactions;

   b. Prepare a "Deed In Lieu Agreement." Such agreements are very similar to forbearance agreements in terms of the acknowledgements and waivers;

   c. Prepare Estoppel Affidavit. The borrower affirms amounts due, the existence of default, the absence of defenses, the full release of any redemption rights, that the value of the property secured by the mortgage is less than the mortgage debt and that the agreement was entered into freely and without duress;

   d. Prepare the appropriate deed. Typically, DILs are documented using a Covenant Deed, not a Warranty Deed;

      Ensure the presence of a "non-merger" clause in the DIL Agreement **and** Deed.

   e. Submit draft documents to the title company in order to obtain approval of the transaction; and

   f. **Promptly** record the deed.

4. Surrender of Collateral Agreement.

   Similar in purpose to a DIL agreement. Where the loan is collateralized by personal property, the debtor can voluntarily agree to surrender the collateral assets against the loan.

II. SELF-HELP COLLECTION.

A. Foreclosure by Advertisement. *Note: This remedy may not be available in all states.*

1. Foreclosure by advertisement is usually faster and less costly than a judicial foreclosure. The time between commencement of the foreclosure by advertisement proceedings and sale is approximately six (6) weeks as compared to approximately 30 weeks in a judicial foreclosure.

2. Because it is a non-judicial proceeding, the burden is on the borrower or a junior lender to initiate court action to enjoin the sale.

3. Disadvantages of Foreclosure by Advertisement.

   a. Borrower remains in possession of the premises until the expiration of the redemption period;

b. Foreclosure by advertisement does not resolve priority disputes and title issues;

c. Attorney's fees are limited to $75 in a foreclosure by advertisement. However, in a judicial foreclosure, if the loan documents so provide, the lender can attempt to recover reasonable attorney's fees and costs; and

d. Foreclosure by advertisement may make it more difficult to collect a deficiency because the borrower can attack the amount bid at the sale as being unreasonable.

4. Procedural Steps to a Foreclosure by Advertisement (Michigan).

a. Prerequisites to Foreclosure by Advertisement.

(1) For consumer loans of a primary residence, federal law prohibits commencement of a foreclosure until the expiration of 120 days after the borrower first becomes delinquent. 12 C.F.R. §1024.41(f).

(a) Loans secured by vacant land or business purpose loans are exempt. 12 C.F.R. §1024.5

(2) Mortgage must contain a clause providing for power of sale upon default as a condition of the mortgage. MCL 600.3201.

(3) Mortgage containing the power of sale and all assignments of the mortgage have been recorded prior to the date of sale. MCL 600.3204(3).

(4) Right to foreclose exists, *i.e.*, condition or event constituting default, accelerating debt and triggering power of sale has occurred. MCL 600.3204(1).

(5) Absence of pending lawsuit or successful collection efforts. MCL 600.3204(2).

(a) No suit is pending to recover debt secured by mortgage.

If a lawsuit for a judicial foreclosure has been filed, it must be dismissed. Note that an action to appoint a receiver is not an "action at law" to recover a debt.

(b) Any execution on an existing judgment must be returned unsatisfied in whole or in part. MCL 600.3204(2).

(c) Each installment mentioned in the mortgage is considered a separate independent mortgage for purposes of foreclosure and can be foreclosed by advertisement if it is in default. MCL 600.3204(4).

(6) Publication and Posting Requirements. MCL 600.3208.

(a) Publication. The foreclosure notice must be published at least once per week for four (4) successive weeks in a newspaper published in the county where some or all of the mortgaged premises are situated.

i) Requirement of "4 successive weeks" appears to require publication for five weeks to establish a base so that subsequent publications are deemed successive. Even if not required, publishing for 5 weeks is a sound practice in order to resolve any inaccuracies in the first published notice.

ii) If no newspaper is published in the county in which some or all of the premises are situated, then the publication requirement is satisfied by publishing the notice in a newspaper published in an adjacent county.

(b) Posting Requirement.

i) Within 15 days after the first publication of the notice of foreclosure, the notice must also be posted in a "conspicuous" place upon any part of the premises described in the notice of foreclosure.

The notice does not need to be posted on the most conspicuous place on premises; simply on a conspicuous place upon any part of premises. *Cox v Townsend*, 90 Mich App 12, 15 (1979) (posting on fence post previously used by mortgagor for posting met statutory posting requirement).

ii) Mortgagee, agents and assigns have the right to enter upon the mortgaged premises for purposes of posting or serving required notices. MCL 600.3276.

(7) Contents of Notice of Foreclosure. MCL 600.3212 (as amended effective January 11, 2020).

(a) Notice of foreclosure must specify:

i) Name(s) of mortgagor and mortgagee;

ii) Assignee of the mortgage (if any);

iii) Date of mortgage;

iv) Where the mortgage was recorded;

v) The amount claimed to be due on the mortgage as of the date of the notice of foreclosure;

vi) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.

vii) A description of the property by giving its street address, if any. The validity of the notice and the validity of any eventual sale under this chapter are not affected by the fact that the street address in the notice is erroneous or that the street address is omitted.

viii) The name, address, and telephone number of the attorney for the party foreclosing the mortgage.

ix) For a residential mortgage, a statement in the following form: "Attention homeowner: If you are a military service member on active duty, if your period of active duty has concluded less than 90 days ago, or if you have been ordered to active duty, please contact the attorney for the party foreclosing the mortgage at the telephone number stated in this notice.".

x) A statement in the following form: "Notice of foreclosure by advertisement. Notice is given under section 3212 of the revised judicature act of 1961, 1961 PA 236, MCL 600.3212, that the following mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, at a public

auction sale to the highest bidder for cash or cashier's check at the place of holding the circuit court in _____ County, starting promptly at (time), on (date). The amount due on the mortgage may be greater on the day of the sale. Placing the highest bid at the sale does not automatically entitle the purchaser to free and clear ownership of the property. A potential purchaser is encouraged to contact the county register of deeds office or a title insurance company, either of which may charge a fee for this information."

xi) The redemption period as determined per MCL 600.3240, which is generally 1 year, but is six (6) months for the following types of property:

1. Commercial or industrial property, MCL 600.3240(3);

2. Multi-family property in excess of four units;

3. Residential property where less than 1/3 has been paid on mortgage debt. MCL 600.3240(4);

4. The redemption period for vacant property is 1 year; and

5. If property is "used for agricultural purposes" before the sheriff's sale, the Mortgagor must provide proof that it filed a Schedule F to the federal tax return in the prior year (loss or gain from farming operations) and record an affidavit that such proof has been delivered. MCL 600.3240(17). If the mortgagor fails to do so **before** the sale, there is a presumption the property **is not** used for agricultural purposes. To challenge the presumption, the lender or borrower can file a lawsuit before the expiration of the redemption period that would apply if the property is

determined not to be used for agricultural purposes (which is generally 6 months).

(8) Abandonment. **Only** available for residential properties of less than four (4) units. There are two (2) types of abandonment; one done before the notice of foreclosure is published and one after.

(a) For the "pre-notice abandonment", the following steps must be taken 30 days before the notice of foreclosure is published. Under MCL 600.3241 or MCL 600.3241a, the redemption period can be shortened to 30 days, but all necessary steps must be taken before the sale:

i) The lender notifies the borrower, by certified mail, return receipt requested, that it intends to foreclose;

ii) The lender records an affidavit:

1. That it sent the default notice/intent to foreclose to the borrower;

2. The borrower has not responded;

3. The lender personally inspected the property and the mortgagor or persons claiming under him are not occupying the property nor does it appear they intend to occupy the property;

iii) The lender sends the recorded affidavit to the borrower, by certified mail, return receipt requested, before the notice of foreclosure is published;

iv) Before the expiration of the 30-day redemption period, the borrower provides the lender with a recorded affidavit that they are occupying or intend to occupy the property.

(b) Abandonment After Publication of the Notice of Foreclosure. MCL 600.3241a.

i) The lender personally inspects the property and the inspection reveals the borrower or

persons are not occupying and do not intend to occupy;

ii) The lender posts a notice at the time of inspection and mails it certified mail, return receipt requested, that:

1. The lender considers the property abandoned;

2. The borrower will lose all ownership rights within 30 days of the sale or 15 days of the notice (whichever is later) unless the borrower, or the borrower's heirs or representatives, sends a notice by first-class mail that the premises are not abandoned.

b. Federal Tax Lien Issues.

(1) One who becomes a mortgagee before recording of notice of federal tax lien enjoys priority over such lien. 26 U.S.C. §6323(a).

(2) Junior federal tax liens can be extinguished through foreclosure by advertisement if the lender notifies taxing authorities as outlined in state and federal law. MCL 600.3220; 26 U.S.C. §7425.

c. Sale. MCL 600.3216.

(1) General requirements.

(a) Public sale between 9:00 a.m. and 4:00 p.m. conducted in the circuit courthouse in the county where all or part of the property is located.

(b) Sale conducted by a sheriff, undersheriff, or deputy sheriff.

(c) Sale must be made to the highest bidder (who has funds to purchase).

Mortgagee's assigns or legal representatives may purchase some or all of the mortgaged premises at the sale. MCL 600.3228.

(2) Sale of distinct parcels. MCL 600.3224.

(a) General rule -- if the mortgaged premises consists of distinct lots that are not occupied as a single parcel, they must be sold separately.

If distinct lots are occupied as a single parcel, they may be sold together.

(b) Limitation on sale -- statute prohibits the sale of more parcels than necessary to satisfy the amount due on the mortgage at the date of the notice, plus legally allowable interest, costs and expenses. MCL 600.3224.

A sale which fails to comply with statutory mandate is voidable. *Cox v Townsend*, 90 Mich App 12 (1979); *Walker v Schultz*, 175 Mich 280 (1913).

d. Adjournment of Sale. MCL 600.3220.

(1) General considerations.

(a) Sale can be adjourned "from time to time" on the request of the party in whose name the notice is published.

The notice may be posted before or at the time of and at the place where the sale is to be made by a sheriff or other person appointed to make the sale. No oral announcement of adjournment is necessary.

(b) It is best to adjourn from week-to-week. If an adjournment is for more than one week at one time, the notice of the adjournment attached to the original notice of sale must be published in the newspaper in which the original notice was published.

e. Bidding Strategy.

Determining a credit bid is important if the property is worth less than the amount due on the mortgage **and** the lender intends to pursue the borrower for a deficiency.

(1) The deficiency is measured by what the lender bids at the foreclosure sale, **not** what the property is eventually sold for;

(2) In a suit to recover a deficiency, the borrower has the statutory defense that the property was "fairly worth" the amount of the debt at the time of the sheriff's sale **or** that

the amount bid was "substantially less than the true value" of the property. MCL 600.3280;

(3) The Courts recognize that true value does not equal market value because a foreclosure sale is a "forced sale" and not an "arms-length" transaction..

f. Right to Inspect After the Foreclosure Sale

Statutory changes effective beginning in 2014 provided the high bidder at the sale with the ability to inspect the premises during the redemption period and the ability to shorten the redemption period under certain circumstances. MCL 600.3237 and 3238.

(1) The initial notice of the "right to inspect." The high bidder must provide an initial notice to the borrower AND any person having possession of the property. The notice must be given by mail, physical posting, or any other method reasonably calculated to achieve actual notice. The notice must include:

(a) The identity of the high bidder;

(b) Contact information, including your business and mailing address, telephone number, and email address, as applicable;

(c) The date of the sheriff's sale and the amount of the bid;

(d) The estimated expiration date of the redemption period;

(e) The details of the right of inspection;

(f) One or more alternative methods for surrendering control of the property; and

(g) A statement that if the borrower intends to vacate the property after the sale, they must notify you and if they fail to do so, they could risk heightened liability for damage to the property. MCL 600.6237.A sample notice is attached as Exhibit "A."

(2) The ***initial*** inspection.

This notice must be given in the same manner as described above, and at least 72 hours in advance of the actual inspection. MCL 600.6238(2). The inspection must be set

at a reasonable time of day and in coordination with the borrower, if possible. A sample notice is attached as Exhibit "B."

This request may be made only once each calendar month, with a maximum of three times in any six months of the redemption period, UNLESS you have reasonable cause to believe that damage to the property is imminent or has occurred. MCL 600.6238(4).

There are no restrictions on exterior inspections which can be done without notice. MCL 600.3238(3).

(3) Right to request information after initial inspection.

After your initial inspection, the borrower is required to provide information about or evidence of, the condition of the interior of any structures on the property in any form reasonably necessary to assess the property's condition. A sample request is attached as Exhibit "C."

If the borrower refuses to provide the requested information or evidence within five business days, or the information reveals that damage has occurred or is imminent, the high bidder has the right to schedule an inspection of the interior in accordance with the notice provisions above (*i.e.*, posting a notice 72 hours in advance). MCL 600.3237(5). If the borrower provides information which shows that damage has not occurred or is not imminent, there is no right to conduct an interior inspection.

(4) Shortening the redemption period.

If the borrower refuses to allow an inspection or if damage to the property is imminent or has occurred, the high bidder may immediately commence summary proceedings for possession or file an action for any other necessary relief to protect the property. MCL 600.3237(6). If the action will be based on the failure to repair damages or provide information, the borrower is entitled to notice of the intent to pursue summary proceedings **and** seven days to correct/repair the condition. The notice must be provided to the borrower by certified mail, physical posting, or in any other manner reasonably calculated to achieve actual notice, and it must include information that you intend to commence summary proceedings if the damage or condition is not repaired or corrected within seven days from receipt. MCL 600.3238(7). A sample notice is attached as Exhibit "D."

The high bidder is prohibited from commencing proceedings if: 1) the damage or condition is repaired or corrected within the seven day period; or 2) the high bidder and the borrower agree on a procedure and timeline to repair or correct the damage or condition and the damage or condition is corrected by the agreed-upon date.

The statute also requires the court to consider other factors before entering a judgment of possession. These include:

- The cause of the damage or condition;
- Whether the borrower has taken appropriate steps to repair or correct the damage or condition and prevent further damage;
- Whether the borrower has contacted the high bidder and any property insurer regarding the damage or condition; and
- Whether the high bidder caused any delay in the repairs or corrections.

(5) What constitutes "damage" entitling the high bidder to a judgment of possession?

- The failure to comply with local ordinances regarding maintenance of the property or blight prevention, if the failure were the subject of enforcement action by the government unit;
- An exterior condition that presents a significant risk to the security of the property or a significant risk of criminal activity occurring on the property;
- Whether the borrower has contacted the high bidder and any property insurer regarding the damage or condition;
- Missing or destroyed structural aspect or fixtures (furnace, water heater, air conditioner, cabinetry flooring, walls, ceilings, roofing, toilets, or other fixtures as that term is defined in the Uniform Commercial Code); and
- Deterioration below, or being in imminent danger of deterioration below, community standards for public safety and sanitation as

established by statute or ordinance. MCL 600.3238(9).

(6) Rebuttable Presumptions.

If the borrower is provided with a notice of intent, there is a rebuttable presumption that the borrower is liable for all damages that occurred before the redemption period expires if the borrower:

(a) failed to consent to an initial or subsequent inspection, or failed to comply with a request for information;

(b) failed to provide timely notice to you of their intent to vacate; or

(c) failed to surrender the property in a manner that reasonably provided you with the opportunity to secure the property.

There is also a rebuttable presumption that the borrower is not liable for damages that occurred after the surrender if they: 1) consented to initial and subsequent inspections and complied with requests for information on the condition of the property; 2) provided timely notice of intent to vacate; and 3) surrendered control of the property in a manner that provided you a reasonable opportunity to secure it. MCL 600.3278.

g. Redemption.

(1) Mortgagor, heirs, executor, administrators or those claiming from mortgagor must pay to the purchaser the sum which was bid for the premises plus interest from the date of the sale at the rate stated in the mortgage. MCL 600.3240(1). In lieu of remitting funds to purchaser, mortgagor may remit payment to the register of deeds in custody of the deed. *Id*. Payment must be made prior to expiration of redemption period.

(2) Mortgagor's liability for insurance and taxes.

(a) Generally, sums to redeem property can include insurance premiums and taxes paid by purchaser during the redemption period.

i) Taxes. Must be assessed during redemption period and paid by purchaser. In order to include all unpaid taxes assessed prior to the

sale, the safest course of action is to pay the taxes prior to the first publication. If the mortgage so provides, unpaid taxes can be included in the unpaid principal.

ii) Insurance premiums. To properly include premiums, it must be the borrower's duty to pay the premium under the mortgage and the payment must be necessary to keep the policy in force during redemption.

(b) Procedure for including post-sale payments in redemption price. Purchaser and someone acting on his behalf submits an "affidavit of payment" that shows amount and items paid and receipt evidencing payment. Affidavit plus attachments must be filed with and endorsed by the register of deeds in order to entitle purchaser to recover amounts reflected therein plus interest if mortgagor attempts to redeem.

B. Setoff.

A bank account is an unsecured loan by a depositor to the financial institution that is available to satisfy an overdue debt owed by the depositor to the financial institution

1. Requirements for setoff.

a. Review account records to determine any limitations on right to setoff. There is a difference between a right to setoff for a past due payment and the ability to setoff for the full debt after proper acceleration of the debt.

b. Debt must have matured. Unless the loan documents specifically give the financial institution the authority to do so, a setoff because of insolvency is impermissible. *Manufacturers National Bank of Detroit,* 910 F2d 1339 (6th Cir 1990);

c. The funds are the depositor/debtor's property. There are no restrictions on the use of the funds (such as a trust or other custodial account);

d. The debt is due and owing at the time of the setoff; and

e. There is mutuality of obligation between the depositor and the financial institution and the debt and the deposit funds. *Hansman v Imlay City State Bank,* 121 Mich App 424; 328 NW2d 653 (1982).

2. A financial institution can only set off against a guarantor's account prior to exhausting the accounts of the primary obligor if the guarantee specifically provides such a right.

3. Because a shareholder is considered separate from a corporation, and is not liable for corporate debts, unless the shareholder has executed a guarantee, the financial institution cannot set off against the shareholder's accounts.

4. If a debtor has a joint interest in an account, the financial institution may set off one half of the account because of the presumption that each account holder contributed equally to the account. The financial institution may be able to set off the entire account if it can show that the debtor was the sole contributor to the account.

C. Assignment of Rents.

In Michigan, assignments of rents are creatures of statute and made "in connection with any mortgage on commercial or industrial property other than an apartment building with less than 6 apartments or any family residence." MCL 544.231.

An assignment of rents becomes "operative" in the event of a default under the mortgage.

An assignment of rents becomes binding on the occupiers of the premises when notice of the default is recorded and served on the occupants. MCL 544.231. It "binds" occupiers of the premises described in the mortgage from the date of recording.

Pro tips. Review forms to ensure the borrower may not accept any prepayment of rent more than 30 days in advance, consent to assignment or sublease of any lease, cancel, release or grant any concessions, modify any existing leases or enter into any new leases without the lenders consent.

In Wisconsin, assignments of rents are also creatures of statute. Wis. Stat. 708.11

When any debt or other obligation is secured by an assignment, the assignment shall be effective as to the assignor upon the execution and delivery of the assignment to the assignee. The assignment shall be perfected as to all subsequent purchasers, mortgagees, lien creditors, and all other 3rd parties for all purposes from the time and date of recording the assignment in the register of deeds office of the county in which the real property affected by the assignment is located. The assignment shall be governed by ch. 706 and shall be considered a conveyance for the purposes of ch. 706. An assignee who enforces an assignment in accordance with its terms shall not be considered to be a mortgagee in possession with attendant liability.

D. Repossession of Tangible Personal Property Collateral

1. General Requirements.

a. There must be a default as defined by the security agreement.

b. Loan documents do not prohibit self-help repossessions.

c. The creditor has an enforceable security interest.

d. Certain debtors are protected from repossession, such as active military personnel, military dependents and Native Americans living on tribal land if the tribal law forbids self-help repossession.

e. Repossession must occur without a "breach of peace," damage to the debtor's property (even if negligent), trespass, any type of physical contact or threat of physical contact. See, UCC 9-609 and Wis. Stat. § 425.206 as well as UCC 9-609.

f. Actions that have been held to constitute a "breach of the peace" include repossession collateral over the debtor's objections (even if the repossession of the collateral is from a public street, parking lot or a private driveway), entering debtor's residence or garage without consent, damaging the debtor's property during repossession

g. Caution should be taken if the repossession is accomplished by an "unauthorized entry" even if the security agreement provides that the creditor is allowed to enter the borrower's premises. Further, while not all courts have held that the use of deceptive means or trickery to lure the debtor into allowing entry constitutes a breach of the peace, it may expose the creditor to allegations of violation of federal and state consumer protection laws. Of course, wrongful repossession or a breach of the peace exposes the creditor to tort claims, including conversion claims.

2. Sale of Repossessed Collateral

3. Article 9 of the Uniform Commercial Code outlines the procedures for the disposition of collateral obtained by self-help, judgment or turnover by the debtor. The general requirements are:

a. Duty to use reasonable care in the custody and preservation of the collateral. However, the secured party may charge reasonable expenses incurred in the "custody, preservation, use or operation" of that property against the debtor and the collateral." UCC 9-207(2)(a). These expenses include any cost to obtain and maintain insurance on the collateral and any payments to discharge taxes assessed the collateral.

b. If the collateral is accidentally damaged or destroyed while in the secured party's possession, the risk of that loss is imposed on the debtor "to the extent of a deficiency in any effective insurance coverage." UCC 9-207(2)(c).

c. The secured party is permitted to use or operate the collateral in three circumstances:

(1) If the use or operation is done to preserve the collateral or its value;

(2) If the use is permitted by "an order of a court having competent jurisdiction;"

(3) Except when the collateral is consumer goods, "in the manner and to the extent agreed by the debtor." UCC 9-207(2)(d).

d. Unless the debtor promptly exercises its right to redeem the collateral, the secured party will dispose of it at a public or private sale or will accept the collateral in full or partial satisfaction of the debt. The "sale, lease or license or other disposition" must be "commercially reasonable." UCC 9-610.

e. Debtors, "secondary obligors" (i.e., guarantors) and other lienholders (disclosed through a UCC search 20 days prior to the date the notice is sent) are entitled to "notice of sale or other disposition" of the collateral ten days before the collateral is disposed of. UCC 9-611, 9-612. This right can only be waived in a post-default agreement, such as a forbearance agreement. UCC 9-613 and UCC 9-614 attached as Exhibits E and F outline the contents of the form of notifications for consumer and non-consumer transactions.

4. Direct Collection of Accounts. On default (and even before default if the debtor and the secured party have agreed), a secured party may "[n]otify an account debtor or other person obligated on collateral" to pay the account or other obligation directly to the secured party and not to the debtor. UCC 9-607(1)(a).

The secured party may collect proceeds to which it is entitled and may commence legal action against third parties to collect accounts and other obligations. UCC 440.9607(1)(b) and (c).

The advantage of collection of accounts is that it is the most liquid asset and oft times easier to collect than to repossess and foreclose on tangible personal property, such as inventory and equipment.

The account debtor is entitled to make sure that the secured party is proceeding appropriately and is entitled to request proof of the assignment. If the secured party fails to provide proof, the account debtor may continue to pay the debtor. UCC 9-406(3).

If the account debtor improperly failed to honor the account debtor notice, the account debtor may up paying the debt twice and could also be liable

for treble damages. *See* MCL 600.2919a. A sample account debtor notification is attached as Exhibit G.

III. JUDICIAL COLLECTION REMEDIES

A. Claim and Delivery.

MCR 3.105; MCL 600.2920.

1. More costly and time consuming than self-help repossession. Used where borrower is hiding collateral or the creditor wants to avoid any claims of breach of the peace.

2. Claim and Delivery requires compliance with the statute and court rule to avoid any due process challenge. Once possession of the collateral is obtained, the creditor is still required to comply with the Uniform Commercial Code's provisions concerning the disposition of property.

3. Procedure.

   a. File a complaint with separate claims for recovery of the collateral and for judgment on the underlying debt.

   b. The complaint must specifically describe the property, the value of the property (for purposes of setting a bond) and whether the property can be divided.

4. Possession Pending Judgment.

   a. Creditor can obtain immediate possession if the creditor proves that its right to possession is "probably valid" and that the collateral will be "damaged, destroyed, concealed, disposed of, or used so as to **substantially** impair its value before trial."

   b. A motion for possession pending judgment can be filed before the defendant files an answer. The motion is supported by an affidavit from the creditor authenticating the underlying loan documents, the security interest, and the facts giving rise to the creditor's right to possession pending judgment.

   c. The court has the option of:

      (1) Denying the motion;

      (2) Allowing the debtor to retain possession of the collateral under order not to damage, destroy, conceal or dispose of it;

      (3) Ordering the sheriff or court officer to seize the collateral within 21 days of the entry of the order and either retain it or deliver possession to the creditor. MCR 3.105(E)(4); or

(4) Allowing the creditor to keep the property on the condition that the creditor post a bond of at least twice the value of the property as set forth in the complaint. MCR 3.105(E)(4)(C).

5. Judgment. The judgment identifies the party entitled to possession, the value of the property and the amount of the unpaid debt and damages to be awarded. MCR 3.105(H)(1).

B. Prejudgment Attachment

1. A prejudgment writ of replevin may be obtained for non-consumer transactions only. Wis. Stat. § 810.02 Although the U.S. Supreme Court declared pre-judgment replevin unconstitutional because it deprived a person of property without due process, *Fuentes v. Shevin, 407 U.S. 67 (1972),* the Seventh Circuit Court of Appeals subsequently scrutinized Wisconsin's prejudgment statute and held that prejudgment replevinis constitutionally tolerable if proceeding ex parte is made necessary by the existence of an emergency and if the state provides adequate procedural safeguards, of which one is that the order be issued by a judge and another is that a prompt hearing on the validity of the order be obtainable; Wisconsin provides both safeguards. Dell's Big Saver Foods, Inc. v Carpenter Cook, Inc. 795 Fed. 1344 (7th Cir. 1986)

2. Section 810.02, the statute that permits prejudgment writs of replevin for non-consumer actions, requires that the affidavit or verified complaint sets forth specific factual allegations that show the following:

(1) That the plaintiff is entitled to the possession of the property claimed, particularly describing it;

(2) That the property is wrongfully detained by the defendant;

(3) The alleged cause of detention according to the plaintiff's best knowledge, information and belief;

(4) That the property has not been taken for a tax, assessment or fine or seized under any execution or attachment against the property of the plaintiff, or that if so seized that it is exempt from the seizure;

(5) The value of the property; and

(6) The location of the property claimed by the plaintiff with sufficient specific factual allegations for the judge or judicial officer to determine that there is reason to believe that the property is in the location described or in the possession of the defendant or any person acting on behalf of, subject to or in concert with the defendant.

3. ***Tip -*** Counsel will notice that one of the six factual allegations is the property's value. Without possession of the property, determining value might prove challenging, but counsel should strive to produce the most accurate value based on the available information.

C. Judicial Foreclosure

. MCL 600.3101 *et seq.* Recommended procedure where the loan involves priority disputes.

1. **Preliminary Work.**

a. As with a foreclosure by advertisement, unless it is subject to a statutory exception, a judicial foreclosure cannot be filed less than 120 days after the borrower first became delinquent.

b. Review note and mortgage for terms regarding pre-conditions for acceleration. Many forms contain conditions beyond the statutory requirement.

c. Determine whether event of default exists (*i.e.*, nonpayment of debt, nonpayment of taxes, nonpayment of insurance, general good faith feeling of insecurity, default of related loan documents).

d. Accelerate loan.

e. Obtain foreclosure commitment.

f. File *lis pendens*. MCL 600.2701.

g. File complaint in circuit court in which the property is located naming as defendants all parties with an interest in the mortgaged premises.

(1) Advantages:

(a) Can request a receiver. MCL 600.2927.

(b) Can request possession;

(c) Recover attorney's fees and cost; and

(d) Resolve priority and other title issues.

h. Judgment of foreclosure cannot provide for a sale earlier than 6 months after the complaint is filed. MCL 600.3115.

i. Prior to the entry of the judgment of sale, the borrower has the right to bring the debt current. If the borrower does, the complaint must be dismissed. MCL 600.3110

j. After the entry of judgment of sale, if the borrower brings the debt current, the court must stay the proceedings, but it can order a sale in the event of subsequent defaults. MCL 600.3120.

2. **Posting and Publication Requirements.**

a. The notice must be published for 6 successive weeks prior to the sale in a newspaper printed in the county in which the premises are located or, if there is no paper printed in the county, in a paper printed in an adjoining county. MCL 600.6052(2).

b. The notice must be "displayed" in 3 public places in the township or city where the real estate is to be sold at least 6 weeks prior to the sale. If the sale is in a township or city other than that where the property is located, the notice must also be displayed in 3 public places in which the property is located. MCL 600.6052(1).

3. **Sale.**

a. The mortgagor or mortgagee can bid. In formulating a bid, the lender should compare: (1) the debt and expenses to (2) the expected sale value of the property at the end of the redemption period with reductions for post-sale interest, taxes, insurance costs and fees associated with sale.

b. The mortgagor's remaining obligation on the debt will be reduced to the extent of the bid, regardless of the price realized on the subsequent sale of the property.

c. The mortgagor's right to redeem expires 6 months after the sale. MCL 600.3140.

D. Breach of the Loan Documents/Breach of Contract

. Standard claim on a debt. Lender is required to show that:

1. A contract exists;

2. The terms of the contract require the performance of certain actions;

3. One of the parties breached the contract; and

4. The breach of the contract caused the other party to sustain monetary damages.

IV. COLLECTING THE JUDGMENT.

A. Discovering the Debtor's Assets.

Debtor's Examination. Judgment creditors have the right to subpoena the debtor or any person known to be indebted to the judgment debtor to provide testimony and produce records concerning the judgment debtor's property or income. MCL 600.6110(1).

1. Examine records in the register of deeds office.

2. Obtain a credit report to obtain information regarding employment, assets and other debts.

3. UCC search for any financing statements or tax liens.

Supplemental Examination

1. Supplemental proceedings are a form of post-judgment discovery. Of the proceedings available, the supplemental examination is perhaps the most common. The supplemental examination is a common and useful tool that allows the judgment creditor to gain additional information about the property available to satisfy the judgment

2. Wisconsin law grants a judgment creditor two methods with which to initiate supplemental proceedings. The first is the order for examination. Here, the judgment creditor files a motion with the court that issued the judgment, asking the court to require that the judgment debtor appear before the court or judge and answer concerning the judgment debtor's property. Wis. Stat. § 816.03(1)(a). The judgment creditor may only do this, however, after: (1) an execution against property has been returned unsatisfied in whole or in part within five years; (2) the officer holding the execution certifies that there is insufficient property for him or her to levy upon to satisfy the judgment; or (3) the judgment creditor, by affidavit, satisfies the court that the judgment debtor, whether an individual, corporation, or other association, has property that he or she unlawfully refuses to apply toward the judgment. *Id.*

3. The second method is called an order for appearance. Specifically, the judgment creditor applies to a supplemental court commissioner, asking that court commissioner to order the judgment debtor to appear before him or her. The order issued does not state any grounds beyond the holding of any unpaid judgment by the judgment creditor. Wis. Stat. § 816.03(1)(b).

4. If the supplemental proceedings bring to light previously undiscovered assets that are available to satisfy the judgment, then the presiding official may appoint a supplemental receiver, commonly referred to simply as a receiver, to assist in reaching such assets. Wis. Stat. § 816.04. The court may only appoint one receiver at a time, *id.* and the appointment should come only upon notice and opportunity for hearing. Id. Typically, the

judgment debtor is notified in the supplemental examination order that a receiver may be appointed. Id.

5. Note. Because of the conditions that must be met before the issuance of an order for examination, an order for appearance is, by far, the most common procedure used by judgment creditors for supplemental proceedings. Obtain a credit report to obtain information regarding employment, assets and other debts.

B. Garnishment

. MCR 3.101.

1. General Considerations.

   a. Used to collect defendant's assets in hands of a third party referred to as the "garnishee" to satisfy judgment debt.

   b. Court must have jurisdiction over the garnishee defendant. MCL 600.4011. Asset must be tangible personal property located within Michigan.

   c. Must use forms approved by the State Court Administrator's Office. MCR 3.101(C).

   d. Garnishee defendant has the right to question the court's jurisdiction, the validity of the proceedings and the creditor's right to judgment. MCR 3.101(L)(4).

   e. Rule distinguishes between periodic and non-periodic garnishments and uses different writ forms.

      (1) "Periodic" includes, but is not limited to "wages, salary, commissions, bonuses, land contract payments, rent and other periodic debt or contract payments" paid during the period of the writ. MCL 600.4012.

      (2) "Periodic" payments do not include interest payments.

   f. "Periodic" garnishments expire unless served within 182 days of the date issued issuance by the Court, MCR 3.101(F)(1) and remain effective until the judgment is satisfied. MCR 3.101(E)(5)(b).

2. Procedures applicable to both periodic and non-periodic garnishments.

   a. Complete applicable verified Request and Writ for Garnishment. Some information included in form is:

(1) The date of judgment and amount of judgment that is unsatisfied.

(2) Information identifying defendant, such as the address, social security number, employer identification number, federal tax identification number, or account number, if known. MCR 3.101(E).

(3) Directions to the garnishee to:

(a) Serve the writ on defendant, in the manner applicable to complaints, within 7 days of service of the writ (*i.e.*, personal service on or first class mail to the last known address);

(b) File a disclosure with the court clerk within 14 days of service and mail a copy of the disclosure to the plaintiff and defendant. MCR 3.101(H) Failure to timely file the disclosure can result in:

i) A default being entered against the garnishee for the amount of the unpaid judgment, interests and costs as stated in the writ. MCR 3.101(S)(1)(a);

ii) An order finding the garnishee in contempt of court. MCR 3.101(S)(1)(b); or

iii) A $100 fine, plus costs, including attorney's fees even if the garnishee does not have any of the defendant's property. MCR 3.101(S)(3).

(c) To begin withholding, delivery of property or payment of obligations to defendant. **Note:** If the garnishee holds the defendant's property, but fails to make it available for execution without sufficient cause, the court can order that execution be had against the garnishee for twice the value of the specific property. MCR 3.101(O)(5).

b. Pay the applicable fee to the court clerk (currently $15);

c. Serve the garnishee with the writ, as well as the applicable fee to the garnishee ($1 for financial institutions, $6 for non-financial institutions), in the manner required by the Court Rules; and

d. File a proof of service with the court.

3. Garnishee's Obligations.

a. File a Garnishee Disclosure within 14 days of service and mail copies to the plaintiff and defendant.

(1) Contents of Disclosure.

(a) For non-periodic garnishments, disclose the liability, if any, less any setoff, except setoffs for liquidated damages. MCR 3.101(H)(1). Note that the garnishee can exercise a right of setoff even after service of a writ of garnishment, even absent acceleration of the underlying debt as long as the underlying loan instrument contains an acceleration clause or an "insecurity clause" which the garnishee availed itself of in good faith.

(b) For periodic garnishments, disclose whether the garnishee is obligated to make any such payments and, if so, to disclose the nature and frequency of the obligation, as well as any writs or orders of higher priority (such as income withholding orders, orders for past due state or federal taxes, orders issued by the bankruptcy court or previously served writs), the file number of the case in which the senior or superior writ was issued, the date it was issued and the date it was served.

b. Begin Withholding.

(1) For non-periodic garnishments, the garnishee is only obligated to withhold obligations owed or property held at the time the writ is served. MCR 3.101(I)(1).

(2) For periodic garnishments concerning earnings that are paid weekly, bi-weekly or semi-monthly, the withholding starts the first full pay period **after** the writ is served. MCR 3.101(H)(2)(a).

(3) For monthly pay periods, if the writ is served within the first 14 day of the pay period, withholding begins the day the writ is served. If the writ is served on the 15th day of the pay period, withholding begins the first full pay period after the writ is served. MCR 3.101(H)(2)(b).

(4) If the judgment debtor does not file objections within 14 days of the service of the writ, within 28 days of the service of the writ, the garnishee begins to transmit the funds to the plaintiff or the court as directed until the garnishment expires.

c. In the case of earnings, maintain a record of the payments for review by the plaintiff, defendant or the court. MCR 3.101(J)(5).

d. With respect to periodic garnishments, within 14 days after the expiration of the writ, or after the garnishee is no longer obligated to make payments, file a report with the court (which is mailed to plaintiff and defendant) of the total amount paid on the writ. MCR 3.101(J)(6).

4. The Judgment Debtor's Objections. To suspend the garnishee's obligation to pay, the judgment debtor must file objections within 14 days after service of the writ. MCR 3.101(K). Objections filed after that date do not suspend payment unless ordered by the court.

a. Types of objections. MCR 3.101(K)(2).

(1) The garnished funds or property are exempt from garnishment. Examples of property exempt in whole or in part from garnishment include:

(a) Social security benefits. 42 U.S.C. §407.

(b) Supplemental security income benefits. 42 U.S.C. §1383(d).

(c) Aid to families with dependent children (ADC) and general assistance benefits. MCL 400.63.

(d) Unemployment compensation benefits. MCL 421.30.

(e) Workers' disability compensation benefits are exempt from garnishment, but a valid assignment of benefits can be made to an insurance company or certain health care providers. MCL 418.821.

(2) The defendant is a debtor in a pending bankruptcy.

(3) The garnishment is barred by an installment payment order. Installment payment orders can enable the debtor to suspend a periodic garnishment as long as the debtor complies with the installment terms. MCL 600.6205; MCR 3.101(N). It does not suspend the issuance of a non-periodic writ or any other collection remedies, such as execution on personalty.

(4) The garnishment is precluded because the maximum amount permitted by law is being withhold pursuant to a higher priority garnishment or other writ.

(5) The judgment has been satisfied.

(6) The garnishment was not properly issued or is otherwise invalid.

Objections cannot be used to challenge the validity of the judgment. MCR 3.101(K)(1).

If the judgment debtor files objections, the court schedules a hearing within 21 days of the date the objections are filed. MCR 3.101(K)(3).

5. Resolution of Disputes After the Garnishee's Disclosure. Within 14 days of the service of the disclosure, the judgment creditor has the right to serve the garnishee with interrogatories or a notice of deposition. MCR 3.101(K)(1). The garnishee's responses and the deposition transcript become part of the disclosure.

   Resolution of any dispute is governed by the rules concerning civil actions, including motion practice. Unless the plaintiff or the garnishee files a demand for a jury trial within 7 days of the filing of the disclosure, answers to interrogatories or deposition transcript, the dispute is tried by the court without a jury. MCR 3.101(M).

6. Garnishment is yet another collection tool available to a creditor plaintiff in Wisconsin. Garnishment, which the plaintiff may appropriately bring either before or after entrance of the judgment, is a proceeding in which "the plaintiff seeks to subject to his claim property of the defendant in the hands of a third person or money owed by such third person to defendant; such third person is called the 'garnishee.'

7. Practice Tip. When a garnishment action is commenced, the creditor should serve the garnishee defendant before serving the debtor to prevent the debtor's transfer of funds out of the subject bank account.

8. A non-earnings garnishment action must be brought separately from the principal legal action. Wis. Stat. § 812.01(2)(a). Court involvement is greater than in an earnings garnishment and is similar to the underlying action in which the judgment was rendered. To commence a non-earnings garnishment action, a judgment creditor must file a garnishment summons and complaint. Wis. Stat. § 812.04(1), (2).

9. The first step in the process is to determine whether to file in small claims court or in circuit court. If the judgment in the principal action is $10,000 or less, a judgment creditor must commence the garnishment action in small claims court, where jurisdiction and procedures are exclusive. Wis. Stat. § 799.01(1). Counsel filing in small claims court should be aware that the form of the garnishee summons and complaint varies by county. Moreover, in garnishment actions brought in small claims court, personal service is required on the garnishee defendant and the principal defendant. Wis. Stat. § 799.12(1). However, the procedure for personal service is

more flexible in small claims court and allows counties to permit service by mail for a small fee. Id. The circuit courts are the proper forum for garnishment actions that exceed $10,000. The following checklists, the first for the plaintiff and the second for the defendant in such cases, pertain to circuit court actions only.

C. Writ of Execution

MCL 600.6001 *et seq*.

1. General Considerations.

   a. Writ allows sheriff, bailiff or other county officer to seize and sell debtor's non-exempt property to enforce the judgment.

   b. In order to execute against real property, the debtor's non-exempt personal property in the county where the real property is located must be insufficient to pay the judgment. MCL 600.6004.

   c. Judgment creditor might be required to post a bond with the sheriff, but the bond costs are recoverable from the proceeds of the sale of the property.

   d. Execution of the writ must be completed within 90 days of the delivery of the writ to the sheriff. MCL 600.6002.

   e. Exemptions are only available to individuals. Corporations do not have exempt property. A list of exempt property under Michigan law is attached as Exhibit H.

      Note that under Michigan law, real property conveyed to a husband and wife is deemed a tenancy by the entireties unless there is specific language to the contrary. Unless the judgment is against both spouses, a judgment creditor cannot levy against such property. MCL 557.71, 101 and 102.

2. Procedure for the Issuance of a Writ. Writ of execution is signed by the court and delivered by the creditor to the sheriff.

3. Sheriff's Responsibilities After the Writ of Execution Against Personal Property is Issued. The sheriff is responsible for:

   a. Preparing an inventory of the judgment debtor's personal property deemed necessary to satisfy the judgment;

   b. Arranging for an appraisal of the cash value of the property. MCL 600.6025. The appraiser delivers the appraisal to the debtor who has 10 days to select statutory exemptions. If the debtor fails to do so in a timely fashion, the sheriff can select the exemptions. MCL 600.6026.

c. Arranging for a sale of the property. For personal property, the date, location and time of the sale must be posted in 3 public places in the city or township where the sale is to occur at least 10 days prior to the sale. MCL 600.6031.

d. Displaying the property at the sale. MCL 600.6032.

e. Determining whether to sell the property in lots or parcels in order to bring the highest price. MCL 600.6032.

Note that if there is levy against property that is exempt in a specific amount, the sheriff can only sell the property if the bid price is in excess of that value. If the bid is in excess of the exemption amount, the sheriff can sell the property, but he must pay the debtor the amount of the exemption and then apply the balance to the satisfaction of the execution. Prior to the sale, the judgment debtor also has the option of paying the sheriff the difference between the appraised value and the exemption amount. MCL 600.6033.

4. Requirements of Sale for Real Property. MCL 600.6052.

a. For real property (MCL 600.6051), the sheriff records a notice of levy in the county where the property is located. The property must be sold in 5 years or the levy is invalid.

b. Posting of notice. Six weeks prior to the sale, notice of the time, place and date of the sale is displayed in 3 public places in the township or city where the real property is to be sold and in 3 public places in the township or city in which the real property is located. The notice must:

(1) set forth the name or number of the township in which the property is located;

(2) set forth the number of the lot; and

(3) otherwise "appropriately" describe the property.

c. Publication of notice. For six successive weeks prior to the sale, the notice is published in a newspaper printed in the county in which the property is located or, if no such paper, in a paper printed in an adjoining county.

d. Purchaser receives a certificate of sale which is recorded with the register of deeds. MCL 600.6055.

e. Redemption expires 1 year from the date of sale. MCL 600.6062. However, it is not until 15 months after the sale date that the sheriff is required to convey title to the purchaser. MCL 600.6068.

5. Wisconsin Provisions: A writ of execution is a formal, written command directing the sheriff to satisfy the judgment out of the property of the judgment debtor. Wis. Stat. § 815.05. As a matter of course, the writ is issued by the clerk of court upon request of the judgment creditor. An execution may be (1) against the property of the debtor; (2) against the judgment debtor's person; or (3) for the delivery of property. Wis. Stat. § 815.03. A judgment creditor may use execution to enforce, Wis. Stat. § 815.02, .any judgment requiring payment of money or delivery of property, once that judgment is docketed. Wis. Stat. § 806.06(4).

6. Only the court of the county in which the judgment was entered has the power to issue an execution, even if the judgment is docketed in another county. *See Wilson v. Craite,* 60 Wis. 2d 350, 210 N.W.2d 700 (1973).

7. The process:

   a. File a petition for a writ of execution with the appropriate court. Remember that only the court of the county in which the judgment was entered has the power to issue an execution, even if the judgment is docketed in another county. *See Wilson v. Craite*, 60 Wis. 2d 350, 210 N.W.2d 700 (1973).

   b. Verify that all necessary identifying information is included. The writ must identify: (1) the names of the parties; (2) the amount of the judgment; (3) the amount due on the judgment; (4) the date on which the judgment was docketed; (5) the court that issued the judgment; and (6) the county in which the court issued the judgment or where a certified copy of the judgment is filed. Id.

   c. Verify that the writ provides required notices to the sheriff. The writ must include notice to the sheriff of: (1) the location of the debtor's personal property so that this is the first sold to satisfy the judgment; and (2) the requirement that the sheriff collect interest on the judgment at the statutory rate of 12% per annum. Wis. Stat. § 815.05(8).

8. The sheriff may require a bond.

9. Once the sheriff has seized the property, the sheriff will schedule a public sale of the property. The sheriff must post notice of the sale of personal property in the town, village, or municipality 20 days before the sale. Wis. Stat. § 815.29. Section 815.29(1) provides, effective May 27, 2010, that notice of execution sale must be posted in one public place of the town or municipality where the sale is to be had, and, if the county has a websWeb site, notice also on such Web website. In addition, if the town or municipality has its own Web website, the notice may be posted there. Personal property must be sold in a manner calculated to bring the highest possible price. Id. This must be done by public auction. Id. The

purchaser, who can include the judgment creditor in cases of personal or real property, receives all rights, title, and interest in the property.

10. An execution issued in Wisconsin only affects property located in Wisconsin, and a federal district court execution only reaches property in that district. Wis. Stat. § 806.17. However, federal district courts recognize judgments of other federal district courts.

D. Judgment Liens

. MCL 600.2801.

1. Application.

   a. Judgments issued in Michigan state courts;

   b. Judgments issued in federal courts;

   c. Judgments issued in bankruptcy court; and

   d. Out-of-state judgment "domesticated" pursuant to the requirements of the Enforcement of Foreign Judgments Act, MCL 691.1171; MCL 600.2801(a).

2. Procedure for Filing Judgment Lien.

   a. Prepare a "Notice of Judgment Lien." The Notice must include:

      (1) The case number and caption of the case in which the judgment was entered;

      (2) The judgment creditor's name and address, as well as that of the creditor's attorney, if the creditor has an attorney;

      (3) The judgment debtor's last known address and the last 4 digits of the debtor's Social Security or tax identification number;

      (4) The date of the judgment, the date the judgment expires and the date the judgment lien expires;

         (a) State court judgments expire 10 years after they are entered. MCL 600.5809(3). Creditors can renew most state court judgments for an additional 10 years if they comply with certain conditions.

         (b) Under the Judgment Lien statute, the judgment lien expires the earlier of 5 years after it is recorded with the register of deeds or the judgment expires.

Judgment liens can be extended once if certain conditions are met. MCL 600.2809(1).

(5) The creditor's signature or that of the creditor's attorney; and

(6) A space for certification of the notice of judgment lien by the clerk of the court that entered the judgment.

(7) The notice does not need to include a legal description of the debtor's interest in any real property. MCL 600.2805(2).

b. File the Notice of Judgment Lien with the court that entered the judgment.

c. Obtain court clerk certification.

d. Serve the Notice of Judgment Lien on the judgment debtor at the debtor's last known address.

(1) For a judgment that is less than $25,000, service is made by certified mail.

(2) For a judgment that is more than $25,000, the judgment debtor must be personally served with the Notice of Judgment Lien.

e. Record the Notice of Judgment Lien. Although it is not required, the safest course of action would be to also record proof of service of the notice on the judgment debtor in each county in which the creditor believes the debtor owns real property.

3. Effect of Recording Notice of Judgment Lien.

a. Judgment lien automatically attaches to debtor's interest in real property in each county in which the Notice is recorded.

"Interest in real property" is defined as "[a]ll the real estate of any judgment debtor, including, but not limited to interests acquired by parties of contracts for the sale of land, whether in possession, reversion or remainder, lands conveyed in fraud of creditors, equities and rights of redemption, leasehold interest including mining licenses, for mining ore or minerals, but not including tenancies at will, and all undivided interests whatever." MCL 600.2801(b), 600.6018.

b. Attaches to all interests in real property at the time it is filed as well as to after acquired property. MCL 600.2803.

c. Judgment lien does not attach to property held by tenants by the entirety (*i.e.,* husband and wife), unless the judgment is against both spouses. MCL 600.2807(1).

4. The judgment lien holder has no right to foreclose on the lien. MCL 600.2819. The lien holder is paid from the net proceeds of any sale or refinance remaining after all senior liens are satisfied up to the amount of any equity.

5. Priorities.

a. Pursuant to MCL 600.2807(2), judgment liens are junior to the following interests even if those interests are recorded after the date of recording:

(1) Purchase money mortgages;

(2) Refinanced mortgages used to payoff purchase money mortgages;

(3) Any conveyance recorded before the creditor's judgment lien is filed;

(4) Advances under future advance mortgages;

(5) Construction liens;

(6) Homeowners association fees and dues; and

(7) State or federal tax liens, *etc*.

6. Discharge. A judgment lien is extinguished when one or more of the following is recorded:

a. Discharge (either in full or partial) of lien signed by the judgment creditor or the creditor's attorney;

b. Certified copy of a satisfaction of judgment;

c. Certified copy of the order discharging the lien;

d. Debtor's discharge in bankruptcy.

Note: There are penalties for failing to timely record a discharge of mortgage after receipt of a written request ($300, plus actual damages and costs) or for failing to discharge the notice after receiving a demand and "reasonable proof" that the person against whom the notice was recorded is not the judgment debtor ($300, plus actual damages, costs and possibly attorney's fees). MCL 600.2811; 600.2813(1) and 600.2815(2).

7. Wisconsin Judgment Lien

a. For 10 years after a judgment is docketed, it serves as a lien on all of the real property that is located in the county of docketing, except for property meeting the homestead exemption, that the judgment debtor(s) owns or acquires. A judgment upon docketing is not, however, a lien on personal property. The 10-year time frame does not include periods in which enforcement of the judgment is suspended for any period, such as by an injunction or security on appeal.

b. Note. Each judgment has a life of 20 years, and it is possible to renew a judgment for an additional 20 years if the party files a new action based on the unsatisfied judgment. Thus, while a party may collect the judgment for a period of up to 40 years if renewed, the lien's enforceability is generally limited to the 10-year period described above.

E. Bankruptcy and Section 363 Sales

1. A sale of property of the estate outside of the ordinary course of business can occur through either a public or a private sale process. Fed. R. Bankr. P. 6004(a). The process typically followed for such a sale begins with the filing of a motion for authority to conduct a sale. The motion will generally identify the assets sold, the method to be followed in entertaining offers, and, if a preliminary purchaser has been identified, the name of the purchaser and the price proposed. The motion will specify the terms of a public auction if one is contemplated. Following the sale, a request is generally filed with the court to confirm the sale. Once a sale order is entered, it is controlling on all parties in interest absent an order vacating the sale approval. *Jarecki v. Commonwealth of Pa. Unemployment Comp. Fund (In re Jarecki)*, 202 B.R. 385 (W.D. Pa. 1995), aff'd, No. 95-3489 (3d Cir. Nov. 6, 1996) (unpublished opinion); *In re FedPak Sys., Inc.,* 80 F.3d 207 (7th Cir. 1996).

2. When a proposed sale involves property that is subject to a lien, the estate typically realizes the greatest benefit when the property is sold free and clear of all liens and encumbrances. The Code authorizes such sales under specific circumstances. See 11 U.S.C. § 363(f). Secured creditors are granted the right to bid an amount up to the amount of their allowed claim for the collateral. 11 U.S.C. § 363(k). This right is known as credit bidding, and it permits secured creditors to protect their interest in the disposition of collateral.

3. Note. Credit bidding is the label used by courts and attorneys to refer to the process in which a lienholder bids at a sale and, if the lienholder is the successful purchaser, is able to offset the amount of the allowed lien claim against the purchase price. The Supreme Court in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012), held that 11 U.S.C. § 1129(b)(2)(A) does not permit debtors to use that section to confirm a plan of reorganization that seeks to sell encumbered assets free

and clear of liens without providing the secured creditors the right to credit bid absent "cause" to deny it the right to do so. This decision is likely to result in debtors exploring more vigorously whether there is "cause" under 11 U.S.C. § 363(k) to deny a secured creditor the right to credit bid. See, e.g., *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2015); *In re DBSD N. Am. Inc.,* 421 B.R. 133, 141–42 (Bankr. S.D.N.Y. 2009), aff'd sub nom. *Dish Network Corp. v. DBSD N. Am. Inc.,* 627 F.3d 496 (2d Cir. 2010).

MICHIGAN'S ADOPTION OF THE UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT/ SALE OF MICHIGAN REAL ESTATE BY A COURT-APPOINTED RECEIVER

NICHOLAS P. SCAVONE, JR., MARC M. BAKST, J. ADAM BEHRENDT, BODMAN PLC[1]

Tuesday, May 2, 2018
3:00 p.m.

I. INTRODUCTION

A. Uniform Commercial Receivership Act, Michigan Public Act 16 of 2018.

1. Adoption; Rationale.

a. The Uniform Commercial Receivership Act, Michigan Public Act 16 of 2018 ("UCRA"), was signed into law in Michigan on February 6, 2018 and became effective on May 7, 2018. UCRA does not have retroactive effect.

b. UCRA was promulgated based upon the Uniform Commercial Real Estate Receivership Act adopted by the Uniform Law Commission ("ULC") in 2015 ("Model Act"). As of this writing, the Model Act has been enacted into law in only four states, including Michigan.[2] The Comments to the Model Act explain the need for the Model Act because few states have "comprehensive statutory guidance regarding the appointment and powers of receivers for commercial real estate." *Id.* at 2. The ULC also noted in the comments to the Model Act that its adoption was designed to override many states' laws which would not permit receiver sales. According to the ULC, this is needed (1) to allow for effective disposition of real estate securing commercial mortgaged-backed securities (CMBS) loans, and (2) to allow for mortgaged properties to be sold for "arms-length" values rather than "distress sale" prices. *Id.* at 4-5. The ULC also noted that the Model Act followed federal law in regard to receiver sales.

---

[1] These materials have been prepared for informational purposes only. They are not legal advice. Readers should not act upon the information in these materials without seeking professional counsel. These materials are based, in part, upon the presentation given by Nicholas P. Scavone, Jr. of Bodman PLC at the 2018 Winter Conference of the Real Property Law Section of the State Bar of Michigan regarding real estate sales by a court-appointed receiver and by J. Adam Behrendt of Bodman PLC relating to a presentation to be held on May 23, 2018 to the Debtor/Creditor Rights Committee Of The Business Law Section Of The State Bar Of Michigan And The Federal Bar Association For The Eastern District Of Michigan.

[2] Michigan joins Oregon, Nevada, and Utah in enacting UCRA. Kentucky, Oklahoma, Tennessee, and West Virginia have introduced legislation to adopt it.

c. UCRA was supported by the Michigan Banker's Association, Michigan Realtors and a number of Michigan practitioners and judges. *See* House Fiscal Agency Legislative Analysis dated October 27, 2017. According to the House Legislative Analysis, UCRA codifies and expands upon the amended Michigan Court Rules amended by the Supreme Court in 2014. *Id.* at 2.

2. Applicability. Among other exceptions, UCRA generally does not apply to improved 1-4 dwelling unit residential property unless the property is not being occupied for dwelling purposes (*see* UCRA Section 4 for details on applicability to residential property).

3. Michigan Court Rules. UCRA comes to Michigan four years after the Michigan Supreme Court's adoption of Michigan Court Rule 2.622 which provided additional clarity upon a court's appointment of a receiver and his or her authority to sell real and personal property. .

II. RECEIVERSHIPS GENERALLY

A. Contexts in Which A Receiver is Sought

1. Receiver Sought by Mortgagee. Since 1843, mortgagees have been barred from taking possession of mortgaged property until foreclosure and expiration of the statutory redemption period. Act No. 62 of 1843; see also Anderson, *Receiverships in Lieu of Foreclosures*, 41 Michigan Real Property Review 2 (2014-15), at 2-3. During foreclosure, the mortgaged property can deteriorate or waste or be damaged. Further, even though a mortgagee can exercise its assignment of rents before foreclosure and through the redemption period,[3] tenants often fail to comply with the statutory requirement to pay over rents to the mortgagee. Consequently, mortgagees frequently seek the appointment of a receiver to protect the collateral and collect rents until the mortgagee can acquire title and possession.

2. Receiver Appointed in a Construction Lien Foreclosure Suit. Receivers are frequently sought in connection with a construction lien foreclosure suit in order to complete construction and to sell the improved project.

3. Receiver Sought by Judgment Creditor. Judgment creditors often seek appointment of a receiver of the judgment debtor's real estate to protect it from waste or damage, and may in that context also seek to have the

[3] With the passage of 1953 PA 210, as amended by 1966 PA 151, MCL 554.231 *et seq.*, Michigan law recognized a lender's ability to secure an interest in leases and rents and collect the rents prior to the appointment of a receiver or exercise of foreclosure. See also 1956 PA 66, as amended, MCL 565.81 et seq. (as to rents from oil and gas properties), and 1925 PA 228, MCL 554.211, *et seq.* (as to trust mortgages).

property sold by the receiver.

B. Appointment.[4]

1. State Law

a. Under Michigan law, appointment of a receiver is in the discretion of the court. The court "may appoint receivers in all cases pending where appointment is allowed by law." MCL 600.2926. See also MCR 2.622 ("Upon the motion of a party or on its own initiative, for good cause shown, the court may appoint a receiver as provided by law."). The phrase "allowed by law" means: "(1) those cases where appointment of a receiver is provided for by statute and (2) those cases where the facts and circumstances render the appointment of a receiver an appropriate exercise of the . . . court's equitable jurisdiction." *Band v Livonia Associates*, 176 Mich App 95, at 105; 439 NW2d 285 (1989).

b. MCL 600.2927 provides that upon agreement of the parties, the failure to pay taxes or insurance premiums constitutes waste, and authorizes the mortgagee to seek appointment of a receiver over any property (other than a dwelling or farm occupied by the owner or commercial property having an assessed valuation of $7,500 or less) in the event of waste, such receiver to be appointed in the discretion of the court.

c. In Michigan, "[t]he primary purpose of a receiver is to preserve property and to dispose of it under the order of the court." See *Band, supra,* at 104 (1989); see also *Cohen v Cohen*, 125 Mich App 206, at 214; 335 NW2d 661 (1982). "The appointment of a receiver is a harsh remedy and should only be resorted to in extreme cases. If less intrusive means are available to effectuate the relief granted by a trial court, a receiver should not be used." *Band, supra*, at 105 (1989); see also *Reed v Reed*, 265 Mich App 131, at 162; 693 NW2d 825 (2005). Appointment of a receiver is appropriate to protect property against imminent danger of loss. See, e.g., *Weathervane Window, Inc v White Lake Constr Co*, 192 Mich App 316, at 322; 480 NW2d 337 (1991).

d. Thus, receivers have been appointed where a borrower has defaulted on its debt and the creditor's security is at risk of impairment or waste, *Burton v May*, 297 Mich 571; 298 NW 286 (1941), or where an entity can no longer do business, *Van Wie v*

[4] For Michigan receivership law and appointment generally, see DeMars, Diehl & Karnib, *When Appointment of a Receiver is Appropriate*, 35 Mich Bus L J 19 (2015); Dudek, *The Uses of a Receivership Over Real Property*, 21 Mich Real Property Rev 41 (Summer 1994).

Storm, 278 Mich 632; 270 NW 814 (1936). The fact that the property owner's "past performance" is "unimpressive" also has led to a finding that the property is at risk. See *Francis Martin, Inc v Lomas*, 62 Mich App 706, at 710-711; 233 NW2d 702 (1975) (where borrowers had, among other things, made no payments due on a promissory note, resulting in a default).

e. UCRA does not change the discretionary nature of receiver appointments. The decision remains in the discretion of the court under MCL 600.2926. Section 6 of UCRA states that the court "may" appoint a receiver under certain specified circumstances.[5] However, UCRA may significantly increase the likelihood that a receiver will be appointed. For example, UCRA Section 6(2)(b) permits appointment solely where "[t]he mortgagor agreed in a signed record to appointment of a receiver on default." Virtually all mortgages (and frequently underlying loan documents) contain a consent by the mortgagee to appointment of a receiver after default.

---

[5] UCRA Section 6 states in pertinent part:

"(1) The court may appoint a receiver as follows:

(a) Before judgment, to protect a party that demonstrates an apparent right, title, or interest in real property that is the subject of the action, under either of the following circumstances:

(i) The property or its revenue-producing potential is being subjected to or is in danger of waste, loss, dissipation, or impairment.

(ii) The property or its revenue-producing potential has been or is about to be the subject of a voidable transaction.

(b) After judgment for any of the following reasons:

(i) To carry the judgment into effect.

(ii) To preserve nonexempt real property pending appeal or when an execution has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the judgment.

(c) In an action in which a receiver for real property may be appointed on equitable grounds.

(d) During the time allowed for redemption, to preserve real property sold in an execution or foreclosure sale and secure its rents to the person entitled to the rents.

(2) In connection with the foreclosure or other enforcement of a mortgage, the court may appoint a receiver for the mortgaged property under any of the following circumstances:

(a) Appointment is necessary to protect the property from waste, loss, transfer, dissipation, or impairment.

(b) The mortgagor agreed in a signed record to appointment of a receiver on default.

(c) The owner agreed, after default and in a signed record, to appointment of a receiver.

(d) The property and any other collateral held by the mortgagee are not sufficient to satisfy the secured obligation.

(e) The owner fails to turn over to the mortgagee proceeds or rents the mortgagee was entitled to collect.

(f) The holder of a subordinate lien obtains appointment of a receiver for the property."

2. Federal Law.

a. Appointment of a receiver by a federal court is considered an extraordinary remedy, requiring a showing of clear necessity. See Murray and Jannen, *Public and Private Sales of Real Property by Federal Court Receivers*, ACREL Papers (March 2011), at 3.

b. "Factors considered by federal courts in connection with a request for appointment of a receiver include 1) the existence of a valid claim by the moving party; 2) fraudulent conduct on the part of the defendant; 3) imminent danger that the property may be lost, concealed, injured, diminished in value, or squandered; 4) inadequacy of available legal remedies; 5) the probability that harm to plaintiff by denial of the appointment is greater than the injury to the parties opposing appointment; 6) plaintiff's probable success in the action; and 7) possibility of irreparable injury to the plaintiff's interest in the property." *Id.*, at 3, n 4 (citing *Waag v. Hamm*, 10 F Supp 2d 1191, 1193 (D. Colo. 1998); *Resolution Trust Corp. v. Fountain Circle Assoc. Ltd. P'ship*, 799 F Supp. 48, 50-51 (ND Ohio 1992). Cf. *US. v. Berk & Berk*, 767 F Supp 593, 598 (D NJ 1991)).

c. Under Federal law, receivers can be appointed when a secured creditor with an interest in real property is in the process of foreclosing on a mortgage or the creditor needs assistance collecting rent from and otherwise protecting the mortgaged property from waste and neglect. See, e.g., *Federal Nat'l Mortg Ass'n v Mapletree Investors Ltd*, 2010 WL 1753112, No. 10-cv-10381 (ED Mich April 30, 2010) (receiver appointed to take control of mortgaged property until it was sold); *Federal Nat'l Mortg. Ass'n v Maple Creek Gardens, LLC*, 2010 WL 374033, No. 09-14703 (ED Mich Jan. 25, 2010) (receiver appointed to maintain property when value was declining and borrower agreed to appointment of a receiver upon default).

III. RECEIVER SALES UNDER STATE LAW[6]

A. Law Prior to Adoption of UCRA.

1. Receivership is Not Primary Relief. Outside of the construction lien foreclosure context, before enactment of UCRA there was no express Michigan statutory authority for a receiver to sell real property. Receiverships have generally been considered to be available only as ancillary relief, not as a remedy in and of themselves. See *National Lumberman's Bank v Lake Shore Machinery Co*, 260 Mich 440; 245 NW 494 (1932). Thus, receivership actions by a mortgagee would typically be accompanied by a foreclosure count or a non-judicial foreclosure.

2. Clogging the Equity of Redemption.

   a. Receiver sales of mortgaged property contravene a mortgagor's statutory right of redemption under MCL 600.3240 and MCL 600.3140. Michigan courts have long held that "[t]he statutory right of redemption . . . is not subject to enlargement or abridgement by the courts" and "[a]bsent equitable considerations such as fraud, the plain intent of the statute must be literally followed." *Herman Hughes Lumber Co v. Wood*, 288 Mich 684; 286 N.W. 126 (1939). Actions in contravention of a mortgagor's redemption rights are said to "clog the equity of redemption," an English law doctrine dating back to at least 1639. See Licht, *The Clog on the Equity of Redemption and its Effects on Modern Real Estate Finance*, 60 St. John's Law Review 452 (1986), at 452 n 2; see also *Russo v Wolbers,* 116 Mich App 327 at 336-338; 323 NW2d 385 (1982) ("The doctrine against clogging the equity of redemption is part of the common law of specific performance. It is an inherent and essential characteristic of every mortgage . . . ."). The "old doctrine" was "brought forward in this country to prevent taking an inequitable advantage of distraught borrowers." *Id.*, at 336 n 1 (citation omitted).

   b. No published Michigan opinion outside of the construction lien foreclosure context has squarely addressed the question whether court-ordered receiver sales free of the statutory right of redemption are lawful. The farthest Michigan courts have gone in this area is to carve out a narrow exception for receiver sales of assets of a "quasi public corporation" that could not be operated by a receiver except at substantial loss. See *Mears and Daniels, supra*

[6] For receiver sales generally, see Mears and Daniels, *Sales of Receivership Assets Free and Clear of Liens and Interests*, 38 Mich Real Prop Rev 112 (2011); Dudek, *Strategic Use of a Real Estate Receiver or Bankruptcy as an Alternative to Foreclosure*, 30 Mich Bus Law J 17 (Spring 2010).

n 5, and *Webber v Miner*, 184 Mich 112; 150 NW 305 (1915); see also *National Bank of Commerce v Corliss*, 217 Mich 435; 186 NW 717 (1922); *Detroit Trust Co v Detroit City Service Co*, 262 Mich 14; 247 NW 76 (1933) ("The right to redeem from a foreclosure sale is a statutory right that has been strictly protected except under the unusual circumstances arising [in connection with a quasi public utility]. The right can be neither enlarged nor abridged by the courts.").

c. Despite the apparent conflict with the redemption statutes and longstanding Michigan common law, over the last decade or so it increasingly became common practice for mortgagees to seek and courts to authorize receiver sales of real estate free of redemption rights. See *Anderson, supra*, at 2 (referring to the practice as a "colossal change in the practice-in contravention of the last 100 years of common law . . . . without statutory authority").

(1) A number of recent unpublished court decisions have upheld the practice (although not binding precedent). For example, in *CSB Bank v Christy,* 2012 WL 5064618, at 4 (Mich App October 18, 2012), the Court of Appeals upheld a court-ordered receiver sale without regard to the requirements of the judicial foreclosure statute, which were "simply inapplicable" to a receiver sale. See also *First Financial Bank, NA v. Bosgraaf,* Case No. 11-02488 (Ottawa County Circuit Court, July 11, 2012) (holding that the mortgagor's right of redemption under MCL 600.3140 was not applicable to a receiver sale).

(2) However, in *Frederick Kubik Revocable Trust v Home Apartments LLC*, 2017 WL 6502672 (Mich App December 2017), the court called the trial court's decision to permit a receiver sale free of the defendant's rights of redemption "error", but denied the mortgagor's challenge because the defendants failed to establish that the error "affected their substantial rights and they do not seek to vacate the sale of the property."

d. In 2014, the Michigan Supreme Court amended the court rules governing receiverships. Such changes included for the first time and express recognition of a receiver's power to sell real property. Under MCR 2.622(E)(2), "[b]y separate order of the court, a receiver may sell real property of the receivership estate." This change also codified a requirement that there be a second order authorizing the sale, usually with submission of the proposed purchase agreement. The power to sell could not be established solely by general authority granted to the receiver under the initial

receivership order. While this evidenced the Supreme Court's recognition of the practice of receiver sales, the law was left unclear due to the absence of statutory authority for such sales and the long-standing common law clogging doctrine.]

B. Uniform Commercial Receivership Act, Michigan Public Act 16 of 2018

1. Appointment of a Receiver Before Judgment or After Judgment. Section 4 of UCRA expressly provides that a receiver can be appointed in connection with some type of enforcement action as to a mortgage both before entry of a judgment or after.

2. Status of Lien Creditor. Section 9 of UCRA provides that, upon appointment, a receiver will have the status of a lien creditor under the Uniform Commercial Code and, if the receivership concerns real property, the real property recording statutes.

3. Demand for Return of Receivership Property. Section 11 of UCRA permits a receiver to direct payment for outstanding obligations to the receivership estate and seek the return of receivership property. Someone with possession of receivership property may not satisfy debt by payment to owner. A trial court may now sanction conduct in violation of these provisions.

4. Receivership Powers Now Expressly Stated. Section 12 permits a receiver to "[c]ollect, control, manage conserve, and protect receivership property" and continue to "operate" a business which constitutes the receivership property. A receiver may also assert claims on behalf of the receivership estate and send out subpoenas for documents or other information. A receiver may also engage professionals like attorneys, accountants, property managers, and the like. A receiver may also repair, restore, and make improvements to the receivership property and apply to out-of-state courts for assistance with property located in other states.

5. Executory Contracts. Sections 12 and 17 allow a receiver "[a]dopt or reject an executory contract of the owner . . . ."

6. Debtor's Responsibilities Now Expressly Stated. Section 13 requires property owners to cooperate with receivers, preserve, and turn over property. An owner is now subject to civil contempt sanctions and claims for attorney fees for failure to cooperate with a receiver.

7. Stay. Other than bankruptcy filings, a receivership order now stays any action or other proceeding to obtain possession of, exercise control over, or enforce a judgment against receivership property or, under certain circumstances, to enforce lien right.

8. Receiver's Protections. A receiver is entitled to defenses and immunities

provided by law.

9. Sales of Real Property. The key provisions of UCRA regarding sales of receivership real estate are set forth in Section 12(1)(b) and in Section 16.

   a. Sales in Ordinary Course. Section 12(1)(b) provides that except as limited by court order, a receiver may "[o]perate a business constituting receivership property, including . . . sale . . . of the property in the ordinary course of business." Ordinary course sales would presumably include, for example, sales of residential units owned by a real estate developer.

   b. Sales Not in Ordinary Course. Section 16 states in pertinent part:

   > "(3) With court approval, a receiver may transfer receivership property other than in the ordinary course of business by sale, lease, license, exchange, or other disposition. Unless the agreement of sale provides otherwise, a sale under this section is free and clear of a lien of the person that obtained appointment of the receiver, any subordinate lien, and any right of redemption but is subject to a senior lien.
   >
   > (4) A lien on receivership property that is extinguished by a transfer under subsection (3) attaches to the proceeds of the transfer with the same validity, perfection, and priority the lien had on the property immediately before the transfer, even if the proceeds are not sufficient to satisfy all obligations secured by the lien.
   >
   > (5) A transfer under subsection (3) may occur by means other than a public auction sale. A creditor holding a valid lien on the property to be transferred may purchase the property and offset against the purchase price part or all of the allowed amount secured by the lien, if the creditor tenders funds sufficient to satisfy in full the reasonable expenses of transfer and the obligation secured by any senior lien extinguished by the transfer.
   >
   > (6) A reversal or modification of an order approving a transfer under subsection (3) does not affect the validity of the transfer to a person that acquired the property in good faith or revive against the person any lien extinguished by the transfer, whether the person knew before the transfer of the request for reversal or modification, unless the court stayed the order before the transfer."

10. Key Points

   a. Sales are free and clear of rights of redemption.

b. Sales are free and clear of all "liens" except senior liens. "Lien" is defined as "an interest in property that secures payment or performance of an obligation." UCRA Section 2(f).

c. Liens attach to proceeds with the same validity, perfection and priority as the liens have with respect to the real estate.

d. Sales may be public or private, and a creditor may credit bid at a sale provided senior liens are paid.

e. Good faith purchasers from a receiver are not affected by later court reversal of a receiver sale.

11. Consequences of UCRA Regarding Real Estate Sales.

a. The exception may now become the rule. Mortgagees may now seek receivership sales with far greater frequency, if not in the ordinary course.

b. UCRA overrules case law establishing receivership as an ancillary rather than primary mechanism for realization on collateral. However, a receivership does not preclude a mortgagee from foreclosing by advertisement. UCRA Section 25(f).

c. UCRA overrules decades of "clogging" case law and deference to redemption rights.

d. Conveyances by receivers typically have been to identified buyers. With the newly created right to credit bid at sales, mortgagees may instead have receivers sell at public auction and credit bid at the sales (thereby avoiding Michigan's lengthy redemption period but allowing the mortgagee to exclusively control the ultimate disposition of the collateral).

- Wisconsin Lawyer, June 12 2019

As I See It

Chapter 128: A Change Will Do Us Good

Hon. Catherine J. Furay

Wisconsin Statutes chapter 128 provides for an assignment for benefit of creditors as a solution for businesses facing financial trouble. It's time the Wisconsin Legislature updated the law to provide real guidance to debtors, creditors, and state court judges.

Collectively, small businesses are an integral part of the national economy. When these businesses face financial trouble, alternatives considered by debtors and their creditors may include bankruptcy reorganization or liquidation, assignments for the benefit of creditors (an "ABC"), closure, or replevin and collection actions.

An ABC is a transfer "of a debtor's property to another person in trust so as to consolidate and liquidate the debtor's assets for payment to creditors, any surplus being returned to debtor."[1] It is the functional equivalent of a Chapter 7 bankruptcy,[2] but it is subject to state law rather than a uniform federal statute.

Wisconsin Statutes chapter 128 contains the state's ABC statute. There have been only nine minor revisions to chapter 128 since 1977.[3] Chapter 128 receiverships are increasingly occurring in Wisconsin for small businesses. Secured creditors start most involuntary filings. While many states have updated their ABC statutes, Wisconsin has not.

The failure to update chapter 128 has caused several problems. Many statutory terms remain undefined, leaving procedure to the imagination of lawyers and judges. Most cases adopt what is referred to as a "Case Management Order" designed to fill in some gaps left open by chapter 128. Some provisions are at risk of legal challenges including potential territorial and constitutional issues. There are also concerns for the protections afforded debtors and unsecured

creditors. For these reasons it is time to look critically at the statute, modernize it, and provide real guidance to parties and state court judges.

Understanding the source of chapter 128, the material differences in the types of state court receivers, and the similarities and differences between ABCs and bankruptcy creates a backdrop for understanding the limitations of and conflicts in chapter 128. Revisions to the Wisconsin ABC law are long overdue. There is a lack of clear procedure and guidance in the current statute for state court judges. It is also appropriate to examine whether an involuntary ABC is necessary or appropriate for a secured creditor to protect its rights and interests.

Roots of the Wisconsin Statute

Trust law is the basis for ABCs. In a voluntary case, a debtor assigns its assets to an assignee to liquidate for the benefit of creditors.[4] The assignee is called a "receiver." Under both common law and the original statutes, all assignments were voluntary acts of a debtor.

Catherine J. Furay, U.W. 1980, is a U.S. Bankruptcy Court judge, Madison.

Wisconsin first codified its ABC law in the late 19th century. In 1926, the U.S. Supreme Court declared state insolvency laws were superseded for all matters comprehended within the Bankruptcy Act. It then suspended ABC statutes on those subjects.[5]

Acting to remedy the suspension of statutes, Wisconsin revised and updated its statute in 1929. There have been few changes to Wis. Stat. chapter 128 since then, although amendments did include a provision for an involuntary ABC.[6] Unlike bankruptcy, for which three unsecured creditors are required in most cases, a single secured creditor can now use the Wisconsin ABC involuntary provisions. The involuntary provisions under the Bankruptcy Code allow a filing only by unsecured creditors. An involuntary receivership or bankruptcy was intended as a remedy for unsecured creditors who, unlike secured creditors, had no other alternative to obtain the appointment of a receiver.

Current Wis. Stat. chapter 128 was established in 1937 and is modeled on selected provisions of the federal Bankruptcy Act of 1898, as amended through 1928.[7] The Bankruptcy Code, however, replaced the Bankruptcy Act in 1978.

Unlike other ABC states, Wisconsin has generally failed to update its ABC law to reflect current bankruptcy provisions. This creates a major statutory construction problem. To determine the meaning of Wis. Stat. chapter 128, Wisconsin courts must look to the repealed and replaced Bankruptcy Act.[8] Despite this rule, secured creditors who seek the appointment of a chapter 128 receiver often ask state courts to enter case management orders and adopt procedures

using current provisions or procedures of the current Bankruptcy Code, not the Bankruptcy Act. Because actual practice already mimics the Bankruptcy Code and procedures, the need for and utility of an updated statute is manifest.

Different State Court Receivers

Despite the existence of remedies and tools that include appointment of receivers under Wis. Stat. section 813.16, secured creditors have increasingly turned to Wis. Stat. chapter 128 for the appointment of a receiver. The reason for this trend may be the differences between the authority of each type of receiver.

In both a replevin and a foreclosure, the creditor may seek the appointment of a receiver prejudgment.[9] A receiver under Wis. Stat. chapter 813 can take possession of the property to preserve it. Such a receiver is not entitled to sell the property. Instead, the receiver protects the property pending a judgment of replevin or foreclosure and the later disposition of property under the appropriate statutes after the applicable redemption period.

Contrast this with a receiver under Wis. Stat. chapter 128. The chapter 128 receiver typically takes control of the business and assets. The receiver almost always does so with an expectation of selling the assets before there is any judgment against the debtor and without regard to applicable redemption rights. Although the chapter 128 receiver is a fiduciary with duties owed to all creditors, the actions of the receiver are not unfettered. The receivership does not bind secured creditors unless they consent. The receiver needs the cooperation of secured creditors because most receivership assets are fully encumbered.

Need for Reform

Secured creditors who seek a chapter 128 receiver often do so in the context of another cause of action in a replevin or foreclosure action. Rather than pursue the appointment of a prejudgment receiver under Wis. Stat. chapter 813, the secured creditor asks for the involuntary appointment of a chapter 128 receiver.

While there are likely many legal infirmities with such a request, the motion for such an appointment often goes unchallenged for one of two reasons: 1) the debtor typically lacks the funds to hire counsel to prosecute the objections, or 2) unsecured creditors are unlikely to receive any substantial distribution from the receivership so expending money on hiring a lawyer to challenge the proceeding is not in their financial interest. Thus, there are few reported cases relating to challenges to involuntary chapter 128 cases, underscoring the need for reform.

Chapter 128 is short. It does not 1) outline the authority of the receiver, 2) identify the limitations on the actions of a receiver, or 3) provide any definition for the process or procedures to be applied by state courts to requests by the receiver. This is likely because the statute began as a copy of the Bankruptcy Act. This assumed secured creditors and an ABC receiver would select procedures that were or are applied in bankruptcy cases and would ask state court judges to adopt those procedures. While some procedures may be appropriate, as discussed below, others are not.

Bankruptcy or an ABC

Some people view an ABC as more efficient, less costly, and of shorter duration than a Chapter 7 liquidation under the Bankruptcy Code.[10] They think that the value received for the assets and amounts paid to creditors could be higher in

an ABC. In an ABC, the debtor alone (or the petitioning creditor if it is an involuntary case) chooses the receiver. Some people think an ABC is advantageous because, although the assignee is a fiduciary for the creditors, a particular assignee – one, for example, who is familiar with the debtor's industry – may be more helpful to a particular debtor or creditor.

In bankruptcy matters, the U.S. Department of Justice U.S. Trustee Program appoints a trustee. The trustee must ask the court for authority to operate the debtor's business if that is considered desirable. The trustee proposes a sale process to the court and creditors. The trustee must determine whether there is equity for unsecured creditors in various assets. If not, the trustee will abandon estate assets, or the secured creditor may obtain relief from stay to foreclose or replevin.

> Unlike other states, Wisconsin has generally failed to update its assignment for the benefit of creditors law to reflect current bankruptcy provisions.

In both a Chapter 7 proceeding and an ABC, if the business of the debtor continues to operate, the receiver will likely seek permission to hire other professionals to help operate the business. This is not uncommon if a buyer for the business is being sought because the value of an operating (going-concern) business is likely higher than that of a business that has closed. Unlike in an ABC, however, the Chapter 7 trustee must decide early in the case whether there is value for anyone except the secured creditors. If the only creditor who will benefit from continued operation is the secured creditor, then the bankruptcy trustee will generally refuse to operate the business and will abandon any interest in the business to the debtor and the secured creditor.

The advantages in duration and cost that may theoretically exist in ABCs are less apparent in Wisconsin. Both the receiver and a bankruptcy trustee must generally obtain court approval to operate the business,[11] sell assets,[12] hire professionals, and distribute estate funds. Adverse parties may be heard.[13] Trustees and receivers may hire lawyers and other professionals. Both proceedings may become protracted and costly.[14] Thus, the time and money spent administering the assets may not be less in an ABC than they would be in a bankruptcy. It is by no means manifest that ABCs are faster, cheaper, or provide better results.

The Need for Speed

While proposed sale procedures and timing may be heard as early as the first day of hearings in a chapter 128 proceeding, consideration of those items could take more time in a bankruptcy. This is certainly a consideration if the debtor is hemorrhaging cash. On the other hand, if factors are present that would support expediting a hearing in bankruptcy, that is possible and happens often. A sale procedure motion can be decided very early in a bankruptcy if the facts support the need to do so.

Meet Our Contributors

Why do you do what you do? What's the best advice you ever received? Share your weirdest courtroom story...

Lawyers have a lot to say. Our authors are no exception. Whether its personal, insightful, or fun, it's always interesting.

Check out our Q&A with the author below

It is not uncommon for the plaintiff creditor to request that the proposed receiver hire consultants of his or her choice. Typically, at the same time the petition is filed, an emergency motion is made to authorize the receiver to borrow, approve the terms of borrowing, and grant mortgages and security interests. The lender in those transactions is almost always the plaintiff creditor and, not surprisingly, the terms requested may include an agreement that all the plaintiff's pre-receivership documents are valid and enforceable and not subject to any defense or attack. Such terms may go so far as to release the lender from all claims of the debtor. Copies of the full agreement are not always part of the court record.

The debtor or a trustee in bankruptcy also can hire professionals, subject to the court examining potential conflicts of interest. They can negotiate for financing subject to notice requirements and full disclosure of all terms and conditions of that financing. Sometimes the lender is the same as the pre-bankruptcy lender, and sometimes it is not. Financing matters often are heard on a preliminary basis within the first few days after a case is filed. Claims against secured creditors, however, cannot be released without complete disclosure and the debtor's affirmative consent. Even with that consent, the trustee and other creditors have the opportunity to preserve such claims for the benefit of unsecured creditors.

Limitations of the Current Statute

As the use of ABCs has expanded in Wisconsin, so too have the actions of receivers and the reach they try to exercise. This raises important questions about the interaction of federal and state insolvency laws and creditor rights provisions. Rather than exercise the right to seek a Wis. Stat. chapter 813 or chapter 816[15] receiver, repossess or foreclose and sell collateral, or file an involuntary bankruptcy, secured creditors are asking state courts to appoint a receiver under Wis. Stat. chapter 128. In most such cases, the reason is to allow secured creditors to exercise what is, in effect, a sanctioned self-help remedy undertaken – at least in part – almost exclusively for the benefit of the petitioning creditor and without the constraints of redemption and other debtor protections.

In other words, the involuntary chapter 128 proceeding can have the effect of avoiding statutory or judicially imposed debtor and creditor safeguards. This is the first reason that serious consideration to amending Wis. Stat. chapter 128 is important.

> The current approach to sales of real property in Wisconsin assignment for the benefit of creditors actions threatens fundamental rights of debtors.

Are receivers extending their reach beyond the breaking point? Receivers now routinely argue the ABC creates a stay applicable to all creditors – both within and outside the state. They argue that any order entered by a Wisconsin court in a chapter 128 proceeding has extraterritorial effect. Receivers ask for, and state courts routinely grant, orders that sales

of assets are "free and clear of all liens, claims, and encumbrances," despite the lack of that language in Wis. Stat. chapter 128. Such orders include sales of real estate within and outside Wisconsin.

The legitimacy of ABC procedures are seldom challenged. Even so, the U.S. Constitution imposes at least some restraint on the ability of state courts to exercise bankruptcy-like powers. It is simply a matter of time before someone with financial incentive raises these challenges. Rather than waiting for a court to strike down portions of Wis. Stat. chapter 128 as unconstitutional, lawyers should consider asking the legislature to address the issues now by balancing various interests and drafting statutory amendments that correct the laws' infirmities.

Some Infirmities to Be Addressed

Territorial Limits. One infirmity of Wis. Stat. chapter 128 is its geographical limit. To be effective, the law must be able to bind all estate creditors and administer all estate assets. A state law does not have the national reach of bankruptcy law and never will. Enforcing orders and reaching creditors under the authority of a state law requires the cooperation or assistance of other states' courts. It has been a longstanding holding that a receiver appointed by a state court "has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property."[16] The reasoning underlying this holding has long been adopted and acknowledged in Wisconsin.[17]

Sales by Wisconsin receivers raise another potential territorial issue. Although title companies have been persuaded to treat ABC orders for sales "free and clear" on the basis they are the equivalent of bankruptcy court orders, the orders are not legally equivalent. But insuring based on such orders may pose material legal risks. Wisconsin courts do not have the national reach of federal bankruptcy law or bankruptcy courts. There is no guarantee that the order of a Wisconsin judge will affect liens, encumbrances, or mortgages that are of record in another state nor that a Wisconsin court's order can bind an out-of-state creditor with no presence or ties to Wisconsin. Enforcing sale orders out of state can be difficult.

U.S. Constitution Preemption. Second, the U.S. Constitution's Contracts Clause and Supremacy Clause preempt conflicting state laws.[18] The Contracts Clause prohibits states from passing any law impairing the obligation of contracts. The "obligation of contracts" includes the state enforcement of mechanisms for contracts including the rights related to security interests, mortgages, and other securities.[19] Orders by state courts to sell property "free and clear" may be subject to challenge under the Contracts Clause in the appropriate set of circumstances.

Federal Statutory Preemption. Third, the enactment of federal bankruptcy laws adds another restraint on state ABC laws by preempting conflicting state laws.[20] So long as the Wisconsin ABC law does not provide for discharge of debts, it might fall outside this preemption scope, but the issue was last visited in 1933.[21]

Another major preemption challenge has been raised in California although not yet in Wisconsin. The U.S. Court of Appeals for the Ninth Circuit found that California's ABC law was preempted if it provided for the receiver's authority to recover preferential payments to creditors.[22] So far, this is the only federal preemption limitation on state ABC laws other than the discharge restriction. This rationale could, however, easily be extended to strike down ABCs more broadly.[23]

Lack of Protection for Debtors' Rights. Fourth, the current approach to sales of real property in Wisconsin ABCs threatens fundamental rights of debtors. Governed by state law, "[t]he right of redemption is an inherent and essential characteristic of every mortgage."[24] The right of redemption is a right "to redeem the property by repaying the debt at any time until the foreclosure has been completed."[25]

Historically, the right to redeem has been a rule that cannot be impaired, cut off, or surrendered. "Any agreement which does so is void and unenforceable as against public policy,"[26] and "[a]ny agreement in or created contemporaneously with a mortgage that impairs the mortgagor's right … [to redeem] is ineffective."[27]

Wisconsin has codified three statutory rights of redemption.[28] Read together, these statutes evidence Wisconsin's efforts to preserve a mortgagor's right of redemption.

As explained by the Wisconsin Supreme Court in *Barr*, without a statutory provision to the contrary, "any contract by which the mortgagor sells or conveys his interest to the mortgagee is viewed suspiciously … in a court of equity."[29] An ABC that enables a creditor to have a receiver appointed who can then sell the debtor's real estate "free and clear of liens, claims, and encumbrances," thus enabling the creditor to realize sale proceeds while circumventing any right of redemption, is likely subject to challenge under *Barr* and applicable statutes.

Limiting Chapter 128 to Voluntary Cases or Unsecured Creditor Petitions

If the only beneficiary of administering assets is a secured creditor, a bankruptcy trustee files a report that there are no assets to be administered. This leads to a closure of the bankruptcy case, and secured creditors are left to their *in rem* remedies of foreclosure or repossession of their collateral. A trustee will administer assets only when there will be a benefit to the bankruptcy estate and thus to unsecured creditors. This markedly differs from current chapter 128 practice in which a receiver may administer assets mainly, if not exclusively, for the benefit of the secured creditor.

No state court receiver under Wis. Stat. chapter 813 has the right to take possession of assets that are not collateral of the petitioning secured creditor in that case. This saves time and money for the court and all other parties in interest. It also makes clear that any receiver of collateral is acting solely in the interests of the petitioning secured creditor. Because a chapter 813 receiver takes possession only of the specific secured creditor's collateral, that receiver has no authority to release claims the debtor or other creditors may have against the secured creditor. Thus, there is no need to consider whether – as often occurs in an involuntary chapter 128 receivership – a release of those claims by a receiver is in the best interests of all creditors or whether it is really only in the best interest of the petitioning secured creditor.

Remedies are available for secured creditors without the need to resort to an involuntary chapter 128 proceeding. Secured creditors can repossess personal property or foreclose on real property. A "selfish receiver" can be appointed under Wis. Stat. chapter 813 to protect and preserve that secured creditor's collateral. There is no justification for an involuntary chapter 128 receiver to be appointed to enforce any of those rights or remedies.

The bankruptcy procedures ensure due process to all parties in interest. They provide specific notice requirements and balance the interests of the debtor, any primary secured creditor, and all other creditors. All parties' rights are protected.[30] Copies of proposed financing agreements are part of the public record. By using a trustee appointed by the U.S. Trustee Program in a Chapter 7 proceeding, all parties are guaranteed of the trustee's neutrality, independence,

and fiduciary capacity to the debtor, creditors, and all parties in interest. This neutrality can be uncertain when the receiver in a chapter 128 proceeding is hand-picked by either the debtor or its primary secured creditor.

A final consideration is the quality of administration of an insolvency case by the court. State court judges regularly handle civil cases. State courts are courts of general jurisdiction, handling various types of cases including criminal matters, family matters, and civil disputes.

A Wis. Stat. chapter 128 case filed may represent a case of first impression for a state court judge. The number of chapter 128 proceedings filed in Wisconsin in total does not approach the volume of bankruptcy cases filed each year. As courts of special jurisdiction, bankruptcy courts have far more experience handling all the issues of insolvent debtors, including liquidating assets and safeguarding the balance of the interests of all parties in the proceeding.

These factors all support the need for a revision to Wis. Stat. chapter 128.

Conclusion

Wisconsin Statutes chapter 128 provides a tool to address orderly liquidation of assets of an insolvent debtor. It creates a distribution scheme that might equitably distribute any proceeds remaining after paying the secured creditor and receiver. The current statute is, however, lacking in detailed guidance for courts. This results in chapter 128 practice that looks more like proceedings under the current Bankruptcy Code (rather than the Act) and in exercises of jurisdiction well beyond what the statutes allow. Chapter 128 includes outdated provisions based on the Bankruptcy Act replaced in 1978 but practice has evolved to try to fill the inadequacies. Chapter 128 contains infirmities in balancing the rights and interests of all parties. Revisions are long overdue.

Meet Our Contributors

What has been your greatest professional accomplishment to date?

Being appointed a United States Bankruptcy Court judge is, in my estimation, the greatest honor and professional accomplishment I could achieve. It gives me the privilege of serving the public and profession on a broader scale than was possible as an attorney.

More than 4,000 cases were filed in the Western District of Wisconsin Bankruptcy Court in 2018, affecting not only the debtors but scores of creditors. Having a debtor thank me when I decided the case adversely to her confirmed that, at least sometimes, I am able to explain the reasons for the decision to the parties and not just the lawyers or for posterity. That is a great accomplishment.

The opportunity to have term law clerks and to teach is rewarding because it is a way to help shape at least a few of our future or new lawyers' skills and their perspective on the practice of law. If I can follow in the footsteps of other judges, elevating the practice and encouraging civility in the profession, I will have achieved another goal.

Perhaps my greatest accomplishment – although not professional – is to have been lucky enough to find a husband who puts up with me and has been my best friend for decades.

***Catherine J. Furay**, U.S. Bankruptcy Court, Madison.*

Endnotes

[1] *Black's Law Dictionary* (10th ed. 2014).

[2] 11 U.S.C. §§ 701-727.

[3] The most recent amendments were in 1999. Bills were simultaneously introduced in 2018 that would have addressed some issues with involuntary use of Wis. Stat. chapter 128 but those bills failed to pass. *See* 2017 Wis. S.B. 862; 2017 Wis. A.B. 1049.

[4] Melvin G. Shimm, *The Impact of State Law on Bankruptcy*, 1971 Duke L.J. 879, 888 (1971); *see Cribb v. Hibbard, Spencer, Bartlett & Co.*, 77 Wis. 199, 46 N.W. 168 (1890).

[5] *In re Tarnowski*, 191 Wis. 279, 210 N.W. 836 (1926); *Hazelwood v. Olinger Bldg. Dep't Stores*, 205 Wis. 85, 236 N.W. 591 (1931).

[6] Wis. Stat. section 128.08provides that a court may sequester a debtor's property and appoint a receiver if an execution was returned unsatisfied or a corporation is dissolved, insolvent, or in danger of insolvency.

[7] Wis. Stat. §§ 128.19-29 (1925).

[8] *Capitol Indem. Corp. v. Hoppe (In re Bossell, Van Vechten & Chapman)*, 30 Wis. 2d 20, 26, 139 N.W.2d 639 (1966).

[9] In a replevin, the creditor seeks to have property turned over prejudgment in compliance with Wis. Stat. section 810.02. Most mortgages also contain provisions for the appointment of a receiver. The same basis in a replevin or foreclosure – an interest in the property and possible loss or impairment of the property or its value – entitles the creditor to ask for appointment of a receiver under Wis. Stat. section 813.16.

[10] 11 U.S.C. §§ 701-727.

[11] 11 U.S.C. §721.

[12] 11 U.S.C. §363.

[13] Fed. R. Bankr. P. 7001.

[14] As an example, a review of open chapter 128 cases of three of the common Wisconsin receivers indicates open cases from as long ago as 2013. The open cases for those receivers by year are the following: 2013 – 1; 2014 – 1; 2015 – 2; 2016 – 1; 2017 – 3; and 2018 – 9. By comparison, there are 10 open Chapter 7 cases in the Western District of Wisconsin dating from 2013. Eight are individual consumer cases. Seven of those cases were closed but have been reopened because additional assets have been discovered. Two were appealed.

[15] A receiver may be appointed under Wis. Stat. section 816.04after a judgment has been entered.

[16] *Booth v. Clark*, 58 U.S. 322, 338 (1855); *Hale v. Allinson,* 188 U.S. 56, 68 (1903).

[17] *Filkins v. Nunnemacher*, 81 Wis. 91, 93, 51 N.W. 79 (1892).

[18] U.S. Const. art. I, § 21, art. VI, cl. 2.

[19] David A. Skeel Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 Tex. L. Rev. 471, 546-47 (1994); *see also International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929).

[20] *International Shoe*, 278 U.S. at 265.

[21] *Johnson v. Star*, 287 U.S. 527 (1933); *Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518, 525-26 (1933).

[22] *Sherwood Partners Inc. v. Lycos Inc.* 394 F.3d 1198, 1206 (9th Cir. 2005).

[23] *Id.* at 1206-08.

[24] *Barr v. Granahan*, 255 Wis. 192, 195, 38 N.W.2d 705 (1949); *see also Farm Credit Bank of St. Paul v. Lord*, 162 Wis. 2d 226, 236, 470 N.W.2d 265 (1991).

[25] Marshall E. Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 Vand. L. Rev. 599, 606 (1999).

[26] *Humble Oil & Refining Co. v. Doerr*, 303 A.2d 898, 905 (N.J. Super. 1973).

[27] Restatement (Third) of Property (Mortgages) § 3.1(b) (1997).

[28] Wis. Stat. §§ 846.103, 846.13, 846.30.

[29] *Barr*, 255 Wis. at 196.

[30] *Tulsa Prof'l Collection Servs. Inc. v. Pope*, 485 U.S. 478, 484 (1988).