

### Y Southeast Bankruptcy Workshop

### **Bankruptcy Alternatives**

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### Bankruptcy Alternatives

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### Article 9 Sales/Dissolutions



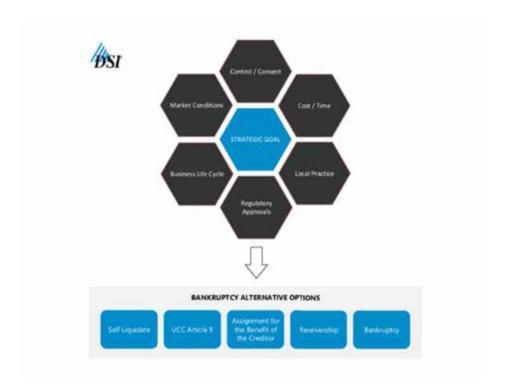
Assignments for the Benefits of Creditors



### Uniform Commercial Receivership Act



**Business Considerations** 





You Make the Call!



### Scenario #1

Small town family-owned sawmill in Georgia.

Majority of stock is held by the board of directors, but a number of shares are held by family members who are unhappy with management (and who aren't afraid to sue a brother!).

Bank holds first lien on all real and personal property that secures term loans and a line of credit that is almost maxed out.

At best, the collateral's fair market value equals balance of debt.

Trade debt is high and payments are running 60-90 days behind.

No personal guaranties, but stock pledges exist in favor of Bank.

Term loans mature in 6 months and Bank has notified the borrower they will not be renewed.

A key customer has just let you know orders for next 12 months are expected to be cut by 50% from prior year.

Board sees no other reasonable credit options and is not willing to put in personal funds to keep the business going.

What do you do?????



Decision-impacting considerations:

-Balance of bank debt

-Ability to fund chapter 11 case

-Likelihood of locating seller in short order

-Value of the assets in various sale processes

-Level of Bank cooperation

-Balance of trade debt/number of trade debt creditors

-Concern of litigation against board

-Concern of review of prior transactions

Does your preferred path forward depend on whether you are the borrower, board member, or lender?



### Scenario #2

Owner of strip malls throughout Southeast

Properties secure loans from 6 different lenders. No cross-collateralization and no intercreditor agreements.

Non-recourse secured debt, but bad-boy guaranties signed by principals of holding company.

Trade debt is minimum and current.

Rising interest rates and declining occupancy are clashing to create perfect storm.

Recent appraisals indicate all properties' fair market values are 10-20% below debt balance.

Lenders beginning to issue notices of default.

What do you do????



- -Lenders' appetite for friendly foreclosures or deeds in lieu.
- -Level of concern of triggering bad-boy guaranties.
- -Ability to fund chapter 11 case.
- -Whether banks have written down the loans to current property values.
- -Multiple jurisdictions involved



### Scenario #3

Automotive parts supplier headquartered in Michigan, but operating plants across Southeast states

US operations but owned by foreign parent

Senior lender under ABL facility, secured by A/R and inventory – fully secured but continually reducing availability based on imminent distress

Term lender (subordinated to ABL lender) has senior lien on all other real and personal property and subordinate lien on working capital assets – undersecured in a liquidation scenario

Term loan in default which triggers ABL default

Trade payables are 90-120 days past due, but most continue to ship because company negotiated payment terms

Company has long term supply contracts with several global OEMs that must have timely production or risk shutting down production lines for multiple vehicles

Customer pricing is below market; raw materials, labor and freight costs have all increased without corresponding price increases from the customers

Company is losing approximately \$1M per month

Parent has funded losses for the last twelve months and notified company that no more funds are available to support operations. What do you do????????



- Who will fund losses to keep operations going?
- Will trade continue to supply?
- Will increased pricing stabilize operations?
  - o Are there deeper operational challenges?
  - o Have capital improvements suffered?
- Have customers lost confidence in current ownership/management?
- Is this supplier needed for capacity in the market?
  - o If yes, will customers support a restructure or require a sale?
  - o If no, will customers resource and force a winddown?
- Will buyer require a bankruptcy "free and clear" sale order?
- Will lenders forbear defaults and/or cooperate in an Article 9 sale?
- Will necessary counterparties consent to assignment of contracts?
- Is there any pending litigation? What is the litigation risk, particularly of a TRO to continue performance?



### Scenario #4

Start up tech company holds IP rights and produces various products under customer contracts

Company has failed to generate stable market for its goods and turn a profit

Company owns little to no hard assets of value

Employees are starting to leave for other opportunities

Funding sources are dwindling but company has some cash on hand to continue operations for a few more months

Creditors are a blanket senior lender, unsecured noteholders, trade creditors and the landlord

What do you do????



- -Is there a restructuring option?
- -Lenders' appetite for funding sale process inside or outside of Chapter 11
- -Value of assets in various processes
- -Value of IP and customer contracts
- -Costs of various processes



### Scenario #5

Long standing family-owned company manufactured products at its facility

Product liability lawsuits crippled the company and caused cash flow issues

To raise cash, the Board voted to sell off excess real estate owned by the Company for somewhat less than fair market value to an insider

With the proceeds, the Company paid back creditors on a pro rata basis, but this included some insider debt.

The remaining cash kept the Company operating another 6 months.

Facing an onslaught of product liability lawsuits, the Company was forced to close and lay off all employees.

The insurance coverage is inadequate to cover all of the product liability, and the facility and surrounding real estate has identified environmental issues

What do you do????



- -Costs of various processes
- -Is dissolution an option?
- How to address insider transactions?
- -How to deal with real estate that may have no value and environmental liability?
- -How to deal with insurance proceeds and future claims?

### **Bankruptcy Alternatives**

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### UCC Article 9 Sales

### Creation of Security Interests

If you have obtained and perfected a security interest in personal property collateral (i.e., accounts, inventory, intangibles), a default may give rise to an action to foreclose on the collateral. Following is a discussion on the process for obtaining a valid security interest in personal property collateral:

Governed by Article 9 of the Uniform Commercial Code

- State not federal law governs
- May vary by state

In order for a security interest to be valid and senior to other creditors, one must establish (1) attachment; and (2) perfection.

### Attachment

- a. Value must be given (i.e., trade credit)
- b. The debtor has rights in the collateral (i.e., transfer of title)
- c. The debtor authenticates a security agreement

### Perfection

For a security interest to be "perfected" (i.e., to assure that no other party can assert a senior interest in the same collateral), one must, depending on the type of collateral, either:

- a. File a financing statement with the appropriate public office
  - 1. Use the correct legal name of the debtor, consulting with official state records, or driver's license or state issued ID
  - 2. It is generally filed in the location of the debtor (state of formation for a company), or where the assets are located
- b. Actually possess the collateral
- "Control" the collateral (i.e., in the case of deposit accounts)
- d. Exception: PMSIs, which perfect automatically upon attachment

When a security interest is perfected, it has priority over all parties that subsequently attempt to take an interest in the subject collateral.

### Duration

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- a. As a general matter, financing statements are good for 5 years
- b. To maintain a security interest for a longer period, a "continuation statement" must be filed within 6 months of the expiration of the UCC-1

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### Amending UCC-1 financing statement

- a. Mergers/name changes/moving four months to amend
- b. Can add or delete collateral

### Purchase-Money Security Interests - What is it?

Security interest in goods that are collateral for an obligation arising in connection with sale of goods to debtor

- a. UCC § 9-103
- Essentially, a PMSI is a security interest taken by a seller of goods to secure all or part of the purchase price of the goods

Typically, sellers take a PMSI in inventory or equipment

### PMSI - How Does it Protect You?

A PMSI grants a seller of goods a "superpriority" security interest over prior perfected security interest holders

- a. Superior to blanket lienholders
- b. Follows identifiable cash proceeds of the sale of the inventory
- c. Gives the PMSI holder superior rights to the cash over a conflicting security interest

### Foreclosure on Personal Property

Section 9-601 of the UCC states that "after default, a secured party has the rights provided in this part and, except as otherwise provided in section 9-602, those provided by agreement of the parties."

Section 9-601 allows the creditor to "reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure."

Procedures for enforcing a security interest under the UCC include:

- · Judicial foreclosure (i.e., foreclosure by filing a lawsuit in the state court)
- Non-judicial foreclosure (i.e., repossession of the property)

### Non-judicial foreclosure:

- a. General Considerations (UCC Section 9-610) After default, a secured creditor can sell personal property without judicial process in all 50 states
  - 1. Notice must be provided before disposition
  - Sale can be a public sale (auction) or a private sale (privately negotiated, directly or through a
    broker); however, a private sale can only be for collateral of a kind that is "customarily sold
    on a recognized market or the subject of widely distributed standard price quotations")
  - 3. Sale must be "commercially reasonable"



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### b. Repossession of Collateral

- Self-help repossession: under Section 9-609(b)(2), creditor may repossess collateral or render equipment unusable on debtor's premises through self-help, so long as there is no "breach of peace" when exercised.
  - "Breach of peace" not defined be cautious!
- Make debtor assemble the collateral: under Section 9-609(c), this can be demanded if underlying security agreement grants this right to the creditor.
- If neither of these options is available, secured creditor may have to commence a judicial foreclosure proceeding.

### c. Notice

- Under Section 9-611, a secured creditor is required to "send a reasonable authenticated notification of disposition."
- 2. Must be reasonable as to manner, content and time.
- Must be given to (i) the borrower, (ii) any secondary obligors (i.e., guarantor), and (iii) any other party with an interest in the property – possibly taxing entities. ("Notice Parties").
  - Only secured creditors who have a perfected interest as of 10 days prior to sale need be notified.
  - You determine who is a Notice Party by conducting a UCC and tax lien search.
- A party selling property must tell the Notice Parties what they are selling, if the sale will be public or private, and when the property will be sold. This period allows a borrower to redeem the collateral.
- If the repossession and surrender of the collateral is friendly, the borrower and guarantors can waive their right to notice and consent to the sale.
- Under Section 9-612(b), at least 10 days' notice of disposition of nonconsumer goods is reasonable
- Section 9-613 safe harbor: if description of debtor and secured party, description of collateral, method of intended sale (for public sale, time and place) is contained, notice will be considered reasonable



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### d. Sale must be "commercially reasonable"

- 1. Article 9 does not define "commercial reasonableness"
- 2. However, the following factors are generally considered:
  - Price: very low sale price = heightened scrutiny
  - Manner of disposition: public sales require sufficient notice to public; private sales more closely scrutinized; consider whether property has a ready market or if special marketing will be required.
  - Time of disposition: did creditor hold onto collateral for too long? What were the economic conditions at time of disposition?
  - Other considerations: should creditor have repaired collateral before sale?

### e. Proceeds must properly be distributed (Section 9-615(a))

- 1. First, reasonable costs of repossession and disposition are taken out of proceeds
- 2. Second, the senior secured creditor's claim must be paid
- Third, any junior secured creditors must be paid to the extent that an authenticated demand for payment is made before distribution
  - Junior creditors may demand an accounting or claim a PMSI.
- Any remaining proceeds are turned over to the debtor (unless collateral is accounts, chattel paper, payment intangibles or promissory notes)
- A junior secured creditor can foreclose on collateral without participation from senior creditors; no requirement to make distribution to senior creditors (however, senior creditor's interests are not discharged)
- 6. A creditor can retain the property in full or partial satisfaction of the debt.
- 7. A consumer debtor must be told of the deficiency still owed.



### UCC Article 9 Sale v. Chapter 11 Sale

Benefits of a UCC Article 9 Sale Compared to Chapter 11	Cons of a UCC Article 9 Sale Compared to Chapter 11
<ul> <li>Less time consuming (section 363 of the Bankruptcy Code requires 60 days minimum)</li> </ul>	<ul> <li>No claim mechanism for unsecured creditors, meaning unsecured creditors are less likely to receive payment</li> </ul>
Typically, fewer professional fees     Sales can be private or public	<ul> <li>Lack of court involvement could lead to litigation over sale</li> </ul>
Allows easier transfer of assets with the benefit of stropping junior liens or interests in the collateral	<ul> <li>Requires either cooperation by borrowe or repossession without a "breach of peace"</li> </ul>
	<ul> <li>More robust bidding process in bankruptcy</li> </ul>
	More secured creditor control
	<ul> <li>Section 363 sale order offers broader buyer and lender protections and allows for assignment of certain contracts without consent</li> </ul>

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### Out-of-Court Winddowns/Structured Dissolutions

An out-of-court winddown typically involves the company seeking buyers for its assets (or the secured lender forecloses on its collateral), reducing its workforce, terminating contracts, and formally dissolving its business according to the state law guidelines. Note that a winddown can be effectuated in conjunction with a UCC Article 9 sale, and ABC or a receivership.

This option is typically elected when:

- · Company can pay creditors in full and return some capital to shareholders, OR
- Company is insolvent and creditors will cooperate in liquidation of assets and distribution of
  proceeds, as available. If secured lender has lien on all assets, many times there are no excess
  proceeds available for distribution to unsecured creditors.

Winddown v. Chapter 11 Liquidation

Benefits of Winddown Compared to Chapter II	Cons of Winddown Compared to Chapter 11
More control over process and negotiations     Less time     Cost effective     Shareholder approval	Requires creditor cooperation     May require counterparty consents     Company needs to have enough liquidit to navigate winddown     No discharge
<ul> <li>Shareholder approval</li> <li>No public filings or disclosures, depending on form of dissolution</li> </ul>	No automatic stay     Creditor claims remain outstanding that could precipitate claims against board or shareholders

Dissolution procedures vary greatly by state, but can typically be achieved in one of the following three (3) ways:

- · Administrative dissolution ("Let it die on the vine")
- Statutory dissolution (must follow the state specific requirements)
- · Judicial dissolution (depends on the state specific requirements)

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### Dissolution Statutes for Southeastern States

- Tennessee: Title 47, Chapter 64
  (Voluntary, Administrative, Judicial Dissolution)
- Alabama: Title 10A, Chapter 2, Article 14
  (Voluntary, Administrative, Judicial Dissolution)
- Kentucky: Title 33, Chapter 271B, Subtitle 271B.14 (Voluntary, Judicial Dissolution)
- Florida: Title 36, Chapter 607, Part 1, 607.1401 607.1433
   (Voluntary, Administrative, Judicial Dissolution)
- Georgia: Title 14, Chapter 2, Article 14
  (Voluntary, Administrative, Judicial Dissolution)
- North Carolina: Chapter 55, Article 14 (Voluntary, Administrative, Judicial Dissolution)
- South Carolina: Title 33, Chapter 14
   (Voluntary, Administrative, Judicial Dissolution)

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### Alabama Enacts Uniform Commercial Receivership Act

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On May 15, 2024, Alabama became the thirteenth state to adopt a version of the Uniform Law Commission's Uniform Commercial Real Estate Receiver Act (the "Act"). The Act seeks to bring more direction and clarity to receivership law than Alabama's current receivership statutes.

But before jumping into a discussion of the Act, let's answer a question you may be asking: "What exactly is a receiver?" A receiver is a third party appointed by a court to take control of property. The receiver is an arm of the court which in part means it is not aligned with the plaintiff (most often the party requesting a receiver) or the defendant (most often the party losing control of its property). Though used in various contexts, receivers most often are appointed when a lender wants to remove a borrower from control of the lender's collateral.

Alabama statutes have provided for receivers since at least 1896 so the concept is by no means new. However, Alabama statutory law has been sparse on the specifics when it comes to receivers. For example, while a statute exists allowing a court to appoint a receiver, the statute does not provide a standard by which a court is to decide if a receiver should be appointed. The Act seeks to fix that. Below is a general overview of the Act. Because the Act contains a number of nuances to the general concepts discussed below, you should read the Act itself before taking action.

- Applies to receivership cases in which a receiver is appointed after January 1, 2025.
- Generally, the scope of the Act covers real property and related personal property used by the owner for commercial purposes or securing a loan related to commercial purposes.
- The Act does not replace Alabama's existing receivership statutes and those statutes will continue to govern
  receiverships used in contexts outside commercial real property.
- With certain exceptions, a receiver is to be appointed only after notice and an opportunity for hearing, but
  a court may issue a preliminary order without either notice or a hearing if the circumstances require such.
  Appointment of a receiver without prior notice or a hearing may be conditioned upon the party requesting
  a receiver posting security for damages (including legal fees) if it later is determined a receiver should not
  have been appointed.
- A receiver may be appointed (a) before judgment in a lawsuit to protect a party's right, title, or interest in
  property if the property is in danger of waste, loss, dissipation, or impairment or if the property has been or
  is about to be the subject of a fraudulent transfer; (b) after judgment to enforce the judgment or to preserve
  property pending appeal; or (c) in an action in which a receiver may be appointed on equitable grounds.
- When considering whether to appoint a receiver over collateral in connection with a foreclosure of collateral,
  a court is to consider all relevant facts including whether a receiver is needed to protect the collateral and
  whether a party agreed in writing to allow a receiver to be appointed (a common remedy found in loan
  documents).



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- A proposed receiver must not be affiliated with the parties or the subject property and the proposed receiver
  must attest to that in writing. Being appointed a receiver in an unrelated case involving one or more the
  parties in the instant action does not disqualify a receiver.
- A receiver is required to post a bond or similar security in an amount set by the court, but the court may also
  allow the receiver to take actions as receiver before a bond is posted. Any claim against the bond must be
  made before the receiver is discharged of its duties.
- A receiver is given the status of a lienholder under Article 9 of the UCC as well as a purchaser for value
  without notice under Alabama's real property statutes. Similar to that of a trustee in bankruptcy, this gives
  a receiver the ability to assert a superior interest in receivership property than creditors without a properly
  perfected interest in the same property.
- Property of the receivership estate must be turned over to the receiver upon demand with certain exceptions.
- A receiver's powers are broad and generally include managing receivership property, selling assets in the
  ordinary course of business, and incurring debt and paying expenses in the ordinary course of business.
- Effective upon the recording of a receivership order with the probate court or upon the actual knowledge
  of the receivership, all persons are stayed from obtaining possession of receivership property or enforcing a
  junior lien against receivership property (though relief for the stay can be granted by the court for cause).
  The court can also enter an injunction of an action if the injunction is necessary to protect receivership
  property. Knowingly violating a stay or injunction can result in an award of damages including attorneys' fees.
- With court approval, a receiver may sell receivership property free and clear of the lien of anyone who sought
  appointment of the receiver together with junior liens and any rights of redemption. Extinguished liens
  attach to the proceeds of the sale.
- A receiver's sale need not be through a public auction and creditors holding liens on property being sold may
  use their debt to credit bid the property.
- With court approval and with certain exceptions, a receiver may "adopt" or "reject" contracts and leases similar to the assumption/rejection process of executory contracts and unexpired leases in bankruptcy cases.
   If the receiver does not seek to adopt a contract or lease within a reasonable time, the contract or lease is deemed rejected.
- Contractual provisions allowing the termination of a contract or lease in the event a receiver is appointed do
  not prevent the receiver from adopting a contract or lease.
- Leases of property used by a tenant as their primary residence cannot be rejected.
- In receiverships commenced at the request of a mortgage lender, leases subject to non-disturbance agreements with the lender are not subject to rejection.
- To address property in another state, a court may appoint a receiver appointed in another state as an "ancillary receiver" regarding property in that state.



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While the Act codifies many things that until now were addressed in the order appointing a receiver, the Act also introduces concepts into Alabama receivership law that were not always used in receiverships before now. These concepts include the ability to sell property free and clear of liens as well as the ability to reject contracts and leases. As is the case with any new set of statutes, many will be interested to see what parts of the Act become subject to multiple interpretations. Fortunately for Alabama, we can look to court rulings from the other states who have enacted the uniform Act (including neighboring Florida and Tennessee) for guidance.

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### North Carolina Commercial Receivership Act

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### Background and History of the Act

### History:

- 2015-2018 Subcommittee of Legislative Committee of Bankruptcy Section Drafted Proposed Receivership Act based on the Uniform Commercial Real Estate Receivership Act of 2016, statutes in Minnesota (Minnesota Statutes, chapter 576, adopted 2012) and Washington (Chapter 7.60 RCW, adopted 2004)
- Proposed through North Carolina Bar Association Bankruptcy Section Council in 2019
- July 1, 2020 Signed by Governor as SL 2020-75
- January 1, 2021 Effective date of Act

### **High Level Overview of Key Concepts:**

Who can be a debtor under the Act

- NCGS 1-507.21(b) and (c)
  - Applies to entities and individual business debtors
  - Individual business debtor is an individual whose consumer debts are less than 50% of his/her total debt on the date of filing of the receivership pleading (NCGS 1-507(b)(12b)
    - Caveat: Part 1 of Article 38 was not repealed by the Act so a receiver may still be appointed for an individual who is not an individual business debtor under NCGS 1-501, et seq.
- · Exclusions to being a debtor under the Act
  - Trust (other than a business trust)
  - Estate of deceased person, missing person, or absentee in military service
  - Ward of the State



### Differences in Limited and General Receivership

- NCGS 1-507.23- Two types of receiverships:
  - Limited-- Based upon foreclosure or enforcement of a security instrument control over specific property
  - General—Receiver is granted control over entire entity and its operations
  - Limited Receivership can be converted to General
- NCGS 1-507.28

   Powers of Receivers
  - Subsection (a)— General Powers of both— can manage partially exempt property pursuant to 1-507.45
  - Subsection (b)- Additional Powers of General Receiver- corporate authority & power to file bankruptcy
  - Court can modify or expand powers and duties

### Grounds for Appointment of Receiver NCGS 1-507.24 (c) – (g)

- Appointment of limited receiver (not general receiver) before judgment (a) to protect party that
  demonstrates right, title or interest in property that is subject of action; (b) if property or its
  income in danger of waste, loss or impairment; or (c) if property is about to be subject of
  voidable transaction (c is the only new ground for pre-judgment appointment)
- Appointment of limited or general receiver for any entity or individual business debtor after
  judgment (a) to carry judgment into effect; (b) dispose of property according to judgment; (c)
  preserve property pending appeal; or (d) execution returned unsatisfied and debtor refuses to
  apply property in satisfaction of judgment (all grounds same as existing statute NCGS 1502).
- Appointment of limited or general receiver for any entity or individual business debtor if debtor

   (a) insolvent,
   (b) not paying undisputed debts when due;
   (c) unable to pay debts as become due;
   (d) imminent danger of insolvency;
   (e) suspends business;
   (f) loses legal existence;
   (g) the subject of a dissolution action (essentially same as NCGS 1-507.1;
   f and g new;
   but applies also to individual business debtor)
- Appointment of limited receiver (not general receiver) in connection with foreclosure or enforcement of a security interest if (a) necessary to protect the property; (b) debtor agreed



in writing to appointment upon default (loan documents/forbearance agreements, etc.); (c) the property and other collateral is not sufficient to satisfy the secured obligation; (d) debtor failed to turn over collateral to secured party; or (e) holder of subordinate lien obtains appointment of receiver (all new grounds).

### Procedure for Appointment of Receiver

- NCGS 1-507.24(a): Appointment of a receiver may be the sole remedy sought in a civil action or it may be ancillary to other relief
  - · Debtor can initiate its own civil action to appoint a receiver itself
  - Court now has jurisdiction to appoint a limited receiver in a power of sale foreclosure
- NCGS 1-507.24(h): party seeking to appoint a receiver must give the debtor at least 10 days notice, but court may appoint a temporary receiver ex parte to avoid irreparable harm, subject to a later hearing
- NCGS 1-507.25: Eligibility of receiver
- NCGS 1-507.31: Employment and compensation of professionals

### Judge Assigned to Receivership

- NCGS 1-507.24(b) & 7A-45.4
- · Goal-consolidate proceedings under one judge until receivership ends
- · Mandatory Complex Business Case-- \$5 million in assets

### Scope of Receivership Property

### NCGS 1-507.20(b)(24); 1-507.24(i)

- All receivership property is under control and supervision of court appointing receiver. NCGS 1-507.41(a)
- A receiver, either limited or general, has power to possess, collect, control, manage, conserve, and protect receivership property – similar in nature to bankruptcy concept of property of the bankruptcy estate
- In general receivership, receivership property is all or substantially all of the debtor's nonexempt property



In limited receivership, receivership property, receivership property is the debtor's nonexempt
property that is described in the order appointing the receiver or a subsequent order

### Automatic Stay

- NCGS 1-507.41
  - Limited Receivership: prohibits any act, action or proceeding to obtain possession
    or control of receivership property or to enforce judgment against; or to create or
    perfect lien against receivership property NCGS 1-507.41(c)
  - General Receivership: prohibits the commencement or continuation of any
    judicial, administrative or other proceeding against the debtor on any claim that
    arose before the appointment of the receiver or to enforce any lien having priority
    over the receiver in the receivership property NCGS 1-507.41(d)
    - Stay expires in 60 days unless extended by the court
  - Court can modify the stay for cause upon request of a creditor NCGS 1-507.41(e)
  - Stay inapplicable to exercise setoff, in criminal proceedings, to continue perfection of security interest NCGS 1-507.41(f)
  - Sanctions allowed for violating the stay NCGS 1-507.41(h)

### Notice of Administration of Case

- NCGS 1-507.34-- Process for Notice to Creditors
  - Master Service List
     Receiver must file within 30 days and update
  - Judge may enter orders without a hearing (when no objections are filed) and based on ex parte application (administrative matters)

### Suits by and against the Receiver

- NCGS 1-507.38
  - Receiver may sue in the receiver's capacity
  - Receiver may be sued in the receiver's capacity, but:
    - Receiver entitled to all defenses and immunities provided by law for an act or omission within the scope of his appointment



- Receiver may not be sued personally for an act or omission in administering receivership property without approval of the judge presiding over the receivership proceeding
- Party can conduct discovery of the receiver concerning any matter relating to his administration of the receivership property only after obtaining court order authorizing discovery. 1-507.27
- Venue of all suits by or against receiver or relating to the receivership or receivership property must be in the court where the receivership is pending, unless court orders otherwise
- For actions pending on the date of the receiver's appointment:
  - Receiver may be joined or substituted as a party if the action relates to receivership property
  - General receiver may be joined or substituted as a party if the debtor was a party to the action
  - May be transferred to the court in which the receivership is pending upon the receiver's or a party's motion made in the court in which the action is pending, provided that the transfer motion is filed no more than 90 days after the receiver's appointment

### Sale of Receivership Property Free and Clear of Liens

- NCGS 1-507.45

   Use or Transfer of Property not in the Ordinary Course
  - Motion & Notice

     14-day period for secured creditor and debtor claiming exemption to object
  - Sale Free & Clear
     similar to Section 363 sale concept
  - Transfer of proceeds to liens in order of priority
  - No sale can be approved if: 1) secured lien will not be paid in full & creditor objects and 2) the Court determines that the creditor will receive is less than creditor would receive within a reasonable time in absence of the sale. Receiver has burden
  - No sale of co-owner's interest in property
  - Not required to be public auction



- Secured Creditor may credit bid
- Good faith protection for purchaser

### Ability of Receiver to Borrow Money

### NCGS 1-507.43

- Limited and general receiver can obtain unsecured credit or incur unsecured debt on behalf of the receivership without court approval
- On motion by the receiver and after notice and a hearing, limited and general receiver may
  obtain secured credit and incur debt secured by receivership property with prior court approval
- Any debt, unsecured or secured, is allowable as an administrative expense of the receivership.
  That administrative expense is paid after the payment of allowed secured claims, to the extent
  of proceeds from the disposition of collateral, but with the same priority as all other expenses
  incurred by the receiver during the receivership, including fees and expenses of the receiver
  and professionals employed by the receiver
- · No provision for a priming lien absent consent of lienholder

### Compensation of Receiver

- NCGS 1-507.31: Compensation
  - Reasonable compensation without need for a court order
  - Factors to be considered in determining compensation: (1) agreement between the
    parties; (2) value of assets; (3) number and amount of claims; (4) time and labor
    expended; (5) novelty and complexity; (6) time and skill required; (7) receipts and
    disbursements; (8) distributions to creditors; (9) compensation in other
    receiverships
- NCGS 1-507.50(b): Surcharge of Collateral
  - If the proceeds to be distributed to the secured creditor are not sufficient to pay
    the lien and the receiver's fees and costs, the court may order the payment of
    those fees and costs from the proceeds to the extent the secured creditor received
    a direct and quantifiable benefit from the receiver's actions



### **Executory Contracts**

- NCGS 1-507.20(b)(7) & 1-507.44
- Similar definition to Bankruptcy Code
   performance due
- Adoption, Performance, Assignment or Rejection—90 days to adopt or reject or else rejected by operation of law
- Receiver can seek extension
- Ipso Facto concept

   Receiver can still adopt K.
- · Can assign with court permission according to state law
- Rejection = breach
- · Claim for damages for rejection must be filed within 30 days or claims deadline

### Turnover of Receivership Property

### NCGS 1-507.39

- Unless otherwise ordered by court, all persons in possession of receivership property must turn
  it over to the receiver and all persons owing a debt that is receivership property shall pay it to
  the receiver except to the extent that the debt is subject to setoff or recoupment
- Similar to §542 of Bankruptcy Code except that turnover is not automatic, it requires demand by the receiver
- Absent a bona fide dispute, the court may sanction as civil contempt a person's failure to turn
  over receivership property to the receiver

### Claims Process

- NCGS 1-507.48-49
  - The court will establish the claims process based on the Receiver's recommendation, including whether proofs of claim must be filed, the form of the proof of claim, where claims are to be filed and the deadline for filing.
    - The court may allow claims based on the books and records without the need for filing proofs of claim
  - Receiver or any party in interest may object to a claim



- Claims for which no objection is filed or not disallowed by the court are deemed allowed
- Court may estimate contingent or unliquidated claims or the right of payment from an equitable remedy

### Priority of Claims

- NCGS 1-507.50-- Claims paid in order of priority on pro rata basis
- · Secured claims, in order of priority- Receiver may surcharge collateral
- · Administrative claims accrued during the receivership
- Domestic support obligations-- reference to 11 U.S.C. 101
- Wages-- reference to 11 U.S.C. 507(a)(4) & (5)
- Consumer customer deposits tied to 11 U.S.C. 507(a)(7)
- Unsecured taxes
- · Other unsecured claims

### **Turnaround Topics**

By Mark Jammartino and Jack Donohue

### Why State Court Receiverships Are Becoming the Norm for Smaller Companies



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Mark lammartino, CPA, CIRA is a senior managing director, and Jack Donohue, CPA, CIRA is a director, with Development Specialists, Inc. In Chicago. In the complex landscape of insolvency and restructuring, there are many methods and venues for addressing lower-middle-market business distress. The popularity of each approach sometimes shifts due to practitioner preferences, the economic cycle, and the relative strengths and weaknesses of each method. The state court receivership, derived from common law, is one of the original methods, but it has been largely eclipsed by the popularity of the federal statutory bankruptcy acts over the past many decades.

However, state court receiverships are now poised to take center stage once again as the preferred method for addressing financial distress of small companies. Today, among the complexities and costs of bankruptcies, there is a growing trend toward the use of receiverships as an alternative to bankruptcy in parallel with the increasing codification of "mini" bankruptcy-like receivership statutes under state law.

### The Historical Context of State Receiverships

Prior to the Bankruptcy Reform Act of 1978, receiverships and bankruptcy proceedings followed a combination of common law and statutes that evolved over time — often unevenly — in different states.

The origins of a receivership as a remedy to address situations when debtors were unable to meet their financial obligations can be traced back to English common law. Rather than well-codified statutes, the relevant authority of a receivership was mostly guided by individual decisions rendered in cases within a particular jurisdiction by the local courts of equity. The varied circumstances of each case led to a variety of precedents, which could be different from one state to another, and different even from the early patchwork of federal law.

As years progressed, many federal statutes (such as the Bankruptcy Act of 1800, Bankruptcy Act of 1898 and Chandler Act of 1938), and both general federal and state law, influenced receiverships and insolvency proceedings. These laws and statutes help address various issues related to receiverships, including creditors' rights, receiver duties and the

treatment of assets in an insolvency proceeding. However, all were generally lacking in that they failed to provide the codification and certainty of outcome necessary to truly be an effective tool for resolving insolvency situations.

The Bankruptcy Reform Act of 1978 introduced the insolvency world to the modern-day chapter 11 bankruptcy — not with the goal of eliminating receiverships, but of expanding the options to financially distressed companies and debtors. It introduced — and continues to expand — legal principles and practices aimed at financial distress. This effort was further expanded by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. These two major acts created the restructuring landscape as we largely know it today and have been the predominant methods of addressing insolvency for nearly 50 years.

These efforts have resulted in a fairly stable and predictable process whereby debtors and creditors can generally understand the likely outcome of an insolvency proceeding. However, as the Bankruptcy Code has become increasingly complex, the act of filing for bankruptcy for smaller insolvent companies has become expensive and overwhelming.

Even subchapter V, created in August 2019, aimed to relieve the burden on smaller companies, but it has its own limitations, including the potential imminent sunsetting of increased liability limits back to the original thresholds of under \$3 million, which will exclude most lower-middle-market companies from accessing its features. Has the pendulum swung too far, and is the time now ripe for another middle ground to develop?

### The Resurgence of State Receiverships

In response to the challenges and expenses associated with bankruptcy proceedings relative to a company's value, receiverships are experiencing a rebound in popularity as the preferred method of addressing insolvency in smaller middle-market businesses. Some states, such as Wisconsin and its chapter 128 process, have provided longstanding receivership options that mirror many features of the Bankruptcy Code and are well established.

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Other states have been keen to replicate Wisconsin's success and are mounting their own efforts to have similar statutes passed in their states. Minnesota passed its own statute in 2012, Michigan in 2018 and North Carolina in 2021, among others. Legislation is now pending in Illinois, with the proposed statute also including many features of federal bankruptcy law, such as automatic stays, creditor adjudication, executory contract rejection procedures and creditor distribution priority schemes. It is expected that other states will pursue similar receivership statutes in the coming years.

### The Role of State Receivership Statutes

These state statutes generally resemble the federal Bankruptcy Code with streamlined features designed to mitigate the worst excesses of federal bankruptcy law and ensure a better fit to lower-middle-market businesses. In addition, while these statutes are generally industry-agnostic, more than a dozen states have also enacted the Uniform Commercial Real Estate Receivership Act, seeking to harmonize receiverships specifically into a codified and prodictable process for the commercial real estate sector across multiple jurisdictions, further consolidating efforts to standardize non-federal insolvency tools available to smaller debtors.

To help propel the adoption and standardization of receivership statutes nationwide, even a new trade association, the Commercial Receivers Association, was established in 2022 and has been steadily launching new chapters in new jurisdictions, including chapters launching in Alabama, Indiana and Louisiana in April 2024 alone. One of its express purposes is to advance the effort to adopt uniform receivership laws throughout the U.S.

Receiverships offer a simpler, more efficient and direct approach to governance within the world of restructuring and insolvency. The initial court order appointing the receiver grants the receiver the necessary powers to execute the duties for restructuring a company. With greater flexibility given to the receiver, even within the confines of a statutory act, innovative and creative restructuring initiatives are increasingly available to state court receivers to resolve insolvency situations.

Administratively, receiverships are significantly easier as far as the complexities of filing for bankruptcy. For example, in a Wisconsin 128 proceeding, the debtor simply files a balance sheet to disclose the company's financial status, as opposed to the extensive documentation required in bankruptcy filings such as the statement of financial affairs and schedules. While the initial court order still reigns supreme in setting forth the exact outlines of a receiver's authority, increasingly standard state frameworks help set expectations and statutory bases for the contents of receivership orders.

Looking to federal Bankruptcy Code parallels, these orders increasingly include provisions similar to an automatic stay, empowerment of the receiver to sell assets free and clear of liens, and limitations to liability potentially ascribed to receivers. All of these factors further streamline the restructuring process and increase the attractiveness of state court receivership as a viable tool.

### **Addressing Drawbacks and Uncertainties**

As more states enact more fulsome receivership acts that mimic federal bankruptcy law, debtors and creditors also will benefit from the increased predictability and reliability of state court receiverships. One of the current potential drawbacks to creditors pushing for a receivership under state law is the uncertainty regarding outcomes, and the belief in the inevitability of a future bankruptcy filing or other process regardless. The absence of fulsome statutes and confusing common law precedent perpetuates this belief; hence, this drawback can be mitigated with a codified statute.

State court receiverships will never replace federal bankruptcy law, and there are many situations for which federal bankruptcy law will remain the optimal tool to address insolvency. Companies with complex capital structures, extensive multistate operations or significant obligations arising from taxes or regulatory issues at the federal level will not be well served in state court.

State court receiverships also will never replace federal receiverships. There are many situations in which a fed-

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### Turnaround Topics: Why State Court Receiverships Are Becoming the Norm

eral receivership is the best method to address insolvencies, particularly large, complex fraud cases initiated by federal regulators or large, complex company insolvencies where more expansive orders binding parties in multiple states would be effective.

Federal receiverships have many of the advantages of a bankruptcy court, or even more so with its orders emanating from a U.S. district court, but also have their own unique drawbacks and challenges. Federal receiverships are often an overlooked and underutilized tool for addressing larger, more complex company insolvencies, and it is expected that creditors would strongly benefit from taking second looks at federal receiverships as possible alternatives to the bankruptcy process. However, many of the issues addressed by the federal bankruptcy or receivership process are simply not present in lower-middle-market companies, and state court receiverships can just as effectively address the remaining issues.

Similarly, professionals seeking appointment as receivers have sometimes shied away from serving in the absence of certainty and clarity regarding their personal exposure. Longstanding Barton doctrine protections available to bankruptcy matters are currently inconsistently applied at the state level, though the increasing adoption of more fulsome receivership statutes at the state level are again addressing these concerns and offering protections to fiduciaries in order to induce them to accept appointment. Although state court receiverships will never be able to provide the same level of personal liability protection afforded to fiduciaries in bankruptcy court (e.g., a fiduciary's ability to compel the Internal Revenue Service to issue a prompt determination of any unpaid tax liabilities can never be extended to a fiduciary appointed under state law), the increasing clarification of fiduciary obligations can only serve to mitigate a receiver's personal exposure and allow for more intelligent acceptance of receivership appointments, thereby enabling further development of state court receivership practice.

### The Future Landscape of Insolvency

We may see an increasing number of states enacting codified receivership statutes, precisely to enable more cost-effective remedies for insolvency situations under state law for low-er-middle-market businesses. These statutes will address the current infirmities under common law to ensure significantly greater predictability and receiver protections to encourage the development of nonbankruptcy alternatives. The ranks of state court receivership practitioners will likely grow. Of course, that is not meant to imply that there are not already well-established state court receivership practices in many jurisdictions.

Existing receivers and their counsel (which can be the same individual) are well-situated to thrive in the growing world of state court receiverships. Creditors seeking to have a receiver appointed already have a deep roster of professionals to call on to serve in these roles, with many people having the deep experience and track records of exercising the sound business judgment necessary to be good fiduciaries. With the expansion of state court receiver opportunities and greater standardization of receivership processes in multiple states, the ranks of future fiduciaries and their attendant firms will also expand, with the ability for firms to better operate at scale and supply creditors with receiver candidates in multiple states supported by service practice groups such as accounting, tax, valuation and forensic investigations.

### Conclusion

With the difficult choice of filing for bankruptcy increasingly becoming a nonviable alternative for smaller companies due to the cost and complexity of doing so, the spreading adoption of model receivership statutes is poised to increase receivership in popularity as a method by which companies can address underlying insolvency issues on a simplified, more cost-effective basis while retaining the best features of federal bankruptcy law. The receivership process will be more streamlined, be more predictable, and provide greater protections to receivers, enabling the continued increase in receivership opportunities for all insolvency practitioners.

### It Is Time to Enhance Judicial Efficiency by Amending Rule 9031

- Mediators are appointed or selected consistent with the authority granted under the Federal Mediation Act<sup>11</sup> to help parties reach a consensual resolution. Mediators act independently of the court and, given the importance of confidentiality in mediation, do not report to the court about the substance of the mediation.
- Examiners are appointed to conduct an investigation and submit a report. While some examiners are appointed with "special powers," those powers are limited, and the focus is not on case management.

 FRE 706 experts are subject-matter experts appointed solely to opine on a specific topic.

Mediators are focused on settlement, examiners are focused on examining, and FRE 706 experts are focused on opining. None are appointed or focused on case administration.

### Dated Concern: No Need and Stare Decisis

Some have resisted the idea of amending Bankruptcy Rule 9031 out of respect for prior decisions and a per-

11 28 U.S.C. § 651, et sog

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12 Subcomm. on Bust. Issues Memorandum to the Advisory Comm. on Bankr. Rules, included in the Meeting Minutes of Advisory Comm. on Bankr. Rules, pp. 142-43 (Dct. 1-2, 2009), available at uscourts, govi standeliath/filestrit\_import/B2003-10 ppr.

ABI Journal

## DSI ASSIGNMENTS

**EXPERTS YOU TRUST. INSIGHT YOU NEED.** 

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

INTRODUCTORY SUMMARY
PRESENTED BY DEVELOPMENT SPECIALISTS, INC.
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# WHAT IS AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS ("ABC")?

- State law alternative to liquidation that provides a means of liquidating the assets of a business in an orderly, controlled manner
  - Used for the sale or liquidation of business assets
- Not to financially rehabilitate or to "turn around" a business
- General Assignments are either statutory or common law and the law varies from state to state as to which approach governs
  - Statutory requires typically requires court supervision of the assignment and the assignee
- assignee follow whatever common law or statutory structure in that state governs the liquidation of a Common law permits an assignment to proceed without court supervision but requires that the business and its assets
- Essentially the state law equivalent to a Chapter 7 bankruptcy under federal law



### ABC KEY FEATURES

- Assignments must involve all of the assignor's assets to qualify as a general assignment
- apply; The assignee will not have the rights of a lien creditor pursuant to Commercial Code § 9-309 Otherwise, an assignment is a specific assignment and common law and/or statutory law does not
- Employee benefit plans, such as 401(k) plans, are not assets of an assignor, so an assignee does not typically wind down those plans (the beneficiaries "own" the Plan assets)
- Transfer of assets is subject to any and all existing liens
- Assignee must validate any alleged secured claims. Creditors with pre-existing liens have the right to take possession of their collateral. Therefore an assignee will need to obtain the consent of properly perfected lien creditors' collateral before liquidation those assets
  - General assignments do not give an assignor a discharge or "releases", as a discharge of debts can only be achieved through a bankruptcy filing
- State statutes that come close to giving bankruptcy type relief, like the automatic stay, are subject to being invalid as only a bankruptcy can provide an automatic stay, discharges, etc. by reason of the U.S. Constitution's Supremacy Clause •



## **ABC KEY FEATURES**

- Board and shareholder approval are required because going out of business is not generally authorized act under the organizational documents
- Assignment "contracts" typically will give an assignee a Power of Attorney to enable an assignee to take actions on behalf of the assignor
  - · Includes bringing claims against third parties to recover on breach of contract claims, file tax returns,
- Outlines the priorities for creditor claims following applicable state and federal law



# **ASSIGNEE QUALIFICATIONS**

- Should be someone who is not related to or directly involved in the management or day-to-day operations and affairs of the assignor; A disinterested third party/person
- Should not be a creditor of the assignor
- Typically an individual or corporate entity with such experience (depending upon state law) in the process of liquidating businesses
- Some states require that an assignee be a resident of the state or county where the assignor resides
- Some states require the assignee to be an individual
- Many states have a requirement for the assignee to post a bond to insure the value of assets is not squandered by the assignee, including breach of fiduciary duty claims



## ASSIGNEE DUTIES

- Becomes a fiduciary on behalf of any and all creditors of the assignor
  - Holds the assets in trust for creditors
- Assignee however is not liable for the Assignor's debts
- Marshals the assets and liquidates the assets
- Uses business judgment when disposing of the assets
- Notices creditors of the ABC for filing of proofs of claim
  - Reviews and addresses claims filed
- Most states require notice be sent within 30 days, with anywhere between 60-180 days from the date of the ABC for creditors to file claims
- Distributes the proceeds pursuant to the state's priority scheme and applicable federal law (see 31 USC § 3713) after the claims bar date has run
- Does not have the authority to dissolve a corporate entity or file a bankruptcy proceeding

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# PROOFS OF CLAIM/BAR DATE PROCESS

- Bar date for notice to creditors and filing of claims usually set by state law
- Some statutes also deem filing of a proof of claim an "assent" to the general assignment
- Failure to file a claim will cause the creditor to lose the right to share in creditor recoveries
  - Late filing puts a creditor behind the claims that were timely filed by creditors
- Assignee generally does not make a distribution to timely filed and valid unsecured creditor claims until the bar date has passed
- Secured creditors will usually be paid from the proceeds of its collateral as the assets are liquidated



# TYPICAL PRIORITY SEQUENCE FOR CREDITOR CLAIMS

- Secured Creditor
- Costs of Administration
- · Federal Claims (i.e., claims filed by any agency of the federal government such as, the EPA, SBA, IRS,
- Employee Priority Wages and Unpaid Benefits
- Accrued in the 90-180 days depending on applicable state status before making of the ABC
- · Subject to cap on amount of claim
- State and Local Taxes

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# TYPICAL PRIORITY SEQUENCE FOR CREDITOR CLAIMS

- Customer Deposits (if applicable such as if the debtor is a retail business)
- General Unsecured Claims
- Equity/Shareholder Interests
- Each class set must be paid in full before paying the claims below that class



# TYPICAL PRIORITY SEQUENCE FOR CREDITOR CLAIMS

- Ability to select the fiduciary to oversee the process
- Speed of the process vs Chapter 7 cases
- Flexibility in the sale of assets
- Ability to sell assets quickly after accepting an assignment assuming
  - Pre-assignment marketing
- Confirmation of any existing security interests and secured creditor consents
- Insider offers should be subject to marketing and competitive sale process
- Lien limitations
- Assignee's lien right (UCC 9-309(12)) effectively limits creditors to the amount and priority of their claim at the time of the ABC
- Assignee's funds are not subject to the levy by creditors
- Ability to terminate pre-assignment writs of attachment or lien of a temporary protective order (select



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## **ABC ADVANTAGES**

- · Creditors can still litigate unpaid claims, but can only liquidate (fix) the amount of the claim
  - No priority for judgment over other unsecured creditor claims
- In court supervised states
- Speed is a function of applicable state law as to notice, sale process, etc.
- May be a limitation on timing except for sale of perishable goods
- Courts typically look to comparable bankruptcy law (e.g. §363 sales)
- Need for appraisals, bond by assignee and other more formal processes
- · Creditor distribution(s) need to be by court order
- decision to use an ABC versus a bankruptcy case (see Berg & Berg Enterprises LLC v. Boyle, 2009 An assignor's Board of Directors is not held to be liable for breach of fiduciary duty by making the DJDAR 15513 (2009) (applying California law)



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## ABC DRAWBACKS

- No automatic stay under state law
- ABCs are an event of default or breach in most commercial contracts/leases
- Rely on assignee right to occupy leased premised (California statute) but subject to paying rent
- Typically no limitation on landlord claims for breach of lease claims other than the objection to mitigate damage (i.e. release the property)
- valid (i.e., This Agreement shall terminate, without notice, (i) upon the institution by or against either party Clauses that indicate an assignor is in breach of their contract based upon a certain event occurring are either party's debts, (ii) upon either party making an assignment for the benefit of creditors, or (iii) upon of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of either party's dissolution or ceasing to do business)





## **ABC DRAWBACKS**

- · In states without preference statutes, no ability to recover on such claims
- In non-court supervised states
- Mechanisms to resolve disputed claims are limited
- Declaratory relief or interpleader actions are most common if disputes cannot be resolved on a business basis
- Equitable subordination rights may not be available under state law vs under the federal bankruptcy code



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# INVOLUNTARY BANKRUPTCIES

- Creditors can file an involuntary petition within the first 120 days after the making of the ABC
- Such petitions are subject to "abstention" by the bankruptcy court pursuant to 11 U.S.C. § 3713 (see Memorandum Decision on Korean Radio Broadcasting, Inc.'s Motion to Dismiss or For Abstention, In re-Korean Radio Broadcasting, Inc., No. 19-46322-ESS, 2020 WL 2047990, at \*2 (Bankr. E.D.N.Y. Mar. 31, 2020))
- Bankruptcy Court must refrain from taking jurisdiction of an involuntary case filed more than 120 days from the date of the ABC pursuant to 11 U.S.C. §543(d)(2) .



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# DSI AUTHORED PUBLICATIONS/ARTICLES

Below is a partial list of publications about ABCs authored by DSI staff which you and your clients may find helpful

- General Assignments for the Benefit of Creditors, the ABCs of ABCs, 5th Edition (published December
- 2018/19, 2020/21 and pending 2022/23 editions); Contributing Editor, contributor of chapters on General Strategic Alternatives for Distressed Businesses, West Publishing (2008, 2010, 2012, 2014, 2016/17, Assignments for the Benefit of creditors and on application of Assignments under California Law
- A Better Alternative to Business Bankruptcy, Today's General Counsel, May 2021
- ABI Law Review Symposium, Model Rules for General Assignments for the Benefit of Creditors: The Genesis of Change, American Bankruptcy Institute Law Review, Spring 2009
- Delaware as a Venue for ABC's: Some Pro's and Con's, (Association of Insolvency & Restructuring Advisors Journal, April 2017)



# DSI AUTHORED PUBLICATIONS/ARTICLES

### Continued:

- So You Want to Arbitrate a Chose in Action Obtained Through an ABC?, Web posted January 2016, American Bankruptcy Institute and the American Bankruptcy Institute Journal
- Sales of Assets by an Assignee for the Benefit of Creditors, Web posted and Copyright © October 2012, American Bankruptcy Institute and the American Bankruptcy Institute Journal
- Priority of U.S. Government Claims in Non-Bankruptcy Proceedings: The Application of 31 U.S.C. §3713, Web posted and Copyright © February 1, 2005, American Bankruptcy Institute and the American Bankruptcy Institute Journal
- Do "Insured vs. Insured" Exclusions Apply to Assignees in Assignments for the Benefit of Creditors? (coauthor), Web posted and Copyright © February 1, 2004, American Bankruptcy Institute
- Non-Bankruptcy Alternative: Assignments for the Benefit of Creditors, New York Law Journal, September 2, 2015

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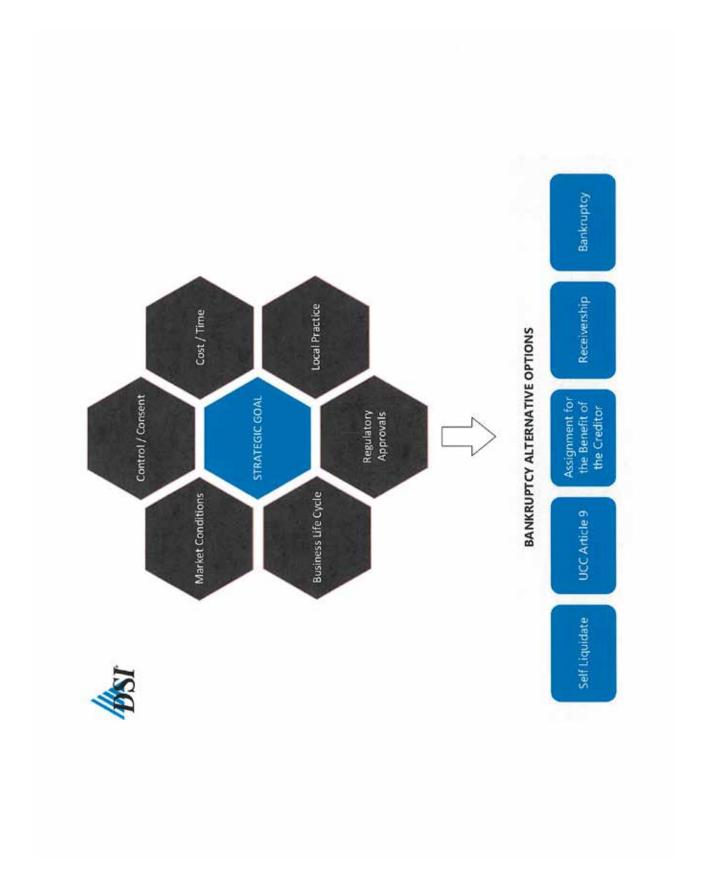
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### **Faculty**

**Patricia K. Burgess** is a partner at Frost Brown Todd LLC in Nashville, Tenn. She chairs the firm's Mobility (Automotive) Industry Team and leads the firm's representation relating to troubled automotive suppliers, including large supplier and automotive bankruptcies, and supply chain risk-management matters (Takata Corp., Dana Corp., Delphi Corp., Johnson Rubber Co., Excello Engineered Systems, Intermet Corp., Lear Corp., Metavation, General Motors, Chrysler, Dura Automotive, Pace Industries and Gissing North America). Ms. Burgess has guided individual and corporate debtors in chapter 11 bankruptcy, as well as workout negotiations outside of court across a spectrum of industries, including logistics companies, franchises and franchisors, real estate investors, restaurant owners, manufacturers, communication companies and automotive suppliers. She also counsels businesses of varying sizes engaged in complex commercial disputes, such as breach of contract, negligence, fraud, misrepresentation, tortious interference, successor liability, business ownership, control and governance issues, mineral trespass and energy-related disputes, franchise disputes, and violations of various state and federal statutes. Ms. Burgess assists with secured lenders in protecting and recovering their collateral whether through workout and forbearance, self-help remedies, state or federal court litigation, or bankruptcy proceedings. She also assists secured and unsecured creditors, debtor-in-possession lenders, landlords, utilities and purchasers of assets in both complex commercial bankruptcies, as well in as large and small individual chapter 11 cases. Ms. Burgess represents plaintiffs and defendants in preference actions nationally, fraudulent conveyance actions, claim objections, breach-of-fiduciary-duty investigations, and any other contested or litigation matters in bankruptcy court, and she represents financial institutions (from local to national) in defending lender-liability claims and violations of state and federal statutes, as well as pursuing commercial foreclosure and collection actions. In addition, she mediates complex commercial disputes, Ms. Burgess has been listed in The Lawdragon 500 Leading U.S. Bankruptcy & Restructuring Lawyers from 2020-23, is a member of Leadership Northern Kentucky's Class of 2016, and is a top-rated lawyer by Martindale-Hubbell. She is a member of ABI and the Turnaround Management Association, International Women's Insolvency & Restructuring Confederation and Southern Automotive Women's Forum, for which she serves as board member. Ms. Burgess received her B.A. summa cum laude in 1991 from Thomas More College and her J.D. in 1994 from the University of Cincinnati College of Law, where she was admitted to the Order of the Coif, Delta Theta Phi and the Moot Court Board.

Joseph J. Luzinski is a senior managing director of Development Specialists, Inc. in Fort Lauderdale, Fla. He has spent more than 35 years in the workout business, serving as a financial advisor, consultant and fiduciary in advising, managing and administering matters involving public and private company workouts and restructurings, both out of court and in chapter 11 and 7 bankruptcies, as well as receiverships, assignments, and federal and state court proceedings. Mr. Luzinski has been CRO, CEO, CFO, president, director, trustee, liquidating trustee, plan agent, receiver and assignee to public and private companies involved in loan workouts, distressed situations and crisis situations. His financial advisory services include engagements involving investigations, fraud assessments, interim management, litigation support and expert witness engagements. His areas of industry expertise include banking, finance, real estate, aviation, retail, franchising, food service, manufacturing, media, law firms, wealthy individuals, fraud, Ponzi schemes and forensic matters. Mr. Luzinski's specific areas of focus include operational analysis, financial analysis, valuation assessment, budget-

### 2024 SOUTHEAST BANKRUPTCY WORKSHOP

ing and planning, crisis-management, turnaround strategy, litigation strategy and litigation support. He also makes presentations to key stakeholders, including lenders, creditors' committees and equity sponsors, and has court experience with testimony and litigation support for contested hearings or trials. Mr. Luzinski has been recognized for several M&A Advisor Turnaround Awards and as a Top Financial Professional in the *South Florida Legal Guide*. He has published articles on relevant business issues and spoken on business panels related to the insolvency profession, and he is frequently quoted in South Florida periodicals on bankruptcy and business matters. Mr. Luzinski received his B.S. from Florida Atlantic University.

**Jeremy L. Retherford** is a partner with Balch & Bingham LLP in Birmingham, Ala., where his practice is focused entirely on bankruptcy and insolvency matters. In addition to representing lenders and creditors in workouts, bankruptcy and nonbankruptcy insolvency proceedings, he also works with distressed companies in navigating insolvency issues, as well as investors in acquiring assets in and out of bankruptcy. On the transaction side, Mr. Retherford often counsels clients in the structure of corporate transactions to minimize bankruptcy and insolvency risks. Lastly, he represents commercial landlords and tenants in lease disputes and in bankruptcy. Mr. Retherford is admitted to practice in Tennessee, Mississippi and Alabama. He is a member of the Judicial Conference of the United States Advisory Committee on Bankruptcy Rules and the American Bar Association, and he is the immediate past-president of the Turnaround Management Association's Alabama Chapter. He also isan ABI Southeast Bankruptcy Workshop Advisory Board member. Mr. Retherford has been listed in Chambers USA for Bankruptcy/Restructuring, Mid-South Super Lawyers since 2012, and in The Best Lawyers in America, which named him 2024 Lawyer of the Year, Birmingham. He is AV-rated by Martindale-Hubbell. Mr. Retherford received his B.B.A. cum laude in 2000 from the University of North Alabama and his J.D. magna cum laude in 2003 from the University of Mississippi School of Law, where he was editor-in-chief of its law journal and a moot court member.

Margaret R. Westbrook is a partner with K&L Gates LLP in Raleigh, N.C., and currently serves as practice group coordinator for the firm's Restructuring and Insolvency Practice Group. She represents and litigates for secured and unsecured creditors in restructuring and insolvency matters both in and out of the state and federal courts in North Carolina, and in other jurisdictions including New York and Delaware. Ms. Westbrook advises transactional clients with respect to insolvency risks and debt restructuring. She represents purchasers and sellers of debt and assets from financially distressed companies in a variety of structures, including foreclosure sales, Article 9 sales and § 363 sales. She has extensive experience with agricultural cases, including chapter 12 proceedings, and with health care insolvency issues both in and outside of formal insolvency proceedings. Prior to joining the firm, Ms. Westbrook clerked for Hon. J. Rich Leonard of the U.S. Bankruptcy Court for the Eastern District of North Carolina from 1996-98. She is the immediate past-president of Carolinas Chapter of the Turnaround Management Association, and she previously chaired the North Carolina Bar Association Bankruptcy Section Council, was a member of the board of the American Bankruptcy Law Journal, and has been recognized for her work on behalf of her clients and the bankruptcy bar in Chambers USA, The Best Lawyers in America and as a Fellow in the American College of Bankruptcy. Ms. Westbrook received her B.A. and J.D. with honors from the University of North Carolina at Chapel Hill.