

BASIC RECEIVERSHIP LAW/CONCEPTS

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BUSINESS LITIGATION

OVERVIEW

Jim's practice focuses on commercial litigation including a concentration on representation of state court and federal equity receivers, director and officer litigation, financial services representation, lender liability defense, and creditors' rights. He has over 15 years of experience in representing financial institutions consisting of commercial mortgage lenders and servicers, national banks and insurance companies. Prior to joining Munsch Hardt, Jim worked at two globally based large law firms in their Dallas and Houston, Texas offices. Prior to beginning his legal career Jim worked in the commercial loan division of several large Texas banks.

MEMBERSHIPS & AFFILIATIONS

- Dallas Bar Association, Bankruptcy and Commercial Law, Business Litigation, Tort and Insurance Practices and Trial Skills Sections
- Frisco Chamber of Commerce
- National Association of Federal Equity Receivers
- State Bar of Texas, Litigation Section

ADMISSIONS

- Texas
- United States Court of Appeals for the Fifth Circuit
- United States District Courts for the Eastern, Northern, Southern and Western Districts of Texas

EDUCATION

- South Texas College of Law, Juris Doctor (Graduated *summa cum laude*)
- The University of Texas at Austin, Bachelor of Business Administration in Finance (Graduated with Honors)



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BUSINESS LITIGATION

OVERVIEW

Ross's practice focuses on complex commercial litigation matters. In that capacity, he is responsible for handling a broad range of disputes including securities litigation, director and officer litigation, shareholder disputes, and various complex commercial litigation matters. A large portion of Ross's practice involves representing trustees and creditors' committees in bankruptcy-related litigation. He also has significant experience collaboratively working with the United States Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC) in receivership matters. Ross often acts as counsel to court-appointed receivers in securities-fraud investigations and as counsel to court-appointed receivers, special servicers, and lenders in receivership matters pending in state and federal courts in Texas and throughout the nation. As a corollary to this practice area, Ross also represents targets of these investigations and parties with interests in assets subject to receiverships.

MEMBERSHIPS & AFFILIATIONS

- Dallas Bar Association, Bankruptcy and Commercial Law and Business Litigation Sections
- State Bar of Texas, Litigation Section

AWARDS & HONORS

- Rising Stars, Thomson Reuters, 2004-2005, 2008-2009

ADMISSIONS

- Texas
- United States Courts of Appeals for the Fifth and Eleventh Circuits
- United States District Courts for the Eastern, Northern, Southern and Western Districts of Texas

EDUCATION

- Southern Methodist University Dedman School of Law, Juris Doctor (Graduated *cum laude*; Jackson Walker Moot Court Program, Chief Justice; Golden Gavel National Legal Honor Society, President; School's Public Interest Law Program)
- Southern Methodist University, Bachelor of Arts in Philosophy (Alpha Epsilon Delta)

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BASIC RECEIVERSHIP LAW/CONCEPTS

I. BASIC RECEIVERSHIP LAW¹/CONCEPTS

A. Nature of Receivership²

A receiver is an officer of the court concerning property in receivership, holding possession of the property for the court that appointed the receiver. As a general matter, a “receiver” is an indifferent person or entity appointed by a court to receive rents, issues, profits, or other things in question pending suit, where it is not reasonable that either party to the litigation should be the operative person or entity. In other words, a receiver is an officer of the court subject only to the court’s direction and control and is a custodian and agent whose functions are limited to the care, management, protection and operation of the property committed to its charge. The receiver owes its allegiance to the court that appointed the receiver, but may owe fiduciary duties to each of the receivership estate’s constituents (e.g. the owner and/or secured creditors).

B. Qualifications of the Receiver

Each jurisdiction may have very specific and widely different requirements in order to qualify as a receiver. In certain jurisdictions, a corporate entity and/or individual may qualify to operate as a receiver appointed by a state court. In other jurisdictions, such as Texas, a receiver must be a citizen of the state and a qualified voter at the time of the appointment (thus, an individual person). As a general rule across jurisdictional lines, the receiver must not be a party to the action, an attorney involved in the action or any other person who has an interest in the outcome of the pending litigation.

¹ This presentation is general in nature regarding the scope, rights, powers and duties of a court appointed receiver over a specific fund and/or property in the context of ancillary litigation. It is intended solely to provide a basic understanding of the receiver’s rights, powers, duties and obligations with respect to property in the receivership estate. It is intended to assist, only in a general nature, those operating in the role of a receiver in this context. It is not intended to, and does not, offer any specific legal advice. For any specific legal issue or question, please contact James M. McGee at (214) 855-7515 or Ross H. Parker at (214) 855-7511.

² This presentation is a general description of common receivership law and concepts. Each state and/or jurisdiction has its own unique laws and procedures with respect to receiverships, including the nomenclature used to describe the receiver. As such, it will be necessary to investigate the particulars of each state and/or jurisdiction in order to determine the specific requirements and procedures regarding appointment.

Consequently, it is necessary to investigate each state’s specific requirements relating to qualification elements of a receiver under that state’s law.

Before assuming the duties of a receiver, the person or entity appointed as a receiver must, in most jurisdictions, execute an oath to perform the duties faithfully and must also execute a good and sufficient bond. A receiver’s bond is conditioned on faithful discharge of the duties of a receiver in the named action and on obedience to the orders of the court. The purpose of the bond is generally understood to be to insure the faithful performance of the receiver’s duties in the care and administration of property in the receivership estate and in the proper disposition or distribution of the property in accordance with the orders of the court. The amount of the bond is fixed by the court.

C. Status and Relationship of Receiver

Given the status as an officer or arm of the appointing court, receivers have been described by various courts as:

- a temporary occupant and caretaker of the property for the courts;
- the medium through which the court asks;
- deriving his/her/its authority from the courts;
- subject to the court’s order, control, direction or supervision;
- owing his/her/its allegiance only to the court;
- responsible primarily to the appointing court, and accountable directly to the appointing court in the performance of his/her/its duties; and,
- a fiduciary of the appointing court.

Furthermore, the receiver’s acts are the acts of the court; jurisdiction over the assets is, in effect, that of the court itself; possession is that of the court; and contracts and liabilities are the contracts and liabilities of the court.

A receiver is not, however, a representative of the state, and does not possess the receivership property in a sovereign capacity. Neither is the receiver generally a public officer within the meaning of a constitutional or statutory provision relating to public officers.

D. The Receiver as Agent/Representative and/or Fiduciary

The general rule is that a receiver is not the exclusive agent or representative of either party to the suit in which the receiver is appointed, is not appointed for the benefit of any particular party, and does not derive authority from any party. A receiver is said to represent the interest of all parties interested in the litigation in which the receiver is appointed.

However, some courts have held that a receiver is not the representative or agent of any party involved in

the litigation in any sense, not even the party who procured his or her appointment, but represents only the appointing court (Western District of New York, Southern District of Ohio, and Central District of California).

E. The Receiver Represents and Protects All Interests

Typically, a receiver stands in the position of a representative and a protector of the interest of the creditors, shareholders, and all others who claim an interest in the property of the receivership. In other words, the receiver represents all of the parties interested in the litigation in which the receiver is appointed, and holds the property in receivership for the benefit of all persons interested in it.

As a representative for all interested parties, the receiver should act in good faith with respect to, and for the benefit of, all parties interested in the property in receivership. Thus, a receiver must act for the benefit of all of the creditors of the receivership, the owner of the property, and all others claiming an interest in the property, alike.

F. The Receiver is a Fiduciary

A receiver is often referred to as a fiduciary of the court, and of all claimants or parties interested in the property or receivership estate. The receiver holds title and possession of the property in the receivership estate as an agent for the appointing court and on behalf of the beneficial owners of the receivership estate, those parties claiming an interest in the property. Since the receiver occupies a fiduciary relation to persons interested in the property, the receiver must perform hers/his/its duties with the high degree of care demanded of a trustee or other similar fiduciary and may not deal with property under the receiver's control in such a way as to benefit the receiver or her/his/its associates. If the receiver does so, the receiver may be surcharged with any profits made as a result of this breach, and also with the profits of those who knowingly join in pursuing an illegal course of action. In this connection, the receiver cannot permit or authorize its agents to do what the receiver is not permitted to do directly.

Under this principle, a receiver may not normally purchase property held in the receivership, either for itself or for another, even if the terms are fair, and regardless of whether there is any intervening fraud.³ Further, although a receiver's employees may not be fiduciaries of the receivership estate, it is the best

practice to obtain court approval, after notice and an opportunity for hearing to all potential constituents of the receivership estate, before allowing a receiver's employees to purchase any assets from the receivership estate.

G. The Effect on Contracts, Rights, Duties, and Liens

The appointment of a receiver does not determine rights. Thus, a receiver's appointment does not:

- affect title or determine rights to property;
- destroy or affect vested rights;
- affect the order of existing liens; or,
- destroy or discharge any liens.

While not divesting lien rights, a receivership court may nevertheless affect the remedy of a lien holder or suspend the enforcement of a third party lien or other rights until the enforcement is approved by the court.

Furthermore, a receivership, or the termination thereof, does not operate to discharge any debts in the bankruptcy sense.

A receivership court may not impair the obligations of a contract, and a receiver may do nothing to impair a contract that is between the parties to the contract. Thus, the appointment of a receiver does not:

- change any existing contractual relation or create any new contractual relation;
- determine rights between the parties by reason of an existing contract; or,
- in general operate to excuse performance under an existing contract.

The appointment of a receiver may, however, have an affect on executory contracts involving the entity in receivership. A receiver is not obligated to perform or carryout the executory contracts of the owner of the estate being administered. A receiver thus may repudiate or reject the executory contracts of the owner of the estate which is being administered. Most courts have held that a receiver may not be in breach, anticipatory or otherwise, of an executory contract unless the receiver first specifically elects to be bound by the contract and adopts it. One caveat is the exception for contracts creating a title, lien, trust, or priority with respect to a particular property constituting or becoming part of the receivership estate.

Some courts have held that the receiver has authority to displace management of the property, where the management is the owner or its agent, that the appointment of a receiver to manage property does not illegally abrogate existing management agreements and that contracts of employment of the dispossessed manager or owner are subject to termination.

³ An exception to this rule may be recognized in certain jurisdictions where the purchase is made after notice to all potential constituents and with leave and approval of the appointing court.

H. Time from which the Receivership Operates

A receiver's rights and duties become fixed at the date of her/his/its appointment. Similarly, if the jurisdiction requires, a receiver's rights and duties vest only after the taking and filing of the oath and qualified bond. Once these conditions have been met, it has been held:

- the receivership property is deemed to be in the custody of the court as of the time of the receiver's appointment;
- the mere appointment of a receiver operates to place the subject property in custodia legis and automatically prohibits its sale in the absence of court approval, even where a prior deed of trust or execution exists;
- the appointment of a receiver freezes the assets, preventing creditors from setting off or executing unmaturing claims against the debtor; and,
- a deed conveying trust property that is not registered until after the appointment of a receiver is void as to creditors.

However, Mississippi courts have held that a receivership may not bind property until the receiver takes actual possession of that property.

I. Property of the Receivership Estate

The extent of the receivership estate property is determined by the appointing court. A receiver has no right to property which does not belong to the entity for which the receiver was appointed. If a receiver seeks to acquire property in the possession of a third party or stranger to the litigation, the complaint in the litigation must first be amended to name the outsider a party, or the receiver must proceed against the outsider by filing a new lawsuit. But, it has been held that where a receiver is appointed to protect the interest of a owner of an undivided half interest in real property, the receivership should include the entire property, not merely the applicant's half interest (Texas).

Typically receivership property will include:

- accounts receivable, earned future income and unearned future income;
- causes of action;
- real property;
- claims and rights to payment;
- licenses, copyrights, business names;
- bank accounts, certificates of deposit, and,
- personalty, equipment, vehicles, furniture/fixtures, and equipment.

J. Affect on Title and Possession of Property

Courts have generally held that the appointment of a receiver does not alter the ownership rights, change the title to property, or affect the title of persons whose

property is in receivership. The appointment of a receiver does not deprive the owners/debtor of the ownership of the property of which the receiver is given authority, and the receiver does not actually take title to the property. Rather, the title to the property in receivership continues in the owner/defendant/debtor whose property is in the receivership until divested by court order, including a court sanctioned sale by the receiver.

A receiver stands in the shoes of the person over whose assets she/he/it is appointed receiver and holds property coming into its hands by the same right and title as the person for whose property she/he/it operates as a receiver.

Although title remains technically in the owner of the property, the appointment of a receiver does divest the owner of possession, management and control of the property subject to the receivership, with the effect of denying the owner the power to transfer of otherwise act with regard to that property.

K. Right to Custody and Possession by Receiver

Upon the imposition of a receivership, the property of the receivership estate passes into the custody of the receivership court and becomes subject to the court's authority and control. As the court's officer or agent, the receiver has the right to hold or possess, or has custody of, the property subject to the receivership for the benefit of all of those claiming an interest in it.

Stated another way, upon appointment of a receiver, the property of the entity in receivership is in *custodia legis* and the receiver's possession, as an officer of the court, is considered to be that of the appointing court.

A receiver also has the right to the corporate books and records, and more accurately described, the court itself is the custodian of the books and records.

L. Protection Against Interference

A receiver is charged with a duty of managing the receivership estate and property entrusted to the receiver and is entitled to be free from outside interference.. Thus, a receivership protects the receiver against interference, without the prior consent of the court, with the receiver's custody, possession, management and control of the property. Since property in a receivership is in *custodia legis*, thus in possession of the court, no one, including a party, has the right to interfere with the property that is in the courts possession through its receiver. Creditors have no right to interfere with the property or acquire new liens upon the property which if enforced would the effect the rights of those also claiming an interest in the property. Consequently, no action may be taken by any creditor which would interfere with the court's control of the assets under the receivership.

When persons other than the receiver have property in their hands which should be in the hands of the receiver, or when any person diverts or attempts to divert receivership assets, the receiver not only may, but must, take all appropriate steps in law to recover possession, management, and control of the property. A receiver has the right and duty to seek the court's assistance in preserving the receivership property in good condition, and may bring a motion to compel the return of receivership assets. In order to fulfill the receiver's obligations and duties to protect receivership assets, a receiver may petition the court to exercise jurisdiction over persons who are interfering with the receiver's right to possession, management or control over receivership assets.

Thus, upon the appointment of a receiver, absent consent or permission from the court:

- property in the hands of a receiver is not subject to garnishment or attachment;
- a lien creditor may not disturb the court's possession;
- a judgment creditor may not attach judgment liens to, or execute against, property in the custody or hands of a receiver; and,
- the entity whose property is in receivership loses power to transfer its property subject to the receivership.

Similarly, a creditor may not set off pre-receivership debts against receivership assets in its possession. Nor may a creditor bank set off an unmatured claim against the debtor once that debtor has been petitioned into receivership, even though the debtor's note may contain an acceleration clause allowing the bank to declare the debt due and payable in the event of a debtor's insolvency.

M. Powers of the Receiver and the Court

Generally, a receiver must faithfully discharge its duties. These include, but are not limited to:

- obey the orders of the court;
- keep separate, accurate records of receipts and disbursements;
- preserve and protect the property under receivership; and,
- continue to operate or wind up the affairs and business of the entity whose property is subject to the receivership.

The receiver derives its authority from the court and acts under the direction and control of the court. In fact, the court that appoints the receiver determines the scope of that receiver's authority. The receiver's powers are fixed by court's orders, or other state statutes governing receivership operation.

The receivership court has jurisdiction or power:

- over the supervision and disposition of the receivership estate;
- over the assets and administration of the receivership estate;
- to hear and determine all controversies relating to the receivership assets;
- to review the actions of the receiver and the propriety of continuing the receivership; and,
- to substitute the courts own independent judgment for that of the receiver.

The appointing court may issue orders as are necessary and proper for the property and interests of those concerned.

The receiver is subject to the court's instructions with respect to property in the receivership estate. While the receiver need not have prior court approval for every single detail of receivership, a receiver has some duty — given his/her/its very limited powers — to apply to the court for advice and direction.

A court may provide a receiver with counsel, or may allow a receiver to employ counsel, provided the necessity of counsel is clearly apparent. The receiver should seek the court's approval for the employment of counsel prior to retaining counsel.

N. Termination of Receivership and Discharge of Receiver

A receivership is terminated by discharge of the receiver. A court may discharge a receiver at any stage of the proceedings. When the reason for the appointment of the receiver has ceased to exist, the court should discharge the receiver upon proper application.

In fact, it is the general rule that the dismissal of the action in which the receiver was appointed does not by itself terminate the receivership or discharge the receiver. Thus, voluntary dismissal of the complaint does not automatically discharge a receiver who has taken possession of property; discontinuance of a lawsuit does not discharge a receiver appointed by a court.

Once the main action is dismissed or terminated, the receiver is not discharged until:

- the receiver has had any opportunity to prepare and present its accounts and final report relating to finally closing the receivership;
- the property is taken from the receiver's possession by the court; and,
- the receiver's liability as to the property is determined.

An order discharging a receiver may be set aside or vacated only by the court that appointed and discharged

the receiver and is not subject to collateral attack in an independent action.

O. Receivership Accounting and Reports

A receiver is required to account to the court for the receipt and disbursement of all money and property received during the pendency of the receivership. The receiver should file periodic reports and accountings. When the receiver operates a business such as a hotel, the court will most likely require frequent reports so that the court can oversee the estate. In addition, on termination of a receivership most jurisdictions require a final accounting.

The receiver's accounting should be of such particularity and detail as will give the interested parties sufficient information to enable them to determine whether to consent or object to the accounting. A report of expenditures under the heading "general expenses" or "miscellaneous expenditures" does not afford sufficient information.

The receiver's periodic reports should also, in narrative form, describe the status of the receivership, matters of litigation, problems to be resolved, and whatever else the receiver believes may be important to the court and/or those parties claiming an interest in the property under the receivership estate.

Any interested party may file an objection to the receiver's reports. Although a receiver is not required to prove every item of his or her account, once a report is opposed, the receiver should file supporting vouchers, evidence, and/or affidavits to support each major item.

P. Receiver's Potential Liability

The liability of receivers, except in cases where they are personally at fault, is in their official capacity. This is true with respect to both contract and tort liability. A receiver is an officer and arm of the court and acts under the direction and supervision of the court; as such, the receiver has only very limited powers and should apply to the court for advice and direction. If the receiver acts without court authority, he or she may assume the risk of liability for costs and expenses incurred. Where a receiver acts within the court's orders, the receiver shares the court's immunity from liability.

A receiver's failure to properly perform his or her duties can result in liability to the estate, and in certain circumstances, to the receiver individually.

Q. Management of the Receivership Estate

The basic purpose of receivership is the conservation of the property. The receiver is charged with the custody of the property and to protect and preserve it. A receiver must exercise ordinary care and prudence; that is, the same care and diligence that the ordinary prudent person would exercise in handling his or her owned estate under like circumstances. If a

receiver is uncertain how to preserve the property, he/she/it should petition the court for instruction and direction.

A receiver in possession of real property stands in the shoes of the owner and, potentially, the appointing creditor. Thus, the receiver has a duty to maintain the property in the same manner as would the owner. In fact, a receiver may be liable for damages resulting from the lack of ordinary care and maintaining the property.

A receiver must exercise reasonable care in depositing funds into the receivership bank accounts. A receiver typically has no authority to borrow or lend money unless specifically authorized by the court. On the other hand, a receiver has, without specific court direction, the right to incur expenses essential to the preservation and use of the property.

Should the receiver's need to borrow money arise, notice and an opportunity to be heard should be given to all parties claiming an interest in the property. Only upon proper court approval should the receiver then seek to borrow funds. This is the same situation with respect to the receiver granting liens upon the property.

To the extent the receivership estate includes claims and causes of action in existing litigation, the receiver may allow the suit to continue under the plaintiffs' control. Alternatively, the receiver may intervene, start a new suit, or settle the litigation. Prior to taking any dispositive action with respect to the suit, the receiver should seek court approval for such action.

Where the prior owner made improper payments out of funds now in the hands of the receiver, the receiver is entitled to institute suit to recover them. Similarly, where the prior owner improperly granted a lien on receivership assets, the receiver may seek court authority to void such liens.

Generally a receiver does not become liable under a lease made by the estate prior to his or her appointment. The receiver has the right to elect whether to accept the lease or reject it, if the receiver finds it of no value to the estate. A receiver's authority to reject an unexpired lease is not, however, absolute, and is subject to court approval. If the receiver accepts the lease, the receiver is entitled to take the leased property and assume the liability to pay the agreed lease amount. If the receiver rejects the lease, upon court approval, the receiver is entitled to return the property.

R. Entering into New Contracts and Expenditures

A receiver may be authorized to enter into a contract. However, a receiver should not enter into a contract, particularly one of any magnitude without the authority or approval of the appointing court. A court is not necessarily required to retroactively validate contracts which exceeded the authority of the receiver. Thus, it is imperative that, should the order appointing

the receiver not specifically provide for such authority, the receiver seek court approval.

The receiver should always sign any document executed in his/her capacity as receiver under the "title," and identify the specific court under whose authority they act.

A receiver's power to enter into contracts that may endure past the termination of the receivership is limited and must be subject to court approval. The receiver is authorized to make expenditures necessary to preserve the receivership estate. Before the receiver expends funds to actually "improve" the receivership estate, it should seek court authorization.

If the receiver discovers the property is operating at a substantial loss, which is likely to continue, the court should be alerted immediately, and the receiver should seek instruction and direction from the court with respect to the continued operations.

S. Priorities and Preferences with Respect to Particular Claims

With respect to a secured creditor's security, the receivership does not operate to deprive the creditor thereof, and the secured creditor may enforce its claim against the security with the permission and consent of the court. When property subject to a secured lien has been brought into the receivership estate, the rents and profits in the hands of the receiver will first be applied to preserve the property.

T. Claims to Insurance Proceeds

Even where a mortgage provides a secured creditor a direct right to insurance proceeds, these proceeds are property of the receivership estate, and subject to the court's jurisdiction. As such, before the receiver takes any action with respect to use of these proceeds to preserve and protect the property, as opposed to payment over to the secured creditor, or to subject the insurance proceeds to control of the secured creditor, the receiver should seek instruction and direction from the court.

U. Sale or Disposition of Property

Generally, a court has jurisdiction to order its receiver to make a sale or disposition of the property in receivership, independently of any plan of reorganization. A receiver may sell real or personal property, but a receiver has no authority to sell real property except upon an order of the court. A "receiver's sale" is one where the receiver is an agent of the court and the property in the receiver's hands is really under the control and supervision of the court.

The receiver should obtain the court's approval of the procedures to be followed for disposition of the receivership property. It may well be necessary to engage other experts, such as real property brokers and

valuation consultants, in order to establish the most expeditious, efficient, and productive procedures.

Once the proceeds of the sale of receivership property are in the possession of the receiver, the proceeds are subject to disposition as decreed by the court.

V. Receivership Expenses; Receivership Compensation and Attorney Fees

Receivers have a right to compensation for their services and expenses. Even though a receiver may not have increased the receivership estate's value (or prevented a decrease in the value), if a receiver reasonably and diligently discharges his or her duties, they are entitled to compensation. It is the receiver's burden to justify his or her account and the compensation paid thereby. The receiver's compensation is a charge on the property of funds in receivership. The receiver must look to the current receipts of the property or funds for payment of its compensation.

The general rule is that costs and expenses of the receivership, including compensation for the receiver, counsel fees, and obligations incurred by the receiver in the discharge of his/her/its duties constitute a first charge against the property or funds in receivership, irrespective of who is ultimately successful in the lawsuit or who is ultimately liable to pay them. This general rule governs the payment of the operating expenses of the receivership.

Generally, in addition to a statutory commission, a receiver is entitled to be reimbursed for expenditures that are necessary to preserve the receivership estate and are authorized by order of the court. In accordance with this general rule, insurance is a charge on property in receivership superior to any lien attaching to the property.

It is suggested that steps be taken to specifically set forth the receiver's fees/compensation in the order appointing the receiver.

W. Costs and Expenses in Suit or Proceedings By or Against Receiver

A receiver is, broadly speaking, entitled to allowances from the corpus of the estate for costs incurred in actions involving the protection or the enforcement of the rights of the receivership estate. Any recovery against the receiver in the performance of his or her duties is payable out of the receivership funds. But, a receiver is not entitled to a fee, or to compensation for his or her attorney, for engaging in litigation that cannot benefit the estate.

II. PRACTICAL TIPS AND SUGGESTIONS

A. The Order should be Very Broad

The order appointing receiver should be broadly drafted, encompass prior court authority for all

operational needs, and should anticipate special or unusual powers that the receiver may require in a given situation. This will provide the receiver with the power and authority to conduct operations without continually requesting court assistance, thus providing the receiver the necessary flexibility to react quickly to anticipated situations. These powers should include, at a minimum:

- ordering the debtor/owner to turn over all books, records, bank account statements, check books, keys, codes, contracts, licenses;
- the power to open new bank accounts;
- the power to retain counsel;
- the power to enter into necessary services provision agreements such as utilities, security, employment agreements;
- the power to collect revenue; and,
- the power to make necessary repairs and maintenance expenditures.

B. The Receiver Should Retain Their own Counsel as Soon as Possible

Because the receiver's appointment is typically requested by a creditor's attorney (for example, counsel for a lender or special servicer), that attorney will continue to exercise his or her judgment to fully protect his client, as opposed to the receiver. If a conflict arises between the lender and the receiver, the receiver will then be forced to seek and retain its own counsel. It is strongly advised that the receiver, at the outset, retain counsel approved by the court in order to protect the receiver going forward.

C. Obtain Court Approval for any Major Decision

As discussed at length in this presentation, a receiver operates under the authority of the court. Once the receiver has obtained court approval or direction, a receiver acts with immunity when carrying out those orders. It is only when a receiver acts outside of the court's authority, or without obtaining the court's consent and approval, that a receiver risks potential liability. In order to avoid this situation, whenever a major decision needs to be made, or if there is any animosity between the lender/owner/receiver, it is best to seek court approval for the desired action.

D. Have the Bond/Oath Ready

Once the receiver has been selected, have the bond and oath ready to file. The oath and bond are statutorily mandated, the receiver cannot begin to discharge his duties until the oath is filed and the bond is posted. The receiver's commercial liability carrier is a good source for obtaining the receiver's bond. Having the bond ready to file as early as possible will allow the receiver to take possession of the property and begin operations as soon as possible.

E. Foreclosure Sales Require Court Approval

It is important to remember that in most jurisdictions, property in the hands of a receiver may be sold, even through foreclosure by a secured lender, only with prior court approval. Thus, it is important to seek such approval as early as possible since, in many jurisdictions, it may take some time in order to get the court's approval.

F. Insurance Policies

It is strongly advised that, if the receiver is forced to obtain new property, liability, or casualty insurance policies, that the receiver lists, by separate endorsement, the current owner of the property and the secured lender.

In a situation where the underlying litigation between the owner and lender is settled, and the property reverts to one or the other, that party needs to be able to prosecute any insurance claims as an additional insured going forward.

The receiver need not name the owner or lender as an additional insured in the policy itself but only by separate endorsement.

G. Sign Only as the Receiver

The receiver should sign any agreement entered into solely in her/his capacity as receiver and make sure that this is specifically indicated on the signature block. This will remove any doubt that the individual/entity operating as the receiver is only contracting and agreeing in that capacity, and not separately or individually.

H. Ongoing Licenses/Agreements

If the property is being disposed of, and the receivership termination is likely, it is important to remember that any ongoing liabilities or obligations assumed or created by the receiver during the term of the receivership must be officially terminated in order to relieve the receiver from any ongoing liability. For example, in a hotel receivership situation, if the receiver is required to renegotiate or novate a flagship license and this obligation extends past the receivership termination, the receiver may be liable for any penalty if the new owner de-flags the hotel.

This is another example of the benefit of retaining counsel to represent the receiver as soon as possible, in order to insure that, at the termination of the receivership, the receiver's potential liability on any existing agreement is extinguished.

I. Retain Additional Experts as Needed

If it becomes necessary, or advisable, for the receiver to obtain any additional expert advice or opinion, the receiver should not hesitate to seek the court's approval for such retention. One example would be in dealing with a catastrophic loss. In such a

situation, are receiver may need to obtain an independent appraisal company to negotiate with the carrier during the claims process.

J. Research Unpaid Taxes as Soon as Possible.

In certain jurisdictions, and for certain types of taxes, local taxing authorities may move to close the business or prevent continued operation of the property until delinquent taxes are paid. It is better to have this potential problem identified earlier rather than later so that the taxing authorities can be dealt with or the receiver can seek the direction of the court to resolve the issue.