

## **RECEIVERSHIPS IN THE UNITED STATES**

**By: Tim L. Collins and Joseph H. Gutkoski**

**Collins & Scanlon LLP,<sup>1</sup> Cleveland, OH**

In recent years, creditors of insolvent U.S. companies have increasingly sought alternatives to traditional bankruptcy proceedings. One such alternative growing in popularity is the imposition of a receivership under applicable state or federal law. Primary reasons for the increased interest in receiverships include: (1) the ability of creditors to participate in the appointment process, including the suggestion of persons to serve as receiver and the drafting of the court order appointing the receiver; (2) the general lack of a developed body of receivership law as to the limits of what a receiver can do, which can provide parties and an appointing court with additional flexibility to tailor creative and case-specific solutions; and (3) the ability (in most jurisdictions) of a receiver to sell assets free and clear of liens, claims, and encumbrances. The purpose of this memorandum is to outline the bases for receiverships under federal and state law,<sup>2</sup> and to discuss some of the issues that U.S. courts have faced in this developing area of the law.

### **A. Types of Receiverships.**

There are two basic types of receiverships: (1) a general (or liquidating) receivership, and (2) a special (or limited) receivership. A general receivership is similar to a trustee in bankruptcy proceedings, in that the receiver controls the assets of the debtor and operates same with the intent to either sell such assets as a going concern or liquidate the assets of the debtor and

---

<sup>1</sup> Tim Collins is the head of Collins & Scanlon's litigation group, and has been actively engaged in litigation practice, including extensive experience with receiverships, for more than twenty-five years. Mr. Collins can be reached at (216) 696-0022 or [tcollins@collins-scanlon.com](mailto:tcollins@collins-scanlon.com). Joseph Gutkoski is an associate in Collins & Scanlon's Cleveland office. Mr. Gutkoski can be reached at (216) 696-0022 or [jgutkoski@collins-scanlon.com](mailto:jgutkoski@collins-scanlon.com)

<sup>2</sup> Given the territorial focus of Collins & Scanlon's practice, an emphasis has been placed on Ohio statutory and case law.

disburse the proceeds to creditors according to the priority of their interests. In a special or limited receivership, the receiver only takes possession of designated assets of the debtor and operates and/or sells only those assets, leaving the rest of the debtor's assets in its possession.

**B. Bases for Federal and State Court Receiverships.**

**1. Federal Court Receiverships.**

Under federal law, the appointment of a receiver is ancillary relief requiring a pending federal action asserting other substantive claims (*e.g.*, a collection action commenced in federal court by a creditor). To initiate an action in federal court, the court must have jurisdiction over the subject matter and parties. Because creditors' rights claims are not typically based upon a federal question, diversity of citizenship between the parties and the minimum amount in controversy under 28 U.S.C. §1332 (*i.e.*, the matter in controversy must exceed the sum or value of \$75,000.00, exclusive of interest and costs) must exist in order to invoke federal court jurisdiction. *See Inland Empire Insurance Company v. Freed*, 239 F.2d 289, 290 (10<sup>th</sup> Cir. 1956). Once jurisdiction over the substantive dispute is established, the federal court has ancillary jurisdiction to appoint a receiver and ancillary subject matter jurisdiction over actions commenced by the receiver in the carrying out of the receiver's duties. *See Haile v. Henderson National Bank*, 657 F.2d 816, 822 (6<sup>th</sup> Cir. 1981); *see also* Fed. R. Civ. P. 66.

**2. State Court Receiverships.**

Most states have enacted statutes authorizing the appointment of a receiver under various circumstances, including waste or material injury to property of the debtor, insolvency, fraud or mismanagement of corporate assets.<sup>3</sup> Many states also provide for appointment of a receiver on general equitable principles, whether the debtor is solvent or insolvent.

---

<sup>3</sup> *See, e.g.*, Delaware: 8 Del. C. § 291 (authorizing appointment of receiver for insolvent corporation); New York: NY CLS Bus. Corp. §§ 1201, *et seq.* and NY CLS N-PCL §§ 1201, *et seq.* (authorizing appointment of receiver for

### **C. What is a Receiver?**

A receiver is an indifferent person between the parties to a cause, appointed by the court to receive or preserve the property or fund in litigation, and receive its rents, issues, profits, and apply or dispose of them at the discretion of the court. He is a fiduciary of the Court, appointed as an incident to other proceedings wherein certain ultimate relief is prayed. He is a trustee or ministerial officer representing the court. *See Celebreeze v. Gibbs*, 60 Ohio St.3d 69, 73 n. 4, 573 N.E.2d 62 (1991), quoting Black's Law Dictionary, (6<sup>th</sup> Ed. 1990) 1268; *see also United States v. Smallwood*, 443 F.2d 535, 536 (8<sup>th</sup> Cir. 1971) ("A receiver is an officer of the court. He is not an agent or employee of either party to the litigation in which he was appointed."). As to a corporation, a receiver "succeeds to the title and rights of action of the corporation itself, and takes all such rights as the corporation itself originally had, and may enforce them by the same legal remedies." *See Ohio ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶ 53 (10<sup>th</sup> Dist. 2006), quoting *Smith v. Johnson*, 57 Ohio St. 486, 488-89, 49 N.E. 69 (1898).

### **D. Who May Be Appointed as a Receiver?**

As noted above, the person appointed as receiver must be indifferent, and not an agent to either party involved in the litigation. *See Celebreeze*, 60 Ohio St.3d at 73 n. 4; *Smallwood*, 443 F.2d at 536. State and federal laws provide additional guidance on what persons may serve as receiver. For instance, federal law specifically prohibits court clerks and their deputies from being appointed as receiver unless there are special reasons requiring such appointment which are recited in the order of appointment. *See* 28 U.S.C. § 957. State receivership law provides

---

corporate assets upon, *inter alia*, commencement of dissolution proceeding, proceeding by judgment creditor for sequestration, action by shareholder or member to preserve assets of corporation in absence of instate corporate officer, or action to preserve in-state assets of out-of-state dissolved or terminated corporation); Ohio: Ohio Rev. Code §§ 2735.01, *et seq.* (authorizing appointment of receiver in pending action where corporation is insolvent or in imminent danger of becoming insolvent); and Pennsylvania: 39 Pa. Cons. Stat. §§ 1, *et seq.* (authorizing appointment of receiver for insolvent corporation upon showing of cause as specifically set forth in such statute) and 15 Pa. Cons. Stat. § 1767 (authorizing appointment of receiver when corporation is deadlocked).

additional rules on who may be appointed as receiver in actions pending before the courts of a given state. In Ohio, for example, the state receivership statute provides that “no party, attorney, or person interested in an action shall be appointed receiver therein except by consent of the parties. No person except a resident of Ohio shall be appointed or act as receiver of a railroad or other corporation of Ohio.” *See* Ohio Rev. Code § 2735.02.

**E. What are the Prerequisites for Appointing a Receiver?**

In addition to the threshold issue of jurisdiction, federal courts generally consider the following factors in determining whether to appoint a receiver: (1) the existence of a valid claim by the moving party; (2) the probability that fraudulent conduct has occurred or will occur to frustrate the claim; (3) imminent danger that property will be lost, concealed or diminished in value; (4) inadequacy of legal remedies; (5) lack of less drastic equitable remedies; and (6) the likelihood that appointment of a receiver will do more harm than good, *See, e.g., United States v. Audubon Capital SBIC, L.P.*, 2013 U.S. Dist. LEXIS 118788, \*12 (E.D. La. 2013); *Steinberg v. Young*, 641 F. Supp. 2d 637, 641 (E.D. Mich. 2009); *Police & Fire Dep't Sys. of Detroit v. Orchard Park, LLC*, 2009 U.S. Dist. LEXIS 20064, \*10 (N.D. Cal. 2009); *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 241-42 (5<sup>th</sup> Cir. 1997). Once appointed, the receiver is required to post a bond, and thereafter, is vested with complete jurisdiction and control over all property, personal and real, wherever situated, with the right to take possession thereof. *See* 28 U.S. C. § 754.

In a state court action, the pre-requisites for appointment of a receiver will be determined by applicable state law. In Ohio, as in federal court, jurisdiction over the parties involved or over the entity placed into receivership must be established. *See Ohio ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶¶ 35-43 (10<sup>th</sup> Dist. 2006). The party requesting the receivership

must show by clear and convincing evidence that the appointment is necessary for the preservation of the complainant's rights. *Malloy v. Malloy Color Lab Inc.*, 63 Ohio App.3d 434, 437, 579 N.E.2d 248 (10<sup>th</sup> Dist. 1989); accord *Huntington Nat'l Bank v. HPM Div.*, 2010-Ohio-6176, ¶¶ 17-18 (10<sup>th</sup> Dist. 2010) (holding the appointment of a receiver improper where the receiver offered no evidence that a receiver was necessary to "protect the assets at issue or to preserve the rights of the receiver"); *Am. Enter. Bank v. Garfield Heights Prop., L.L.C.*, 2013-Ohio-2526, ¶¶ 11-12 (8<sup>th</sup> Dist. 2013) (finding the appointment of a receiver proper where a mortgage provided that, in the case of foreclosure, a receiver should be appointed); *Equity Ctrs. Dev. Co. v. South Coast Ctrs. Inc.*, 83 Ohio App. 3d 643, 649-652, 615 N.E.2d 662 (8<sup>th</sup> Dist. 1992) (finding the appointment of a receiver was improper when excessive legal fees could be remedied with damages and allegations of withholding of financial data could be addressed via injunctive relief or accounting).

The decision to appoint a receiver in Ohio lies within the discretion of the court; however, in doing so, the court must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying relief, the ends of justice, the rights of all parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies. *See Celebreeze, supra*, 60 Ohio St.3d at 73 n. 3; 65 American Jurisprudence 2d (1972) 873, 874, Receivers, Sections 19, 20; *Sobieraj v. Gomersall*, 2003-Ohio-4339, ¶ 13 (8<sup>th</sup> Dist. 2003). Similar to federal court, before an appointed receiver enters upon his duties in an Ohio state court proceeding, he must swear an oath to perform his duties faithfully, and execute a bond in such sum and manner as the court directs. *See Ohio Rev. Code § 2735.03.*

Ohio receivership law addresses the requirements to appoint a receiver in a variety of contexts. *See Ohio Rev. Code § 2735.01(A)-(F); see also, e.g., Ohio Rev. Code § 1313.56*

(appointment of a receiver to take charge of the assets if there is evidence of a fraudulent conveyance); Ohio Rev. Code. § 1707.27 (appointment of a receiver for violation of the Ohio Securities Act); Ohio Rev. Code § 5119.342 (appointment of a receiver to take possession of and operate a mental health and addiction services center); and Ohio Rev. Code § 3767.41 (appointment of a receiver in an action regarding a building that has been declared a public nuisance).

For example, pursuant to Ohio Rev. Code § 2735.01(A), a receiver may be appointed in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners/others owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property/fund/proceeds is probable, and when it is shown the property/fund is in danger of being lost or materially injured. *See* Ohio Rev. Code § 2735.01(A). In such cases, the movant need only establish that there is a genuine issue of material fact that the property or fund is in such danger or that a reasonable person could find such danger. *See Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 2005-Ohio-2706, ¶ 52 (7<sup>th</sup> Dist. 2005).

Ohio Rev. Code § 2735.01(B) authorizes the appointment of a receiver in an action by a mortgagee, for the foreclosure of his mortgage and sale of mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt. *See* Ohio Rev. Code § 2735.01(B). In such cases, the movant is only required to establish one of the two elements of Ohio Rev. Code § 2735.01(B): either (1) the mortgaged property is in danger of being lost, removed, or materially injured, or (2) the condition of the mortgage has not been performed, and the property is probably insufficient to

discharge the mortgage debt. *See Huntington Nat'l Bank v. PRS Invs. LLC*, 2013-Ohio-2245, ¶ 6 (6<sup>th</sup> Dist. 2013).

A receiver should not be appointed if the movant has a full and adequate remedy at law. Moreover, a receiver should not be appointed as a mode of granting ultimate relief absent extreme and unusual circumstances. *Hoiles v. Watkins*, 117 Ohio St. 165, 173, 157 N.E. 557 (1927) (when there was no other matter to be litigated between the parties, it was inappropriate to appoint a receiver solely to protect the interests of minority stockholders of a solvent company against the potential fraud of a majority stockholder); accord *Soul v. Lockhart*, 119 Ohio St. 393, 400-402, 164 N.E. 419 (1928).

Under Ohio receivership law, it is not necessary that the assets in question be within the jurisdiction of the trial court appointing the receiver. *See Gold, supra*, 2006-Ohio-943 at ¶¶ 35-43. The power of the court to confer authority on a receiver is not limited to property found within the jurisdiction of the court. *Bank v. McLeod*, 38 Ohio St. 174, 184 (1882). However, a receiver cannot take possession of property outside the jurisdiction of the court appointing him if there are creditors having claims to the property in that jurisdiction. “The courts of that state will not permit the foreign receiver to take possession, preferring the rights of its own citizens to those of the people of another jurisdiction.” *Barbour v. Lockard*, 9 Ohio Dec. Rep. 254,\*4 (S.C. 1877).

#### **F. What May a Receiver Do?**

The role of the receiver is to safeguard disputed assets, to suitably administer the receivership property, and to assist the court in achieving a final, equitable distribution of the assets. *See Liberte Capital Group, LLC v. Capwill*, 248 Fed. Appx. 650, 655 (6<sup>th</sup> Cir. 2007). Generally, the rights, powers, and responsibilities of a receiver are set forth in the court’s

appointment order. Regardless of whether a matter is pending in state or federal court, a receiver is an officer of the court who, once appointed, shall manage and operate the property according to the laws of the state where the property is located. *See, e.g., Waag v. Hamm*, 10 F. Supp. 2d 1191, 1193 (D. Colo.1998), citing 28 U.S.C. § 959(b). As an officer of the court, a receiver may generally do such acts respecting the receivership property as the court may authorize. *See, e.g., Ohio Rev. Code. § 2735.04.*

Federal law surrounding receiverships clearly and repeatedly demonstrates that a receiver's powers are extraordinary and virtually only limited by the district court judge's concept of equity. Some key receivership powers include: (1) the power to sell receivership property free of liens of third parties;<sup>4</sup> (2) the power to seek an injunction of actions against the receivership estate to assist in the efficient administration of the receivership estate (similar to an automatic stay in traditional bankruptcy proceedings);<sup>5</sup> and (3) the power to sue defendants from all over the country (and in foreign countries) in the court where the receivership action is pending.<sup>6</sup>

Likewise, and although the powers of a receiver in a state court proceeding will be determined by applicable state law, such powers are traditionally broad. Pursuant to Ohio Rev. Code § 2735.04, for example, the powers of a receiver include: (1) the power to bring and defend actions in his own name as receiver; (2) the power to take and keep possession of

---

<sup>4</sup> *See, e.g., Broadway Trust Co. v. Dill*, 17 F.2d 486 (3<sup>rd</sup> Cir. 1927); *Seaboard Nat. Bank v. Rogers Milk Products Co.*, 21 F.2d 414 (2<sup>nd</sup> Cir. 1927); *People's Pittsburgh Trust Co. v. Hirsch*, 65 F.2d 972 (3<sup>rd</sup> Cir. 1933). Furthermore, the sales of assets by a receiver are governed by 28 U.S.C. §§ 2001 and 2002 (sales of real property), and 28 U.S.C. § 2004 (sales of personal property). These provisions are very specific with respect to certain requirements (*e.g.*, notice provisions and appraisals), but vague with respect to the procedures to be employed in the sales, thereby allowing for a certain degree of flexibility and creativity.

<sup>5</sup> *See, e.g., S.E.C. v. Wencke*, 622 F.2d 1363 (9<sup>th</sup> Cir. 1980); *S.E.C. v. United Fin. Grp., Inc.*, 576 F.2d 217 (9<sup>th</sup> Cir. 1978); *S.E.C. v. Byers*, 592 F. Supp. 2d 532 (S.D.N.Y. 2008).

<sup>6</sup> *See* 28 U.S.C. § 754 and 28 U.S.C. § 792.



property;<sup>7</sup> (3) the power to receive rents; (4) the power to collect, compound for, and compromise demands; (5) the power to make transfers of property;<sup>8</sup> and (6) the power to do any acts respecting the property as the court authorizes. *See* Ohio Rev. Code § 2735.04. The Ohio Supreme Court has interpreted this statute broadly as “enabling the trial court to exercise its sound discretion to limit or expand a receiver’s powers as it deems appropriate.” *See Celebreeze v. Gibbs*, 60 Ohio St. 3d 69, 74, 573 N.E.2d 62 (1991); accord *Wells Fargo Bank, N.A. v. Odit*, 2014-Ohio-2540, ¶ 15 (10<sup>th</sup> Dist. 2014); *Huntington National Bank v. Motel 4 BAPS, Inc.*, 191 Ohio App.3d 90, 2010-Ohio-5792, ¶ 8 (8<sup>th</sup> Dist. 2010).

#### **G. Appealability of Order Appointing Receiver.**

An order appointing a receiver in a federal case is immediately appealable although interlocutory in nature. *See* 28 U.S.C. § 1292(a)(2); *see also Guy v. Citizens Fidelity Bank & Trust Co.*, 429 F.2d 828, 833 (6<sup>th</sup> Cir. 1970). The same generally holds true in state courts. In Ohio, for example, an order appointing a receiver is considered a final order that may be immediately appealed by the parties. *See, e.g., JPMCC 2004-CIBC10 7th St. Office, LLC v. URS Tower LLC*, 2013-Ohio-796, ¶ 10 (1<sup>st</sup> Dist. 2013); *Cunningham v. Ohio Police and Fire Pension Fund*, 175 Ohio App.3d 566, 2008-Ohio-218, ¶ 6 (8<sup>th</sup> Dist. 2008).

---

<sup>7</sup> However, case law demonstrates some limitations in this regard. For example, where a receiver was appointed for a company and authorized to take possession of property, he did not, by the order of appointment, become invested with the legal title to promissory notes payable to such company. *See Miller Brothers Star Shoes Co. v. Griffiths*, 11 Ohio App. 277, 279-280 (8<sup>th</sup> Dist. 1919).

<sup>8</sup> Courts in Ohio may authorize receivers to sell property at a private sale free and clear of liens and encumbrances under certain circumstances, including notice of the sale to persons whose property interests are jeopardized, and an opportunity to respond. *See, e.g., Park Nat’l Bank v. Cattani Inc.*, 187 Ohio App.3d 186, 2010-Ohio-1291, ¶¶ 18-19 (12<sup>th</sup> Dist. 2010) (holding the property was properly sold without liens because there was a good offer on the table and a sheriff’s sale would not have generated a greater price and likely prompted a reduction in the already sinking property value); *Avondale Cmty. Council v. Lentine*, 2012-Ohio-186, ¶ 17 (1<sup>st</sup> Dist. 2012) (finding the sale of unencumbered apartment buildings to be proper given the fairness of the sale); *Galt Alloys, Inc. v. Key Bank Nat’l Ass’n*, 85 Ohio St. 3d 353, 357-358, 708 N.E.2d 701 (1999) (discussing notice to persons whose property interests are jeopardized); *Huntington National Bank v. Motel 4 BAPS, Inc.*, 191 Ohio App.3d 90, 2010-Ohio-5792, ¶18 (8<sup>th</sup> Dist. 2010) (same).

#### **H. Consequences for Failure to Abide by Receivership Orders.**

The failure to abide by an order appointing a receiver, in both state and federal court, can lead to contempt proceedings against the failing party. Contempt of court consists of the disregard of judicial authority and a court's ability to punish such conduct is a part of its inherent authority. Thus, disobedience to the lawful orders of a court constitutes contempt. *See* Enforcement of and Collateral Attack on Injunctions, 11A Fed. Prac. & Proc. Civ. §2960 (2<sup>nd</sup> Ed.). Because receivers are frequently appointed in actions involving fraud, it is not uncommon that the fraudulent actors or those with whom they are in concert will attempt to evade or ignore orders of the receivership. Such contempt can arise, for instance, in connection with concealment of or failure to turn over assets, or a failure to honor "freeze" orders or orders for preservation or production of records and other "discovery" orders, to name only a few. Contempt can also arise when third parties, such as banks, fail (sometimes negligently) to comply with freeze or turnover orders. Such conduct is punishable in federal court through a finding of civil contempt. *See, e.g.,* Mission Capital Works, Inc. v. SC Rest., Inc., 2008 U.S. Dist. LEXIS 64803, \*21 (W.D. Wash. 2008) (finding defendant in contempt of court for their failure to provide documents, information, and access as required under the order appointing the limited receiver and the limited receiver's requests). Likewise, state courts may hold violators in contempt for the failure to abide by receivership orders. *See, e.g.,* U.S. Bank Nat'l Assoc. v. Golf Course Mgmt. Inc., 2009-Ohio-2807, ¶¶13-16 (12<sup>th</sup> Dist. 2009) (defendants held in contempt when they failed to comply with an order giving receiver access to their property, assets, and information relating to the operation of their business).