

Best Practices Series – Distressed Debt: Receiverships

Michael D. Fielding¹
Husch Blackwell LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112
816-983-8000

michael.fielding@huschblackwell.com
www.huschblackwell.com

1. General Receivers vs. Limited Receivers
 - a. General Receivers
 - i. Controls all assets of borrower
 - ii. Broad powers
 - iii. Similar to Ch 7 or 11 trustee
 - b. Limited Receivers
 - i. Limited/specific assets or activities
 - ii. Limited powers
 - iii. powers must be set forth in order granting receivership; no general powers not specified in orders
2. Benefits of a Receivership
 - a. More flexibility
 - b. Provides buffer of protection between bank and the asset
 - c. Secured lender typically picks the Receiver
 - d. No creditor's committee or US Trustee oversight
3. Risks of a Receivership
 - a. Costs of the receivership get out-of-hand
 - b. Receiver goes rogue against the lender
 - c. Court not as familiar with insolvency proceedings
 - d. No automatic stay
 - e. No national jurisdiction over parties
 - f. Limited case law/precedence
 - g. Involuntary bankruptcy could be filed

¹ Michael D. Fielding is a partner in the Food & Agribusiness unit of Husch Blackwell LLP in Kansas City, Missouri where he helps clients successfully resolve difficult problems involving distressed agricultural and commercial loans. He currently serves as President of the Ag Law Section of the Kansas Bar Association. He has published more than 40 articles on a variety of legal issues and regularly presents on successfully resolving debt with insolvent and bankrupt debtors. Listed in the 2021 and 2022 editions of Best Lawyers in America, he has been named multiple times as a "Best of the Bar" honoree by the Kansas City Business Journal, and he was recognized in 2019 and 2022 by IFLR 1000 as being Highly Regarded in Restructuring and Insolvency (Missouri). He is licensed in Missouri, Kansas, Iowa, Nebraska, Utah and numerous federal courts and is board certified in Business Bankruptcy by the American Board of Certification.

- h. Uncooperative borrower
- 4. Examples Where a Receiver is Ideal
 - a. Gross mismanagement (incompetence) of borrower
 - b. Environmentally suspect property
 - c. Borrower engaged in fraud, misappropriation or conversion of assets
 - d. Imminent risk of loss of collateral
 - e. Corporate deadlock and dissolution
 - f. Property with environmental concerns
- 5. Examples Where a Receiver is NOT Ideal
 - a. Cost of receivership exceeds estimated financial benefit/recovery
 - b. Property (particularly real) located in multiple states
 - c. Borrower decides to do an Assignment for the Benefit of Creditors
- 6. Key Questions Whether to Appoint a Receiver
 - a. What is the nature of the asset and what is the lender's interest?
 - b. Where is it located?
 - c. What inherent dangers or risks are associated with the asset? (e.g., environmental, attractive nuisance, etc.)
 - d. Where is the income stream for the asset?
 - e. What does the receiver need to do to control and preserve income?
- 7. How will the Receiver be Compensated?
 - a. Fixed amount?
 - b. Hourly?
 - c. Will the Receiver have his/her own counsel?
 - d. Will receiver be paid from lender's collateral?
- 8. Grounds for Appointment of a Receiver
 - a. Contractual
 - b. Statutory
 - c. Common Law (Equity)
- 9. Receivership Statutes Vary by State
 - a. Examples of Robust Statutory Scheme
 - i. Arizona
 - ii. Missouri
 - iii. Tennessee
 - iv. Texas
 - v. Utah
 - b. Examples of Limited Statutory Scheme
 - i. California
 - ii. Colorado
 - iii. Illinois
 - iv. Iowa
 - v. Kansas
 - vi. Nebraska
 - vii. Wisconsin
- 10. Federal Court vs. State Court Receiver

- a. Fed. R. Civ. P. 66 directs federal court to consider local practice
 - b. Receiver appointment is similar to an injunction
 - c. Receivership order will control
 - d. Limited federal statutes
11. Receivership Orders – Common Provisions
- a. Grounds/reasons for appointment;
 - b. Property subject to receivership;
 - c. Budget;
 - d. Compensation of receiver
 - e. Right to borrower money;
 - f. Right to sell or lease property;
 - g. Right to reject leases;
 - h. Right to operate business;
 - i. Right to records;
 - j. Receiver’s compensation;
 - k. Receiver’s employment of professionals;
 - l. Payment of receiver’s professionals;
 - m. Right to use borrowers permits and licenses
 - n. Right to pursue causes of action
12. Risks of Receivership Orders
- a. Limited case law
 - b. Contravenes existing law
 - c. Exceeds scope permitted by the statute
 - d. Provisions could be overturned on appeal
13. Receiver Bonds
- a. Typical cost?
 - b. Where obtained?
 - c. Who pays for the bond?
 - d. Indemnification of receiver from IRS claims?
14. Receiver Budgets
- a. Creation of budget
 - b. Permitted budget variance
 - c. Results if budget variance exceeded?
15. Receivership Borrowings
- a. Allowed by applicable law?
 - b. Allowed by the court order?
 - c. Is the lender granted any priming or super-priority lien?
16. Receivership Sales
- a. Does applicable law or the order allow a “free & clear” sale?
 - b. Is sale via public or private method?
 - c. Standards for sale (commercial reasonableness; business judgment)
 - d. Title insurance
 - e. Does right of redemption remain?
17. Common Objections to a Receiver

- a. “Cause” does not exist
 - b. Appointment is a draconian remedy
 - c. Counterclaims as a defensive measure to appointment
18. Duration & Termination of Receivership
- a. What key milestones must be accomplished?
 - b. How will Receiver fees & expenses be paid—especially if case drags on?
 - c. How are subordinate claims paid
19. Receiver vs. Bankrupt Debtor
- a. Receiver must turnover property
 - b. Bankruptcy Code has a turnover exception (11 U.S.C. § 543(d))
 - c. Receiver entitled to administrative expense claim

These materials have been prepared solely for information and educational purposes, do not create an attorney-client relationship with the authors or Husch Blackwell LLP, and should not be used for legal counseling in specific situations. These materials reflect only the personal views of the author and are not necessarily the views of Husch Blackwell LLP or its clients.