

A POCKET GUIDE TO TEXAS RECEIVERSHIPS

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CHAPTER 7

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Overview

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Education

J.D. from Boston University School of Law
B.S. from Calvin College

Bar Admissions

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

Related Practices

Bankruptcy, Restructuring & Insolvency
 Fraud & Asset Recovery
 Insolvency Litigation
 Receiverships
Litigation
 Appellate
 Arbitration
 Energy Litigation

Related Industries

Financial Services

Dennis's fiduciary practice centers on federal and state court receiverships that have included serving as a receiver, a private liquidating agent, a Ch. 11 Trustee and representing various court-appointed fiduciaries. Federal receivership appointments arose from civil enforcement proceedings brought by the SEC and the FTC. Assets have included publicly traded stock, commercial and residential real estate, undeveloped land, ranch property and livestock, oil and gas assets, partnership interests, life insurance derivatives, foreign bank accounts, fine art, inventory, vehicles and other items. State court receivership matters arose from TSSB, municipal enforcement and lender collection suits. Cases have required the liquidation of small businesses, the renovation and remediation of apartment complexes, the wind-up of a forex trading fund and sales of various assets.

Litigation practice has included appellate matters, personal injury defense, telecommunications, fair housing and various other matters. Current practice centers on cases involving securities fraud, commercial matters and fiduciary malpractice.

Energy

Achievements

Law Business Research Limited – International Who's Who of Asset Recovery Lawyers (2012, 2017)

Martindale-Hubbell® BV® Distinguished™ Peer Review Rated™

Thomson Reuters – Texas Rising Stars (2004-2005)

Memberships

Dallas Bar Association

National Association of Federal Equity Receivers

State Bar of Texas

Experience

State Court Receiverships

Appointed as receiver in *Texas State Securities Board v. RSM Forex Fund* (Tex. Dist. Ct. – Collin) (\$4.5 MM forex fund); *Frost Bank v. Evans* (Tex. Dist. Ct. – Dallas) (turnover of \$6.7 MM in assets) and *Vertex v. Earth Biofuels* (Tex. Dist. Ct. – Harris) (turnover of various offerings), and represented the receiver in *City of Dallas v. Rao* (Tex. Dist. Ct. – Dallas) (code enforcement) and *Wells Fargo v. Gould Ashley Creek* (Tex. Dist. Ct. – Dallas) (apartment complex).

Federal Receiverships

Appointed as a federal equity receiver in SEC and FTC enforcement proceedings, including *SEC v. IPIC* (N.D. Tex.) (\$170 MM Ponzi scheme), *SEC v. Provident Royalties* (N.D. Tex.) (\$485 MM oil/gas investment fraud), *SEC v. Striker Petroleum* (N.D. Tex.) (\$150 MM oil/gas investment fraud), *SEC v. Brown* (E.D. Tex.) (\$6 MM real estate fraud); *FTC v. Advanced Management Systems* (W.D. Wa.) (fake credit restructuring scheme); *SEC v. Roberts* (E.D. Ark.) (\$44 MM forex fund) and *FTC v. Shopper Systems* (E.D. Fla.) (\$26 MM business opportunity fraud). Represented federal equity receivers and examiners in various enforcement proceedings involving real estate fraud, oil/gas schemes, prime bank schemes and life settlement and viatical frauds.

Committee Representation

Represented the Official Unsecured Creditors' Committee for Life Partners Holdings, Inc., which filed for Chapter 11 after entry of a \$47 MM judgment in favor of the SEC. Life Partners managed a \$2.4 B insurance portfolio of "life settlements." The Joint Plan was confirmed after a five week contested confirmation hearing, making it the first "life settlement" company to successfully emerge from bankruptcy with a confirmed Chapter 11 Plan.

Securities Litigation

Represented a liquidating trustee pursuing claims against broker-dealers following a securities fraud.

Securities Litigation

Represented investors holding millions of dollars in auction-rate securities in arbitration proceedings. Represented a liquidating trustee pursuing claims against broker-dealers following a securities fraud.

Newsroom

Press Release: Munsch Hardt Attorneys Win 2017 Turnaround of the Year Award

Press Release: Munsch Hardt Honored at 2017 Turnaround Atlas Award

Article: Presenting a Receivership Distribution Plan

Speech: Locating and Seizing Assets in Foreign Jurisdictions

Press Release: International Who's Who of Asset Recovery Lawyers Adds Munsch Hardt Attorneys to Membership

Press Release: Four Munsch Hardt Attorneys Achieve Texas Rising Star Honors

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I. NATURE OF REMEDY

A. Custodia Legis

By appointing a receiver to possess certain property a court takes judicial custody of that property through its powers in rem over property within its jurisdiction. From that point forward, no other court has the power to issue orders having legal effect as to the rights of persons relative to the property in receivership. Any such order is void. Only a superior court, such as a court of appeals by appellate review or a federal court by removal or bankruptcy, may supersede the orders of the appointing court. Likewise, foreclosure, being a substitute for judicial foreclosure, is not effective unless authorized specifically by the appointing court. All persons with claims to the property must come before the appointing court, either by presenting a claim to the receiver, or intervening in the receivership proceedings.

B. Agent of Court

In appointing a receiver, a court delegates its own power through the receivership order. Since the receiver is thus an extension of the court itself, the presiding judge may direct the receiver's actions in all respects, and may review and countermand the receiver's actions. It is therefore appropriate for the receiver to anticipate the will of the court, and, in case of doubt, a receiver should consult with the court, formally by report and request for instructions, or informally by direct communication, in order to ensure the receiver acts in accordance with the court's own ultimate exercise of its discretion or determination of the applicable law. While a receiver may be able to anticipate the will of the court in routine matters, a receiver faced with matters peculiar to a particular case should raise such matters through a status conference or informal communication. The adversarial system that applies to the administrative of remedies at law does not apply to the court's supervision and direction of its receiver who acts pursuant to the court's powers in equity. The equitable power of the court may be employed to do what is just and fair under the circumstances through summary and ex parte procedures in the same manner as the presiding judge might interface with sheriffs, constables, coordinators, clerks and other persons under the court's direct control.

C. Special versus General Receiverships

The court may define the nature of the property entrusted to the receiver either in terms of a description of the property, or in terms of the holder of legal title. Thus, for example, a receiver may be directed to take custody of personalty by reference to a description or real property by reference to its location, in which case the receiver is said to be a specific receiver.

Alternatively, a receiver may be generally given all authority or all property of a legal or natural person.

Absent specific orders to the contrary, a general receiver inherently takes on additional duties and customary powers. Where, for example, a receiver is directed to take control of all records of a person, it follows that a receiver must comply with obligations such as the preparation and filing of tax returns employing such records. For this reason, a general receiver may apply for a narrowing of these obligations if, for example, the records and relative cooperation of the individual involved may preclude the reasonable discharge of such responsibilities. Most receivership orders will include a series of specific directives in order to address such matters.

D. History of Remedy and Current Uses

In the courts of the State of Texas, receiverships are generally employed to preserve assets not generally subject to attachment or sequestration, to enforce the law in complex circumstances, and to collect judgments. A pretrial receiver's objective is most often to maintain the status quo, whereas a post-judgment receiver pursues liquidation for the benefit of the plaintiff. For example, it is common to appoint a receiver pre-judgment to operate a business, and to direct the receiver post-judgment to either return the business to the successful litigant or to liquidate the business for that party's benefit. In a law enforcement context, such as where a building requires remediation to comply with city codes, a receiver may be tasked with effecting such remediation. A receiver may be flexibly employed to gather some or all of a judgment debtor's assets, either with or without the use of a turnover order.

Prior to the advent of the federal bankruptcy laws, it was common for a creditor to obtain a receiver over all of the property of the debtor, following which other creditors would intervene in the receivership and/or present their own claims to the receiver. The receiver would then seek to give notice to all other creditors so as to bind those creditors to the actions of the court. It was necessary to obtain the consent of superior creditors, but, so long as that was done, the receivership could effect a restructure the rights of all creditors in the assets of the debtor, as well as grant the debtor a discharge of debts in settlement of all claims. The procedures developed in this manner gave rise to bankruptcy statutes first in many states and later to federal legislation. The exercise of superior federal jurisdiction operated to remove these matters from the state courts. The federal courts also employ receivers to aid enforcement proceedings brought by federal agencies, as well as, to a lesser extent, the collection of federal judgments.

E. Sources of Legal Authority

Receivership principles and procedures were developed by Texas courts in the course of administration based upon the precedents of eastern states, who, in turn, looked to the experience of the English chancery courts that were established to carry out the directives of the king and his primary administrative agent, his chancellor. By the time Texas courts began to experience a material volume of requests for receivership appointments, chancery courts had already developed a substantial body of equitable legal precedent. In the early twentieth century, the use of receivers declined in favor of federal bankruptcy proceedings. Meanwhile, the Texas legislature provided some statutory gloss as to certain matters. However, these statutes refer to the earlier practice in equity, such that one cannot argue the statutes trace the full extent of equitable power, but rather the statutes merely establish superseding authority on certain matters.

The leading comprehensive treatise setting forth the law of equity as developed by American courts as a whole is *Clark on Receivers*. This excellent six volume set should be treated as authoritative. A Texas centered summary is provided in *Texas Jurisprudence*. Texas statutes are set out below. State and federal bankruptcy statutes can provide some guidance as they are derived from the same body of equitable receivership law.

II EQUITABLE BASES

Rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver, and to the powers of a court regarding receivers, to the extent that they are not inconsistent with applicable statutory provisions or with the general laws of the state. *Tex. Civ. Prac. & Rem. Code* § 64.004.

A. Receiverships in Equity

Where not sought or granted on statutory grounds, the remedy of receivership rests purely on equitable rights.

The appointment of a receiver on equitable grounds may be obtained in suits for the cancellation of an instrument, or for specific performance, as well as in actions involving title to real property. A receiver may also be appointed to conserve the assets of an unincorporated association.

Conduct in the nature of fraud, and persistence in the taking of undue advantage with respect to the use and operation of property of a special character, such as oil lands, will also afford equitable ground for the appointment of a receiver where damage and loss result, but there must be some equitable ground to justify the appointment of a receiver. When it is proceeding under its general equity powers, the court must be convinced that the appointment of a receiver is

necessary, and it must appear that a receivership is the appropriate means of securing an appropriate end.

A receiver may be appointed for property in the possession of an executor or administrator where necessary to protect the estate, but this is not a typical remedy. A receivership is not authorized merely because, for example, an executor has made some improper charges or fails to conduct a business for the estate in the most efficient manner. Similarly, under certain limited circumstances, a court of equity may appoint a receiver of trust property in the hands of a trustee or of anyone that may be in possession of the property. However, a court will not generally interfere with the interests or rights of a trustee in the absence of a showing of abuse or danger of abuse of the trust fund, or unless there is danger of loss or injury if the property remains in the trustee's possession.

Injunction and receivership are frequently companion remedies; thus, a receiver may be appointed as an incident to the issuance of an injunction where necessary to its effectiveness. Where an injunction issues to prevent interference with property, a receiver may be appointed to take charge of the property and prevent its destruction or waste. A receiver will not be appointed, however, where ample protection is afforded by the issuance of an injunction, or where the injunction granted completely secures all rights of the plaintiff. A receiver may be appointed in lieu of requested injunctive relief in appropriate circumstances.

B. Requirements

A receiver in equity should not be appointed unless a clear showing of necessity is made.

Absent a contractual right, a receiver may be appointed only when receivership is shown to be reasonably necessary for preservation of property involved in litigation and for protection of the rights of persons having claims against it. It must be shown that the property or fund in litigation is in danger of being lost, removed, or materially injured.

A receiver will be appointed only when the party seeking the appointment shows a right to, or interest in, the property or fund in litigation or shows at least a probable right or interest in either. To fulfill this requirement, the party must show a clear right to the property itself or some lien on it, or that the property constitutes a special fund to which the party has a right to resort for the satisfaction of a claim. The petitioner's right or interest must be clear and certain from the allegations constituting the cause of action in support of which the receivership is sought.

In determining the danger of loss or injury to property, the court may consider any relevant events or transactions. The appointment of a receiver is not justified merely because a business has been operated at a loss or because some profits have not been realized as

a result of the failure to operate the business in the most efficient manner.

In an application for receivership based on equitable rather than statutory grounds, a receiver will not be appointed if another remedy exists at law or in equity. However, a receivership may be authorized where the other remedies available are not as practical or efficient as the appointment of a receiver.

III. STATUTORY BASES

Where a receivership is sought under one of the statutory provisions authorizing the appointment of a receiver, the right to the remedy is legal and determinable primarily by the statute rather than by rules of equity. For this reason, questions such as the adequacy of some other remedy, the existence of a less drastic remedy in equity, and the insolvency of the defendant are not controlling with reference to the statutory right to an appointment.

A. Receivership Under the Texas Civil Practice & Remedies Code

Pursuant to Texas Civil Practice & Remedies Code § 64.001: A court of competent jurisdiction may appoint a receiver (1) in an action by a vendor to vacate a fraudulent purchase of property; (2) in an action by a creditor to subject any property or fund to its claim; (3) in an action between partners or others jointly owning or interested in any property or fund; (4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property; (5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or (6) in any other case in which a receiver may be appointed under the rules of equity.

Under subsections (1), (2) or (3), the receiver may be appointed on the application of the plaintiff in the action or another party.

The party must have a probable interest or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured. Under subsection (4), the court may appoint a receiver only if it appears that the mortgaged property is in danger of being lost, removed, or materially injured or the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgaged debt.

B. Receivership Under the Texas Business Organizations Code

Pursuant to Texas Business Organizations Code § 11.402, any court that has subject matter jurisdiction over specific property of a Texas or foreign entity that is located in Texas and is involved in litigation has jurisdiction to appoint a receiver for that property as provided in § 11.403.

Receivers can be appointed over specific property (§ 11.403), to rehabilitate a Texas entity (§ 11.404), or to liquidate a Texas entity (§ 11.405).

Under the conditions set forth in §§ 11.409 and 11.410, a district court in the county in which the registered office of a foreign entity doing business in Texas is located has jurisdiction to appoint an ancillary receiver for the property and business when the court determines that circumstances exist that require such appointment; and a district court may appoint a receiver for all of the property, in and outside Texas, of a foreign entity doing business in Texas under the conditions set forth in § 11.410.

IV. EQUITABLE PROCEDURES

A. Ancillary Proceeding

A receivership is necessarily ancillary to a pending principal action to establish or vindicate a right other than the appointment of a receiver. A party may not join in one action asking for a receiver for the purpose of having the receiver act in another action against the same defendant. The party cannot require a receiver to perform functions relating to a dispute about which the appointing court is not asked to decide. The receivership proceeding must stand or fall with the pendency of the main suit to which it is incidental.

A suit will not be regarded as an independent one to secure only the appointment of a receiver where the pleadings disclose a controversy between the plaintiff and defendant. That a party is not entitled to the appointment of a receiver does not affect the primary purpose of the suit, whatever that purpose may be.

As an exception to the foregoing general rule, it is not necessary that an application for appointment of a receiver to protect the interests of concurrent owners of oil and gas interests be ancillary to other relief sought.

B. Summary Procedures Appropriate

A receivership proceeding is a summary proceeding. It is summary in the sense that it deprives the defendant, temporarily at least, of the possession and management of property before a final judgment is rendered against the defendant. Moreover, a court acts in equity without the involvement of a jury, and may substantially constrict or eliminate discovery.

C. Claims of Non-Parties

In connection with the administration of an estate in receivership, the court has incidental power to consider and determine, and to settle the priority of, claims made against funds or property in the court's control and custody. Claims against funds or property in the possession of a receiver must be presented to the court in which the receivership is pending to entitle such claims to allowance in that proceeding.

The court may pass on a claim that arose before the appointment of the receiver, as well as on one that arose

during the receivership. Where installment claims are certain and their present worth may be determinable by recognized methods of computation, they may be adjudicated even though they have not matured. However, the court may not determine a claim that will not come into existence until after the termination of the receivership.

The court having jurisdiction of receivership will usually enforce a claim that has been reduced to judgment in another court.

Pending a receivership, another court may determine a claim against the property, though it may not interfere with the possession of the receiver.

D. Suits by Receiver

1. In General

Under the general statutes governing receivers, a receiver may bring suits in an official capacity without permission of the appointing court. See Tex. Civ. Prac. & Rem. Code § 64.033.

The Texas Business Organization Code grants a corporate receiver authority to sue in any court in the receiver's name. Tex. Bus. Orgs. Code § 11.406(a)(3). A corporate receiver thus has the power and duty to pursue to judgment the corporation's claims against others and may not abandon corporate assets because litigation is required to secure them. A receiver has no right of action, however, where the corporation had none, and any claim by the receiver as a receiver is subject to the same defenses that would have been available if the claim had been presented by the corporation.

The general rule – that a receiver takes only the rights and may bring only such actions as the corporation could have brought in recovery of its assets – is subject to an exception where the corporation is insolvent. The receiver for an insolvent corporation acts in a dual capacity as trustee both for the stockholders and creditors, and as trustee for creditors, the receiver may maintain actions involving acts done in fraud of creditors even though the corporation would not be permitted to do so.

An action by a receiver is maintainable as a separate suit bearing no relation to the suit in which the receiver was appointed. The fact that a receiver has instituted a suit in the court in which the receivership is pending does not determine venue or prior jurisdiction of that court.

The right of a receiver to institute an action may not be questioned unless the receiver's appointment is shown to be void, and a receiver who institutes an action ordinarily has the same rights and is subject to the same requirements as any other litigant.

2. Actions Authorized by Receivers

A receiver is generally authorized to institute and maintain any action necessary for the vindication of the receiver's authority and for the proper administration of the estate in the receiver's hands.

A receiver is also authorized to bring the following specific actions:

1. A receiver may bring an action to enforce the bond of the receiver's predecessor or sue on unpaid stock subscriptions.
2. A receiver who acts to protect innocent creditors of an insolvent corporation acts in a dual capacity as trustee for both the stockholders and the creditors, and as trustee for the creditors, the receiver can maintain actions done in fraud of the creditors even though the corporation would not have been allowed to do so. If, however, an action for fraud is personal to a creditor, stockholder, or policyholder, a receiver may not maintain suit in the receiver's representative capacity for their joint benefit.
3. A receiver may intervene in a pending action where the circumstances require the receiver's intervention.

A receiver has no right to litigate orders of the court giving preference or priority or turning over specific property to one or more of the parties.

V. APPLICATION

A. Elements

Pursuant to Texas Civil Practice & Remedies Code § 64.001: A court of competent jurisdiction may appoint a receiver (1) in an action by a vendor to vacate a fraudulent purchase of property; (2) in an action by a creditor to subject any property or fund to its claim; (3) in an action between partners or others jointly owning or interested in any property or fund; (4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property; (5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or (6) in any other case in which a receiver may be appointed under the rules of equity.

Under subsections (1), (2) or (3), the receiver may be appointed on the application of the plaintiff in the action or another party.

The party must have a probable interest or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured. Under subsection (4), the court may appoint a receiver only if it appears that the mortgaged property is in danger of being lost, removed, or materially injured or the condition of the mortgage has not been performed and the property is probably insufficient to discharge the

mortgaged debt.

Pursuant to Texas Business Organizations Code § 11.402, any court that has subject matter jurisdiction over specific property of a Texas or foreign entity that is located in Texas and is involved in litigation has jurisdiction to appoint a receiver for that property as provided in § 11.403.

Receivers can be appointed over specific property (§ 11.403), to rehabilitate a Texas entity (§ 11.404), or to liquidate a Texas entity (§ 11.405).

Under the conditions set forth in §§ 11.409 and 11.410, a district court in the county in which the registered office of a foreign entity doing business in Texas is located has jurisdiction to appoint an ancillary receiver for the property and business when the court determines that circumstances exist that require such appointment; and a district court may appoint a receiver for all of the property, in and outside Texas, of a foreign entity doing business in Texas under the conditions set forth in § 11.410.

B. Proof

The burden of proof to show the existence of circumstances justifying appointment of a receiver rests on the party seeking the appointment. The court may receive as evidence a verified petition as well as oral testimony. Unsworn statements will not be received. When a receiver is sought in equity, it is required for the applicant to demonstrate the necessity of the appointment by legal evidence. When a receiver is sought on a statutory ground, it is unnecessary to prove the defendant's insolvency, the amount of the plaintiff's legal remedy, or the existence of other equitable grounds.

C. Notice

Notice is required as in all cases, except as set forth in any local rules allowing for ex parte consideration upon proper showing of emergency or probability of damage or dissipation to the assets.

Pursuant to Texas Rule of Civil Procedure § 695, if the receiver is to take charge of immovable property, the receivership action cannot be initiated ex parte and requires at least three (3) days' notice prior to a hearing on the appointment. *Indep. Am. Sav. Assoc. v. Preston 117 Joint Venture*, 753 S.W.2d 749 (Tex. App.—Dallas 1988, no writ).

D. Qualifications and Selection of Receiver

Pursuant to Texas Civil Practice & Remedies Code Chapter 64, a receiver must be a person who is a citizen and qualified voter of Texas at the time of the appointment, must maintain actual residence in Texas during the receivership, and not be a party, attorney or other person interested in the action for appointment of a receiver. In conflict with this, the Texas Business Organizations Code § 11.406, provides for a receiver

to be appointed over a foreign entity who is a receiver must be an individual citizen of the United States or an entity authorized to act as a receiver.

E. Receiver's Bond and Oath

The receiver must execute an oath to faithfully discharge the receiver's duties and orders of the court. Tex. Civ. Prac. & Rem. Code § 64.022. The receiver is required to post a bond in an amount set by the court and conditioned on faithful discharge of the receiver's duties and obedience to the orders of the court. Tex. Civ. Prac. & Rem. Code § 64.023; Tex. Bus. Orgs. Code § 11.406(a)(2).

F. Applicant's Bond

No receiver shall be appointed until the party applying for the receiver has filed with the clerk a good and sufficient bond, payable to the defendant in the amount fixed by the court, conditioned for the payment of all damages and costs in case it should be decided that such receiver was wrongfully appointed to take charge of property. Tex. R. Civ. P. 695(a).

G. Customary Powers

1. Typical Powers of a Receiver

A receiver may (1) take charge and keep possession of the property; (2) receive rents; (3) collect and compromise demands; (4) make transfers; and (5) perform other acts in regard to the property as authorized by the court in the order appointing receiver. Tex. Civ. Prac. & Rem. Code § 64.031.

Additionally, the court may direct the receiver to continue operation of a business. The receiver may be appointed to rehabilitate a domestic entity, and to liquidate a domestic entity. Tex. Bus. Orgs. Code §§ 11.404, 11.405.

2. Examples of Orders

See Exhibit A.

VI. MANAGEMENT OF RECEIVERSHIP

A. Reporting

As soon as possible after appointment, the receiver should file with the court an inventory of all property received. Tex. Civ. Prac. & Rem. Code § 64.032.

The receiver should also file with the appointing court, with notice to all parties and interested persons, by the twentieth day of each month commencing the month following the filing of the inventory, a full and complete report including the profit and loss statement with year-to-date figures as to the prior month's business operations, financial operations, assets, collections and disbursements. The receiver should also file on a monthly basis a report to the parties detailing all changes during the reporting period in the assets and liabilities, the operations, the checking account balances, escrow balances, cash flow position, etc.). This report should also contain a property condition

report.

Upon the termination of the receivership, the receiver should file within thirty (30) days a final report setting forth in detail the profit and loss statement during the entirety of the receivership, and a final balance sheet listing all assets and liabilities and operations.

B. Receiver's Rights to Documents and Property

A receiver may take charge and keep possession of the property, rents, collecting compromised demands, make transfers, and perform other acts as authorized by the court in the order appointing receiver.

Typical provisions in the order appointing receiver provide: for the receiver to take immediate possession and control of all real and personal property related to the subject of the receivership, all accounts, records, software, passwords, websites, computer systems, all funds and bank accounts, all books, records, and documents.

C. Administrative Claims

1. Definition

The costs of the administration of the receivership estate include both the receiver's fees and the expenses incurred subsequent to the appointment order by the receiver, whether those expenses be personal expenses, operating costs, preservation costs, or any other contract or obligation undertaken by the receiver.

2. Priority

Administrative costs are to be paid first from income, and then, subject to the lien rights of a nonconsenting lienholder, from the corpus of the estate, and finally, if necessary, by the requesting party.

3. When Applications Required

Claims against funds or property in the possession of a receiver must be presented to the court in which the receivership is pending to entitle such claims to allowance in that proceeding.

A claim in which the receiver has a personal interest should be presented by application. A receiver's fee can be established provisionally, but must be confirmed with evidence of reasonableness before the receivership concludes.

Expenses incurred in the course of administration are typically presented by periodic accounting reports. Parties may thus object as appropriate and obtain a hearing. A failure to object gives rise to waiver through laches.

A third-party claimant may present a claim to the receiver. In so doing, the creditor submits itself as a party or a quasi-party to the proceeding, and the general rules regarding setoffs are applicable. Formal intervention is not required. The court in which a receivership is pending may require claims to be presented within a specified time period after notice of

the proceedings. The court is not authorized to enact a general limitation period however. A court may bar a claimant who fails to file a proof of claim during the period authorized from participating in the distribution of the property of the domestic entity. However, a court may not order or effect a discharge of an unrepresented claim absent steps being taken to obtain personal jurisdiction over the creditor.

4. Statutory Adjustment to Common Law – Payments from Income

By statute, a receiver shall apply the earnings of the property held in receivership to the payment of the following claims in the order they are listed:

- a. Cost of suit;
- b. Wages of employees due by the receiver;
- c. Debts owed for materials and supplies purchased by the receiver;
- d. Debts due for improvements made during the receivership;
- e. Claims and accounts made against the receiver on contracts made by the receiver, among any other claims made against the receiver; and
- f. Judgments recovered in suits brought before the receiver was appointed.

The claims listed in this section have a preference lien on the earnings of the property held by the receiver.

Tex. Civ. Prac. & Rem. Code § 64.051.

5. Obligation of Requesting Party

The requesting party ordinarily stands as the guarantor of the receiver's individual costs. Likewise, to the extent of distributions to the requesting party, such party is obligated either to pay administrative expenses or to permit the receiver to deduct such expenses from distributions. However, the requesting party is not a guarantor that the receiver will operate a business successfully, and so the requesting party is not obligated to pay unsecured claims arising in such a context.

6. When Expenses Taxable as Costs

A court may shift the obligations of the requesting party in the same manner as the court may shift court costs.

7. Leases and Landlords

A junior mortgagee who has secured the appointment of a receiver to collect rental acquires a lien on the sum collected that is superior to the claim of the senior encumbrancer. If the senior encumbrancer has intervened in the junior mortgage suit and has obtained

an order extending the benefit of the receivership to the senior lienholder, the rights as acquired by the senior lienholder extend only to the rentals that are collected subsequently to the making of that order.

A receiver has the power to receive and collect rents for leased premises in the receiver's custody. Additionally, with the approval of the court, a receiver may lease or rent property in the receiver's charge for a definite term. The appointment of a receiver for the estate of a lessee does not necessarily terminate the lease. Mere inadequacy of price is not grounds for refusal to confirm a lease executed by a corporation receiver unless the inadequacy is so great as to shock the conscience, or there are additionally circumstances showing unfairness.

8. Other Contracts – Assumption or Rejection

The court in which a receivership is pending may authorize the receiver to enter into contracts pertaining to the property involved in the proceeding, and in such a case, the contract is essentially with the court. A contract is unauthorized where it is beyond the authority conferred on the receiver or beyond the power of the court to confer.

A receiver is not generally obliged to perform a contract made by the owner of the property prior to the receivership, nor is a receiver liable in damages for its breach. A receiver may, however, adopt an existing contract by, for example, exercising a right that is secured only by reason of the contract. In some circumstances, the court may require a receiver to adopt a contract, and the failure of a receiver to adopt a contract may form the basis of an action against the property or owner or the allowance of a claim against the owner.

9. Official Capacity of Receiver

The receiver is under the authority, control and supervision of the appointing court. The receiver has only the authority conferred by the appointing order, although, while not ideal, an order may broadly grant powers in equity. A receiver who acts in furtherance of the appointing order or subsequent orders is not personally responsible for the debts or obligations of the receivership estate, but rather is entitled to shelter under the court's judicial immunity.

D. Priority Tax Claims

Property in the hands of a receiver remains subject to priority tax claims. Such claims are second only to administrative expenses.

E. Secured Claims

1. In General

Secured claims retain their right to priority notwithstanding the appointment of a receiver. A receiver steps into the shoes of the party requesting the

receivership, or, alternatively, the owner of the property.

2. Non-Consenting Priority Lienholders

A receiver's administrative expenses are inferior to the lien of a secured creditor who has not appeared in the receivership or consented to it or whose rights have been determined to be inferior following proper service and due process.

3. Foreclosure

A secured creditor may not, however, disturb the receiver's possession of its collateral without making application to the appointing court. Thus, non-judicial foreclosure proceedings are void. Following the appointment of a receiver, a secured creditor must proceed through the appointing court to obtain a judicial foreclosure or its equivalent in the form of an order granting leave to foreclose.

F. Unsecured Claims

Unsecured claims arising prior to the appointment of the receiver are payable only after the satisfaction of secured claims. However, except as to federal tax liens, a receiver is not obligated to identify all secured creditors before effecting a distribution to the requesting party in satisfaction of that party's judgment if such creditors have not submitted claims to the receiver.

G. Sale of Property

1. Procedures

A sale of property in receivership must be made in accordance with the order of the court authorizing the sale. Although it is ordinarily conducted by the receiver, the sale may be carried out by the sheriff when so ordered. The receiver or selling agent must follow the court order with respect to the manner, place and terms of sale. The trial court may direct what notice of a sale by the receiver must be given and that compliance with the order is sufficient.

A sale of property in receivership is not generally effective until it is reported by the receiver and confirmed by the court, after notice to the parties. The court must determine from all the facts and evidence whether the bid received was fair and reasonable. The court may decline to accept any bid that fails to comply with the order of sale.

2. Other Liens or Interests in Property

Certificates of a receiver are not generally entitled to priority as against pre-existing liens. A lienholder who is not a party to a receivership proceeding at the time of the issuance of the certificates may contest the priority of payment as against the lienholder's claim. The power to displace a prior lien is one of extraordinary discretion, and should not be exercised unless the facts justifying displacement are clear and unequivocal.

H. Receiver's Certificates of Indebtedness

A receiver's certificate is a contractual obligation issued by a receiver under the authority and the direction of the court. Receiver's certificates are evidence of indebtedness and may determine the extent of liability thereunder and the manner and rank of payment. The certificate creates a lien for a debt incurred or for money loaned to the receiver and generally stand in the same class as ordinary obligations. However, the court may make them first liens with precedence over other debts, even though secured by mortgage liens, or the court may make the certificates subordinate to other claims. By statute, a code enforcement receiver's lien takes preference to that of a mortgage holder.

I. Effect of Bankruptcy

Although the filing of a bankruptcy of a company or individual who is, or whose assets are, subject to a receivership does not terminate the receivership, it may affect the rights and powers of the receiver to exercise authority over the entity and/or its property. 11 U.S.C. §§ 362 & 542-43. However, the bankruptcy court, after noticing hearing, may excuse compliance with the automatic stay by the receiver pursuant to the requirement in 11 U.S.C. § 543(d).

J. Duration of Receivership

Except as regulated by statute, as in the case of corporate receiverships, the duration of receivership and the tenure of the person appointed as receiver are within the control of the court in which the proceeding is pending. The term of the receiver may be limited by the order of appointment. When it is not limited, the term will ordinarily continue through the trial and decision of the main suit, until the restoration or sale of property, and the settlement of liabilities incurred pending the receivership.

Within certain specified exceptions, a court may not administer a corporation in receivership for more than three years after the date the receiver is appointed and the court must wind up the corporation's affairs within that period. Tex. Civ. Prac. & Rem. Code § 64.072(a). The Business Organization Codes set forth no restrictions on the period of judicial retention of a business entity in receivership. In the case of an operating or rehabilitating receivership, however, failure to present a feasible plan for remedying the condition of the company within twelve months after the appointment of a receiver permits an application for a liquidating receivership.

VII. TERMINATION OF RECEIVERSHIP

The court may discontinue a receivership at any time it decides the receivership is no longer necessary for the preservation of the property or the protection of the rights of the parties. The termination or the continuation of a receivership may be sought by a

motion or the application of any party to the proceeding, but an application for the retention of a receiver will be denied where the applicant is not entitled to have the receivership continued under the facts shown. A court is generally under no duty to terminate a receivership while the principal litigation remains pending or where some occasion or necessity exists for continuing the receivership. A receivership is not terminated by the withdrawal of the party on whose application the receiver was appointed. A receivership will not ordinarily be terminated so long as there are debts outstanding to be paid.

Notice of the termination of receivership must be given to all persons who are not parties to the suit but whose property would be affected by the decree.

A. Distributions of Property**1. Interim**

A court may order interim distributions of property. However, such interim distributions are subject to disgorgement until a final distribution order is entered.

2. Final

After a receiver has given an account of the administration and the receivership is terminated, the court has the power to order the receiver to dispose of the property in the receiver's possession. The funds or property remaining after the settlement of claims should be restored to its owner or distributed to the parties entitled thereto. An order directing the distribution of property by a receiver is final and not subject to collateral attack. The final order is made on the report making the ultimate distribution. The order not only governs the disposition of the property, but also protects the receiver from liability to third persons.

B. Final Fee Application

A receiver may present interim fee applications. A receiver must present a final fee application, together with evidence of the reasonable and customary nature of the fee.

C. Final Accounting

It is the right and the duty of the court to examine and approve a receiver's final account and to fix the amount of the receiver's fees and order them paid. The report or account should be on a particularity that will give the parties sufficient information to enable them to determine whether to assent or to accept to the report or any part of it. The receiver need not attach to the final account all the books, vouchers, receipts, payrolls, and records necessary to support each of the account. The report is open to objections on which the court must rule. Where objections are interposed to a final account, the resulting proceeding is in effect a civil action, the judgment in which is final and appealable by the receiver and those interested in the funds of the estate.

D. Discharge of Receiver

The discharge of a receiver must be accompanied by an order of the appointing court, on its own motion or on the motion of a party. The discharge of a receiver is a matter involving the discretion of the appointing court. The discharge of a receiver is a matter involving the discretion of the court. A receiver will be discharged when the litigation is ended, and there is no occasion for further continuation of the receivership. A receiver may be discharged when it appears that the receiver's services are no longer necessary for the preservation or operation of the property or when it is shown to be in the best interest of all concerned.

The discharge of a receiver operates to end the receiver's official existence. It terminates the authority and duties of the receiver.

An order of discharge generally brings the receivership to an end and terminates the control or jurisdiction of the court over the property. The discharge of the receiver alone, however, does not release the jurisdiction of the court as to claims that have been presented during the receivership. Nor does it affect the liability of the owner or purchaser of property in respect to injuries sustained during the receivership.

