



AMERICAN  
BANKRUPTCY  
INSTITUTE

# Northeast Bankruptcy Conference and Consumer Forum

## Creditor Remedies

### **Hon. Peter G. Cary**

U.S. Bankruptcy Court | Portland, Maine

### **Jonathan M. Horne**

Harris Beach Murtha Cullina PLLC | Boston

### **David C. Johnson**

Marcus | Clegg | Portland, Maine

### **Rob R. Vanderbeek**

Novo Advisors | New York



## CREDITOR'S REMEDIES

**Panelists:**

**Rob Vanderbeek**  
Partner, Novo Advisors

**David C. Johnson, Esq.**  
Marcus Clegg

**Jonathan M. Horne, Esq.**  
Partner, Harris Beach Murtha

**Jonathan M. Horne, Esq.**  
Partner, Murray, Plumb & Murray

**Moderator:**

**Chief Judge Peter G. Cary**  
United States Bankruptcy Court, District of Maine



## I. RECEIVERSHIPS – STATE AND FEDERAL

**Rob Vanderbeek**

Partner, Novo Advisors



### ADVANTAGES OF RECEIVERSHIP

#### **Preservation of Asset Value**

- Receivership provides immediate stabilization of distressed properties, preventing further deterioration that commonly occurs during prolonged foreclosure proceedings
- Court-appointed receivers maintain continuity of business operations
- Assets are preserved through expert oversight while legal disputes are resolved, maximizing recovery potential for all parties

#### **Speed and Cost Efficiency**

- Receivership proceedings are significantly faster and less expensive than traditional bankruptcy and foreclosure processes
- The process eliminates prolonged litigation costs while providing immediate asset protection
- Receivers can facilitate quick sales when appropriate, often achieving better market values than distressed liquidation auctions

#### **Neutral Third-Party Management**

- Receivers act as court-appointed neutral parties, serving the interests of the court rather than any specific stakeholder
- This neutrality helps resolve conflicts between borrowers, lenders, and other interested parties
- Professional receivers bring specialized expertise in operational turnarounds, and complex financial restructuring

#### **Legal Protection and Flexibility**

- Receivership provides lenders with liability protection by keeping them off title while maintaining asset control
- Courts can craft receivership orders to work within complex debt structures and intercreditor agreements
- The process offers equitable powers often beyond those available in bankruptcy proceedings





## DISADVANTAGES AND CHALLENGES

### Market and Operational Constraints

- Properties sold through receivership are typically sold "as is, where is," potentially limiting sale prices
- Receivers may lack specific local market knowledge, particularly when appointed from outside the geographic area
- Employer/employee relationships may suffer during transition periods, potentially leading to increased turnover of key employees

### Legal and Administrative Complexities

- Receivership proceedings require court approval for major decisions, potentially slowing critical business operations
- The process involves complex legal procedures and ongoing court reporting requirements
- Different states have varying receivership laws, creating inconsistencies in multi-state property portfolios

### Loss of Control for Property Owners

- Property owners experience significant loss of control once a receiver is appointed, with decision-making authority transferred to the court-appointed party
- Owners may face restrictions on accessing property income and making operational decisions

### Cost Considerations

- Receivership involves ongoing costs including receiver fees, court costs, and professional service expenses
- These costs reduce the overall recovery for creditors and can accumulate over extended receivership periods
- Receivers typically require bonding, adding additional upfront expenses to the process



## OPPORTUNITIES IN REAL ESTATE RECEIVERSHIP



### Unprecedented Market Distress

- Commercial real estate delinquency rates reached 6.30% as of February 2025, with office sector delinquencies exceeding 11% for the first time since 2000
- Multifamily delinquency rates climbed from 1.91% to 4.58% throughout 2024
- Current market conditions mirror the 2008 financial crisis, creating significant demand for receivership services
- Rising interest rates and economic uncertainty continue driving receivership demand across all commercial sectors

### Investment and Acquisition Opportunities

- Distressed properties through receivership are often available at below-market values due to inherent risks and urgent sale requirements
- REITs and institutional investors increasingly turn to receivers to identify and acquire distressed assets
- Strategic investors can expand portfolios in desirable locations through receivership acquisitions





## OPPORTUNITIES IN REAL ESTATE RECEIVERSHIP CONT.



### Professional Service Opportunities

- Receivers regularly seek qualified commercial real estate professionals for broker opinions of value (BOVs) rather than expensive formal appraisals
- Market analysis and consulting services are in high demand for lease rate assessments, tenant improvement allowances, and market positioning
- Experienced receivers often act simultaneously as owners, property managers, developers, sellers, and consultants, requiring diverse professional partnerships
- Commercial real estate professionals with receivership knowledge will be in high demand



## II. INVOLUNTARY BANKRUPTCIES

**Jonathan M. Horne, Esq.**  
Partner, Harris Beach Murtha





## INVOLUNTARY BANKRUPTCY ADVANTAGES

### Transparency and Oversight

- Debtor required to file detailed Schedules and Statement of Financial Affairs
- Section 341 meeting and Rule 2004 process provide additional discovery tools not available outside bankruptcy
- In Chapter 7, independent trustee appointed to investigate and recover assets

### Stops Asset Dissipation

- Stops ongoing asset dissipation
- Strong arm powers and preference claims available to recover prepetition transfers

### Equitable Distribution of Assets

- Trustee empowered to investigate secured creditor priority and perfection issues
- Transparent proof of claim and objection process to ensure equitable treatment of claims
- Trustee empowered to liquidate assets through a timely and orderly process

### Cost Considerations

- Overall costs of administration may be higher but are shared ratably across the estate
- Petitioning creditor costs are recoverable as an administrative expense under §503(b)



## INVOLUNTARY BANKRUPTCY RISKS

### “If You Come at the King, You Best Not Miss”

- Unsuccessful petition opens petitioning creditors to liability for the debtor’s costs and reasonable attorneys fees in defending the petition
- Petitioner that files in bad faith is subject to potential damages proximately caused by the filing and punitive damages

### Potential Clawback Liability

- Debtor’s prepetition transactions will be disclosed in bankruptcy, opening the door to potential preference and other claims against creditors

### Loss of Individual Control

- Once petition is filed, can only be dismissed after notice to all creditors and a hearing even if all petitioners and debtor consent
- Limits ability to negotiate resolution of individual claims

### Debtor Can Proceed in Chapter 11

- Debtor has option to proceed as Chapter 11 debtor in possession
- Petition may not achieve desired result



## INVOLUNTARY BANKRUPTCY STRATEGIES

### Strength in Numbers

- While generally only three creditors are necessary, better to have as many petitioning creditors as possible in the event some claims are challenged
- Do not rely on ability of other creditors to join petition after filing

### Do Your Diligence

- Debtor may not be paying your claim, but are you sure it is generally not paying its debts as they become due?
- Failure to investigate before filing may be an indication that petition was filed in bad faith

### Final Judgements are Preferred

- Debtor can disqualify petitioning creditor claim by establishing a “bona fide dispute” as to liability *or* amount
- Final unstayed judgments on the merits generally receive preclusive effect for purposes of the “bona fide dispute” test

### Have Pure Motives

- It determining bad faith, courts consider whether petitioning creditor is using involuntary proceeding in an attempt to obtain a disproportionate advantage for itself, particularly when the petitioner could have advanced its own interest in a different forum



## III. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

The Uniform Law Commission has been working on a draft uniform ABC act.

“An assignment for benefit of creditors (ABC) is a voluntary, debtor-initiated state law alternative to the bankruptcy process, state receiverships, and voluntary workouts. Though initiated by the debtor, ABCs may provide benefits to creditors as well as debtors that alternative procedures do not. However, ABC statutes vary widely from state to state, as do custom and practice; thus, the use of ABCs varies across the country. The Study Committee on Assignment for Benefit of Creditors recommended that a drafting committee be formed to address (1) state ABC law’s interaction with bankruptcy and other state and federal laws; (2) choice of law rules, including whether an ABC should be treated as a security interest; (3) court involvement in the ABC process; and (4) transparency, due process, conflicts of interest, and adequate notice procedures, particularly with respect to duties of assignees. This committee will draft a uniform or model act on the subject.”

<https://www.uniformlaws.org/committees/community-home?communitykey=b2802ec0-9273-4b6e-ad75-0188589aba45>

\* Many thanks to Edwin E. Smith, Morgan, Lewis & Bockius LLP, the Co-Chair of the Assignment for Benefit of Creditors Committee of the Uniform Law Commission, for his insight on the Uniform Law Commission’s progress on the draft.



### III. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

For a copy of the draft ABC Act, click on the link below, go to “Documents”, select “2025 Annual Meeting, and choose “Draft Assignment for the Benefit of Creditors Act.”

<https://www.uniformlaws.org/committees/community-home?communitykey=b2802ec0-9273-4b6e-ad75-0188589aba45>



### IV. OTHER ALTERNATIVES TO TRADITIONAL WORKOUTS



# Faculty

**Hon. Peter G. Cary** is Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Maine in Portland, initially appointed in January 2014. He is also a panel member of the U.S. Bankruptcy Appellate Panel for the First Circuit, a member of the First Circuit Workplace Conduct Committee, and member of the First Circuit Access to Justice Committee - Bankruptcy Court Subcommittee, a member of the First Circuit Artificial Intelligence Working Group, the chair of the Academic Recognition Committee of the National Conference of Bankruptcy Judges, the treasurer of the Maine State-Federal Judicial Council, a member of the Bankruptcy Judges Advisory Group to the Administrative Office of the U.S. Courts, and an advisory director of the Nathan & Henry B. Cleaves Law Library. Judge Cary is Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification. He received his undergraduate degree *cum laude* and Phi Beta Kappa from the University of Massachusetts at Amherst in 1982 and his J.D. *cum laude* from Boston College Law School in 1987.

**Jonathan M. Horne** is a member with Harris Beach Murtha Cullina PLLC in Boston and represents businesses and individuals in all aspects of the bankruptcy process. He represents committees, trustees and debtors in connection with commercial bankruptcy and insolvency matters, including initiating and defending bankruptcy litigation, involuntary bankruptcy proceedings, state court receiverships and advising and negotiating in connection with out-of-court workouts and forbearance agreements. In his litigation practice, Mr. Horne represents clients' interests in a wide range of commercial and business disputes, including D&O fiduciary litigation, and complex contract and construction disputes in both state and federal court. He also represents clients in ERISA benefit claims with a focus on representing insurance companies in medical benefit claim cases. Mr. Horne is listed in *The Best Lawyers in America* in the area of Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law from 2023-25, in *Massachusetts Super Lawyers* for Business Bankruptcy from 2023-24, and as a leading Bankruptcy/Restructuring lawyer in *Chambers USA*. He is a member of ABI and is admitted to practice in Massachusetts and New York. Mr. Horne received his B.A. from Wabash College and his J.D. from St. John's University School of Law.

**David C. Johnson** is an attorney with Marcus Clegg in Portland, Maine, and is experienced in a diverse range of complex civil matters in federal and state courts, as well as arbitration and mediation. Specializing in shareholder and corporate governance disputes, he has focused on complex commercial litigation, real estate litigation and construction litigation. He also has been involved in all aspects of debtor and creditor practice in bankruptcy court, with experience in matters ranging from chapter 7 liquidation cases to complex commercial chapter 11 reorganization cases. Mr. Johnson has argued matters for clients in many different venues, including the First Circuit Court of Appeals. He received his A.B. *cum laude* in 1992 from Bowdoin College and his J.D. in 1995 from Boston College Law School.

**Rob Vanderbeek, CIRA, CDBV** is a partner with Novo Advisors in Morristown, N.J., and has more than 30 years of restructuring, performance improvement and due diligence as well as litigation, valuation and forensic experience in a broad range of industries, including health care, energy,

financial services, transportation and trucking, manufacturing, mortgage products, real estate, retail, hospitality, equipment leasing and distribution. He has led many distressed companies through the restructuring and sales processes, both in and out of court, for various constituents. Mr. Vanderbeek has served as interim COO and other interim mandates related to complex cases, and has played key roles in operational cost-rationalization efforts, as well as a fiduciary in litigation support and forensic investigations. He has testified in bankruptcy court, including on DIP and cash-collateral matters. Most recently, Mr. Vanderbeek advised secured lenders with a \$200 million working capital facility to Verity Healthcare, six acute care medical centers in California. He also advised a chapter 11 trustee regarding operational stabilization, potential reopening, and the bankruptcy sale and disposition of seven critical access hospitals. Mr. Vanderbeek has advised hospitals regarding strategic alternatives and contingency-planning to facilitate a sale, including advising North Oakland Medical Center and Brookdale Medical Center Boards regarding strategic alternatives. Prior to joining Novo, he spent five and a half years at Grant Thornton, where he served as a managing director. Before that, he worked at Goldin Associates (now Teneo), a financial advisory boutique, where he was as a member of its Management Committee and ranked in the Top 25 Crisis Management Professionals in *Deal League Tables* for six years. Before joining Goldin, Mr. Vanderbeek served as a managing director in the Restructuring & Turnaround practice at Huron Consulting Group. Prior to that, he worked in the restructuring practices of AlixPartners and FTI, and earlier in his career, he worked as a bank examiner at the Federal Reserve Bank of New York. Mr. Vanderbeek received his B.S. in finance from Lehigh University, his M.B.A. from NYU Stern School and his J.D. from Pace School of Law.