AMERICAN BANKRUPTCY INSTITUTE

2019 Northeast Bankruptcy Conference and Northeast Consumer Forum

Other Nonbankruptcy Alternatives: Exchange Offers, Strict Foreclosures and Workouts

William W. Kannel, Moderator
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.; Boston

Stefanie Birbrower Greer
Prudential Insurance Company of America; Newark, N.J.

Craig R. Jalbert
Verdolino & Lowey, P.C.; Foxboro, Mass.

Lisa M. Kresge
Brennan Recupero Cascione Scungio McAllister LLP
Providence, R.I.

CONCURRENT SESSION

2019

2019 American Bankruptcy Institute's Northeast Conference

Other Nonbankruptcy Alternatives: Exchange Offers, Strict Foreclosures and Workouts

William W. Kannel, Moderator, *Member/Chair*, Bankruptcy & Restructuring Practice, **Mintz**
Stefanie Birbrower Greer, **Prudential Insurance Company of America**
Craig R. Jalbert, **Verdolino & Lowey**
Lisa M. Kresge, **Brennan Recupero Cascione Scungio McAllister**

July 13, 2019

1

Hypothetical #1 – TIA Restructuring

ABI, Inc., a Delaware corporation formed in 2010, has amassed approximately $100 million in liabilities, including its own debt (in the form of secured and unsecured notes) and an unconditional guarantee of bonds issued by its affiliate, ABI SubCo.

Both ABI entities are financially imperiled, but there's optimism among the board and most (but not all) of the holders of ABI debt. To survive, ABI must restructure its capital stack. Specifically, ABI, Inc. needs to trim off some of the principal amount of its debt, extend maturities, and especially needs to shed its guaranty of the ABI SubCo debt.

Apart from wanting to avoid the steep expense of a Chapter 11, there are additional political and practical reasons for the ABI entities to avoid a bankruptcy process. ABI, Inc. has succeeded in convincing its noteholders to participate in a consensual out-of-court restructuring, but has reached an impasse with certain of the ABI SubCo bondholders.

Approximately 80% of ABI SubCo bondholders, including a significant holder who also serves as director of ABI, Inc., have agreed to support a plan where consenting bondholders would exchange ABI SubCo bonds for equity in ABI, Inc. As part of such transaction, the outgoing bondholders would execute a consent directing the bond trustee to, *inter alia*, release the ABI, Inc. guaranty and to delete from the bond indenture a covenant prohibiting ABI SubCo from disposing of all or substantially all of its assets.

Despite (or perhaps because of) ABI's financial woes, there has been a healthy secondary market for its debt and the ABI SubCo bonds. Shortly before ABI came to terms with the majority of bondholders, Spoilers Capital, a hedge fund with a taste for distressed debt and a penchant for aggression, acquired a minority position at a deep discount from a less adventurous institution.

Spoilers Capital has refused to accept the equity-for-debt proposal and has insisted, to ABI and to the bond trustee, that proceeding with the contemplated transaction and, specifically, the release of the ABI, Inc. guaranty and covenant-stripping, would violate Spoilers' 'sacred right' to the payment of principal in accordance with the terms of the bond indenture and Section 316(b) of the Trust Indenture Act.

2

Hypothetical #2 – Strict Foreclosure

ABI, Inc., a Delaware corporation ("ABI"), is in the business of developing and manufacturing widgets for the use in production of whozits. Although it has experienced success during its lifespan, including through the development of valuable widget-related intellectual property, in recent years it has faced increasing financial difficulties.

Five years ago it entered into a loan agreement with XYZ, Inc. ("XYZ"), a Delaware corporation and a manufacturer and distributor of whozits, pursuant to which ABI received the benefit of a $100 million revolving credit facility. In order to secure ABI's payment and performance of its obligations under the loan agreement, ABI provided XYZ with a security interest in all of its assets. In addition, Walter B. Widget, founder, CEO and President of ABI, provided XYZ with a personal guaranty.

ABI also has an outstanding mezzanine debt in the amount of $20 million, as well as approximately $5 million in unsecured trade debt.

ABI quickly utilized the entirety of the $100 million facility, and, faced with increasing liquidity issues, defaulted under the terms of its loan agreement with XYZ.

ABI believes that the total value of its assets (all of which are secured by XYZ's first priority, properly perfected lien) is in the vicinity of $80 million. XYZ agrees, but also believes that it can make substantial improvements to the ABI business model to make it profitable in the near term. There are a number of synergies between XYZ's and ABI's businesses that would result in substantial cost savings and increased exposure for both businesses. In addition, XYZ is very familiar with the types of contracts utilized in ABI's business, and is comfortable that to the extent they are not readily assignable, XYZ can successfully negotiate new agreements on similar or better terms.

With the knowledge that XYZ is significantly underwater and a desire to gain access to ABI's personal property, XYZ decides to submit a formal proposal to ABI to accept ABI's collateral in full satisfaction of XYZ's security interest in accordance with Section 9-620 of the Delaware Uniform Commercial Code. After performing a lien search, XYZ determines that there are no other secured parties. Therefore, XYZ is not required to provide any further notice regarding its intentions.

ABI determines to consent to XYZ's proposal to retain all collateral in exchange for full satisfaction of its security interest. XYZ's acceptance of the collateral discharges its lien and terminates all other subordinate interests. Mr. Widget thanks his lucky stars that he did not personally guaranty the mezzanine debt, and retires to Boca.

3

Hypothetical #3 – Receivership

ABI, LLC ("ABI") is a Connecticut limited liability company formed in 2018 to purchase and develop a tract of undeveloped land in Connecticut. ABI is owned by two individuals, Amy Adams and Bob Builder. They are both residents of Connecticut.

First Bank of Connecticut ("First Bank") loaned $20 million to ABI to finance the purchase of the real property and the construction of a mixed use complex on the land. The loan is secured by a first priority mortgage on the real property.

Construction on the project is about two-thirds done. ABI has hit a few unexpected snags along the way. The construction budget is tight, but profits once the development is done and fully leased are projected to be high. Amy has started to suspect that Bob may be mismanaging funds and the two of them are having difficulty reaching agreement on decisions regarding management of ABI and the construction project.

ABI has fallen behind on its loan payments. First Bank has a large number of properties in its real estate owned (REO) inventory. First Bank's most recent as-developed appraisal and internal analysis shows that it should be paid in full if construction is completed quickly.

4

Hypothetical #4 – Out of Court Wind-Down

ABI, Inc., a Delaware corporation formed in 2010 ("ABI"), operates retail locations and employs several hundred workers in numerous states. Another victim of the death of retail, ABI's business is failing quickly, with no identifiable hopes for recovery.

After falling behind on payables, ABI is now having to pay suppliers on a COD basis, leaving the company generally current with its trade creditors. Likewise, employees are being paid on time and benefit plans are fully funded. ABI's only secured lender is oversecured and the balance sheet shows roughly $10 million in unsecured debt.

ABI's board (which includes certain of the aforementioned investors) has been advised that existing investors have a unanimous lack of appetite for throwing good money after bad. The company's efforts to raise capital from other sources have failed. Similarly, efforts to identify a third party to either buy ABI as a going concern or otherwise enter into a 'strategic partnership' have not generated any interest.

The end is near. ABI has approximately $5 million in cash and illiquid assets valued at a roughly equal amount. The board is on the verge of throwing in the towel, but wants to eliminate or reduce any personal liability that might survive a dissolution. ABI is allergic to lawyers and legal fees.

5

American Bankruptcy Institute
2019 Northeast Bankruptcy Conference

Other Nonbankruptcy Alternatives: Exchange Offers, Strict Foreclosures and Workouts

Restructuring Debt Governed by the
Trust Indenture Act

Prepared by:

William W. Kannel
WKannel@mintz.com
D: 617.348.1665

Aaron M. Williams
AWilliams@mintz.com
D: 617.348.4964

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
Boston, Massachusetts

Saturday, July 13, 2019

I. The Trust Indenture Act of 1939 (as amended, the "**TIA**")[1]

a. The TIA governs the offering of notes, bonds,[2] debentures, evidences of indebtedness and certificates of interest.

b. The TIA was enacted in the same spirit as its more well-known contemporaries, the Securities Act of 1933 and the Securities Exchange Act of 1934; to wit, "to vindicate a federal policy of protecting investors."[3]

c. In service of this aspiration, the TIA prohibits any person from selling a note, bond or debenture in a public offering[4] unless such security has been issued under an indenture qualified under and in accordance with the TIA, which requires, in turn, the retention by the issuer of a trustee to act on behalf of security holders.

II. The Sacred Rights

a. Section 316 of the TIA[5] seeks to provide a balance between (i) the rights of a majority of debtholders to take collective action upon the occurrence of an event of default under an indenture and (ii) the rights of individual debtholders, who may not agree with the majority position.

b. Section 316(a) enables the collective action of the majority and provides, in relevant part:

> The indenture to be qualified –
>
> (1) shall automatically be deemed ... to contain provisions authorizing the holders of not less than a majority in principal amount of the indenture securities ... to direct the time, method and place of conducting any proceeding for any remedy available to [the] trustee, or exercising any trust or power conferred upon such trustee, under such indenture.
>
> (2) may contain provisions authorizing the holders of not less than seventy-five per centum in principal amount of the indenture securities ... to consent on behalf of all the holders of all such indenture securities to the postponement

[1] 15 U.S.C. §§ 77aaa *et seq*.
[2] NB: Municipal bonds are exempt from the TIA. *See* TIA § 304(a)(4)(B) (importing exemption via Section 3(a)(2) of the Securities Act of 1933). However, the 'sacred rights' conferred under § 316 are almost always imported into muni indentures by contract.
[3] *See also* Bluebird Partners, L.P. v. First Fidelity Bank, N.A., 85 F. 3d 970, 974 (2d. Cir.) (explaining that the TIA was "enacted because previous abuses by indenture trustees had adversely affected the national public interest and the interest of investors in notes, bonds [and] debentures.")
[4] The TIA applies to public bond issuances under indentures involving more than $10,000,000 in aggregate principal amount of debt. *See* TIA § 304(a)(9).
[5] 15 U.S.C. § 77ppp.

> of any interest payment for a period not exceeding three years from its due date.

c. Section 316(b) balances the foregoing rights of the majority by imposing restrictions on the scope of collective action, creating the following 'sacred rights'[6] of each individual debtholder:

> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of, and interest on, such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder, except as to a postponement of an interest payment consented to as provided in [Section 316(a)(2)], and except that such indenture may contain provisions limiting or denying the right of any such holder to institute any such suit, if, and to the extent that, the institution or prosecution thereof, or the entry of judgment therein, would, under applicable law, result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.

d. In sum, Section 316(b) safeguards each debtholder's individual right (i) to receive payment of principal and interest and (ii) to institute suit for enforcement of such payments. Note the following three exceptions (two express, one unstated) to these 'sacred rights':

   i. A supermajority (75% or more) of debtholders may agree to postpone interest payments for a period of no more than three years after such payments are due.[7]

   ii. The sacred right to sue for payment is abridged by limiting such right to the extent that such suit would result in the release of the trustee's lien on collateral granted under the indenture.[8] This exception is because of laws in some jurisdictions that require a plaintiff bringing suit for payment of a secured debt to also bring a parallel suit to realize on the related collateral, with the failure to do so constituting a waiver of the security.[9]

---

[6] In addition to the 'sacred rights' conferred within Section 316, indentures qualified under the TIA are deemed to include, by operation of law, various other terms, including trustee requirements (§ 310), information rights (§§ 312 and 313), period reporting obligations (§ 314) and certain duties of the trustee (§ 316). *See* TIA § 318(c).
[7] TIA § 316(a)(2).
[8] TIA § 316(b).
[9] *See* George W. Shuster, Jr. "The Trust Indenture Act and International Debt Restructurings," 14 ABI L. REV. 431, 436 (2006) (citing the congressional record).

iii. The third, unstated exception to the sacred rights concerns nonconsensual restructuring implemented through federal bankruptcy proceedings.[10]

III. Competing Interpretations of the Sacred Rights: Legal v. Practical

a. An obligor or majority bondholder group seeking a more flexible array of restructuring options might argue that Section 316(b) protects only a *legal* right to payment, and not the *practical* ability to be paid.

b. Conversely, a bondholder or minority bondholder group seeking to prevent a restructuring could argue that the statute prohibits the impairment of not only the right to institute suit for the enforcement of such payment, but also the *practical* impairment of the right to receive payment.

c. These theories have been battle-tested and, at present, the narrower construction, that Section 316(b) protects only a *legal* right to payment, has prevailed. The related rulings and reasoning are discussed below; see esp. the *Marblegate* cases.

IV. Case Law Interpreting Section 316(b)

a. *Federated Strategic Income Fund v. Mechala Group Jamaica, Ltd.*[11]

i. The Mechala Group, a holding company for a variety of operating subsidiaries, including Jamaica's largest developer of the island's second largest food distributor, suffered significant financial setbacks owing primarily to the decline of the Jamaican economy. The plaintiffs, Federated, were the beneficial owners of certain notes issued by Mechala under two indentures.

ii. Mechala sought to conduct a tender offer for such notes, which offer required consent to significant amendments to the indentures, including the elimination of subsidiary guarantees and the deletion of covenants limiting affiliate transactions. Ultimately, Mechala would have transferred substantially all of its assets to its subsidiaries.

[10] *See* In re Delta Air Lines, Inc., 370 B.R. 537, 550 (Bankr. S.D.N.Y. 2007) ("It is self-evident that Section 316(b) could not have been intended to impair the capacity of a debtor and its creditors to restructure debt in the context of bankruptcy. The cases have uniformly recognized that reorganization proceedings in Chapter 11 are not within the purview of TIA Section 316(b)."); s*ee also* Argo Fund Ltd. v. Bd. of Dirs. Of Telecom Arg., S.A. (*In re* Bd. of Dirs. Of Telecom Arg., S.A.), 528 F.3d 162, 172 (2d Cir. 2008) (Sotomayor, J.) (agreeing with and quoting *Delta*).
[11] 1999 U.S. Dist. LEXIS 16996 (S.D.N.Y. Nov. 2, 1999).

iii. Federated sought to enjoin the proposed tender offer, arguing the amendments required unanimous consent under the TIA.

iv. The court determined "[i]t is beyond peradventure that when a company takes steps to preclude any recovery from noteholders for payment of principal coupled with the elimination of the guarantors for its debt, that such action ... constitute[s] an 'impairment' or 'affect' the right to sue for payment"[12] and held that the plaintiffs had shown a likelihood of success on the merits of a TIA claim. The court granted the injunction.

b. *In re Northwestern Corp.*[13]

i. Northwestern, the debtor, had previously acquired substantially all assets of Montana Power Company ("MPC") and assumed its obligations under an indenture under which MPC had issued certain debentures. In connection with such assumption, Northwestern executed a supplemental indenture, which had the effect of subordinating the MPC securities to Northwestern's existing debt. Northwestern subsequently filed under Chapter 11 and proposed a plan that featured a poor recovery for the MPC holders.

ii. The MPC holders asserted, in the context of a fraudulent conveyance, that the assumption and subordination had inappropriately relegated them to the bottom of the heap of Northwestern's creditors.

iii. The court held that TIA § 316(b) "applies to the holder's *legal* rights and not the holder's *practical* rights to the principal and interest itself,"[14] and that the earlier transaction was not an impairment of the holders' rights insofar as Northwestern had assumed MPC's payment obligations and such assumption did not require a guarantee of solvency.

c. *YRC Worldwide*[15]

i. YRC Worldwide had issued notes subject to two indentures. As part of a restructuring effort, YRC proposed to conduct an exchange offer whereby holders would exchange their interests in the notes for equity in YRC and

[12] Id. at *21-22.
[13] Magten Asset Management Corp. v. Northwestern Corp. (*In re* Northwestern Corp.), 313 B.R. 595 (Bankr. D. Del. 2004)
[14] Id. at 600.
[15] YRC Worldwide Inc. v. Deutsche Bank Trust Co. Americas, 2010 U.S. Dist. LEXIS 65878 (D. Kan. July 1, 2010)

would consent to indenture amendments to delete, *inter alia*, a put right and a covenant prohibiting YRC form merging or transferring substantially all of its assets unless the transferee agreed to assume all of YRC's obligations under the indentures.

ii. More than 90% of each class of holders accepted the exchange offer and consented to the proposed amendments. The indentures trustees, however, declined to execute the supplemental indentures that would effect such amendments, on the basis that, under TIA § 316(b), the proposed deletions would require unanimous consent of the holders. YRC sued for declaratory judgment.

iii. The court's ruling turned on whether the put dates constituted payment due dates for purposes of TIA § 316(b). The court determined that the put provision conferred upon each holder an absolute right to receive its principal on a date certain. Therefore, the court agreed with the trustees that, by operation of TIA § 316(b), deletion of the put right required unanimous consent.[16]

iv. However, the court also found that deletion of the indenture provision barring the merger or transfer of substantially all assets (absent assumption by the transferee) did not require unanimous consent. The court considered the *Mechala* and *Northwestern* cases and, more persuaded by the latter, held that "whatever its affect [sic] on the holders' ultimate ability to recover their investment, the deletion of [the subject provision] does not affect the holder's *legal* rights to receive payments from [YRC] or the guarantors or to institute suit to enforce those payment obligations."[17]

d. *Marblegate* – The S.D.N.Y. Decisions[18]

i. Education Management Corp. ("EM Corp"), a for-profit higher education institution that derived roughly eighty percent of its revenue from federal student aid programs, proposed a coercive tender offer as part of an out-of-court restructuring of $1.5 million of debt, which included indebtedness pursuant to guarantees of its subsidiaries' secured debt and unsecured

[16] *See* id. at *15.
[17] Id. at *23.
[18] Marblegate Asset Management v. Education Management Corp., 75 F. Supp. 3d 592 (S.D.N.Y. 2014) ("*Marblegate I*") and Marblegate Asset Management v. Education Management Corp., 111 F. Supp. 542 (S.D.N.Y. 2015) ("*Marblegate II*"). The S.D.N.Y. rulings in *Marblegate* were later overturned by the Second Circuit, discussed *infra*.

notes. In particular, EM Corp was grappling with $217 million of unsecured notes issued by its wholly-owned subsidiary, Education Management LLC ("EM LLC"), which EM Corp had guaranteed. (Restructuring through a bankruptcy process was a non-starter because bankruptcy would have rendered EM Corp ineligible to continue to receive federal funding through Title IV of the Higher Education Act of 1965, which accounted for the significant majority of EM Corp's revenues.)

ii. Pursuant to a restructuring support agreement, creditors had been presented with two paths. Either (1) an exchange of EM LLC notes for EM Corp common stock, resulting in an approximately 67% reduction in value for noteholders, or (2) an alternative path containing a variety of carrots and sticks designed to motivate consent. The first path required unanimity, which the noteholders could not achieve.

iii. The second path contemplated a four-step transaction. First, EM Corp's secured lenders would release EM Corp from the guaranty securing their credit agreement and, pursuant to the terms of the indenture governing the EM LLC notes, thereby trigger a corresponding release of the guaranty of the notes. Second, the secured lenders would foreclose on substantially all of the assets of EM Corp and its subsidiaries. Third, the secured lenders would immediately convey those same assets back to a newly formed EM Corp subsidiary. Fourth, the newly formed subsidiary would distribute new debt and equity to *consenting* creditors; leaving non-consenting creditors only with claims against an entity left with no assets by virtue of the foregoing sequence of events.

iv. The majority of EM Corp's creditors were amenable to the second path. But minority holdouts challenged the transaction and sought a preliminary injunction. Although the *Marblegate I* court expressly rejected *Northwestern* and *YRC* and held that TIA § 316(b) "protects the *ability*, and not merely the form right, to receive payment"[19] and, thus, the holders' arguments would likely succeed on the merits, the court declined to issue an injunction on other grounds.[20]

[19] *Marblegate I* at 612 (emphasis in original).
[20] The factors that militated against the injunction were (i) a likelihood of irreparable harm, (ii) that the balance of hardships tipped in EM Corp's favor regardless of the bondholders' likelihood of success, and (iii) advancement of the public interest.

v. Following consummation of the transaction, the court, in *Marblegate II*, doubled down on its broad interpretation of TIA § 316(b) and held that permitting such a transaction "would allow the next cycle of reorganizations [to] take place on a voluntary basis without supervision of any court or administrative agency ... so long as the mechanism involves foreclosure and asset sale rather than simple amendment. The Court declines to so enfeeble the Trust Indenture Act."[21] The EM parties subsequently appealed to the Second Circuit, discussed *infra*.

e. *Caesars*[22]

i. Several months after *Marblegate II*, the Southern District of New York again confronted the scope of Section 316(b) protections and again concluded that the statute protections the *practical ability* (and not just the technical right) of holders to receive payment of principal and interest.

ii. Caesars Entertainment Corporation ("CEC") and its subsidiaries, including Caesars Entertainment Operating Company ("CEOC") owned and operated dozens of casinos throughout the United States. In 2010, CEOC had issued $1.5 billion in senior notes that were unsecured, but guaranteed by CEC. In 2014, Caesars entities purchased a substantial majority of notes at par plus accrued in exchange for selling holders' agreement to support a future restructuring of CEOC, release of CEC's guaranty and elimination of a covenant restricting disposition by CEOC of substantially all of its assets. Minority bondholders, who viewed the CEC guaranty as the only reliable source of payment on the notes – filed suit on the theory that such changes were nonconsensual changes to payment rights in violation of TIA § 316(b).

iii. In ruling against Caesars' motion to dismiss, the court relied on *Mechala* and its *Marblegate* rulings to conclude that the holders' allegations that the transaction effectively "stripped plaintiffs of the valuable ... Guarantees leaving them with an empty right to assert a payment default from an insolvent issuer are sufficient to state a claim under § 316(b)."[23]

---

[21] *Marblegate II* at 548 (internal quotations omitted).
[22] MeehanCombs Global Credit Opportunities Funds, LP v. Caesars Entertainment Corp., 80 F. Supp. 3d 507 (S.D.N.Y. 2015) ("*Caesars I*") and BOKF, N.A. v. Caesars Entertainment Corp., 144 F. Supp. 3d 459 (S.D.N.Y. 2015) ("*Caesars II*").
[23] *Caesar I* at 517.

iv. On the same day that the court ruled on the motion to dismiss, CEOC and certain of its subsidiaries (but not CEC) filed voluntary Chapter 11 petitions.[24] The filing constituted an Event of Default under the subject indentures and thus triggered CEC's obligations under its guaranty. The indenture trustees demanded payment, but CEC argued the guaranty had been released and that it had no obligations thereunder. The trustees sued.

v. The court denied the trustees' motion for summary judgment and held that the trustees did not meet their burden of demonstrating that there was no genuine dispute of material fact as to whether releasing the guaranty effected a nonconsensual debt restructuring.

vi. But in seeking to harmonize any inconsistencies as between its holdings in *Marblegate* and *Caesars I* with its ruling in *Caesars II*, and to identify guideposts to assist with the determination of what actions run afoul of Section 316(b), the court in *Caesars II* provided two bright-line rules:

> "It is indisputable that if CEOC had unilaterally adjusted the amount of principal or interest it would pay on a note, that would be an impairment under § 316(b). Similarly, renegotiating a debt obligation with a majority of noteholders to the detriment of a nonconsenting minority *under the same indenture* would be an impairment."[25]

vii. However intentioned, the foregoing statement left many questions unanswered. The *Caesars II* opinion further begged the question of how a court should assess whether "an impairment may also occur whether a company restructures debt arising under *other* notes in the context of an out-of-court reorganization, leaving some noteholders with an unaltered forma right to payment, but no practical ability to receive payment."[26] Likewise, the court acknowledged that the release of a guaranty may, in certain circumstances, constitute impermissible impairment. Rather than articulating more concrete principles, the court advocated a fact-specific analysis requiring transactions must "be analyzed as a whole to determine if the overall effect was to achieve a debt restructuring that impaired plaintiffs' right to payment."[27]

[24] Second lien noteholders had filed an involuntary Chapter 11 against CEOC two days earlier.
[25] *Caesars II* at 472 (emphasis in original).
[26] Id. at 474 (emphasis in original).
[27] Id. at 475.

f. *Marblegate* – The Second Circuit Decision[28]

i. On appeal, the Second Circuit reversed the district court's rulings in *Marblegate* and erased much of the uncertainty owing to inconsistent rulings in *Marblegate* and *Caesars*.

ii. Following its own lengthy exposition on the legislative history of the TIA, the Second Circuit adopted a narrow reading of § 316(b), holding that the statute prohibits only non-consensual amendments to an indenture's core payment terms and does not provide an absolute and unconditional right to payment.[29] Because the EM LLC was not modified with respect to principal, interest and/or maturity terms, the Second Circuit concluded that the holders retained the legal right to payment and, therefore, the TIA's sacred rights had not been violated.

iii. The Second Circuit expressed concern that adopting the district court's broad reading of TIA § 316(b) to encapsulate the *practical* ability (in addition to the *legal* ability) to collect payments "leads to both improbable results and interpretive problems" and noted that "if the 'right ... to receive payment' means a bondholder's practical ability to collect payment, then protecting the 'right ... to institute suit for the enforcement of any such payment would be superfluous."[30]

iv. In dissent, Judge Straub described the proposed restructuring as giving to bondholders "a Hobson's choice" between altered payments rights or no payments at all. In Judge Straub's estimation, such circumstances constituted a clear violation of TIA § 316(b).

[28] Marblegate Asset Management, LLC v. Education Management Corp., 846 F.3d 1 (2d Cir. 2017)
[29] *See* id. at 17.
[30] *Id*. at 7.

American Bankruptcy Institute
2019 Northeast Bankruptcy Conference

Not Just Your ABC's:
Practical Alternatives to a Business Bankruptcy Filing

Prepared by:

Lisa M. Kresge
lkresge@brcsm.com
D: 401-453-2300

Brennan, Recupero, Cascione, Scungio & McAllister LLP
Providence, Rhode Island

Saturday, July 13, 2019

I. INTRODUCTION

In 2018, there were a total of 5,475 Chapter 11 (business reorganization) bankruptcy filings. Chapter 11 bankruptcy cases can be both expensive and time consuming and do not always result in a successful reorganization. As defaults increase and credit markets tighten not only do you see increases in business bankruptcy filings, but you also see a rise in bankruptcy alternatives. While there are many advantages to a bankruptcy filing, it is not always the best and certainly not the only option for a troubled company. Some of the reasons a troubled company or one of its creditors may pursue an alternative to a bankruptcy filing include: costs, timing, litigation risks and perceived reputational damage. The purpose of these materials is to explain and summarize some of the common alternatives to a bankruptcy filing.

II. RECEIVERSHIPS

(a) Overview. One of the more popular alternatives to a bankruptcy filing is a receivership proceeding. A receivership involves a court order that puts all property subject to a dispute in a court action under the control of an independent party (the receiver) for the purpose of securing and sometimes selling the property. The receiver is able to preserve the property and/or operate a business and ultimately facilitate a transition (i.e., an orderly liquidation, a sale as a going concern, etc.). A receiver can be appointed for a broad purpose (i.e, operating or liquidating a business) or for a very, specific purpose (i.e., protecting a specific piece of property from a foreclosure sale).

(b) Equity Receiverships. For centuries, English courts of chancery used receivers as an equitable remedy to protect creditors. 1 Ralph E. Clark, THE LAW AND PRACTICE OF RECEIVERS § 4 (3d ed. 1959) ("Clark on Receivers"). This practice carried over to the United States. Clark on Receivers §§ 5-10. E.g., *Petrovis v. King Holdings*, 56 R.I. 498, 501 (to "conserve the assets of the corporation and preserve its property for those interested therein, equity has inherent jurisdiction, independent of statue, to appoint a receiver").

(c) Statutory Receiverships. Courts can also appoint a receiver under various state statutes. For example, R.I. Gen. Laws § 7-1.2-1314 (covering business corporations), R.I. Gen. Laws § 7-6-60 (covering non-business corporations) and R.I. Gen. Laws § 7-16-40 (covering limited liability companies).

(d) Types of Receivers. Receivers can be divided into (i) those appointed by the court, (ii) those appointed out of court by agreement of the parties and (iii) those appointed by governmental officials[1].

(e) Uniform Commercial Real Estate Receivership Act (UCRERA). The standards for the appointment of a receivership vary from state to state and sometimes from court to court. Without a uniform statute, there are often questions about whether a broad receivership order can override other state laws on debt collection, lien rights, foreclosure procedures, etc.. As a result, in July 2015, the National Conference of Commissioners on Uniform Laws adopted a Uniform Commercial Real Estate Receivership Act ("UCRERA"). UCREARA has been adopted in Maryland (October, 1, 2019), Michigan (May 7, 2018), Nevada (October 1, 2017), Oregon (January 1, 2018), Tennessee (July 1, 2018) and Utah (May 9, 2017). It is pending in three (3) states: Arizona (pending SB1216), Connecticut (HB 7271) and North Carolina (H919 and S64. A copy of the text of URCRA is attached.

(f) State Court Jurisdiction and Venue. A state court's jurisdiction is confined to the boundaries of the state and thus, a receiver appointed by a state court can only exert control over property within that jurisdiction. Venue laws may also limit where a receivership action may be brought.

(g) Procedure and Basis for Appointment of a Receiver. The procedure and basis for the appointment of a receiver is generally analogous to what is required for injunctive relief. Typically, a request for the appointment of a receiver is made by separate motion ancillary to an underlying complaint (i.e., a breach of contract or foreclosure lawsuit). Often the request is accompanied by an affidavit verifying the underlying facts in support of the request.

(h) Contractual Right to a Receiver. Most commercial loan security documents provide a secured creditor with the right to appoint a receiver. Courts may allow the request for the appointment of a receiver based on the contractual right or consider that contractual right as a factor in favor of the appointment of a receiver under general equitable principles.

(i) Rights and Responsibilities of a Receiver. The rights and responsibilities of a receiver are granted and defined by the order of appointment. A sample form of an order of appointment is attached.

---

[1] Comptroller of the Currency of the United State may appoint a receiver of a national bank. U.S. Comp. Stat. (1916)

(j) Advantages of a Receivership. Advantages of a receivership include:

- a receivership may cost less and be quicker, (for several reasons, including less reporting obligations);
- there is less stigma as opposed to a bankruptcy;
- there is generally more flexibility to tailor remedies;
- a creditor may have input in who gets appointed as receiver; and
- a receivership can be used against organizations that cannot be forced into an involuntary bankruptcy (i.e., churches and non-profits).

(k) Disadvantages of a Receivership. Some of the disadvantages of a receivership include:

- there is no automatic stay of litigation;
- a receivership has jurisdictional limitations which means that actions in other jurisdictions can continue;
- a receiver generally has less power and control than a bankruptcy trustee;
- a debtor can always file for bankruptcy while a receivership is ongoing; and
- the law of receiverships is inherently less predictable than bankruptcy law.

III. ASSIGNMENT FOR THE BENEFIT OF CREDITORS

(a) Overview. Similar to a receivership, in an assignment for the benefit of creditors (ABC), a troubled company voluntarily assigns title, custody and control of its assets to an independent third party, the assignee. The assignee acts as a fiduciary on behalf of all creditors of a business and is responsible for liquidating the assets of the business and distributing proceeds to creditors. It is not used to rehabilitate a business, but is instead a vehicle used to sell or liquidate a business. In some, but not all states, ABCs are required to be a court supervised process. Thirty-three states and the District of Columbia have statutes governing ABCs.[2]

(b) Assignee Qualifications. Generally, the assignee is an insolvency professional, but not necessarily a lawyer. It is also generally required that they assignee be "disinterested."

(c) Avoidance Powers. Section 9-301 of the Uniform Commercial Code (where enacted) gives an assignee the rights of a lien creditor. Accordingly, an assignee can preserve assets of the assignment estate for the benefit of all creditors and can use its lien creditor statute to recover assets under applicable fraudulent transfer laws.

---

[2] See e.g., DEL CODE ANN. Tit. 10, §§7381-7387 (1999); MASS GEN LAWS, Ch. 203, §§40-42 (2000), N.Y. DEBT & CRED. LAW §§1-24 (1999), RI GEN LAWS, §§10-4-1 – 10-4-13 (1999); VT STAT. ANN. , §§2151-2158.

(d) Advantages. Some of the advantages of an ABC include:

- the administrative costs may be lower than with bankruptcy;
- the process may be less formal, more streamlined, and quicker;
- management chooses the assignee; and
- publicity is minimized (a sale has less stigma and may yield higher returns).

(e) Disadvantages. Some of the disadvantages of an ABC include:

- the assignee has a duty to all creditors;
- the assignee cannot force transfers of leases or contracts without the other party's consent if such restriction is in the lease or contract or arises under applicable law (is also often a ground for termination the lease or contract);
- there is no automatic stay of litigation;
- an ABC is grounds for a bankruptcy filing;
- a bankruptcy trustee in a subsequent proceeding can avoid distributions made by an assignee; and
- creditors can sue the debtor for deficiencies.

III. OUT-OF-COURT WORKOUTS

(a) Overview. An out-of-court workout is when the debtor and its creditors reach a consensual agreement about outstanding obligations and repayment terms without a formal court proceeding. Out-of-court workouts are less common given the difficulty of reaching agreement among multiple creditors who are willing to renegotiate repayment terms. An out-of-court workout could take the form of an agreement to extend the original term (due date) and/or an agreement to accept less than full payment.

(b) Advantages. Some of the advantages of an out-of-court workout include:

- they are less expensive (i.e., shorter timelines, fewer parties-in-interest, etc.);
- debtors and creditors control the process (i.e., no or less judicial oversight, notice required, increased potential for private sale, etc.); and
- there is limited reputation damage.

(c) Disadvantages. Some of the disadvantages of an out-of-court workout include:

- underperforming management may end up staying in place;
- there is no automatic stay of litigation;
- leases and contracts cannot be terminated or assigned without the parties' consent if such restriction is in the lease or contract or arises under applicable law (i.e., contractual and legal limitations on assignment and termination are enforceable);

- sales are not free and clear of any interest (including liens, security interests, and other encumbrances);
- there is no cap on lease damages or employee-related claims; and
- creditors or equity holders may not agree to the workout and block the entire restructuring (i.e., cannot bind dissenting creditors and equity holders).

IV. ARTICLE 9 SALES

(a) Overview. An Article 9 sale is an out-of-court process in which a secured lender exercises its lien rights with respect to personal property in accordance with the Uniform Commercial Code (UCC). The secured party may repossess its collateral and sell it at a public auction or through a private sale or the secured party may accept the collateral in satisfaction of the debt. The UCC outlines the parameters for the transfer and the distribution of proceeds.

(b) Steps in a Secured Party Sale. The essential steps in conducting any secured party sale are (1) a valid security interest, (2) structure the sale properly and build a record of commercial reasonableness, (3) notice of the sale to the proper parties; and (4) conduct the sale.

(c) Commercially Reasonable. Underlying every secured party sale is the requirement that "every aspect of a disposition of collateral, including the method, manner, time, place, and other terms must be ***commercially reasonable***." UCC § 9-610(b). Commercial reasonableness is a nebulous, but workable concept. Any party aggrieved by the sale may challenge it after the fact. For these reasons, strict compliance with the UCC requirements is essential. A sale is likely to generate a better net result if the sale takes into account the nature of the collateral and the market (i.e., reach out to the most likely types of buyers, establish evidence of value of the goods, decide whether to give potential buyers the opportunity to inspect the goods, consider whether to clean up or otherwise prepare the goods for sale).

(d) Notice of Sale. Notice of the sale should go to the debtor, any guarantors, the bankruptcy trustee, receiver or assignee of the debtor or any guarantor, any known secured parties, secured parties who show on a UCC search, the IRS if it has filed a notice of federal tax lien, any other party who has given notice to the secured creditor, and any known lawyers of such parties. A specimen secured party sale notice is attached.

(e) Advantages. Some of the advantages of foreclosure sale or an Article 9 secured party sale include:

- it is generally a quicker and less expensive process than bankruptcy;
- junior liens are eliminated without judicial intervention;

- customers, vendors and unsecured creditors do not get notice of the sale; and
- creditors and interested parties without lien rights have less opportunities to hold up the process.

(f) Disadvantages. Some of the disadvantages of a foreclosure or an Article 9 sale include:

- litigation may result over the commercial reasonableness of the sale (secured creditor needs to comply with all the ground rules set forth in Article 9);
- there is no automatic stay of litigation; and
- the buyer does not get a court order indicating that the sale is not free and clear of all liens.

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FOURTH YEAR
WILLIAMSBURG, VIRGINIA
JULY 10 - JULY 16, 2015

WITHOUT PREFATORY NOTE OR COMMENTS

July 29, 2016

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Commercial Real Estate Receivership Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Affiliate" means:

(A) with respect to an individual:

(i) a companion of the individual;

(ii) a lineal ancestor or descendant, whether by blood or adoption, of:

(I) the individual; or

(II) a companion of the individual;

(iii) a companion of an ancestor or descendant described in clause (ii);

(iv) a sibling, aunt, uncle, great aunt, great uncle, first cousin, niece, nephew, grandniece, or grandnephew of the individual, whether related by the whole or the half blood or adoption, or a companion of any of them; or

(v) any other individual occupying the residence of the individual; and

(B) with respect to a person other than an individual:

(i) another person that directly or indirectly controls, is controlled by, or is under common control with the person;

(ii) an officer, director, manager, member, partner, employee, or trustee or other fiduciary of the person; or

(iii) a companion of, or an individual occupying the residence of, an individual described in clause (i) or (ii).

(2) "Companion" means:

(A) the spouse of an individual;

(B) the [registered] domestic partner of an individual; or

(C) another individual in a civil union with an individual.

(3) "Court" means [identify court of general equity jurisdiction in this state].

(4) "Executory contract" means a contract, including a lease, under which each party has an unperformed obligation and the failure of a party to complete performance would constitute a material breach.

(5) "Governmental unit" means an office, department, division, bureau, board, commission, or other agency of this state or a subdivision of this state.

(6) "Lien" means an interest in property which secures payment or performance of an obligation.

(7) "Mortgage" means a record, however denominated, that creates or provides for a consensual lien on real property or rents, even if it also creates or provides for a lien on personal property.

(8) "Mortgagee" means a person entitled to enforce an obligation secured by a mortgage.

(9) "Mortgagor" means a person that grants a mortgage or a successor in ownership of the real property described in the mortgage.

(10) "Owner" means the person for whose property a receiver is appointed.

(11) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(12) "Proceeds" means the following property:

(A) whatever is acquired on the sale, lease, license, exchange, or other disposition

of receivership property;

(B) whatever is collected on, or distributed on account of, receivership property;

(C) rights arising out of receivership property;

(D) to the extent of the value of receivership property, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to the property; or

(E) to the extent of the value of receivership property and to the extent payable to the owner or mortgagee, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to the property.

(13) "Property" means all of a person's right, title, and interest, both legal and equitable, in real and personal property, tangible and intangible, wherever located and however acquired. The term includes proceeds, products, offspring, rents, or profits of or from the property.

(14) "Receiver" means a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, and, if authorized by this [act] or court order, transfer, sell, lease, license, exchange, collect, or otherwise dispose of receivership property.

(15) "Receivership" means a proceeding in which a receiver is appointed.

(16) "Receivership property" means the property of an owner which is described in the order appointing a receiver or a subsequent order. The term includes any proceeds, products, offspring, rents, or profits of or from the property.

(17) "Record", used as a noun, means information that is inscribed on a tangible medium or that is stored on an electronic or other medium and is retrievable in perceivable form.

(18) "Rents" means:

(A) sums payable for the right to possess or occupy, or for the actual possession or occupation of, real property of another person;

(B) sums payable to a mortgagor under a policy of rental-interruption insurance covering real property;

(C) claims arising out of a default in the payment of sums payable for the right to possess or occupy real property of another person;

(D) sums payable to terminate an agreement to possess or occupy real property of another person;

(E) sums payable to a mortgagor for payment or reimbursement of expenses incurred in owning, operating, and maintaining real property or constructing or installing improvements on real property; or

(F) other sums payable under an agreement relating to the real property of another person which constitute rents under law of this state other than this [act].

(19) "Secured obligation" means an obligation the payment or performance of which is secured by a security agreement.

(20) "Security agreement" means an agreement that creates or provides for a lien.

(21) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

(22) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

SECTION 3. NOTICE AND OPPORTUNITY FOR HEARING.

(a) Except as otherwise provided in subsection (b), the court may issue an order under this [act] only after notice and opportunity for a hearing appropriate in the circumstances.

(b) The court may issue an order under this [act]:

(1) without prior notice if the circumstances require issuance of an order before notice is given;

(2) after notice and without a prior hearing if the circumstances require issuance of an order before a hearing is held; or

(3) after notice and without a hearing if no interested party timely requests a hearing.

SECTION 4. SCOPE; EXCLUSIONS.

(a) Except as otherwise provided in subsection (b) or (c), this [act] applies to a receivership for an interest in real property and any personal property related to or used in operating the real property.

(b) This [act] does not apply to a receivership for an interest in real property improved by one to four dwelling units unless:

(1) the interest is used for agricultural, commercial, industrial, or mineral-extraction purposes, other than incidental uses by an owner occupying the property as the owner's primary residence;

(2) the interest secures an obligation incurred at a time when the property was used or planned for use for agricultural, commercial, industrial, or mineral-extraction purposes;

(3) the owner planned or is planning to develop the property into one or more dwelling units to be sold or leased in the ordinary course of the owner's business; or

(4) the owner is collecting or has the right to collect rents or other income from the property from a person other than an affiliate of the owner.

(c) This [act] does not apply to a receivership authorized by law of this state other than this [act] in which the receiver is a governmental unit or an individual acting in an official capacity on behalf of the unit [except to the extent provided by the other law].

(d) This [act] does not limit the authority of a court to appoint a receiver under law of this state other than this [act].

(e) Unless displaced by a particular provision of this [act], the principles of law and equity supplement this [act].

Legislative Note: *In many states, there are statutes under which a governmental unit or official may be appointed as a receiver for an organization such as a hospital, insurance company, or other organization affected with a public interest. This act generally would not govern the receivership, but the bracketed language at the end of subsection (c) would permit a state to modify its existing receivership statute to incorporate some or all provisions of this act.*

SECTION 5. POWER OF COURT. The court that appoints a receiver under this [act] has exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property.

Legislative Note: *This section is appropriate in a state where a court in one county, circuit, or district may issue orders with statewide effect and has the power to act on property located in another county, circuit, or district within the state. In a state where a court in one county, circuit, or district may appoint a receiver but an order entered by the court in that county, circuit, or district lacks statewide effect, the state should modify this section to make clear that an order of a court appointing a receiver under this act has statewide effect.*

SECTION 6. APPOINTMENT OF RECEIVER.

(a) The court may appoint a receiver:

(1) before judgment, to protect a party that demonstrates an apparent right, title, or interest in real property that is the subject of the action, if the property or its revenue-producing potential:

(A) is being subjected to or is in danger of waste, loss, dissipation, or impairment; or

(B) has been or is about to be the subject of a voidable transaction;

(2) after judgment:

(A) to carry the judgment into effect; or

(B) to preserve nonexempt real property pending appeal or when an execution has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the judgment; [or]

(3) in an action in which a receiver for real property may be appointed on equitable grounds[; or

(4) during the time allowed for redemption, to preserve real property sold in an execution or foreclosure sale and secure its rents to the person entitled to the rents].

(b) In connection with the foreclosure or other enforcement of a mortgage, [a mortgagee is entitled to appointment of][the court may appoint] a receiver for the mortgaged property if:

(1) appointment is necessary to protect the property from waste, loss, transfer, dissipation, or impairment;

(2) the mortgagor agreed in a signed record to appointment of a receiver on default;

(3) the owner agreed, after default and in a signed record, to appointment of a receiver;

(4) the property and any other collateral held by the mortgagee are not sufficient to satisfy the secured obligation;

(5) the owner fails to turn over to the mortgagee proceeds or rents the mortgagee

was entitled to collect; or

(6) the holder of a subordinate lien obtains appointment of a receiver for the property.

(c) The court may condition appointment of a receiver without prior notice under Section 3(b)(1) or without a prior hearing under Section 3(b)(2) on the giving of security by the person seeking the appointment for the payment of damages, reasonable attorney's fees, and costs incurred or suffered by any person if the court later concludes that the appointment was not justified. If the court later concludes that the appointment was justified, the court shall release the security.

Legislative Note: *Subsection (a)(4) permits the court to appoint a receiver for the property and its rents during the redemption period. It would be appropriate in a state that provides a post-sale statutory redemption right.*

Subsection (b) includes bracketed alternatives. Under the first, a mortgagee is entitled to appointment of a receiver in the six circumstances listed in subsection (b). Under the second, these six circumstances would justify appointment of a receiver, but appointment would be subject to the court's discretion rather than an entitlement. Under Section 7 of the Uniform Assignment of Rents Act (UARA), an assignee of rents is entitled to appointment of a receiver under the circumstances expressed in subsection (b). Thus, in a jurisdiction that has enacted UARA, subsection (b) should use the first bracketed alternative to avoid the risk that adoption of this act might create an implied repeal of UARA Section 7. Even if a jurisdiction has not adopted UARA, it may still wish to enact the first bracketed alternative.

SECTION 7. DISQUALIFICATION FROM APPOINTMENT AS RECEIVER; DISCLOSURE OF INTEREST.

(a) The court may not appoint a person as receiver unless the person submits to the court a statement under penalty of perjury that the person is not disqualified.

(b) Except as otherwise provided in subsection (c), a person is disqualified from appointment as receiver if the person:

(1) is an affiliate of a party;

(2) has an interest materially adverse to an interest of a party;

(3) has a material financial interest in the outcome of the action, other than compensation the court may allow the receiver;

(4) has a debtor-creditor relationship with a party; or

(5) holds an equity interest in a party, other than a noncontrolling interest in a publicly-traded company.

(c) A person is not disqualified from appointment as receiver solely because the person:

(1) was appointed receiver or is owed compensation in an unrelated matter involving a party or was engaged by a party in a matter unrelated to the receivership;

(2) is an individual obligated to a party on a debt that is not in default and was incurred primarily for personal, family, or household purposes; or

(3) maintains with a party a deposit account as defined in [U.C.C. Section 9-102(a)(29)].

(d) A person seeking appointment of a receiver may nominate a person to serve as receiver, but the court is not bound by the nomination.

SECTION 8. RECEIVER'S BOND; ALTERNATIVE SECURITY.

(a) Except as otherwise provided in subsection (b), a receiver shall post with the court a bond that:

(1) is conditioned on the faithful discharge of the receiver's duties;

(2) has one or more sureties approved by the court;

(3) is in an amount the court specifies; and

(4) is effective as of the date of the receiver's appointment.

(b) The court may approve the posting by a receiver with the court of alternative

security, such as a letter of credit or deposit of funds. The receiver may not use receivership property as alternative security. Interest that accrues on deposited funds must be paid to the receiver on the receiver's discharge.

(c) The court may authorize a receiver to act before the receiver posts the bond or alternative security required by this section.

(d) A claim against a receiver's bond or alternative security must be made not later than [one] year after the date the receiver is discharged.

Legislative Note: *Subsection (d) creates a limitation period for a claim against the bond based on an action by the receiver. The period should be consistent with the state's limitation period for obtaining relief from a judgment.*

SECTION 9. STATUS OF RECEIVER AS LIEN CREDITOR. On appointment of a receiver, the receiver has the status of a lien creditor under:

(1) [U.C.C. Article 9] as to receivership property that is personal property or fixtures; and

(2) [the recording statute of this state] as to receivership property that is real property.

SECTION 10. SECURITY AGREEMENT COVERING AFTER-ACQUIRED PROPERTY. Except as otherwise provided by law of this state other than this [act], property that a receiver or owner acquires after appointment of the receiver is subject to a security agreement entered into before the appointment to the same extent as if the court had not appointed the receiver.

SECTION 11. COLLECTION AND TURNOVER OF RECEIVERSHIP PROPERTY.

(a) Unless the court orders otherwise, on demand by a receiver:

(1) a person that owes a debt that is receivership property and is matured or

payable on demand or on order shall pay the debt to or on the order of the receiver, except to the extent the debt is subject to setoff or recoupment; and

(2) subject to subsection (c), a person that has possession, custody, or control of receivership property shall turn the property over to the receiver.

(b) A person that has notice of the appointment of a receiver and owes a debt that is receivership property may not satisfy the debt by payment to the owner.

(c) If a creditor has possession, custody, or control of receivership property and the validity, perfection, or priority of the creditor's lien on the property depends on the creditor's possession, custody, or control, the creditor may retain possession, custody, or control until the court orders adequate protection of the creditor's lien.

(d) Unless a bona fide dispute exists about a receiver's right to possession, custody, or control of receivership property, the court may sanction as civil contempt a person's failure to turn the property over when required by this section.

SECTION 12. POWERS AND DUTIES OF RECEIVER.

(a) Except as limited by court order or law of this state other than this [act], a receiver may:

(1) collect, control, manage, conserve, and protect receivership property;

(2) operate a business constituting receivership property, including preservation, use, sale, lease, license, exchange, collection, or disposition of the property in the ordinary course of business;

(3) in the ordinary course of business, incur unsecured debt and pay expenses incidental to the receiver's preservation, use, sale, lease, license, exchange, collection, or disposition of receivership property;

(4) assert a right, claim, cause of action, or defense of the owner which relates to receivership property;

(5) seek and obtain instruction from the court concerning receivership property, exercise of the receiver's powers, and performance of the receiver's duties;

(6) on subpoena, compel a person to submit to examination under oath, or to produce and permit inspection and copying of designated records or tangible things, with respect to receivership property or any other matter that may affect administration of the receivership;

(7) engage a professional as provided in Section 15;

(8) apply to a court of another state for appointment as ancillary receiver with respect to receivership property located in that state; and

(9) exercise any power conferred by court order, this [act], or law of this state other than this [act].

(b) With court approval, a receiver may:

(1) incur debt for the use or benefit of receivership property other than in the ordinary course of business;

(2) make improvements to receivership property;

(3) use or transfer receivership property other than in the ordinary course of business as provided in Section 16;

(4) adopt or reject an executory contract of the owner as provided in Section 17;

(5) pay compensation to the receiver as provided in Section 21, and to each professional engaged by the receiver as provided in Section 15;

(6) recommend allowance or disallowance of a claim of a creditor as provided in Section 20; and

(7) make a distribution of receivership property as provided in Section 20.

(c) A receiver shall:

(1) prepare and retain appropriate business records, including a record of each receipt, disbursement, and disposition of receivership property;

(2) account for receivership property, including the proceeds of a sale, lease, license, exchange, collection, or other disposition of the property;

(3) file with the [appropriate real property recording office] a copy of the order appointing the receiver and, if a legal description of the real property is not included in the order, the legal description;

(4) disclose to the court any fact arising during the receivership which would disqualify the receiver under Section 7; and

(5) perform any duty imposed by court order, this [act], or law of this state other than this [act].

(d) The powers and duties of a receiver may be expanded, modified, or limited by court order.

SECTION 13. DUTIES OF OWNER.

(a) An owner shall:

(1) assist and cooperate with the receiver in the administration of the receivership and the discharge of the receiver's duties;

(2) preserve and turn over to the receiver all receivership property in the owner's possession, custody, or control;

(3) identify all records and other information relating to the receivership property, including a password, authorization, or other information needed to obtain or maintain access to

or control of the receivership property, and make available to the receiver the records and information in the owner's possession, custody, or control;

(4) on subpoena, submit to examination under oath by the receiver concerning the acts, conduct, property, liabilities, and financial condition of the owner or any matter relating to the receivership property or the receivership; and

(5) perform any duty imposed by court order, this [act], or law of this state other than this [act].

(b) If an owner is a person other than an individual, this section applies to each officer, director, manager, member, partner, trustee, or other person exercising or having the power to exercise control over the affairs of the owner.

(c) If a person knowingly fails to perform a duty imposed by this section, the court may:

(1) award the receiver actual damages caused by the person's failure, reasonable attorney's fees, and costs; and

(2) sanction the failure as civil contempt.

SECTION 14. STAY; INJUNCTION.

(a) Except as otherwise provided in subsection (d) or ordered by the court, an order appointing a receiver operates as a stay, applicable to all persons, of an act, action, or proceeding:

(1) to obtain possession of, exercise control over, or enforce a judgment against receivership property; and

(2) to enforce a lien against receivership property to the extent the lien secures a claim against the owner which arose before entry of the order.

(b) Except as otherwise provided in subsection (d), the court may enjoin an act, action,

or proceeding against or relating to receivership property if the injunction is necessary to protect the property or facilitate administration of the receivership.

(c) A person whose act, action, or proceeding is stayed or enjoined under this section may apply to the court for relief from the stay or injunction for cause.

(d) An order under subsection (a) or (b) does not operate as a stay or injunction of:

(1) an act, action, or proceeding to foreclose or otherwise enforce a mortgage by the person seeking appointment of the receiver;

(2) an act, action, or proceeding to perfect, or maintain or continue the perfection of, an interest in receivership property;

(3) commencement or continuation of a criminal proceeding;

(4) commencement or continuation of an action or proceeding, or enforcement of a judgment other than a money judgment in an action or proceeding, by a governmental unit to enforce its police or regulatory power; or

(5) establishment by a governmental unit of a tax liability against the owner or receivership property or an appeal of the liability.

(e) The court may void an act that violates a stay or injunction under this section.

(f) If a person knowingly violates a stay or injunction under this section, the court may:

(1) award actual damages caused by the violation, reasonable attorney's fees, and costs; and

(2) sanction the violation as civil contempt.

SECTION 15. ENGAGEMENT AND COMPENSATION OF PROFESSIONAL.

(a) With court approval, a receiver may engage an attorney, accountant, appraiser, auctioneer, broker, or other professional to assist the receiver in performing a duty or exercising

a power of the receiver. The receiver shall disclose to the court:

(1) the identity and qualifications of the professional;

(2) the scope and nature of the proposed engagement;

(3) any potential conflict of interest; and

(4) the proposed compensation.

(b) A person is not disqualified from engagement under this section solely because of the person's engagement by, representation of, or other relationship with the receiver, a creditor, or a party. This [act] does not prevent the receiver from serving in the receivership as an attorney, accountant, auctioneer, or broker when authorized by law.

(c) A receiver or professional engaged under subsection (a) shall file with the court an itemized statement of the time spent, work performed, and billing rate of each person that performed the work and an itemized list of expenses. The receiver shall pay the amount approved by the court.

SECTION 16. USE OR TRANSFER OF RECEIVERSHIP PROPERTY NOT IN ORDINARY COURSE OF BUSINESS.

(a) In this section, "good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(b) With court approval, a receiver may use receivership property other than in the ordinary course of business.

(c) With court approval, a receiver may transfer receivership property other than in the ordinary course of business by sale, lease, license, exchange, or other disposition. Unless the agreement of sale provides otherwise, a sale under this section is free and clear of a lien of the person that obtained appointment of the receiver, any subordinate lien, and any right of

redemption but is subject to a senior lien.

(d) A lien on receivership property which is extinguished by a transfer under subsection (c) attaches to the proceeds of the transfer with the same validity, perfection, and priority the lien had on the property immediately before the transfer, even if the proceeds are not sufficient to satisfy all obligations secured by the lien.

(e) A transfer under subsection (c) may occur by means other than a public auction sale. A creditor holding a valid lien on the property to be transferred may purchase the property and offset against the purchase price part or all of the allowed amount secured by the lien, if the creditor tenders funds sufficient to satisfy in full the reasonable expenses of transfer and the obligation secured by any senior lien extinguished by the transfer.

(f) A reversal or modification of an order approving a transfer under subsection (c) does not affect the validity of the transfer to a person that acquired the property in good faith or revive against the person any lien extinguished by the transfer, whether the person knew before the transfer of the request for reversal or modification, unless the court stayed the order before the transfer.

SECTION 17. EXECUTORY CONTRACT.

(a) In this section, "timeshare interest" means [an interest having a duration of more than three years which grants its holder the right to use and occupy an accommodation, facility, or recreational site, whether improved or not, for a specific period less than a full year during any given year].

(b) Except as otherwise provided in subsection (h), with court approval, a receiver may adopt or reject an executory contract of the owner relating to receivership property. The court may condition the receiver's adoption and continued performance of the contract on terms

appropriate under the circumstances. If the receiver does not request court approval to adopt or reject the contract within a reasonable time after the receiver's appointment, the receiver is deemed to have rejected the contract.

(c) A receiver's performance of an executory contract before court approval under subsection (b) of its adoption or rejection is not an adoption of the contract and does not preclude the receiver from seeking approval to reject the contract.

(d) A provision in an executory contract which requires or permits a forfeiture, modification, or termination of the contract because of the appointment of a receiver or the financial condition of the owner does not affect a receiver's power under subsection (b) to adopt the contract.

(e) A receiver's right to possess or use receivership property pursuant to an executory contract terminates on rejection of the contract under subsection (b). Rejection is a breach of the contract effective immediately before appointment of the receiver. A claim for damages for rejection of the contract must be submitted by the later of:

(1) the time set for submitting a claim in the receivership; or

(2) [30] days after the court approves the rejection.

(f) If at the time a receiver is appointed, the owner has the right to assign an executory contract relating to receivership property under law of this state other than this [act], the receiver may assign the contract with court approval.

(g) If a receiver rejects under subsection (b) an executory contract for the sale of receivership property that is real property in possession of the purchaser or a real-property timeshare interest, the purchaser may:

(1) treat the rejection as a termination of the contract, and in that case the

purchaser has a lien on the property for the recovery of any part of the purchase price the purchaser paid; or

(2) retain the purchaser's right to possession under the contract, and in that case the purchaser shall continue to perform all obligations arising under the contract and may offset any damages caused by nonperformance of an obligation of the owner after the date of the rejection, but the purchaser has no right or claim against other receivership property or the receiver on account of the damages.

(h) A receiver may not reject an unexpired lease of real property under which the owner is the landlord if:

(1) the tenant occupies the leased premises as the tenant's primary residence;

(2) the receiver was appointed at the request of a person other than a mortgagee; or

(3) the receiver was appointed at the request of a mortgagee and:

(A) the lease is superior to the lien of the mortgage;

(B) the tenant has an enforceable agreement with the mortgagee or the holder of a senior lien under which the tenant's occupancy will not be disturbed as long as the tenant performs its obligations under the lease;

(C) the mortgagee has consented to the lease, either in a signed record or by its failure timely to object that the lease violated the mortgage; or

(D) the terms of the lease were commercially reasonable at the time the lease was agreed to and the tenant did not know or have reason to know that the lease violated the mortgage.

Legislative Note: *If a state statute defines the term "timeshare interest," the state should incorporate that definition into subsection (a).*

SECTION 18. DEFENSES AND IMMUNITIES OF RECEIVER.

(a) A receiver is entitled to all defenses and immunities provided by law of this state other than this [act] for an act or omission within the scope of the receiver's appointment.

(b) A receiver may be sued personally for an act or omission in administering receivership property only with approval of the court that appointed the receiver.

SECTION 19. INTERIM REPORT OF RECEIVER. A receiver may file or, if ordered by the court, shall file an interim report that includes:

(1) the activities of the receiver since appointment or a previous report;

(2) receipts and disbursements, including a payment made or proposed to be made to a professional engaged by the receiver;

(3) receipts and dispositions of receivership property;

(4) fees and expenses of the receiver and, if not filed separately, a request for approval of payment of the fees and expenses; and

(5) any other information required by the court.

SECTION 20. NOTICE OF APPOINTMENT; CLAIM AGAINST RECEIVERSHIP; DISTRIBUTION TO CREDITORS.

(a) Except as otherwise provided in subsection (f), a receiver shall give notice of appointment of the receiver to creditors of the owner by:

(1) deposit for delivery through first-class mail or other commercially reasonable delivery method to the last-known address of each creditor; and

(2) publication as directed by the court.

(b) Except as otherwise provided in subsection (f), the notice required by subsection (a) must specify the date by which each creditor holding a claim against the owner which arose

before appointment of the receiver must submit the claim to the receiver. The date specified must be at least [90] days after the later of notice under subsection (a)(1) or last publication under subsection (a)(2). The court may extend the period for submitting the claim. Unless the court orders otherwise, a claim that is not submitted timely is not entitled to a distribution from the receivership.

(c) A claim submitted by a creditor under this section must:

(1) state the name and address of the creditor;

(2) state the amount and basis of the claim;

(3) identify any property securing the claim;

(4) be signed by the creditor under penalty of perjury; and

(5) include a copy of any record on which the claim is based.

(d) An assignment by a creditor of a claim against the owner is effective against the receiver only if the assignee gives timely notice of the assignment to the receiver in a signed record.

(e) At any time before entry of an order approving a receiver's final report, the receiver may file with the court an objection to a claim of a creditor, stating the basis for the objection. The court shall allow or disallow the claim according to law of this state other than this [act].

(f) If the court concludes that receivership property is likely to be insufficient to satisfy claims of each creditor holding a perfected lien on the property, the court may order that:

(1) the receiver need not give notice under subsection (a) of the appointment to all creditors of the owner, but only such creditors as the court directs; and

(2) unsecured creditors need not submit claims under this section.

(g) Subject to Section 21:

(1) a distribution of receivership property to a creditor holding a perfected lien on the property must be made in accordance with the creditor's priority under law of this state other than this [act]; and

(2) a distribution of receivership property to a creditor with an allowed unsecured claim must be made as the court directs according to law of this state other than this [act].

SECTION 21. FEES AND EXPENSES.

(a) The court may award a receiver from receivership property the reasonable and necessary fees and expenses of performing the duties of the receiver and exercising the powers of the receiver.

(b) The court may order one or more of the following to pay the reasonable and necessary fees and expenses of the receivership, including reasonable attorney's fees and costs:

(1) a person that requested the appointment of the receiver, if the receivership does not produce sufficient funds to pay the fees and expenses; or

(2) a person whose conduct justified or would have justified the appointment of the receiver under Section 6(a)(1).

SECTION 22. REMOVAL OF RECEIVER; REPLACEMENT; TERMINATION OF RECEIVERSHIP.

(a) The court may remove a receiver for cause.

(b) The court shall replace a receiver that dies, resigns, or is removed.

(c) If the court finds that a receiver that resigns or is removed, or the representative of a receiver that is deceased, has accounted fully for and turned over to the successor receiver all receivership property and has filed a report of all receipts and disbursements during the service of the replaced receiver, the replaced receiver is discharged.

(d) The court may discharge a receiver and terminate the court's administration of the receivership property if the court finds that appointment of the receiver was improvident or that the circumstances no longer warrant continuation of the receivership. If the court finds that the appointment was sought wrongfully or in bad faith, the court may assess against the person that sought the appointment:

(1) the fees and expenses of the receivership, including reasonable attorney's fees and costs; and

(2) actual damages caused by the appointment, including reasonable attorney's fees and costs.

SECTION 23. FINAL REPORT OF RECEIVER; DISCHARGE.

(a) On completion of a receiver's duties, the receiver shall file a final report including:

(1) a description of the activities of the receiver in the conduct of the receivership;

(2) a list of receivership property at the commencement of the receivership and any receivership property received during the receivership;

(3) a list of disbursements, including payments to professionals engaged by the receiver;

(4) a list of dispositions of receivership property;

(5) a list of distributions made or proposed to be made from the receivership for creditor claims;

(6) if not filed separately, a request for approval of the payment of fees and expenses of the receiver; and

(7) any other information required by the court.

(b) If the court approves a final report filed under subsection (a) and the receiver

distributes all receivership property, the receiver is discharged.

SECTION 24. RECEIVERSHIP IN ANOTHER STATE; ANCILLARY PROCEEDING.

(a) The court may appoint a receiver appointed in another state, or that person's nominee, as an ancillary receiver with respect to property located in this state or subject to the jurisdiction of the court for which a receiver could be appointed under this [act], if:

(1) the person or nominee would be eligible to serve as receiver under Section 7; and

(2) the appointment furthers the person's possession, custody, control, or disposition of property subject to the receivership in the other state.

(b) The court may issue an order that gives effect to an order entered in another state appointing or directing a receiver.

(c) Unless the court orders otherwise, an ancillary receiver appointed under subsection (a) has the rights, powers, and duties of a receiver appointed under this [act].

SECTION 25. EFFECT OF ENFORCEMENT BY MORTGAGEE.

[(a)] A request by a mortgagee for appointment of a receiver, the appointment of a receiver, or application by a mortgagee of receivership property or proceeds to the secured obligation does not:

(1) make the mortgagee a mortgagee in possession of the real property;

(2) make the mortgagee an agent of the owner;

(3) constitute an election of remedies that precludes a later action to enforce the secured obligation;

(4) make the secured obligation unenforceable; [or]

(5) limit any right available to the mortgagee with respect to the secured obligation[;][; or]

[(6) constitute an action within the meaning of [cite the "one-action" statute of this state][; or]]

[(7) except as otherwise provided in subsection (b), bar a deficiency judgment pursuant to law of this state other than this [act] governing or relating to a deficiency judgment].

[(b) If a receiver sells receivership property that pursuant to Section 16(c) is free and clear of a lien, the ability of a creditor to enforce an obligation that had been secured by the lien is subject to law of this state other than this [act] relating to a deficiency judgment.]

Legislative Note: *If state law does not prohibit or otherwise limit the ability of a lienholder to obtain a deficiency judgment following the enforcement of a lien, the state should enact this section without subsections (a)(7) and (b).*

A state that does not have a "one action" statute should omit subsection (a)(6).

SECTION 26. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 27. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 28. TRANSITION. This [act] does not apply to a receivership for which the receiver was appointed before [the effective date of this

[act]].

SECTION 29. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

SECTION 30. EFFECTIVE DATE. This [act] takes effect . . . .

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

[ ]

Plaintiff

v.

C.A. No. _____

[ ]

Defendant

ORDER APPOINTING PERMANENT RECEIVER

This cause came on to be heard on _____, 20__, before Justice _____ upon Petition for the Appointment of Permanent Receiver, and upon consideration thereof, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. _____ of Providence, Rhode Island, be and is hereby appointed Permanent Receiver of the Defendant, [ ], and of all the estate and effects thereof of every name, nature and description with full authority to exercise all the powers conferred upon the Receiver by the laws of this State and by this Order, together with the additional powers incidental to a Permanent Receiver.

2. The Receiver shall, no later than five (5) days from the date hereof, give the Receiver's bond for the faithful performance of the Receiver's duties as Receiver in the sum of _____ Dollars ($_____) with surety of a surety company authorized to do business in the State of Rhode Island, conditioned that the Receiver will well and truly perform the duties of the Receiver's said office.

3. The Receiver hereby appointed is authorized, empowered and directed to take possession and charge of the estate, assets, effects, property and business of the Defendant, including cash surrender value of any insurance owned by the Defendant, and to preserve the same, and the Receiver is hereby vested with the title to all assets, property, choses in action, and any rights of the Defendant; that this appointment of Permanent Receiver is made in succession to the appointment of the Temporary Receiver heretofore made by Order of this Court, and the Receiver shall take and be vested with the title to all assets, property and choses in action which have heretofore accrued to the Temporary Receiver with power to confirm and ratify in writing such arrangements as are entered into by such Temporary Receiver and to carry out and perform the same. Said Receiver shall obtain authorization from this Court before retaining accountants, business consultants, appraisers and special counsel. All disbursements by the Receiver shall be itemized in detail in the Receiver's reports to this Court and all disbursements to accountants, business consultants, appraisers and special counsel shall be subject to approval by this Court. The Receiver and the law firm of which the Receiver is a member are hereby engaged as general

counsel to said Receiver.

4. The Receiver is hereby authorized to collect all the debts due the Defendant, to prosecute and defend, suits in its name or in the Receiver's name and capacity as Receiver or to intervene in any action, suit, or proceeding relative to the estate or effects of the Defendant and to compromise any controversy or dispute concerning any such property and generally do any other act which might be done by the Defendant or that may in the judgment of the Receiver be necessary or desirable for the protection, maintenance and preservation of the property and assets of the Defendant.

5. The Receiver be and hereby is authorized in the Receiver's discretion to carry on the business of the Defendant pending the settlement of the estate and until further Order of this Court in such manner as will in the Receiver's judgment best conserve the Defendant; to incur expenses for goods and services and to buy and sell merchandise, supplies or stock in trade for cash or on credit, as in the Receiver's discretion may be desirable or necessary for the continuation of the business of the Defendant; to employ, discharge and fix the compensation of such managers, superintendents and other agents and employees as in the Receiver's judgment may be advisable or necessary in the management, conduct, control, operation or custody of the Defendant's property, assets and business.

6. The Receiver be and hereby is authorized to borrow funds from any individual, corporation, limited liability company, partnership, trust, or any other person, association, entity or organization, for the purpose of carrying on the business of the Defendant pending the settlement of the estate and to give as security for such borrowing the accounts receivable created by virtue of the carrying on of the business of the Defendant or otherwise, or to pledge, mortgage, or otherwise encumber any of the other estate or effects of the Defendant subject to existing valid encumbrances.

7. The Receiver is hereby authorized and empowered to secure insurance of any kind or description as may be necessary and to accept the provisions of the Workmen's Compensation Act and to take all steps necessary to that end.

8. The Receiver is authorized in the Receiver's discretion to appoint and employ such managers, agents, employees, accountants and attorneys as may in the Receiver's judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the Defendant and of the assets thereof, and that said Receiver be and hereby is authorized to make such payments and disbursements as may be needful or proper for the preservation of the properties of the Defendant.

9. The Receiver be and hereby is authorized and empowered to sell, transfer and convey the Receiver's right, title and interest and the right, title and interest of the Defendant in and to any real property or personal property, tangible or intangible, for such sum or sums of money as to the Receiver appears reasonable and proper, at private sale or sales; PROVIDED, however, that approval is first given for such sale or sales by this Court on *ex parte* application by the Receiver.

10. The Receiver is hereby authorized and empowered to sell at public auction any or all of the assets referred to in the preceding paragraph hereof; to engage an auctioneer and to insert such display advertisements within or without the State of Rhode Island as the Receiver deems proper advertising for such sale. Such a public auction sale conducted by the Receiver in accordance with the provisions of this paragraph shall be considered and is hereby declared to be a commercially reasonable sale, and such sale shall constitute compliance with the requirements of a commercially reasonable sale as set forth in Chapter 9 of Title 6A of the Rhode Island General Laws.

11. In fulfillment of the reporting requirements of R.C.P. 66(e), the Receiver shall file with the Court the reports referred to in said Rule, as and when the Receiver deems necessary or advisable under the circumstances, or, in any event, as and when required by Order of this Court. In addition, the Receiver shall file with this Court, on or before May 1 and October 1 of each year, a Receivership Control Calendar Report in accordance with Rhode Island Superior Court Administrative Order No 98-7.

12. The commencement, prosecution, or continuance of the prosecution, of any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession, both judicial and non-judicial, or any other proceeding, in law or in equity or under any statute or otherwise, against the Defendant or any of its property, in any Court, agency, tribunal or elsewhere, or before any arbitrator, or otherwise by any creditor, equity security holder, corporation, limited liability company, partnership, trust, or any other person, association, entity or organization, or the levy of any attachment, execution or other process upon or against any property of the Defendant, or the taking or attempting to take into possession of any property in the possession of the Defendant or of which the Defendant has the right to possession or the cancellation, rescission or termination at any time during the proceeding herein of any insurance policy, lease, or other contract with the Defendant, by any of such parties as aforesaid, other than the Receiver, or the interference with the Receiver in the discharge of the Receiver's duties by any of such parties as aforesaid, or the termination of telephone, electric, gas or any utility service to the Defendant, by any public or private utility, without such parties' first obtaining approval thereof from this Court (in regard to which the Receiver shall be entitled to prior written notice and an opportunity to be heard), are hereby restrained and enjoined until further Order of this Court.

13. The Receiver be and hereby is authorized and empowered as soon as the Receiver has sufficient funds available to pay all City, State and United States taxes of any kind, nature and description including withholding taxes.

14. The Receiver shall continue to discharge the Receiver's duties and trusts hereunder until further Order of this Court and from time to time make reports of the Receiver's doings in the premises as directed by this Court; and that the right is reserved to the Receiver and to the parties hereto to apply to this Court for any other or further instructions to the Receiver;

and that this Court reserves the right, upon such notice, if any, as it shall deem proper, to make such further orders herein as may be proper, and to modify this Order from time to time.

15. All creditors of the Defendant in order to be entitled to be paid from the assets of the Defendant are required to file with the Receiver at the Receiver's office at 362 Broadway, Providence, RI 02909, on or before _____, 20__, statements showing the amount of indebtedness claimed by them to be due, the consideration therefor, and the security or lien or priority, if any, which any creditor claims to be entitled to.

16. Notice of the entry of this Order be given (a) by the Clerk of this Court by publication of a copy of the annexed Receivership Notice in the Providence Journal on or before _____, 20__, and (b) by the Receiver by mailing on or before _____, 20__, a copy of the said Receivership Notice to each creditor and stockholder of the Defendant as shown on the books and records of the Defendant, addressed to such creditor or stockholder at his, her or its last known address.

17. This Order is entered by virtue of and pursuant to this Court's equity powers and pursuant to its powers as authorized by the laws and statutes of the State of Rhode Island.

ENTERED this _____ day of _____, 20__.

ENTER: PER ORDER:

_____ _____

_____, J.

Presented by: _____

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

[ ]

v.

C.A. No. PB _____

[ ]

RECEIVERSHIP NOTICE

Please take notice that on _____, 20__, an order appointing Permanent Receiver was entered by this Court in this matter. Said order appointed _____ of Providence, Rhode Island, as Permanent Receiver of the Defendant and specified that said Receiver was to give the Receiver's Surety Bond in the amount of $_____, with respect to the Receiver's faithful performance of the duties conferred upon the Receiver by said Order. Said order, the original of which is on file in the Office of the Clerk of this Court, and which order is incorporated herein by reference, contains, inter alia, the following provisions:

"12. The commencement, prosecution, or continuance of the prosecution, of any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession, both judicial and non-judicial, or any other proceeding, in law or in equity or under any statute or otherwise, against the Defendant or any of its property, in any Court, agency, tribunal or elsewhere, or before any arbitrator, or otherwise by any creditor, equity security holder, corporation, limited liability company, partnership, trust, or any other person, association, entity or organization, or the levy of any attachment, execution or other process upon or against any property of the Defendant, or the taking or attempting to take into possession of any property in the possession of the Defendant or of which the Defendant has the right to possession or the cancellation, rescission or termination at any time during the proceeding herein of any insurance policy, lease, or other contract with the Defendant, by any of such parties as aforesaid, other than the Receiver, or the interference with the Receiver in the discharge of the Receiver's duties by any of such parties as aforesaid, or the termination of telephone, electric, gas or any utility service to the Defendant, by any public or private utility, without such parties' first obtaining approval thereof from this Court (in regard to which the Receiver shall be entitled to prior written notice and an opportunity to be heard), are hereby restrained and enjoined until further Order of this Court."

"15. All creditors of the Defendant in order to be entitled to be paid from the assets of the Defendant are required to file with the Receiver at the Receiver's office at 362 Broadway, Providence, RI 02909, on or before _____, 20__, statements showing the amount of indebtedness claimed by them to be due, the consideration therefor, and the security or lien or priority, if any, which any creditor claims to be entitled to."

ENTERED this ____ day of _____, 20__.

ENTER: PER ORDER:

_____ _____

BRCSM
Brennan / Recupero / Cascione / Scungio / McAllister LLP
Attorneys at Law

Lisa M. Kresge, of counsel
E-mail lkresge@brcsm.com

SPECIMEN

Notice of Secured Party's Sale by
[Secured Party Name]

_____, 20__

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND VIA FIRST-CLASS MAIL, POSTAGE PREPAID

[Must address to customer, guarantors, and bankruptcy trustees, receivers, and assignees of any of the foregoing – N.B. the other secured parties and other parties claiming an interest in the goods are identified as cc's at the end of the notice]

Re: _____

Ladies and Gentlemen:

This office represents [***Secured party]*** ("*[Secured Party]*"). [*Secured Party]* holds liens and security interests in the goods (the "Collateral") described below:

[DESCRIPTION OF COLLATERAL]

The Collateral secures your obligations to [Secured Party] pursuant to your agreements with [Secured Party].

[FOR PUBLIC AUCTION] [Secured Party] will sell the Collateral to the highest qualified bidder in public as follows:

Date: _____, 20__

Time: _____ _.m. _____ time

362 Broadway
Providence, RI 02909
401.453.2300

One Church Green
PO Box 488
Taunton, MA 02780
508.822.0178

www.brcsm.com

Place: _____, _____

[FOR A PRIVATE SALE] [Secured Party] will sell the Collateral privately sometime after ***[day and date]***.

[FOR AN INTERNET TYPE AUCTION – NEED TO BE CAREFUL AND TAILOR TO TERMS OF SALE]

You are entitled to an accounting of the unpaid indebtedness secured by the Collateral ***[***for a charge of $_____***]***. You may request an accounting by calling _____ at [Secured Party] at [telephone number].

[If [Secured Party] does not have possession and control of the collateral]: [Secured Party] demands that you immediately assemble the Collateral at _____, and make it available to [Secured Party].

[If [Secured Party] is also pursuing accounts receivable as proceeds of goods that have been released]: [Secured Party] also demands that all payments on accounts receivable be turned over to [Secured Party], in kind and immediately upon receipt, and that all proceeds of Collateral whether or not now on deposit be immediately turned over to [Secured Party].

Please note that partial payments will not cure your default, but partial payments will be applied to the total balance due in such manner as [Secured Party] may determine. In addition, you are responsible for any deficiency resulting from the sale or other disposition of collateral.

All communications concerning this debt, including any instrument or electronic payment tendered as full or partial satisfaction of this debt, must be sent to me at my firm's Providence office.

[Secured Party] reserves the right to exercise additional remedies, whether alternatively, successively or concurrently, and at such time or at such times as [Secured Party] deems expedient.

Very truly yours,

[Secured Party] International of Washington, Inc.
By its counsel Brennan, Recupero, Cascione, Scungio & McAllister, LLP

Lisa M. Kresge

Encl.
cc:
[All secured parties who filed UCC-1's and others known to [Secured Party], and others who have given notice that they claim an interest in the goods]