Receiverships and Bankruptcy: Between Scylla and Charybdis

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RECEIVERSHIPS AND BANKRUPTCY: BETWEEN SCYLLA AND CHARYBDIS

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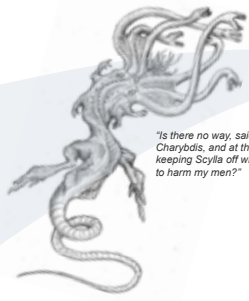
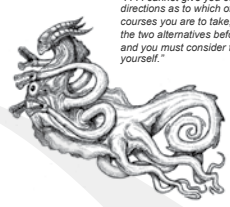
BETWEEN SCYLLA AND CHARYBDIS

Creditors frequently seek appointment of receivers as a means of exercising remedies against collateral, attempting to avoid the time and expense of a chapter 11 case. If a voluntary or involuntary bankruptcy occurs, however, the intersection of receivership and bankruptcy laws may result in inconsistent rights and obligations.



"Is there no way, said I, of escaping Charybdis, and at the same time keeping Scylla off when she is trying to harm my men?"

Distressed Assets



". . . I cannot give you coherent directions as to which of two courses you are to take; I will lay the two alternatives before you, and you must consider them for yourself."

"There is no help for it; your best chance will be to get by her as fast as ever you can . . . so drive your ship past her full speed."

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RECEIVER OR TRUSTEE

Usually, but not always, receivers and trustees share the same objective, namely, to preserve the assets of a debtor in order to liquidate or reorganize and pay the debtor's creditors. Whether one option is better than the other depends on the specific facts of each case.

Black's Law Dictionary defines receiver as:

A disinterested person appointed by a court . . . for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated).

1. Is the financial distress caused by mismanagement or fraud?
2. Who intends to initiate the proceeding?
3. Are there unsecured creditors who will be affected by the choice?
4. Are there potential avoidance actions that might only be pursued under one of the options?
5. Is the federal government involved?
6. Has a purchaser been identified whose offer is conditioned on selection of one of the processes?

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APPOINTMENT

Receiver

1 POWERS AND DUTIES	2 CLAIMS	3 FIDUCIARY DUTIES	4 JURISDICTION
Order from the appointing court will determine the powers and duties of the receiver.	Order from the appointing court will determine the process by which claims will be determined.	A receiver acts as an officer of the court that appointed him or her and is subject to the court's discretion.	FEDERAL: • 28 USCA §§ 754, 959, 2001-4 • Fed. R. Civ. P. 66 STATE: • Equitable powers and statutorily defined factors

Beyond such general terms, the rules that apply in receiverships may vary significantly from one court to another.

Bankruptcy Trustee

1 POWERS AND DUTIES	2 CLAIMS	3 FIDUCIARY DUTIES	4 JURISDICTION
Detailed provisions in the Bankruptcy Code.	Detailed provisions in the Bankruptcy Code.	A trustee becomes the representative of the bankruptcy estate and has a fiduciary obligation to all parties with interests in the estate.	Appointed by the U.S. Trustee pursuant to 11 U.S.C § 323(a).

The Bankruptcy Code's detailed provisions regarding claims allowance, priority and distribution and the Bankruptcy Rules provide certainty and uniformity to the bankruptcy process from one court to another.

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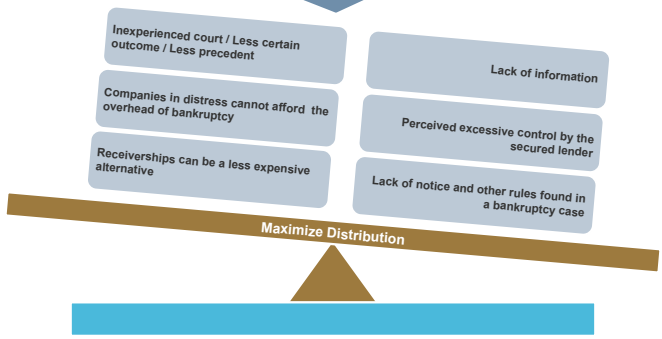
BANKRUPTCY OR RECEIVERSHIP?

When unsecured creditors consider whether they would be better off in a bankruptcy case than in a receivership, they are commonly concerned about:



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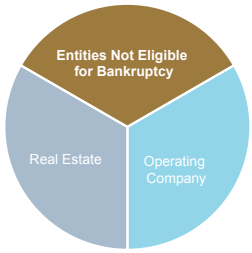
TYPES OF RECEIVERSHIPS

State Equity Receiverships

Insurance Companies, Banks and Other Entities Not Eligible for Bankruptcy



Bankruptcy does not intersect with receiverships where the entity is not eligible to be a debtor

- Liquidations of such institutions are customarily supervised under state or federal receiverships
- Section 109(b) of the Bankruptcy Code provides:

A person may be a debtor under chapter 7 of this title only if such person is not –

1) A railroad;
2) A domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, a New Market Venture Capital company . . . a small business investment company . . . credit union, or industrial bank . . .; or
3) A foreign insurance company, or
4) A foreign bank, savings bank, cooperative bank, savings and loan association . . .

- Section 109(d) provides that only a railroad or a person that may be a debtor under Chapter 7, and an uninsured state member bank, or corporation organized under section 25A of the Federal Reserve Act with certain qualifications, may be a debtor under Chapter 11

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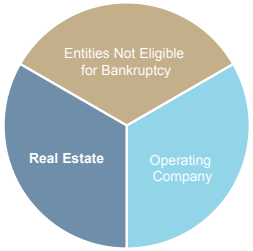
TYPES OF RECEIVERSHIPS

State Equity Receiverships

Real Estate in Distress Receivership Commenced by Secured Creditor



Bankruptcy can intersect with real estate receiverships

- Commenced by secured lender that holds the mortgage on the property and has the right under the security deed to have a receiver appointed upon the event of default
- Commonly intersect with bankruptcy because:
  - Borrower files voluntary petition, or
  - Creditors commence involuntary case
- General rule under §543 is that a receiver, as custodian, is directed to turn over to the trustee or debtor in possession the assets in the receiver's possession upon receipt of notice of commencement of the bankruptcy case and to file an accounting with the bankruptcy court
- The receiver may be excused from turning over property depending on the time that the receivership has been pending and other factors regarding prepetition management of the assets

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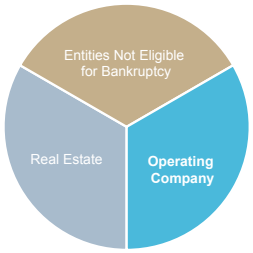
TYPES OF RECEIVERSHIPS

State Equity Receiverships

Operating Company in Distress Receivership Commenced by Secured Creditor



Bankruptcy can intersect with operating company receiverships

- Operating company where the secured creditor desires to have court-supervised process and borrower's board and equity holders acknowledge business cannot continue and a going concern business sale would provide a greater return than a forced liquidation
- Receivers are not forced to liquidate a company's assets, but may, with appropriate language in the receivership order, continue to operate the business
- There are limitations applicable to states regarding interference with contract rights and the discharge of claims, in the absence of full payment or unanimous creditor consent to acceptance of less than full payment that makes a more likely outcome to be a court-supervised sale of the business as a going concern followed by distribution of the proceeds to creditors
- If the goal is to sell all or a portion of the business, a purchaser will require the ability to obtain clear title
- Even if the law may allow a receiver to sell "free & clear", if there is not clear law from the highest court in the jurisdiction, a more robust sale could take place in bankruptcy where the law is more settled

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SURVEY OF SELECT SOUTHEASTERN STATE RECEIVERSHIP PRACTICES

Uniform Law Commission Study Committee on Real Estate Receiverships

- Reviewed whether a Uniform Act on appointment and powers of RE receivers would be appropriate or likely to gain widespread adoption
- Drafted Model Commercial Real Estate Receiverships Act
- Produced a 50 State Capsule Summary of Foreclosure/Receivership Laws

Other source of comparative data

- Friedland, Hammeke, Vandersteeg and Allen, *Strategic Alternatives For and Against Distressed Businesses*, 2015 ed. Published by Thomson Reuters

Key provisions of receivership laws of 12 SE States

- Preferential transfer avoidance
- Sales free and clear of liens
- Receivership financing
- Compensation of receivers

Note…

The United States Court of Appeals for the Ninth Circuit has concluded that state preferential transfer avoidance law have been preempted by the Bankruptcy Code. Because the Ninth Circuit's analysis has received some subsequent criticism, it may be useful to consider how the laws of a particular state speak to such topic.

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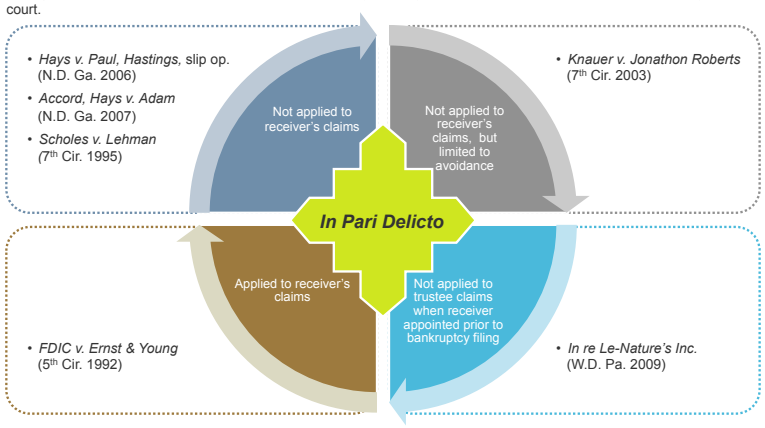
BENEFITS OF RECEIVERSHIPS

In Pari Delicto

Equitable defense similar to the doctrine of unclean hands. The application of the doctrine has been murky when a third party is placed in control of an entity. Use of the defense against trustees in bankruptcy or creditor committees seems to have gained traction, however, courts have been less likely to apply it when the plaintiff is a receiver appointed by the court.



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BENEFITS OF RECEIVERSHIPS

Unitary Enterprise Theory

A receiver can consolidate the assets of various receivership entities into a single fund to treat all entities within the receivership estate as a "unitary enterprise" with relative ease, as compared to substantive consolidation, that is more difficult to obtain.

Court Powers	Essential Element	Constructive Trust	Distribution
Fraudulent Schemes	**Commingling of Funds**	**Unitary Enterprise**	**Creditors**
At the federal level, district courts act with "wide discretion" and "broad powers" to establish a unitary enterprise. Critical element is a finding that persons responsible for the fraudulent activity "did not respect the separateness of the Receivership Entities nor the restricted purpose of invested funds that were intended to be limited to use for specific facilities." Courts then determine that the receivership entities have become part of a "unified scheme to defraud" the various investors and creditors.	Funds have been mixed with the legitimately held assets of the receivership entities. Federal district courts have embraced a lenient standard for finding that funds have been commingled. Any evidence that illegally obtained funds have been placed into an account taints all funds within that account. Substantive consolidation standard is that commingling must be systematic such that it would be impossible to trace the funds from individual creditors or investors.	Courts create a constructive trust over all assets of the receivership estate. Each investor and creditor has an equitable interest in all of the funds within the trust. Under *pro rata* distribution, the claims of creditors and investors of all receivership entities are satisfied at an equal proportion out of the consolidated *res* of the receivership estate.	General creditors of the receivership estate stand to gain the most because they are able to participate in a *pro rata* distribution of the combined receivership estate assets. Conversely, creditors who dealt solely with a single entity within the receivership estate and who could resist pooling of assets under substantive consolidation in a bankruptcy, might receive a greater distribution under a bankruptcy of their single entity than under a unitary enterprise in a receivership.

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BANKRUPTCY OR RECEIVERSHIP?

When work out negotiations have run their course without a successful outcome and the secured creditor is unwilling to provide the debtor in possession financing in bankruptcy, the borrower's board of directors and unsecured creditors may become satisfied that the receivership will afford a greater opportunity for distribution than might occur in a bankruptcy case.

Whether a collision will occur between the receivership and the bankruptcy depends on:

Type of Receivership + **Amount and type of debt** + **Existence of claims that might be pursued more effectively by receivers than trustees** + **Existence of claims that may only be pursued in bankruptcy cases**

WILL THERE BE A COLLISION?

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TYPES OF RECEIVERSHIPS

Federal Equity Receiverships

Railroad

- As railroad companies were established and expanded in nineteenth century America, many small railroads were placed into equity receiverships when they encountered financial distress
- As rail lines ran through more than one state, creditors turned to the federal courts for their ability to administer receiverships across state lines
- Many rules created by the federal courts in these receiverships were incorporated into the reorganization provisions of the Bankruptcy Act of 1898

SEC & CFTC

- District courts act with broad discretion when fashioning relief in cases involving receiverships initiated in regulatory agency enforcement actions
- District courts are charged with utilizing its "broad powers" and "wide discretion" to "determine the most equitable distribution result for *all* claimants"
- Because case law involving district courts' administration of receivership estates is sparse, court determinations are "usually limited to the facts of the particular case"
- Focus of these receiverships is customarily broader than that of a receiver in a case commenced by a secure creditor, therefore the outcome in subsequent bankruptcy cases is that the SEC or CFTC receiver is more likely to remain in control of the bankrupt entities

Other Multi-State Corporate

- With the rise of companies owning real and personal property in more than one state, where diversity of citizenship between the secured creditor and the borrower is present, federal receiverships offer the same type of benefits found in the railroad receiverships
- One court can supervise the multi-state liquidation or reorganization, thereby reducing the cost of the process
- The Ply-Marts case is an example of such a federal equity receivership commenced in federal rather than state court because the debtor had operating assets in more than one state and there was diversity of citizenship between the secured creditor plaintiff and the borrower defendant

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DISADVANTAGES OF RECEIVERSHIPS

PREFERENCE

No ability to pursue federal bankruptcy preference avoidance and recovery.

Case law is unsettled as to whether the Bankruptcy Code preempts state preference laws.

NOTICE

No rules regarding notice to creditors before a receiver takes action.

Can be ameliorated by notice provisions in order.

LIENS

Unclear if property may be sold free & clear of liens unless secured claims are paid in full.

Parties may find it difficult to find title insurance.

CONSISTENCY

Lack of and/or conflicting precedent in state case law.

1 2 3 4 5 6 7 8 9

DISCHARGE

No discharge of liability for creditor claims.

Unless all creditors agree to accept less than full payment, reorganization of business unlikely.

AUTOMATIC STAY

Cannot effectively prevent creditors from suing the borrower and obtaining judgments and thereby obtain priority in right of payment.

SUPERVISION

No U. S. Trustee to manage and monitor process.

Secured creditor likely to monitor progress
No spokesperson for unsecured creditors.

SALE PROCESS

No clear court supervised sale process.

No standards for noticing, objections or process unless provide for in the order.

EXPERIENCE

Inexperienced judges.

Inexperienced courts.

Inconsistent decisions and administration of process.

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PLY-MARTS, INC. – CONVERSION RECEIVERSHIP TO BANKRUPTCY

One practical limitation of receiverships is the possibility that after a receivership case commences, the debtor may react by filing a voluntary petition for relief under the Bankruptcy Code or three unsecured creditors may join to file an involuntary petition to displace the receivership.

Ply-Marts, Inc. was a commercial borrower and building supply company that encountered financial distress as a result of the economic recession and the 2008 collapse of the residential real estate construction industry.

At the request of a secured creditor, a receiver was appointed by the USDC for the Northern District of Georgia. Shortly after, three unsecured creditors joined together to file an involuntary petition for relief under Chapter 11.

The bankruptcy judge entered several consent orders in the involuntary bankruptcy case that:

- Postponed the turnover of assets by the receiver.
- Denied motion by secured creditor and receiver seeking to excuse receiver from compliance with turnover requirements.
- Authorized the secured creditor to extend credit to the receiver following the involuntary petition.
- Granted the secured creditor's motion for relief from stay and to convert the Chapter 11 case to Chapter 7.
- Permitted the receiver to sell the Ply-Mart operating divisions as going concerns and to wind down the business.
- Denied joint motion by the secured creditor and the receiver seeking abstention and/or dismissal.

The receiver as custodian then promptly turned over the remaining property in the receivership estate to the trustee and filed his final accounting.

The Chapter 7 trustee subsequently filed preference avoidance and recovery actions, something the receiver did not have the power to do, ultimately recovering almost $700,000.00.

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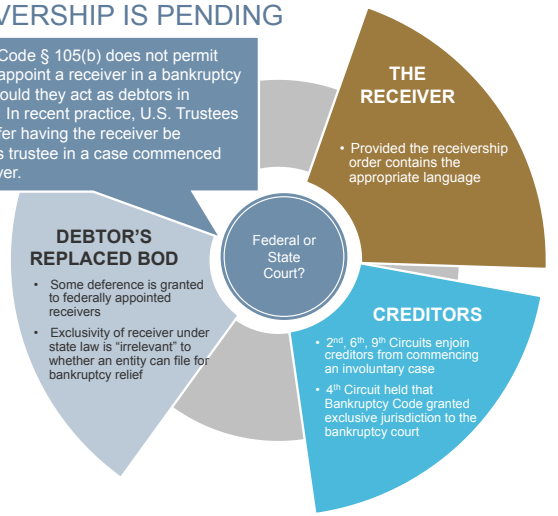
WHO MAY FILE A BANKRUPTCY PETITION IF A RECEIVERSHIP IS PENDING

Bankruptcy Code § 105(b) does not permit the court to appoint a receiver in a bankruptcy case, nor should they act as debtors in possession. In recent practice, U.S. Trustees seem to prefer having the receiver be appointed as trustee in a case commenced by the receiver.



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RECEIVER AS CUSTODIAN

Section 543 of the Bankruptcy Code governs the turnover of property by a custodian. It should be read in conjunction with Bankruptcy Rule 6002, "Accounting by Prior Custodian of Property of the Estate," which dictates the procedure to be followed when a bankruptcy is filed while a state or federal court receivership is pending. Rule 6002 requires the following:

DELIVER
The receiver as custodian should deliver the property in their possession or control to the trustee.

FILE
The receiver as custodian should file and transmit to the U.S. Trustee a report and account with respect to the property of the estate and the administration thereof.

EXAMINE
An examination should be made into the superseded administration by the bankruptcy court.

REASONABLENESS
After notice and a hearing, the bankruptcy court shall determine the propriety of the administration, including the reasonableness of all disbursements.

In re China Village, LLC (Bankr. N.D. Cal, Jan. 2012) is instructive on points such as when it is appropriate to surcharge a superseded receiver; whether a superseded receiver's counsel is required to be appointed by the court or disinterested under § 327 and entitled to compensation for post-petition services to the receiver; the award of fees for the receiver and their counsel under § 503(b)(4).

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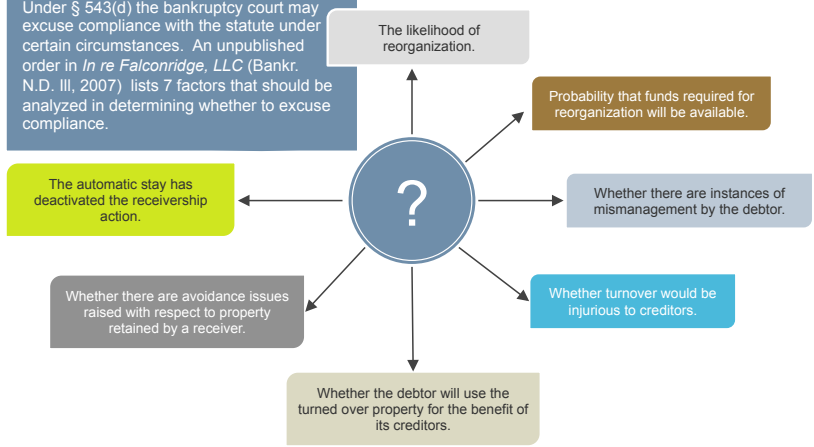
RECEIVER CAN BE EXCUSED FROM COMPLIANCE

Under § 543(d) the bankruptcy court may excuse compliance with the statute under certain circumstances. An unpublished order in *In re Falconridge, LLC* (Bankr. N.D. Ill, 2007) lists 7 factors that should be analyzed in determining whether to excuse compliance.



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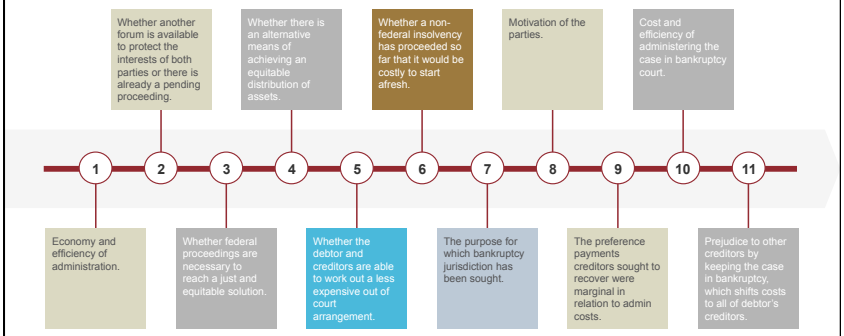
ABSTENTION AND DISMISSAL



Section 305(a)(1) of the Bankruptcy Code provides that a Bankruptcy Court may dismiss any bankruptcy case at any time if "the interests of creditors and the debtor would be better served by such dismissal." Courts look to the totality of the circumstances to determine whether a bankruptcy should be dismissed under this section.

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CONCLUSION

1. While bankruptcy courts have the benefit of significant expertise and accordingly the preferred venue for the reorganization or liquidation of companies in financial distress, in the appropriate case a state or federal equity receivership may be a less costly and more efficient process.
2. Creditors who are not parties to a receivership may intervene and seek to have the receivership court modify the court supervised procedures to more closely follow the provisions of the Bankruptcy Code.
3. Because a bankruptcy case is not easily dismissed once filed, stakeholders should communicate with each other and with the receiver in order to determine whether bankruptcy like protections can be grafted onto the receivership process by consent before jumping to the conclusion that a bankruptcy filing is the best course of action.
4. Where a receivership court is not inclined to apply rules that would exist in a bankruptcy case or the secured creditor who is the plaintiff in the underlying receivership action is unwilling to cooperate, a bankruptcy petition may be the best course.
5. If a collision of the receivership and bankruptcy occurs, timely compliance with the provisions of Bankruptcy Code Section 543 and Bankruptcy Rule 6002 is the best and only course forward.

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2015 SOUTHEAST BANKRUPTCY WORKSHOP

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RECEIVERSHIPS AND BANKRUPTCY: BETWEEN SCYLLA AND CHARYBDIS[1]

Scylla and Charybdis, in Greek mythology, were two monsters found on opposing sides of a narrow strait through which the hero Odysseus had to pass during his voyage described in Homer's Odyssey. To prepare him for the difficult journey, Circe informed Odysseus that he was about to encounter two difficult challenges, with a warning one might expect an experienced bankruptcy practitioner to give his or her client:

> '... I cannot give you coherent directions as to which of two courses you are to take; I will lay the two alternatives before you, and you must consider them for yourself.'

With the eternal optimism of a debtor/borrower or perhaps the realism of a lender, Odysseus asked Circe:

> "Is there no way,' said I, 'of escaping Charybdis, and at the same time keeping Scylla off when she is trying to harm my men?'

To which Circe, in pertinent part, replied:

> 'There is no help for it; your best chance will be to get by her as fast as ever you can ... so drive your ship past her at full speed.'[2]

This topic is timely in light of an increasing use of receiverships under state and federal law by lenders to distressed companies as a less expensive alternative to bankruptcy. Because the two schemes are not mutually exclusive they may collide and when they do, for example when a receivership is interrupted by a bankruptcy filing, the potential cost savings may evaporate and the parties may incur a greater cost than if they had initially resorted to bankruptcy. Nevertheless and perhaps if pursued with

[1] The authors thank Rachel Zisek, a University of Georgia Class of 2016 law student, for her assistance in the preparation of this paper. These materials are based on a similar paper authored by J. Michael Levengood and presented to the State Bar of Georgia Consumer and Business Bankruptcy Section in 2009 by the author together with Judge Mary Grace Diehl and Greg Hays.

[2] Homer's Odyssey, Book XII.

the alacrity Circe recommended to Odysseus, it is possible to liquidate a troubled business in a receivership that adequately serves the needs of its stakeholders without the need for a bankruptcy filing. This paper will explore the various legal and practical differences, benefits and disadvantages of receiverships compared to bankruptcy, and issues that arise when the two meet.

Introduction

*****

ABSTRACT

Creditors frequently seek appointment of receivers as a means of exercising remedies against collateral, attempting to avoid the time and expense of a chapter 11 case. If a voluntary or involuntary bankruptcy occurs, however, the intersection of receivership and bankruptcy laws may result in inconsistent rights and obligations.

*****

Usually, but not always, receivers and trustees share the same objective, namely to preserve the assets of a debtor in order to liquidate or reorganize and pay its creditors. Whether one option is better than the other depends on the specific facts of each case. Answers to the following questions will help identify the optimal solution. Is the financial distress caused by mismanagement or fraud? Who intends to initiate the proceeding? Are there unsecured creditors who will be affected by the choice? Are there potential avoidance actions that might only be pursued under one of the options? Is the federal government involved? Has a purchaser been identified whose offer is conditioned on selection of one of the processes?

Black's Law Dictionary defines "receiver" as:

> A disinterested person appointed by a court ... for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated).
>
> Black's Law Dictionary 1383 (9th ed. 2009).

The court that appoints the receiver will by order determine the powers and duties of the receiver and the process by which claims against the receivership estate will be determined. The receiver acts as an officer of the court that appointed the receiver and is subject to its direction. Beyond such general terms, the rules that apply in receiverships may vary significantly from one court to another. In federal court, appointment of a receiver is governed by 28 U.S.C.A. §§ 754, 959 and 2001-4, Fed. R. Civ. P. 66, and by the broad equitable powers of the district courts. The statutory landscape for receiverships on the state level is wide and varied. Appointment is based on a variety of factors, but all state courts having the equitable power to appoint receivers regard appointment of receivers as within their discretion. A majority of states have statutorily defined factors for the appointment of a receiver and many generally refer to equitable factors.[3]

A bankruptcy trustee, on the other hand, is appointed by the United States Trustee, and becomes the representative of the bankruptcy estate pursuant to 11 U.S.C. § 323(a). A bankruptcy trustee has a fiduciary obligation to all parties with interests in the estate.[4] The Bankruptcy Code's detailed provisions regarding claims allowance, priority and distribution and the Bankruptcy Rules provide certainty and uniformity to the bankruptcy process from one court to another.

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[3] See, generally, Uniform Law Commission's Study Committee on Appointment and Powers of Real Estate Receiverships Appendix: 50 State Capsule Summary of Foreclosure/Receivership Laws 4/1/13.

[4] Hon. Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee,* 80 Am. Bankr. L.J. 147 (2006)

One practical limitation of receiverships is the possibility that after a receivership case commences, the debtor may react by filing a voluntary petition for relief under the Bankruptcy Code or three unsecured creditors may join together to file an involuntary petition to displace the receivership. An example of this limitation and of the intersection of receiverships and bankruptcy is Ply-Marts, Inc., which had been a commercial borrower and a building supply company in the southeastern United States that encountered financial distress as a result of the economic recession and the 2008 collapse of the residential real estate construction industry in Georgia. One of the authors represented the federal receiver for Ply-Marts, Inc. before and during the involuntary Chapter 11 case commenced by three unsecured creditors shortly after the receiver was appointed by the U.S. District Court for the Northern District of Georgia at the request of the secured creditor. The bankruptcy judge entered several consent orders in the involuntary bankruptcy case that postponed the turnover of assets by the receiver, authorized the secured creditor to extend credit to the receiver following the filing of the involuntary petition for relief and permitted the receiver to sell the Ply-Mart operating divisions as going concerns and to wind down the business in an orderly fashion. The bankruptcy judge also ultimately entered an order for relief, denied the joint motion of the secured creditor and the receiver for relief under Bankruptcy Code sections 305 (seeking abstention and/or dismissal) and 543 (seeking to excuse the receiver as custodian from compliance with the bankruptcy turnover requirements of that section), granted the secured creditor's motion for relief from stay and granted the secured creditor's motion to convert the Chapter 11 case to a Chapter 7 case. The receiver as custodian then promptly turned over the remaining property in the receivership estate to the trustee and filed his final accounting. The Chapter 7

trustee in the Ply-Marts, Inc. case subsequently filed preference avoidance and recovery actions, something the receiver did not have the power to do, ultimately recovering almost $700,000 according to her final report in the chapter 7 case. Therefore, the Ply-Marts, Inc. case provides a relatively typical example of the collision of a receivership and bankruptcy.

When unsecured creditors consider whether they would be better off in a bankruptcy case than in a receivership, they are commonly concerned about a lack of information, the perceived excessive control by the secured creditor who sought the appointment of a receiver and the lack of notice and other rules and procedures in a receivership that are commonly found in a bankruptcy case, where rules and procedures are designed to facilitate the orderly liquidation of companies in financial distress in an open and transparent fashion. On the other hand, many companies in distress cannot afford the overhead of a bankruptcy case and receiverships can be a less expensive alternative. When work out negotiations have run their course without a successful outcome and the secured creditor is unwilling to provide debtor in possession financing in bankruptcy, the borrower's board of directors and unsecured creditors may become satisfied that the receivership will afford a greater opportunity for a distribution than might occur in a bankruptcy case. Whether a collision will occur between the receivership and bankruptcy depends on the types of receiverships, the amount and type of debt, the existence of claims that might be pursued more effectively by receivers than a trustee in bankruptcy and the existence of claims that may only be pursued in bankruptcy cases.

I. Types of Receiverships

Although the U.S. Constitution grants to Congress the power to establish uniform laws on the subject of bankruptcy, for much of the nineteenth century Congress did not do so. Consequently, the liquidation of companies in distress was ordinarily the province of state debtor and creditor laws, and those states whose courts exercised powers of equity to appoint receivers to provide for court supervision of the process. Receivers are officers of the courts that appoint them and their powers are specified in the orders that appoint them. Consideration of every receivership should start with a review of that order.

A. Federal Equity Receiverships

1. Railroad Receiverships

As railroad companies were established and expanded during the Nineteenth Century in America, many small railroads were placed into equity receiverships when they encountered financial distress. In appropriate cases, customarily railroad companies whose rail lines ran through more than one state, creditors turned to the federal courts because of their ability to administer receiverships of such companies across state lines. Many of the rules created by the federal courts in these federal equity receiverships were incorporated into the reorganization provisions of the Bankruptcy Act of 1898.

2. SEC and CFTC Receiverships

In furtherance of the policies underlying the establishment of the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC"), the SEC and the CFTC commonly resort to the equitable power of the federal courts to place in receivership businesses where there is evidence of securities

fraud. District courts act with broad discretion when fashioning relief in cases involving equity receiverships, including receiverships initiated in such enforcement actions. Ultimately, district courts have "the power to fashion any distribution plan that is fair and equitable" *SEC v. Sunwest Mgmt., Inc.*, No. 09-6056-HO, 2009 WL 3245879, *8 (D. Or. Oct. 2, 2009) and their "power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." *SEC v. Capitol Consultants, LLC,* 397 F.3d 733, 738 (9th Cir. 2004) (quoting *SEC v. Hardy,* 803 F.2d 1034, 1037 (9th Cir. 1986)). Consequently, the district court is charged with utilizing its "broad powers" and "wide discretion," *SEC v. Elliot,* 953 F.2d 1560, 1569-70 (11th Cir. 1992) to "determine the most equitable distribution result for *all* claimants" of the receivership. *Sunwest Mgmt., Inc.,* 2009 WL 3245879 at *9 (emphasis added). Finally, because case law involving district courts' administration of receivership estates is sparse, court determinations are "usually limited to the facts of the particular case." *Capitol Consultants, LLC,* 397 F.3d at 750. Because the focus of a receiver in an SEC or CFTC receivership is customarily broader than that of a receiver in a case commenced by a secured creditor of a commercial borrower in financial distress, the outcome in subsequent bankruptcy cases is that SEC or CFTC receivers may be more likely to remain in control of the bankrupt entities than a receiver appointed at the behest of a secured creditor.

3. Other Multi-State Corporate Receiverships

With the rise of companies owning real and personal property in more than one state, where diversity of citizenship between the secured creditor and the borrower is present, federal receiverships offer the same type of benefits found in the railroad

receiverships. One court can supervise the multi-state liquidation or reorganization, thereby reducing the cost of the process. The Ply-Marts, Inc. case is an example of such a federal equity receivership. It was commenced in federal rather than state court because the debtor had operating assets in more than one state and there was diversity of citizenship between the secured creditor plaintiff and commercial borrower defendant.

B. State Equity Receiverships

1. Insurance Companies, Banks and Other Entities Not Eligible for Bankruptcy

Bankruptcy does not intersect with receiverships where the business entity that is in distress is not eligible to be a debtor in a bankruptcy case. Bankruptcy is unavailable to such institutions and their liquidation is customarily supervised under state or federal receiverships. Section 109 (b) of the Bankruptcy Code provides:

> A person may be a debtor under chapter 7 of this title only if such person is not --
>
> (1) a railroad:
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Market Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as , a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or

> (3) (A) a foreign insurance company engaged in such business in the United States; or
>
> (B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978 in the United States.

Section 109(d) of the Bankruptcy Code provides that only a railroad or a person that may be a debtor under Chapter 7 of the Bankruptcy Code, and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act with certain qualifications may be a debtor under Chapter 11 of the Bankruptcy Code.

2. Real Estate in Distress Receivership Commenced by Secured Creditor

A very common state court receivership is a real estate receivership commenced by the secured creditor that holds the mortgage on the property and has the right under its security deed to have a receiver appointed upon an event of default by the borrower. These types of receiverships commonly intersect with bankruptcy either because the borrower files a voluntary petition for relief under the Bankruptcy Code or because creditors of the borrower commence an involuntary bankruptcy case. The general rule under section 543 of the Bankruptcy Code is that a receiver as custodian is directed to turn over to the trustee or debtor in possession the assets in the receiver's possession upon receipt of notice of the commencement of the bankruptcy case and to file an accounting with the bankruptcy court. Depending on the amount of time that the receivership has been pending and other factors regarding the prepetition management of the assets, a receiver may be excused from turning over the property to the debtor. See Section VII.

3. Operating Company in Distress Receivership Commenced by Secured Creditor

It is not surprising to find a state court equity receivership of an operating company where the secured creditor desires to have a court-supervised process and the borrower's board of directors or managers and its equity holders acknowledge that a receivership is appropriate because they have concluded that the business cannot continue and that a going concern business sale would provide a greater return than a forced liquidation of the company's inventory and equipment. Receivers are not forced to liquidate the company's assets in a state court receivership but may, with appropriate language in the receivership order, continue to operate the business. However, because of limitations applicable to states regarding interference with contract rights and the discharge of claims, in the absence of full payment of creditors or unanimous creditor consent to acceptance of less than payment in full, it would seem that a more likely outcome of such "operating" receiverships is a court-supervised sale of the business as a going concern followed by a distribution of the sale proceeds to creditors rather than a true reorganization. Where the goal of the proceeding is to sell all or a portion of a business as a going concern, a purchaser is going to require that it obtain clear title. Even if the law may allow a receiver to sell "free and clear," if there is not clear law from the highest court in the jurisdiction, a more robust sale could take place in bankruptcy where the law is more settled.

4. Survey of Select Southeastern State Receivership Practices

In 2011, the Uniform Law Commission ("ULC") established a Study Committee on Real Estate Receiverships to review whether a Uniform Act on the appointment and powers of real estate receivers would be appropriate and whether such a uniform law

would be likely to gain widespread adoption by the States. R. Wilson Freyermuth, John D. Lawson Professor of Law at the University of Missouri School of Law is the Reporter for the Committee that in 2014 drafted a Model Commercial Real Estate Receiverships Act. In 2013, the ULC Study Committee produced a 50 State Capsule Summary of Foreclosure/Receivership Laws. Another source of comparative data regarding state receivership laws is Friedland, Hammeke, Vandesteeg and Allen, *Strategic Alternatives For and Against Distressed Businesses*, 2015 ed. published by Thomson Reuters. Attached to this paper as Appendix A is a comparative outline of four key provisions of the receivership laws of twelve southeastern states. These provisions are: (i) preferential transfer avoidance, (ii) sales free and clear of liens, (iii) receivership financing and (iv) compensation of receivers. The ULC Study Committee Survey and Strategic Alternatives treatise were used as source materials for this paper's **Appendix A**. One additional note regarding preferential transfer avoidance is that the United States Court of Appeals for the Ninth Circuit has concluded that state preferential transfer avoidance law have been preempted by the Bankruptcy Code. See section III(B) below. Because the Ninth Circuit's analysis has received some subsequent criticism, it may be useful to consider how the laws of a particular State speak to such topic.

5. Sample Receivership Order

A copy of a sample receivership order under federal law is available via the ABI Events app, on ABI's website, and on your USB drive.

II. Benefits of Receiverships

A. In Pari Delicto

The *in pari delicto* doctrine is an equitable defense similar to the doctrine of unclean hands in which a plaintiff that participated in allegedly wrongful conduct is

estopped from recovering damages from a fellow wrongdoer. As noted in *Official Comm. of Unsecured Creditors of Allegheny Health, Educ. and Research Found. v. PricewaterhouseCoopers, LLP,* 2008 WL 3895559 (3d Cir. July 1, 2008), *"[i]n pari delicto* is a murky area of law. It is an ill-defined group of doctrines that prevents courts from becoming involved in disputes in which the adverse parties are equally at fault." Id. at *5. The application of the doctrine has been just as murky when a third party is placed in control of the entity. Although early use of this defense against trustees in bankruptcy or creditor committees seemed to gain traction, courts have been less likely to apply it when the plaintiff was the receiver appointed by the court for the receivership estate.

In the case of *Hays v. Paul, Hastings, Janofsky & Walker LLP,* No. 1:06-CV-754-CAP, slip op. at 25-27 (N.D.Ga. Sept. 14, 2006), the court applied Georgia law and declined to apply the *in pari delicto* doctrine to bar a receiver's claims. *Accord*, *Hays v. Adam*, 512 F.Supp. 2d 1330, 1344 (N.D.Ga. 2007). Similarly, the Seventh Circuit has found that the *in pari delicto* doctrine does not apply to bar a receiver's claims. *Scholes v. Lehmann,* 56 F.3d 750, 754 (7th Cir. 1995) (holding that "the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated."). However, the Seventh Circuit subsequently limited that holding in the case of *Knauer v. Jonathon Roberts Fin. Group, Inc.,* 348 F.3d 230, 236 (7th Cir. 2003) (while the *in pari delicto* doctrine is not a defense against a receiver's claim for the avoidance of fraudulent conveyances as was the case in *Scholes v. Lehman*, it may apply as a defense to other types of third party claims brought by a receiver). For another case declining to apply the *in pari delicto* doctrine to bar a corporate receiver's third party claims, *see FDIC v. O'Melveny & Meyers*, 61 F.3d 17 (9th Cir. 1995).

Although the Third Circuit extended the application of the doctrine of *in pari delicto* to bar the claims of an unsecured creditors committee in *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.,* 267 F.3d 340 (3d Cir. 2001), the court went on to distinguish receivership proceedings from bankruptcy cases, because "unlike bankruptcy trustees, receivers are not subject to § 541." Id. at 358. The Fifth Circuit, however, applied the defense in the case of *FDIC v. Ernst & Young,* 967 F.2d 166 (5th Cir. 1992), and precluded the receiver from asserting claims applying the *in pari delicto* doctrine. For cases discussing the applicability of *in pari delicto* to claims brought by bankruptcy trustees, *see Picard v. J.P. Morgan Chase & Co. (In re Bernard Madoff Inv. Sec., LLC),* 54 F.3d 54 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2895 (2014). *See also*, *Flaxer v. Gifford (In re Lehr Constr. Corp.),* 528 B.R. 598 (Bankr.S.D.N.Y., 2015) (*in pari delicto* doctrine bars bankruptcy trustee's faithless servant claim) citing *Deangelis v. Corzine (In re MF Global Holdings Inv. Litig.)*, 998 F. Supp. 2d 157, at 189 (S.D.N.Y. 2014) (because a bankruptcy trustee stands in the shoes of a bankrupt corporation, the *in pari delicto* doctrine prevents the trustee from recovering in tort if the corporation, acting through authorized employees in their official capacities, participated in the tort). *See also, Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150, (11th Cir. 2006), in which the Eleventh Circuit stated:

> We need not resort to legislative history because the text of section 541(a) is unambiguous, and "the language of our laws is the law." *CBS, Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1227 (11th Cir. 2001). Under the plain meaning of section 541(a), the debtor estate includes all "legal or equitable interests of the debtor as of the commencement of the case." 11 U.S.C. § 541(a) (emphasis added). "A bankruptcy trustee stands in the shoes of the debtor and has standing to bring any suit that the debtor could have instituted" when the debtor filed for bankruptcy, and there is no suggestion in the text of the Bankruptcy Code that the trustee acquires rights and interests greater than those of the debtor. *O'Halloran*, 350 F.3d at 1202; see also 11 U.S.C. § 362(a). If a claim of ETS would have been

> subject to the defense of *in pari delicto* at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense.

The appointment of a receiver before the commencement of a bankruptcy case has been held in at least one case to effectively cleanse the debtor thereby insulating a liquidating trustee of the debtor from the taint of the former bad actors so that the *in pari delicto* doctrine does not bar the trustee in a subsequent bankruptcy case from asserting his claims. See *In re Le-Nature's Inc.,* 2009 WL 3571331 (W.D.Pa. Sept. 16, 2009), in which the district court distinguished the Third Circuit's *Lafferty* decision, stating:

> In *Lafferty*, two debtor corporations filed for bankruptcy after a "Ponzi scheme" collapsed leaving the investors in these corporations with substantial losses. The scheme was orchestrated by the corporate debtors' sole shareholder, William Shapiro, who issued fraudulent debt certificates on behalf of the corporations. When the corporations had no prospect of repaying the debt, the corporations sought protection through bankruptcy. Subsequent to the bankruptcy filings, the debtors' estates, through their creditors' committees, brought claims alleging that third parties had fraudulently induced the debtor corporations to issue debt securities thereby deepening their insolvency and forcing them into bankruptcy.
>
> One of the main issues in the *Lafferty* case was whether the *in pari delicto* doctrine would bar the claims brought by the creditor's committee on behalf of the debtors' estates. The Court of Appeals for the Third Circuit held that *in pari delicto* could bar the claims if Shapiro's conduct could be imputed to the corporations and hence to the creditors' committees since the committees stood in the shoes of the debtor-corporations.
>
> …
>
> Unlike the facts in *Lafferty*, I must evaluate the *in pari delicto* doctrine in light of the fact that when Kirschner stepped into the shoes of Le-Nature's it was no longer being operated by a corrupt management team (Podlucky and the Insiders) due to the minority shareholders who convinced the Chancery Court to replace the leadership. Thus, at the moment the bankruptcy was filed, Le-Nature's was not being run by the wrongdoers who allegedly engaged in fraud. [FN11] This distinction alone leads me to conclude that since Le-Nature's alleged wrongdoing

> shareholders were stripped of their power by the alleged innocent minority shareholders prior to the bankruptcy filing, there was nothing to impute at the time of the bankruptcy filing, and accordingly, the *in pari delicto* doctrine cannot apply to bar Kirschner's claims against Krones. FN12
>
> FN11. I find Judge Cowen's dissent in *Lafferty* instructive on this point. He notes that the *Lafferty* majority concluded that the creditors' committees were barred from recovery because "at the moment the bankruptcy was filed the wrongdoers had not actually been removed yet." 267 F.3d at 362. In *Lafferty*, the trustee took over a company which, until the moment the trustee assumed control, had been run by a corrupt shareholder. This directly contrasts with the facts of the immediate case. Although Krones suggests that the brief period of the time the custodian actually controlled Le-Nature's prior to the bankruptcy filing was not enough to "cleanse" the company of the "taint," I disagree based on the majority and dissenting opinions in *Lafferty*.
>
> FN12. Even assuming, arguendo, that the minority shareholder's actions, KCZ's succession, and KCZ's control over Le-Nature's (all of which predated the filing of the bankruptcy) are of no moment, the second part of the *Lafferty* analysis-where the Court questions whether the acts and conduct of Podlucky and the Insiders can be imputed to Le-Nature's-also fails.

As indicated above, although the case law in this area is still developing, it appears that courts are more likely to apply the *in pari delicto* defense to preclude claims by trustees, debtors in possession and unsecured creditors committees than similar claims brought by receivers.

B. Unitary Enterprise Theory

Receiverships are also favored over bankruptcy proceedings because of the ease through which a Receiver can consolidate the assets of various receivership entities into a single fund to treat all entities within the receivership estate as a "unitary enterprise". At the federal level, district courts act with "wide discretion" in using their "broad powers" to establish a unitary enterprise. *SEC v. Sunwest Mgmt., Inc.,* No. 09-6056-HO, 2009 WL 3245879, *8 (D. Or. Oct. 2, 2009).

When a district court determines that various entities under the control of a receivership estate acted as a unitary enterprise in the course of perpetuating a fraudulent scheme, the critical element is a finding that the persons responsible for the fraudulent activity "did not respect the separateness of the Receivership Entities nor the restricted purposes of invested funds that were intended to be limited to use for specific facilities." *SEC v. Sunwest Mgmt., Inc.,* 2009 WL 3245879 at *1. In those circumstances, courts determine that the receivership entities have become part of a "unified scheme to defraud" the various investors and creditors of the receivership estate. *SEC v. Byers,* 637 F. Supp. 2d 166, 181 (S.D.N.Y. 2009).

The essential element of any unitary enterprise is the commingling of funds, such that fraudulently obtained funds have been mixed with the legitimately held assets of the receivership entities. Commingling of funds can take different forms. Court have consolidated assets due to commingling where parties combined the funds from various receivership entities with operational revenue into a single centralized fund, out of which all operating expenses and distributions for each receivership entity were paid. *See Sunwest Mgmt., Inc.,* 2009 WL 3245879 at *4 (SEC alleged that defendants "commingl[ed] investor and creditor funds and operational revenue into essentially a single fund" which was then funneled into one of the defendant's personal bank accounts and was then redistributed as operating expenses and investor returns); Byers, 637 F. Supp. 2d at 180 (finding unitary enterprise where "cash from the operations was routinely pooled to pay for operating expenses and distributions across various offerings"). Commingling has also been found where money was moved

indiscriminately between corporate entities without regard for any corporate formalities. *Byers,* 637 F. Supp. 2d at 178.

Federal district courts have embraced a lenient standard for finding that funds within a corporate account have been commingled, stating that any evidence that illegally obtained funds have been placed into an account taints all funds within that account. *Sunwest Mgmt., Inc.,* 2009 WL 3245879 at *9. Rather than finding that the commingling of funds must be systematic such that it would be impossible to trace the funds from individual creditors or investors, as is frequently the standard for the similar remedy of substantive consolidation in bankruptcy cases, district courts have found the existence of unitary enterprises due to commingling where there is any evidence that the defendants have "blurr[ed] the distinction between the Receivership Funds." *CFTC v. Eustace,* No. 05-2973, 2008 WL 471574, *7 (E.D. Pa. Feb. 19, 2008). Thus, the government only has the burden of proving that some tainted proceeds have been commingled with other funds. *Byers,* 637 F. Supp. 2d at 178.

Once a determination has been made that receivership entities have functioned as a unitary enterprise, courts create a constructive trust over all assets of the receivership estate and each investor and creditor has an equitable interest in all of the funds within that trust. *SEC v. The Better Life Club of Am., Inc.,* 995 F. Supp. 167, 181 (D.D.C. 1998). The assets within the trust are then distributed on a pro rata basis. Under a pro rata distribution, the claims of creditors and investors of all receivership entities are satisfied at an equal proportion out of the consolidated *res* of the receivership estate. The use of this type of distribution is "most favored" in receivership cases. *Byers,* 737 F. Supp. 2d at 176-77.

It is because of the relative ease with which a Receiver may resort to a unitary enterprise theory that general creditors of the receivership estate (including defrauded securities investors) stand to gain the most from a receivership distribution, because they are able to participate in a pro rata distribution of the combined receivership estate assets. Conversely, creditors who dealt solely with a single entity within the receivership estate and who, under traditional bankruptcy substantive consolidation principles could resist the pooling of the assets and liabilities of that entity with the larger receivership estate, might be able to receive a greater distribution under a bankruptcy of their single entity than under a receivership unitary enterprise. As a result, those creditors would likely prefer to place the entity against which they hold claims in bankruptcy.

III. Disadvantages of Receiverships

A. No Discharge/Limited Opportunities for Reorganization

State courts may not provide a discharge of liability for creditor claims and so unless all creditors agree to accept less than full payment of their debts, reorganization of the business is unlikely. As the U. S. Supreme Court held in the case of *International Shoe v. Pinkus,* 278 U.S. 261, 263-65, 49 S.Ct. 108, 109-110, 73 L.Ed. 318 (1929):

> A state is without power to make or enforce any law governing bankruptcy that impairs the obligation of contracts or extends to persons or property outside its jurisdiction or conflicts with the national bankruptcy law.... The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. Constitution, art. 1, s 8, cl. 4. The purpose to exclude state action for the discharge of insolvent debtors may be manifested without specific declaration to that end; that which is clearly implied is of equal force as that which is expressed.

B. No Ability to Pursue Federal Bankruptcy Preference Avoidance and Recovery

Because section 547 of the Bankruptcy Code is only available in a bankruptcy case, a state court receiver does not have the ability to recover preferential transfers even if state law permits the avoidance and recovery of preferences. *See Sherwood Partners, Inc. v. Lycos, Inc.,* 394 F.3d 1198 (9th Cir.), *cert. denied,* 546 U.S. 927 (2005) (holding that state preference laws are preempted by the Bankruptcy Code). But see, *Ready Fixtures Co. v. Stevens Cabinets*, 488 F. Supp. 2d 787 (W.D. Wis., 2007) (holding that Wisconsin state preference laws do not conflict with the Bankruptcy Code and are, therefore, not preempted) and *Haberbush v. Charles and Dorothy Cummins Family Ltd. Partnership*, 139 Cal. App. 4th 1630, 43 Cal. Rptr. 3d 814 (Cal. App. 2 Dist. May 31, 2006) (disagreeing with the *Sherwood Partners* decision and holding that California's preferential transfer avoidance statute is not preempted by the Bankruptcy Code thereby permitting an Assignee under a state law assignment for the benefit of creditors to pursue such claims). An unsecured creditor faced with a receivership should weigh the likelihood of being a defendant in a preference action and the existence of significant preferential transfers to other unsecured creditors as it weighs whether or not a bankruptcy case is the preferred alternative for it.

C. No Automatic Stay

Because section 362 of the Bankruptcy Code is only available in a bankruptcy case, a state court receivership cannot effectively prevent creditors from suing the borrower and obtaining judgments that thereby obtain priority in right of payment under state law. Federal courts, by way of contrast, can and do enjoin creditor action

against the receivership estate. The inclusion of channeling injunction provisions in the receivership order may accomplish the similar goal of bringing all disputes before the receivership court, at least in federal court.

D. No Rules Regarding Notice to Creditors, Claims Filing, or Objections

A significant concern to non-party creditors is the lack of common rules regarding the service of notice to creditors before the Receiver takes important action in administering the assets in the receivership estate. This can be ameliorated by the inclusion of notice provisions in the receivership order. However, the only parties likely to receive notice of the secured creditor's request for the appointment of a receiver are the defendants in the receivership action, and so unsecured creditors and other secured creditors commonly first learn of a receivership action when they receive a copy of the receivership order. Nevertheless, timely intervention and a request for modification of the receivership order may be more aligned with the creditor's interest than jumping to the conclusion that an involuntary bankruptcy is the preferred alternative. However, where the company is being liquidated, the bankruptcy court's established process and priorities are commonly more predictable than a state or federal receivership court that is not as accustomed to supervising liquidations.

E. No U.S. Trustee

There is no U.S. Trustee equivalent in the federal or state receivership. The federal and state courts rely upon the receiver and the receiver's counsel to manage the process efficiently and expeditiously and, without the oversight provided by the U.S. Trustee, receiverships may linger beyond the time necessary and appropriate to accomplish their intended goal. The secured creditor whose collateral is being liquidated is, however, incentivized to closely monitor the receiver's progress and

commonly does. But without a spokesperson for the unsecured creditors, there is no easy way to insure that the receiver maximizes a recovery beyond that necessary to satisfy the secured creditor.

F. Unclear if Property May be Sold Free and Clear of Liens Unless Secured Claims Are Paid in Full

In *Spreckels v. Spreckels Sugar Corp.,* 79 F.2d 332 (2d Cir. 1935), where receiver sought to sell property free and clear of liens, Judge Learned Hand stated:

> We have no doubt that the power exists; the question is only as to the propriety of, and the proper conditions upon, its exercise. It is quite true, although there is perhaps no rigid rule about it, that ordinarily a court will not sell property free and clear of liens unless it can see that there is a substantial equity to be preserved.

Id. at 334.

Under Georgia law, "[u]nless otherwise provided in the order, liens upon the property held by any parties to the record, shall be dissolved by the receiver's sale and transferred to the funds arising from the sale of the property." O.C.G.A. § 9-8-6. However, this may only be done where the lienholder is a party to the case "and the priority of the holder is carried over to the net proceeds of the sale." 2 Pindar's Ga. Real Estate Law & Proc. § 21-6 (6th ed.) (citing O.C.G.A. § 9-8-6; *Ackerman v. Moon,* 81 Ga. 688, 8 S.E. 321 (1888)); *see also Empire Cotton Oil Co. v. Park,* 147 Ga. 618, 95 S.E. 216 (1918); *Denny v. Broadway Nat. Bank,* 118 Ga. 221, 44 S.E. 982 (1903); *McLaughlin v. Taylor,* 115 Ga. 671, 42 S.E. 30 (1902). Further, any such sale by a receiver would be a sale in equity and thus appear to require confirmation of the sale by the court, O.C.G.A. § 23-4-35, at least where the receivership order does not contain pre-authorization of sales by the receiver. As mentioned in section I(B)(3) above, where the goal of the proceeding is to sell all or a portion of a business as a going

concern, a purchaser likely will require title insurance. Even if the law may allow a receiver to sell "free and clear" the parties may have difficulty finding a title insurance company willing to issue such a title policy if there is not clear law from the highest court in the jurisdiction. Title insurance is commonly available for purchasers of assets in bankruptcy and so a more robust sale process is possible in bankruptcy where the law is more settled.

G. No Clear Court Supervised Sale Process

Unlike section 363 of the Bankruptcy Code and Bankruptcy Rule 6004, the requirements for prior notice and an opportunity to object to receiver sales are left to the vagaries of the receivership order, which is often silent as to the procedure or expressly empowers the receiver to sell in public or private sale at his discretion.

IV. Who May File a Bankruptcy Petition If a Receivership is Pending

A. The Receiver

Provided the Receivership Order contains the appropriate language, or if not, the Receiver seeks and obtains an order from the appointing court, the Receiver may file a petition for relief on behalf of the business entity or entities that are in the receivership estate.

B. The Debtor's Replaced Board of Directors, Management or Equity

Because the bankruptcy courts look to state law to determine who has the power to commence a bankruptcy case, bankruptcy courts commonly conclude that the board of directors of a company that has a state or federal receiver may commence a bankruptcy case.

Although some deference is granted to receivers appointed by federal district courts, bankruptcy courts are not as likely to prohibit a debtor's board of directors

from resorting to bankruptcy on the grounds that the debtor is subject to a pending state court receivership action that purports to preclude interference with the receiver by filing a bankruptcy petition. For example, in *In re Automotive Professionals, Inc.,* 370 B.R. 161, 180-81 (Bankr. N.D. Ill. 2007), the bankruptcy court determined that an Order of Conservation issued by a state court that placed the assets and business of the debtor under the possession of the Illinois Director of Insurance did not preclude the debtor's directors and officers from filing a voluntary bankruptcy petition. The court went on to add that "the exclusivity of an administrative receiver's title to all assets under state law is irrelevant to the determination of whether a particular entity may file for bankruptcy relief .... Title 11 suspends the operation of state insolvency laws except as to those classes of persons specifically excluded from being debtors under the [Bankruptcy] Code." *Id.* at 181 (quoting *In re Cash Currency Exch., Inc.,* 762 F.2d 542, 552 (7th Cir. 1985); *see also In re Orchards Village Investments, LLC,* 405 B.R. 341, 349 (Bankr. D. Or. 2009).

C. Creditors

Creditors have been enjoined from commencing involuntary bankruptcy cases by federal and state courts. However, appellate courts have been more willing to enforce such provisions in federal than in state court orders. See Section V below.

V. Which Courts Enjoin Filing of a Bankruptcy Petition

Federal courts in SEC cases may enjoin creditors from commencing involuntary cases against companies in the receivership estate. For example, the Second Circuit in the case of *SEC v. Steven Byers, Wextrust Capital, LLC, et al.,* 609 F.3d 87 (2d Cir. 2010), joined the Ninth and Sixth Circuits in upholding an anti-bankruptcy injunction contained in a receivership order. Although indicating that this power should be used

cautiously, the Second Circuit Court of Appeals held that district courts may issue anti-litigation injunctions barring bankruptcy filings as a part of their broad equitable powers in the context of an SEC receivership.

In contrast, in *Gilchrist v. General Elec. Capital Corp.,* 262 F.3d 295 (4th Cir. 2001), a federal receiver was appointed under an order by the District of South Carolina that directed "'all persons'... not to file any action that 'affects' [the debtor's] assets." *Id.* at 297. A week later, creditors filed an involuntary petition in the Southern District of Georgia against the debtor. The Court of Appeals found that the mere fact that the receivership action was filed first had no bearing and that the automatic stay provision applied to the receivership action. *Id.* at 303-04 (holding the Bankruptcy Code is "unequivocal in its grant of exclusive jurisdiction to the bankruptcy court, and § 362(a) imposes an automatic stay on all proceedings merely upon the filing of a bankruptcy petition.... we believe it would frustrate Congressional intent to imply such a limitation based solely on consideration of a first-filed policy."); *see also In re Corporate and Leisure Event Productions, Inc.,* 351 B.R. 724, 731 n. 26 (Bankr. D. Ariz. 2006) (declining to enforce a receivership order that precluded a bankruptcy filing, stating "It should go without saying that if removal of corporate officers and directors by a receivership order were sufficient to prevent a bankruptcy filing, creditors who seek their state court remedies to the exclusion of all others would routinely obtain receivership orders with such boilerplate language."). The court in *Gilchrist* went on to state that even if there was not a jurisdictional issue, they did "not believe that the equities favor the common-law receivership process over the highly developed and specific bankruptcy process." Id. at 304. The court noted that the bankruptcy court was better suited to administering the assets of the debtor where the

"procedural requirements for liquidating a large corporation with thousands of creditors, many of whom might challenge the priority of liens and the adequacy of asset sales, present a task that would push the receivership process to its limits." *Id.*

VI. Receiver as Debtor / Trustee

Bankruptcy Code Section 105(b) does not permit the bankruptcy court to appoint a receiver in a bankruptcy case. *Norton Bankruptcy Law and Practice 3d,* §4:133. Early cases indicated that receivers should not act as debtors in possession. In *Matter of Plantation Inn Partners,* 142 B.R. 561 (Bankr. S.D. Ga. 1992), Judge Davis concluded:

> … to permit the Receiver to indefinitely remain in possession and to vest him permanently with all the duties and powers of a debtor-in-possession goes far beyond the limited relief envisioned by Section 542. To do so would circumvent the prohibition of Section 105(b) against the appointment of receivers in lieu of a debtor-in-possession or trustee. Clearly the Code contemplates that the long-term administration of a Chapter 11 case will be managed by a trustee or debtor-in-possession, not a hybrid created by judicial fiat. *See Collier on Bankruptcy,* ¶ 1104.01[e] at 1104-29, 30.

Although the U.S. Trustee has in the past objected to a receiver acting as trustee in a subsequent bankruptcy case, in recent practice, the U.S. Trustee seems to prefer having the receiver be appointed the trustee in a bankruptcy case commenced by the receiver. Citing the Second Circuit's decision in the case of *Adams v. Marwil (In re Bayou Group, LLC),* 563 F.3d 541 (2d Cir. 2009), Grant Stein observes in his article entitled "The Intersection of Receiverships and Bankruptcy" published in the Volume 27, Number 4 issue of *The Bankruptcy Strategist* (February 2010), that a well drafted receivership order may enable a receiver to be appointed trustee in a bankruptcy case or otherwise remain in control. Stein cites several cases in which receivers filed bankruptcy cases and were subsequently appointed trustee including *In re*

International Management Associates, LLC, No. 06-62966 (Bankr. N.D. Ga. Filed Mar. 16, 2006) (individual named as SEC receiver was appointed trustee) and *Rothstein Rosenfeldt Adler PA,* No. 09-34791 (Bankr. S.D. Fla. Filed Nov. 10,. 2009) (individual named as state court receiver handling a Ponzi scheme consented to an order for relief and was appointed to serve as Chapter 11 trustee). See also, *In re Petters Co., Inc.*, 401 B.R. 391 (Bankr.D.MN., 2009)(an individual appointed as federal receiver may qualify to serve as trustee in a subsequent bankruptcy case provided he formally effects the turnover required under Bankruptcy Code Section 543).

VII. Receiver As Custodian

A. 543 Turnover Issues

Section 543 of the Bankruptcy Code governs the turnover of property by a custodian. Section 543 provides as follows:

> **(a)** A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.
>
> **(b)** A custodian shall--
>
> (1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and
>
> (2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.
>
> **(c)** The court, after notice and a hearing, shall--

> protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;
>
> (1) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian; and
>
> (2) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.
>
> **(d)** After notice and hearing, the bankruptcy court--
>
> (1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and
>
> (2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

Bankruptcy Code Section 543 should be read in conjunction with Bankruptcy Rule 6002, entitled "Accounting by Prior Custodian of Property of the Estate," which dictates the procedure to be followed when a bankruptcy is filed while a state or federal court receivership is pending. Bankruptcy Rule 6002 (a) requires the custodian to deliver property in the custodian's possession or control to the trustee and to promptly file and transmit to the United States Trustee a report and account with respect to the property of the state and the administration thereof. Bankruptcy Rule 6002(b) provides that once the custodian's report and account has been filed and after an

examination has been made into the superseded administration, after notice and a hearing, the bankruptcy court shall determine the propriety of the administration, including the reasonableness of all disbursements. *A copy of the Final Report and Accounting that was filed by the Receiver for Ply-Marts is available via the ABI Events app, on ABI's website, and on your USB drive.* For an explanation of how a superseded receiver should proceed if the court does not excuse compliance with Bankruptcy Code Section 543, see *In re China Village, LLC*, 2012 Bank. LEXIS 105, 2012 WL 32684 (Bankr. N.D. Cal., January 4, 2012) in which a bankruptcy court reviewed the final report and accounting as well as the application for fees and expenses by the superseded state court receiver and the receiver's counsel. The decision is instructive on points such as when is it appropriate to surcharge a superseded receiver and whether a superseded state court receiver's counsel is required to be appointed by the court or disinterested under Bankruptcy Code § 327 and entitled to compensation for post-petition services to the receiver (the bankruptcy court held that Bankruptcy Code § 327 was not applicable), and the award of fees for the receiver and the receiver' counsel under Section 503(b)(4) of the Bankruptcy Code. If the bankruptcy court excuses compliance with Bankruptcy Code Section 543 even if only during the initial phases of the bankruptcy, *see In re Internet Specialties West, Inc.*, 2013 Bankr. LEXIS 2849, 58 Bankr. Ct. Dec. 63 (Bankr. C.D.Cal., 2013) (the court held that Bankruptcy Code Section 503(b)(3)(E) applied to a superseded receiver as custodian even after a bankruptcy case was filed and so Bankruptcy Code Section 503(b)(4) included the fees incurred by the receiver's counsel after the bankruptcy was filed). *See also Riley v. Decoulos (In re Am. Bridge Prods.)*, 599 F.3d 1 (1st Cir., 2010) (where a superseded receiver as custodian fails to render a final accounting and has not

been discharged in either state or federal court, a limitations period under state law for bringing claims for mismanagement and breach of fiduciary duty do not apply, and the bankruptcy court may consider such otherwise time barred claims during the discharge hearing subject to a laches defense against the equitable claims where undue delay combines with prejudice.) *See, however, Barkley v. West (In re West)*, 474 B.R. 191 (Bankr. N.D. Miss. 2012) (post-petition transfer of property of the debtor not avoided because the trustee's claim was time-barred. holding that although Bankruptcy Code section 542 contains no statute of limitations, effectively it is subject to the limitations period of Bankruptcy Code section 549(d) with respect to property transferred post-petition). The same might hold for the turnover provisions of Bankruptcy Code section 543 after the limitations period in Bankruptcy Code section 549(d) has passed.

Under Section 543(d) the bankruptcy court may excuse compliance with the statute under certain circumstances and *may* allow a custodian, such as a receiver, to continue in his role "if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property." Further, the bankruptcy court *shall* allow the custodian to continue his role "if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice."

Courts have held that Section 543(d), which allows a bankruptcy court to continue the prepetition receivership and to relieve a receiver from his duty to comply with the Bankruptcy Code's turnover and accounting requirements, is a modified abstention provision that reinforces policies set forth in the Bankruptcy Code section

governing abstention. *In re Lizeric Realty Corp.,* 188 B.R. 499 (Bankr. S.D.N.Y. 1995) (excusing the receiver from turnover of property because under the Bankruptcy Code, there is an exception to requirement that custodian of debtor's property who has knowledge of commencement of bankruptcy case turnover to debtor any assets of estate in his possession in cases where interest of creditors and equity security holders would be better served by permitting custodian to continue in possession).

In an unpublished Order addressing whether a receiver should be excused from compliance with Section 543(b), Judge Cox collected and listed seven factors that should be analyzed in determining whether the interest of creditors would be better served by permitting a receiver to continue in possession, custody, or control of a debtor's property. *In re Falconridge, LLC,* Chapter 11 Case No. 07-19200 (Bankr. N.D. Ill.), Order dated November 8, 2007 (Docket No. 31). Judge Cox, noting that courts weigh a number of factors based on the specific facts of each case, collected the following seven factors from a variety of reported decisions:

a) The likelihood of a reorganization;

b) The probability that funds required for reorganization will be available;

c) Whether there are instances of mismanagement by the debtor;

d) Whether turnover would be injurious to creditors;

e) Whether the debtor will use the turned over property for the benefit of its creditors;

f) Whether or not there are avoidance issues raised with respect to property retained by a receiver, because a receiver does not possess avoiding the powers for the benefit of the estate; and

g) The fact that the bankruptcy automatic stay has deactivated the state court receivership action.

Falconridge Order, page 11-12 (citing *Dill v. Dime Sav. Bank,* 163 B.R. 221, 226 (E.D.N.Y. 1994); *Lizeric Realty,* 188 B.R. at 506-507; *Northgate Terrace Apartments,* 117 B.R. 328, 332 (Bankr. S.D. Ohio 1990); *In re Poplar Springs Apartments,* 103 B.R. 146, 150 (Bank. S.D. Ohio 1989); *In re WPAS, Inc.,* 6 B.R. 40, 43-44 (Bankr. M.D. Fla. 1980)). Judge Cox further stated that "the paramount and sole concern is the interest of *all* creditors." *Falconridge Order,* page 12 (emphasis in original) (citing *KCC-Fund V., Ltd.,* 96 B.R. 237, 239-40 (Bankr. W.D. Mo 1989)); and that the "interests of the debtor are not to be considered in the court's decision." *Falconridge Order,* page 12 (citing *Dill,* 163 B.R. at 225; *Foundry of Barrington P'Ship v. Barrett (In re Foundry of Barrington P'Ship),* 129 B.R. 550, 557 (Bankr. N.D. Ill. 1991)); *see also In re Orchards Vill. Invs., LLC,* 405 B.R. at 351-354 (declining to require receiver to turn over assets of bankruptcy estate where debtor lacked income to fund reorganization, debtor's primary motivation for Chapter 11 filing was to protect interests of equity holders, and the evidentiary record reflected mismanagement of the assets prior to the Receivership).

B. Abstention and Dismissal

1. Factors for Dismissal

Section 305(a)(1) of the Bankruptcy Code provides that a Bankruptcy Court may dismiss any bankruptcy case at any time if "the interests of creditors and the debtor would be better served by such dismissal." The "prime congressional policy underlying the abstention doctrine of § 305 is to prevent the commencement and continuation of disruptive involuntary cases." *In re Weldon F. Stump & Co.,* 373 B.R. 823, 828 (Bankr.

N.D. Ohio 2007) (exercising permissive abstention under § 305 where a state-court receivership action had already commenced).

The courts look to the totality of the circumstances to determine whether a bankruptcy should be dismissed under Section 305. A non-exclusive list of factors courts consider to dismiss any bankruptcy under Section 305 include:

a) economy and efficiency of administration;

b) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;

c) whether federal proceedings are necessary to reach a just and equitable solution;

d) whether there is an alternative means of achieving an equitable distribution of assets;

e) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;

f) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and

g) the purpose for which bankruptcy jurisdiction has been sought.

In re Paper I Partners, L.P., 283 B.R. 661, 679 (Bankr. E.D.N.Y. 2002); *see also In re Fax Station,* 118 B.R. 176, 177 (Bankr. D.R.I. 1990); *In re Short Hills Caterers, Inc.,* 2008 WL 2357860, *4 (Bankr. D.N.J. June 4, 2008). In addition, the court in the case of *In re Spade,* 269 B.R. 225, 228-29 (D. Colo. 2001) determined that the involuntary bankruptcy petition was not in the best interests of creditors and should be dismissed

based on the following factors: 1) the motivation of the parties; 2) the preference payments creditors sought to recover through the trustee were marginal in relation to the administrative costs associated with such an action; 3) the cost and efficiency of administering the case in bankruptcy court; and 4) the prejudice to the other creditors by keeping the case in bankruptcy, which would shift the costs to all of the debtor's creditors.

2. Receivership as Another Available Forum

A dismissal under Section 305 is appropriate when there is another available forum. *In re Macke International Trade, Inc.,* 370 B.R. 236, 247 (Bankr. 9th Cir. 2007) ("Typical circumstances for dismissing under § 305 include the pendency of proceedings such as assignments for the benefit of creditors..., state court receiverships..., or bulk sale agreements."); *In re Bailey's Beauticians Supply Co.,* 671 F.2d 1063 (7th Cir. 1982) (affirming the dismissal of an involuntary petition where debtor had executed an assignment for the benefit of creditors prior to the filing of a petition, finding that there would be a duplication of unnecessary expenses and undue delay); *In re Silver Spring Center,* 177 B.R. 759 (Bankr. D.R.I. 1995) (dismissing case filed by debtor shortly after the appointment of a temporary receiver in state court); *In re Williamsburg Suites, Ltd.,* 117 B.R. 216 (Bankr. E.D. Va. 1990) (holding that the process of winding up of a partnership would not be better served under the bankruptcy process than under state law procedures); *In re O'Neil Village Personal Care Corp.,* 88 B.R. 76, 80 (Bankr. W.D. Pa. 1988) ("Several courts have held that § 305 abstention or dismissal is appropriate when another forum is available to determine the parties' interests, and in fact, such an action had been commenced."); *In re Tarletz,* 27 B.R. 787 (Bankr. D. Colo. 1983) (holding it was appropriate to dismiss the case because the

interests of the creditors and the debtor would be better served by such a dismissal, as there were adequate remedies available in a state court proceeding); *In re Sun World Broadcasters, Inc.,* 85 B.R. 719 (Bankr. M.D. Fla. 1980) (dismissing an involuntary case because there was already a pending receivership); *In re Short Hills Caterers, Inc.*, 2008 WL 2357860, at *5 (noting that "courts generally dismiss an involuntary case under § 305(a)(1) where the debtor has made an assignment for the benefit of creditors") (citations omitted).

Conclusion

While bankruptcy courts have the benefit of significant expertise and accordingly are the preferred venue for the reorganization or liquidation of companies in financial distress, in the appropriate case a state or federal equity receivership may be a less costly and a more efficient process. Creditors who are not parties to a receivership may intervene and seek to have the receivership court modify the court supervised procedures to more closely follow the provisions of the Bankruptcy Code. Because a bankruptcy case is not easily dismissed once filed, stakeholders should communicate with each other and with the receiver in order to determine whether bankruptcy like protections can be grafted onto the receivership process by consent before jumping to the conclusion that a bankruptcy filing is the best course of action. However, where a receivership court is not inclined to apply rules that would exist in a bankruptcy case or the secured creditor who is the plaintiff in the underlying receivership action is unwilling to cooperate, a bankruptcy petition may be the best course.

Finally, if a collision of the receivership and bankruptcy occurs, timely compliance with the provisions of Bankruptcy Code Section 543 and Bankruptcy Rule 6002 is the best and only course forward.

ABI SOUTHEAST BANKRUPTCY WORKSHOP

RECEIVERSHIPS AND BANKRUPTCY: BETWEEN SCYLLA AND CHARYBDIS

APPENDIX A

STATE	FINANCING	AVOIDING PREFERENCES	FREE AND CLEAR	PAYMENT AS A RECEIVER
Alabama	Receivers are permitted to accumulate property and operate the debtor's business. Receivers can also receive either express or implied power to borrow money. A receiver's express power to borrow can come from a court, the implied power comes from the receiver's ability to continue the debtor's business. *See In re C.M. Burkhalter & Co.,* 182 F. 353, 354 (N.D. Ala. 1910); *In re Jefferson County, Ala*, 474 B.R. 228, 250 (Bankr. N.D. Ala. 2012)(recognizing court's ability to grant receivership powers expressly).	There is no Alabama law that permits the avoidance of preferences in a receivership action.	If a receiver is granted the authority to sell property subject to liens, he would need either court approval or lienholder approval to sell free and clear. However, it is unclear whether an Alabama court would allow such a sale.	The court solely has discretion to determine the amount of a receiver's compensation. *Seiple v. Mitchell*, 239 Ala. 533, 535 (1940). It is typically the receivership estate's revenue, coupled with monthly fees and expenses.

STATE	FINANCING	AVOIDING PREFERENCES	FREE AND CLEAR	PAYMENT AS A RECEIVER
Florida	Receivers strictly adhere to creditor priorities when handling financing in a Chapter 11 bankruptcy (*Scheiner v. Adamco, Inc*., 81 So. 2d 205 (Fla. 1955)). Receiver's certificates are certificates or evidences of indebtedness issued under a court order by receivers in possession of property, payable out of a particular fund and are usually a first lien on the property except that a court has no power to order that such certificates be a prior and superior to a lien created by a prior existing judgment on property that had been conveyed by the judgment debtor. *Orr v. Dade Developers, Inc.,* 138 Fla (1939); 44 Fla Jur 2d Receivers § 64. *See generally Lehman v. Trust Co. of America*, 57 Fla. 473, 503-504 (1909); *Gibbs v. F.D.I.C.*, 2014 WL 644685 at *4 (M.D. Fla. Feb. 19, 2014); *In re Basil Street Partners, LLC*, 2013 WL 3209481 at *25 (M.D. Fla. Mar. 4, 2013).	There is no Florida law that permits the avoidance of preferences in a receivership action unless it relates to insurance (see, Fla. Stat. Ch. 440.386 Individual self-insurers' insolvency).	Courts may authorize a sale free and clear of liens with the liens to transfer to the proceeds of the sale. (*Arzuman v. Saud*, 964 So. 2d 809, 811 (Fla. 4th DCA 2007). The general Florida rule is that the mere appointment of a receiver does not in and of itself confer any of the owner's power or authority to sell such property. Receivers appointed in mortgage foreclosures may be limited to the powers and authority in the contract between the parties. (*Shubh Hotels Bocca, LLC v. Federal Deposit Ins. Corp*. (Fla. 4d FCA 2010).	Receiver is entitled to reasonable compensation for the services done to benefit the receivership estate (*Sundale Associates, Ltd. v. Moore*, 481 So. 2d 1300 (Fla. 3d DCA 1986)). Usually, this reasonable compensation comes through an hourly rate, but other forms of compensation like flat fees, contingency fees, or hybrid terms may also be provided (*Southest Bank, N.A. v. Ingrassia*, 562 So. 2d 718 (Fla. 3d FCA 1990).

STATE	FINANCING	AVOIDING PREFERENCES	FREE AND CLEAR	PAYMENT AS A RECEIVER
Georgia	Georgia law allows for receivers to liquidate receivership estates and arrange for payments of creditors (*Macon & W.R. Co. v. Parker*, 9 Ga. 377 (1851)). (O.C.G.A. § 9-8-1 et seq.)	Georgia law expressly permits a debtor to prefer one creditor over another (O.C.G.A. § 18-2-40) except in an insurance liquidation or rehabilitation proceeding (O.C.G.A. § 33-37-27).	Georgia law permits free and clear sales (O.C.G.A. § 9-8-6), but only when the relevant lienholder is a party to the case and "the priority of the holder is carried over to the net proceeds of the sale" (2 Pindar's Ga. Real Estate Law & Proc. § 21-6 (6th ed.))	The court may order compensation to a receiver from the assets of the corporation in bankruptcy or proceeds from sale of those assets (O.C.G.A. § 14-2-1432(e)).
Louisiana	Receivers are given the powers of a judicial liquidater under La. R.S. 12:146(C). This means they can borrow and obtain money to continue the debtor's business. Receivers can also borrow money through receivership certificates. *See, e.g.*, *In re Receivership of Baldwin Lumber Co.*, 176 La. 909, 911 (1933)(describing receiver's borrowing of funds through receivership certificates to pay the expenses of debtor's continued operation).	There is no Louisiana law that permits the avoidance of preferences in a receivership action unless it relates to an insurance rehabilitation or liquidation proceeding (see, La. Sec. 22:2020).	There is no case law or statutes on a receiver's ability to sell free and clear in Louisiana.	Receivers are compensated from the corporation's assets.

STATE	FINANCING	AVOIDING PREFERENCES	FREE AND CLEAR	PAYMENT AS A RECEIVER
Mississippi	Receivers are allowed to manage a debtor's business. However, if the receiver is only appointed to liquidate the estate, his actions are only limited to liquidation.	Receivers do not have the same rights as bankruptcy trustees in Mississippi. However, they do have the power to sue as receiver of the corporation, subject to the court's discretion.	A Mississippi state court may authorize free and clear sales only if the relevant lienholders are parties to an order for the sale of property and receive notice of the sale.	Receivers are required to be compensated for their services and necessary expenses and are given a lien on any property they possess.
Maryland	Maryland law provides receivers the ability to "continue to the corporate business." MD Code, Corporations and Associations, § 3-414(d). Receivers are able to "take charge of the assets and operate the business of the corporation." MD Code, Corporations and Associations, § 3-414(b)(1) Receivers are also permitted to borrow money through the use of receiver's certificates. *See, e.g.*, *Central Trust Co. of Maryland v. American Foundry & Mfg. Co.*, 141 A. 111, 114 (describing that court approval is required before receiver's certificates can be used); *Goldstein v. F.D.I.C.*, 2012 WL 1819284 at *10 n.9 (D.Md May 16, 2012)(describing the FDIC's ability to satisfy	Maryland law considers receivers as synonymous with the debtor with regards to voiding preferences. It defers to federal law with regards to determining which preferences are voidable. Md. Code, Commercial Law § 15-101(b), (d).	A sale by a receiver is not binding unless it is court-approved. Therefore, Title 14, Chapter 300 of the MD Rules covers judicial sales, including free and clear sales.	Courts determine how receivers are compensated in accordance with Md. Rule 13-303. The receiver has to file an application requesting an allowance of compensation and expenses and containing a description of services provided. The relevant court is allowed to supersede any agreement between the parties about compensating a receiver.

STATE	FINANCING	AVOIDING PREFERENCES	FREE AND CLEAR	PAYMENT AS A RECEIVER
	damages claims through receivership certificates while acting as a receiver of a failed bank).			
North Carolina	Receivers are permitted to "all [sic] acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business." N.C.G.S.A. § 1-507.2. North Carolina law appears to focus on resolving existing problems rather than permitting new financing. Receivers are also permitted to borrow money through receiver's certificates, per judicial discretion. *See U.S. v. Vanguard Inv. Co., Inc.*, 667 F.Supp. 257, 265 (M.D. N.C. 1987)(authorizing a receiver to borrow money through receiver's certificates which took precedent over all other obligations and debts of the debtor).	There is no North Carolina law that permits the avoidance of preferences in a receivership action unless it relates to an insurance rehabilitation or liquidation proceeding (see, NC Gen Stat. § 58-30-150).	A federal or state court has the ability to order a free and clear sale if the need is apparent and the sale's proceeds are sufficient to pay lien claimants. § 7878 Sales free and clear of liens, 16 Fletcher Cyc. Corp § 7878 (February 2015).	Receivers are allowed reasonable compensation for their services, not to exceed five percent upon receipts and disbursements. This money is to come out of the receivership estate. N.C.G.S.A. § 1-507-9.

STATE	FINANCING	AVOIDING PREFERENCES	FREE AND CLEAR	PAYMENT AS A RECEIVER
South Carolina	There is not discussion of how a receiver can effectively handle the financing of a reorganization. The Code of Laws of South Carolina instead focuses more on appointment and the payment of damages. Receivers are also able to borrow money through receiver's certificates. *See Koester v. Citizens' Pub. Co.*, 154 S.C. 154 (1930)(allowing receiver to incur financing through receiver's certificates which took priority over the debtor's assets and earnings).	There is no South Carolina law that permits the avoidance of preferences in a receivership action unless it relates to an insurance rehabilitation or liquidation proceeding (see, SC Code § 38-27-470).	Unless the receivership order explicitly allows free and clear sales, South Carolina law generally prohibits these sales, as it views a receiver's power of sale as merely custodial (*Kirven v. Lawrence*, 137 S.E.2d 764 (S.C. 1964)).	Receivers can receive costs, charges, and expenses, but these will only be the charged to the parties procuring the appointment of the receivership. (Code 1976 § 15-65-90).
Tennessee	Receivers can operate the debtor's business and incur expenses in the ordinary course of business as long as it is provided in the order appointing receiver. Receivers are also able to borrow money through receivership certificates. *See Costello v. Acco Transport Co.,* 133 Tenn.App. 411, 418 (1949)(permitting the issuance of receivership certificates in reorganization);	There is no Tennessee law that permits the avoidance of preferences in a receivership action unless it relates to an insurance rehabilitation or liquidation proceeding (see, Tenn. Code 56-9-317).	Historically, free and clear sales are permitted. *Hill v. Southern Ry. Co.*, 42 S.W. 888 (Tenn. Ch. App. 1897). However, it depends on the contents of the order appointing receiver granting the power to sell.	Receivers are compensated from the receivership estate. *KMC Co., Inc. v. Nabors*, 572 S.W.2d 255 (Tenn. Ct. App. 1977).

STATE	FINANCING	AVOIDING PREFERENCES	FREE AND CLEAR	PAYMENT AS A RECEIVER
	Grizzell v. Mountain, 2014 WL 4245989 at *1 (E.D.Tenn. Aug. 26, 2014) (finding receivership certificates constituted full satisfaction of alleged injury).			
Texas	Receivers are allowed to control and collect receivership property and operate a business related to the receivership. Tex. Civ. Prac. & Rem. Code Ann. § 64.001. Receivers are also able to borrow money through receivership certificates. *See McAllister v. F.D.I.C.*, 1997 WL 33139039 at *1 (W.D.Tex. Sept. 12, 1997); *Clark v. F.D.I.C.*, 849 F.Supp.2d, 736,748-749 (S.D.Tex. 2011).	There is no Texas law that permits the avoidance of preferences in a receivership action unless it relates to an insurance rehabilitation or liquidation proceeding (see, Tex. Insurance Code Sec. 443.204) or a bank receivership (see, Tex Finance Code Sec. 36.216).	The generally applicable receivership statute allows free and clear sales that are authorized and confirmed by the appointing court.	A general order of the court determines how a receiver is compensated.
Virginia	The Virginia state court appointing a receiver to operate a going concern may enter an order permitting a receiver broad authority. See generally Va. Code. Ann. §§ 8.01-582-599 (Michie 1950). The receiver's authority will be governed exclusively by the terms of the court's order of appointment. Case law suggests that a passive	There is no Virginia law that permits the avoidance of preferences in a receivership action unless it relates to an insurance rehabilitation or liquidation proceeding (see, Virginia Code Sec. 38.2-1513).	The Virginia state court's order appointing a receiver to operate a going concern or to wind down a business must expressly reference the powers that the receiver will need. Generally, receivers can request from the appointing court the power to sell property free and clear. However, the	Receivers are entitled to compensation for their services as the court deems appropriate. However, these amounts are limited, depending on the type of activity the receiver undertakes during the reorganization (i.e. interest incoming, check drafting, funds for beneficiaries, etc.).

STATE	FINANCING	AVOIDING PREFERENCES	FREE AND CLEAR	PAYMENT AS A RECEIVER
	or liquidating receiver will be permitted only to "preserve the property, collect the assets, and report the fund to the court for distribution" for the liquidating business in a given jurisdiction. See *State Bank of Va. v. Domestic Sewing-Mach.* Co, 39 S.E. 141, 143 (Va., 1901); Constantinos G. Panagopoulos & Theodore R. Flo, Strat. Alt. Dis. Bus. 73:2 (2015).		receiver must satisfy any liens on the property to do so. Constantinos G. Panagopoulos & Theodore R. Flo, Strat. Alt. Dis. Bus. 73:2 (2015).	Va. Code Ann. § 8.01-589.
West Virginia	Receivers are permitted to operate the business related to the receivership. Receivers can also borrow money through receivership certificates. *See U.S. Bank Nat. Ass'n v. First Nat. Bank of Keystone*, 394 F.Supp. 829, 835 (S.D.W.V. 2005).	There is no West Virginia law that permits the avoidance of preferences in a receivership action unless it relates to an insurance rehabilitation or liquidation proceeding (see, WV Code 33-10-26).	There are no statutes/case law regarding free and clear sales in West Virginia, as most real estate sales are accomplished through trustee sales.	Payment is subject to the court's discretion. However, according to the corporation code of West Virginia, the court can direct distributions from the receivership estate in order to pay the receiver for his services.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

BANK OF AMERICA, N.A., in its capacity as collateral and administrative agent for certain financial institutions as Lenders, Plaintiff, vs. PLY-MARTS, INC., Defendant.	CIVIL ACTION NO. 08-CV-072 JTC

FINAL REPORT OF RECEIVER AND REQUEST FOR DISCHARGE

COMES NOW Lee N. Katz, as Receiver for Ply-Marts, Inc., (the "Receiver") and files his Final Report and Request for Discharge.

1.

On June 23, 2008, this Court appointed Lee N. Katz as Receiver for Ply-Marts, Inc (Docket No. 3). On August 7, 2008 the Receiver filed his Preliminary Report (Docket No. 7). In his Preliminary Report, the Receiver informed the Court that an involuntary petition had been filed against Ply-Marts, Inc. in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division on July 1, 2008 and that Plaintiff and the Receiver had filed a joint motion to excuse

the Receiver from compliance with the turnover requirements of 11 U.S.C. Section 543 (the "Joint Motion") which had been granted on an interim basis pending a final hearing by the Bankruptcy Court. Subsequently, Plaintiff and the Receiver reported in the Status Report filed on September 10, 2008 (Docket No. 9), that the Bankruptcy Court had entered an Order for Relief under Chapter 11 of the Bankruptcy Code against Ply-Marts, Inc. (Bankruptcy Docket No. 46), that the Bankruptcy Court had entered an Order on September 3, 2008 which among other things denied the Joint Motion, modified the automatic stay in certain respects, and converted the Chapter 11 Case to a Chapter 7 Case, and that the Plaintiff and Receiver had filed a Joint Motion to Reconsider, Alter or Amend Judgment regarding the September 3, 2008 Order of the Bankruptcy Court (Bankruptcy Docket No. 55) (the "Joint Motion to Reconsider').

2.

On September 3, 2008, the United States Trustee appointed Tamara M. Ogier as trustee in the Chapter 7 bankruptcy case (Bankruptcy Docket No. 48) (the "Chapter 7 Trustee").

3.

On September 29, 2008, the Receiver filed his Final Report and Accounting in the bankruptcy case (Bankruptcy Docket No. 70). A copy of the Final Report

and Accounting that was filed in the bankruptcy case is attached hereto as Exhibit "A." As set forth in his Final Report and Accounting, the Receiver was unable to pay certain claims of creditors of the Receivership Estate because of the entry of the Order for Relief and the Bankruptcy Court's denial of the Joint Motion.

4.

On September 29, 2009, the Receiver also filed a Motion to Pay Final Compensation and Reimbursement of Expenses of Receiver and Receiver's Professionals (Docket No. 83) (the "Receiver and Receiver's Professional's Compensation Motion"). A copy of the Receiver and Receiver's Professionals' Compensation Motion is attached hereto as Exhibit "B."

5.

On October 10, 2008, the Bankruptcy Court entered an Order Granting the Joint Motion to Reconsider, Alter or Amend Judgment (Bankruptcy Docket No. 96) (the "October 10 Order"). A copy of the Bankruptcy Court's October 10 Order is attached hereto as Exhibit "C."

6.

As reported in the Receiver's Final Report, upon entry of the Bankruptcy Court Order denying the Joint Motion, the Receiver turned over to the Chapter 7 Trustee all of the Receivership Estate property then held by the Receiver except for

certain property of the Receivership Estate with respect to which Plaintiff had sought stay relief and that was the subject of the Joint Motion to Reconsider.

7.

Subsequent to the entry of the Bankruptcy Court's October 10 Order, and consistent with the provisions of said Order, the Receiver turned over to Plaintiff the remaining property of the Receivership Estate.

8.

Subsequent to the entry of the Bankruptcy Court's October 10 Order, and consistent with the provisions of said Order, the Court granted the Receiver and Receiver's Professionals' Compensation Motion by Order entered on October 31, 2008. (Bankruptcy Docket No. 110). A copy of said Order is attached hereto as Exhibit "D."

WHEREFORE, having fully administered the Receivership Estate, having complied with all orders of the Bankruptcy Court and having filed his Final Report, the Receiver respectfully requests that after notice and a hearing, this Court accept his Final Report, discharge Lee N. Katz from the office of Receiver of Ply-Marts and from all liability for his acts as Receiver, and grant him such other and further relief as may be just and proper.

This 1st day of December, 2008.

Respectfully submitted:

s/ Lee N. Katz
Lee N. Katz, Receiver

By: s/ J. Michael Levengood
J. Michael Levengood
Georgia Bar No. 447934
Gary W. Marsh
Georgia Bar No. 471290

MCKENNA LONG & ALDRIDGE LLP
Suite 5300, 303 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 527-4000
Facsimile: (404) 527-4198

Attorneys for Lee N. Katz
Receiver for Ply-Marts, Inc.

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing FINAL REPORT OF RECEIVER AND REQUEST FOR DISCHARGE upon all parties to the above-captioned action by depositing a copy of the same in the United States Mail, with sufficient postage thereon, addressed to, except as otherwise noted:

C. Edward Dobbs
James S. Rankin, Jr.
PARKER, HUDSON, RAINER & DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Avenue NE
Atlanta, Georgia 30303

Tamara M. Ogier, Chapter 7
Trustee for Ply-Marts, Inc.
170 Mitchell Street, SW
Atlanta, Georgia 30303

Wendy L. Hagenau, Esq.
Powell Goldstein LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street
Atlanta, Georgia 30309

Jason T. Schneider
6111D Peachtree Dunwoody Road
Atlanta, Georgia 30328

This 1st day of December, 2008.

s/ J. Michael Levengood
J. Michael Levengood
Georgia Bar No. 447934

MCKENNA LONG & ALDRIDGE LLP
Suite 5300, 303 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 527-4000
Facsimile: (404) 527-4198

ATLANTA:5059024.1

EXHIBIT "A"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	
PLY-MARTS, INC.,	CHAPTER 7 CASE
Debtor.	NO. 08-72687-mgd

FINAL REPORT OF RECEIVER AND ACCOUNTING

COMES NOW Lee N. Katz, as Receiver for Ply-Marts, Inc., (the "Receiver") and files his Final Report and Accounting regarding the property of the estate and his administration of thereof pursuant to Rule 6002(a), Federal Rules of Bankruptcy Procedure (the "Final Report"). The Receiver is also filing separately a motion to pay final compensation and reimbursement of expenses to the Receiver and the Receiver's Professionals. Finally, the Receiver is also filing separately on behalf of the Debtor its Schedules, Statement of Affairs and Master List of Unsecured Creditors.

INTRODUCTION

1.

The Receiver is a prior custodian of property of the estate of Ply-Marts, Inc., having been appointed Receiver for Ply-Marts, Inc. in that certain civil action commenced by BANK OF AMERICA, N.A., in its capacity as collateral and administrative agent for certain financial institutions as Lenders, ("Agent") against Ply-Marts, Inc. ("Ply-Marts") in Civil Action 3:08-cv-072-JTC pending in the United States District Court for the Northern District of Georgia, Newnan Division (the "District Court action") in an Order entered by Chief Judge Camp on June

23, 2008 (the "Receivership Order") before the commencement of this bankruptcy case on July 1, 2008.

2.

On July 1, 2008, Dixie Plywood Company of Atlanta, Inc., JB Hunt Transport, Inc. and Primesource Building Products, Inc. (the "Petitioning Creditors") filed an Involuntary Petition for Relief against Ply-Marts under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, (the "Bankruptcy Court") thereby commencing this bankruptcy case.

3.

On July 2, 2008, the Agent and the Receiver filed two emergency motions in the Involuntary Bankruptcy Case (Bankruptcy Docket No. 5 and 6) which resulted in the entry two orders by the Bankruptcy Court. Among other things, the first order (Bankruptcy Docket No. 11) authorized the Agent to honor Ply-Marts checks that were presented for payment on or after July 1, 2008 and authorized the Agent to continue to make protective advances to the Receiver as contemplated in the Receivership Order. The second order (Bankruptcy Docket No. 13), on an interim basis, excused the Receiver from complying with Section 543 of the Bankruptcy Code and authorized the Receiver to administer the assets of the Receivership Estate in accordance with the Receivership Order, with certain limitations, pending a final hearing to be held on August 22, 2008.

4.

On August 22, 2008 the Bankruptcy Court conducted a final hearing on the joint motion by the Receiver and the Agent to excuse the Receiver from compliance with Bankruptcy Code

Section 543 (Bankruptcy Docket No. 6), the joint motion of the Receiver and the Agent to dismiss the Bankruptcy Case (Bankruptcy Docket No. 15), the Motion for Relief from Stay filed by the Agent (Bankruptcy Docket No. 20), the Answer to the Involuntary Petition filed by the Receiver on behalf of Ply-Marts (Docket No. 23) and the Motion by the Petitioning Creditors for an order appointing a Chapter 11 trustee and compelling the Receiver to turn over all property of the estate to the Chapter 11 trustee (Bankruptcy Docket No. 28). The Bankruptcy Court entered an Order for Relief under Chapter 11 of the Bankruptcy Code on September 2, 2008. (Bankruptcy Docket No. 46). The Bankruptcy Court also entered an order on September 3, 2008 (Bankruptcy Docket No. 47) denying the motion to excuse compliance with Bankruptcy Code Section 543, modifying the automatic stay to permit the Agent to continue to collect the debtor's accounts receivables and to apply the proceeds to the debtor's debts to the Agent, denying the motion to appoint a chapter 11 trustee, denying the motion to dismiss the chapter 11 case, and pursuant to Section 1112(b)(1) converting the Chapter 11 case to a Chapter 7 case. The Agent and the Receiver filed a timely motion for reconsideration of the September 3, 2008 Order (Bankruptcy Docket No. 55).

5.

As authorized by the Bankruptcy Court's interim order (Bankruptcy Docket No. 13), the Receiver performed his duties as Receiver in accordance with the Receivership Order following the commencement of this Bankruptcy Case. Immediately after the September 3, 2008 Order was entered and the United States Trustee filed its notice of appointment of Chapter 7 Trustee, the Receiver's counsel contacted the Chapter 7 Trustee to coordinate the Receiver's delivery of estate property to the Chapter 7 Trustee and met with the Chapter 7 Trustee and her counsel at

the offices of Ply-Marts in Norcross, Georgia, to deliver the property of the Ply-Marts estate in his possession to the Chapter 7 Trustee. The Receiver has also provided to the Chapter 7 Trustee a copy of the Receiver's discovery production to the petitioning creditors to assist the Chapter 7 Trustee in performing her duties.

6.

The Final Report is submitted to provide the Bankruptcy Court with his report of the Receiver's administration of the Receivership Estate. The Receiver is prepared to file the Final Report in the District Court action and has joined in the motion for reconsideration of the Bankruptcy Court's September 3, 2008 Order in order to obtain this Court's approval to do so. The Receiver is also filing on behalf of the Debtor, Schedules, Statement of Affairs, Master List of Creditors and List of Equity Security Holders. In order to file this Final Report and the Schedules, Statement of Affairs and lists, the Receiver has relied on the books and records of the Debtor which were in disarray and in many cases he had to obtain reports from the Debtor's legacy computer system without input from the employees who entered that data. Accordingly, the Receiver used his best efforts to produce this Final Report as well as the Schedules, Statement of Affairs and lists, and believes that they fairly represent the financial condition of the Debtor and his administration of the Receivership Estate.

ADMINISTRATION BETWEEN JUNE 23, 2008 AND JULY 1, 2008

7.

Immediately upon his appointment, the Receiver moved quickly to communicate with creditors, customers and employees, and to identify and secure the assets of the Receivership Estate. He also continued the orderly liquidation of the assets of Ply-Marts. Beginning on the

afternoon of his appointment, the Receiver and management of Ply-Marts contacted the twenty to twenty five largest vendors of Ply-Marts to inform them of the commencement of this case and of his appointment as Receiver. Upon request, the Receiver, his counsel and management of Ply-Marts provided copies of the Receivership Order to creditors of Ply-Marts and otherwise provided them with information regarding the Receivership case. The Receiver attempted to provide the creditors with whom he spoke a candid assessment of the challenges facing Ply-Marts. Many of the creditors with whom the Receiver spoke during this initial period had spoken with the Receiver during the months prior to the commencement of this case while he was serving as Liquidation Manager for Ply-Marts.

8.

The Receiver caused to be filed Notices under 28 U.S.C. Section 754 of the filing of the Complaint and of the Entry of the Order appointing the Receiver in the following thirteen jurisdictions:

The United States District Court for the District of South Carolina
The United States District Court for the Eastern District of Tennessee
The United States District Court for the Western District of Tennessee
The United States District Court for the Middle District of Tennessee
The United States District Court for the Western District of North Carolina
The United States District Court for the Eastern District of North Carolina
The United States District Court for the Middle District of North Carolina
The United States District Court for the Northern District of Alabama
The United States District Court for the Middle District of Alabama
The United States District Court for the Southern District of Alabama
The United States District Court for the Middle District of Georgia
The United States District Court for the Southern District of Georgia
The United States District Court for the Middle District of Louisiana

9.

The Receiver supervised the business operations of Ply-Marts and used the existing Ply-Marts bank accounts to pay ordinary and necessary business expenses including employee payroll and related taxes, utilities, and purchases of inventory. The Receiver retained McKenna Long & Aldridge LLP as his counsel and GGG, Inc. of which he is a managing partner, to assist him in administering the receivership estate. Two GGG professionals, Katie Goodman, and Sam Horgan, worked with the Receiver to continue sale efforts and to supervise and support the financial reporting employees of Ply-Marts. The Receiver and his professionals commenced the following:

(a) Manage staff of approximately 175 employees;

(b) Devise commission schedule and bonuses for managers and sales personnel to maximize inventory value;

(c) Devise commission schedule and bonuses for collection personnel on accounts receivable (both current and ineligible) and work with collection attorneys on same;

(d) Accounting issues: supervise various accounting personnel;

(e) Initial review of evidence of perfection of secured claims asserted by Agent;

(f) Investigate and notify courts of stay of various lawsuits against Ply-Marts;

(g) Investigate the circumstances surrounding the failure by Ply-Marts to include in the legal description attached to its deed to Four Corners, a portion of the real property located in Ellijay, Georgia, that Four Corners purchased from Ply-Marts in 2005;

(h) Numerous discussions with the Agent regarding liquidation and receivership issues on a daily basis including daily cash reporting and expense analysis;

(i) Discussions with various vendors and collection agencies.

ADMINISTRATION BETWEEN JULY 1, 2008 AND SEPTEMBER 3, 2008

10.

The Involuntary Petition was filed after the close of business on July 1, 2008. When the Receiver learned the next day that an Involuntary Petition had been filed, he contacted his counsel and representatives of the Agent and its counsel, and decided to file a joint emergency motion with the Agent in the Bankruptcy Case seeking authority to continue to perform his duties as Receiver in accordance with the Receivership Order so that he could continue to try to maximize the return for creditors through the orderly liquidation of Ply-Marts that he had begun. The Receiver prepared for and attended the emergency hearing that was held in the Bankruptcy Court on July 6, 2008. He complied with the terms of the consent interim order (Bankruptcy Docket No. 13), and as authorized in that consent interim order, he continued to perform his duties as Receiver under the Receivership Order. The Receiver devoted appropriate time and energy to the review of motions filed in the Bankruptcy Case by his counsel, the Agent and the Petitioning Creditors. The Receiver and his counsel spent considerable time reviewing, researching and responding to petitioning creditors' substantial informal discovery requests in the nature of interrogatories and document production requests, and Chris Williams, the former chief financial officer of Ply-Marts, and the Receiver provided deposition testimony to the petitioning creditors on August 15 and 18, 2008, and prepared for the final Bankruptcy Court hearings on August 22, 2008. In responding to the petitioning creditors discovery requests, the Receiver, Ply-Marts personnel under his supervision, and his counsel reviewed and produced more than 4,000 pages of documents between July 15, 2008 when the request was made and July

31, 2008 when his detailed response was provided and August 1, 2008 when substantially all of the documents were produced.

11.

The Receiver has undertaken literally hundreds of steps to manage the orderly wind-down of a substantial company with hundreds of employees, multiple locations in multiple states, and to operate that business during that process. By way of example, but not limitation, specific actions of the Receiver have included the following:

(a) Obtain replacement insurance when policies expired on July 1, 2008;

(b) Consolidate lumber inventory into two locations (Marietta and Winder) and sell inventory from lumber operations;

(c) Investigate $2.5 to $3 million shortage in inventory based on Ply-Marts books and records and determined that it is most likely due to poor inventory accounting since October 31, 2007 which is when the last physical inventory was taken which was exacerbated by the transfer of lumber between stores as facilities were consolidated, an apparent failure to account for obsolete and returned inventory and manufacturing reporting problems (despite the inventory shortages, the Receiver was successful in selling for more than fifty cents on the dollar on average all of the inventory on the books and records);

(d) Consolidate fleet and forklifts and sell excess equipment;

(e) Negotiate and sell inventory and equipment of the Specialty Division and inventory of the Stairs Division located in Greer, South Carolina thereby saving about 125 jobs;

(f) Negotiate and sell inventory and equipment of the Stairs Division located in Charlotte, North Carolina;

(g) Negotiate Asset Purchase Agreements for inventory sales;

(h) Negotiate sale of Marietta lumber inventory;

(i) Human Resources issues including layoffs, 401(k), and related miscellaneous issues including health insurance;

(j) Record Retention; accumulate and organize delivery tickets and invoices from multiple operations to assist in the collections procedures;

(k) Cash issues: investigate multiple accounts and consolidate. Oversee proper payments to division vendors until sale of assets;

(l) Operations; coordinate and manage operations of Stairs and Specialty Division units;

(m) Real Estate: investigate and make decisions concerning real estate leases, insurance and other issues;

12.

On August 7, 2008, the Receiver filed a Preliminary Report in the District Court action pursuant to the Receivership Order. Paragraph 14 of the Receivership Order instructs that "In preparing this preliminary report, the Receiver shall consider and evaluate the economic viability and benefit to the Receivership Estate of continuing the operation of any of the Receivership Assets." The Receiver considered and evaluated the economic viability and benefit to the Receivership Estate of continuing the operation of the Receivership Asset and concluded that ongoing operations of Ply-Marts were losing money and that the business could be continued only with substantial advances by the Agent. The Receiver reported that he had communicated with representatives of the Agent frequently in order to keep the Agent apprised of the cost of continuing operations as well as his progress in selling assets, and that the Receiver continued certain operations where it appeared that doing so would maximize the return for creditors from a sale of assets of a going concern, while discontinuing other operations where necessary. The Receiver also reported in his Interim Report that he had made significant progress in performing his duties under the Receivership Order and had liquidated all of the operating assets of the Receivership Estate during his initial 45 days as Receiver notwithstanding the commencement of an involuntary bankruptcy case against Ply-Marts on July 1, 2008 which complicated the orderly

liquidation by calling into question the Receiver's ability to sell assets as contemplated in the Receivership Order. The Receiver repeats certain sections of his Preliminary Report to the District Court in this Final Report and Accounting to the Bankruptcy Court.

DESCRIPTION OF THE HISTORICAL BUSINESS OF PLY-MARTS

13.

Ply-Marts is a forty-year old business that was founded in 1968 by Don and Tom Mahaffey as a single location building supply dealer. Ply-Marts opened its second location in 1970. In the late 1970's and 1980's, Ply-Marts expanded its offerings to include windows and pre-stained wood. By 1988, the product and service mix of Ply-Marts was broad enough to open Specialty locations. From late 1994 to 1999, Ply-Marts entered a period of significant geographic expansion and company sales grew from $105 million in 1995 to $170 million in 1999. During and after the building materials market downturn in 2000 and 2001, Ply-Marts focused on streamlining its existing operations and from 2003 to 2006, Ply-Marts experienced tremendous growth as the market rebounded. Sales grew to a peak of $346 million during the fiscal year that ended in October of 2006.

14.

Historically, approximately 50% of Ply-Marts' revenue has been derived from its operations in the greater Atlanta metropolitan markets, with 40% of its revenues being derived from its operations in other Georgia counties, 5% of its revenues being derived from its operations in North Carolina, 3.5% of its revenues being derived from its operations in Alabama and 1.5% of its revenues being derived from its operations in South Carolina. As of January 2008, Ply-Marts operations were generally conducted through one of three divisions, namely

Lumber, Specialty and Stairs. For the fiscal year ending October 2007, Lumber revenues were $205.87 million, or about 78% of total revenues, and generated a gross margin of about 12.5% and a gross profit of about $25.66 million. The Lumber Division sold its products through seven sales and service locations that operated as full service lumber yards and had 50 sales professional in the field. The range of products sold by the Lumber Division included framing materials, exterior sidings and cornice, windows and doors, roofing materials and moldings, trim and architectural millwork. The Specialty Division had a team of 43 professional sales people and a staff serving markets across Georgia and the Greenville, South Carolina area. For the fiscal year ending October 2007, Specialty revenues were $42.62 million, or 16.23% of total revenues, with a gross margin of about 42% and a gross profit of about $17.94 million. The Specialty Division operated from six locations anchored by key operations in north and south metropolitan Atlanta. Specialty Division products included ventilated shelving, tub and shower enclosures, glass and mirrors, bath hardware, window and porch screens, screen doors, and wood, vinyl and composite shutters, builders hardware including dead bolts, entry and privacy and passage locks and handle sets, garage doors and melamine closet systems. The Stairs Division had a team of eight sales people and three technical representatives supported by manufacturing operations and installation teams operating in Georgia, South Carolina and North Carolina. For the fiscal year ending October 2007, Stairs Division revenues totaled $14.18 million, or about 5.4% of total revenues. The Stairs Division generated a gross profit margin of 47% and a gross profit of $6.67 million. Products of the Stairs Division included stair systems, stair parts and curved stairs.

15.

On October 31, 2005, Ply-Marts sold to and leased back from Four Corners Realty, LLC ("Four Corners") the 17 facilities that it owned for a total purchase price of $23,922,850. On January 31, 2007, Ply-Marts and Four Corners entered into a Loan Agreement whereby Ply-Marts agreed to loan the aggregate amount of $4,000,000 to Four Corners in order for Four Corners to add improvements to, to renovate or to expand buildings on and generally to develop one or more of the Four Corners properties. As of the date of the Receiver's appointment, Four Corners owed approximately $3,348,292 to Ply-Marts under this loan agreement and Ply-Marts was no longer conducting operations in or paying rent under the leases except for a few locations. As of August 1, 2008, the Receiver paid rent only for the first fifteen days of August at the Marietta facility and paid a full month's rent for the Norcross facility where all of the Ply-Marts records and miscellaneous furniture, fixtures and equipment of the closed facilities have been collected and are being stored, and where the few remaining Ply-Marts employees, who were necessary to assist in reporting and in collecting accounts receivable, were stationed.

16.

Ply-Marts customer base primarily consisted of professional residential builders and remodeling firms. About 90% of its customer base builds homes in the state of Georgia, with over 50% of them building in metropolitan Atlanta. The remaining customers are located in the Chattanooga, Tennessee, Greenville, South Carolina and Charlotte, North Carolina markets. During 2007, the residential construction industry was severely impacted by the housing market collapse and many of Ply-Marts customers have either filed bankruptcy or ceased operations in 2007 and 2008.

17.

Beginning in 2007, the housing industry experienced a significant downturn and Ply-Marts' sales for the fiscal year that ended in October of 2007 dropped to about $260 million. Ply-Marts management attempted to weather the storm and responded to the reduction in sales volume by developing a plan to reduce monthly operating expenses by $1.5 million. Implementing that plan, Ply-Marts consolidated seven operations and eliminated 175 positions. Pay for all employees, across the board, was cut: 20% for senior management, 15% for supervisory management, and 10% for all other employees. Unfortunately, the housing market continued to falter and the initial expense reductions proved insufficient. In December 2007, Ply-Marts management projected that monthly revenues would decline to $8.5 million by February of 2008 which was 58% below the previous year. Randy Mahaffey and Rich Mahaffey, the largest shareholders of Ply-Marts and the members of its board of directors, and Ken Southerland, the President of Ply-Marts, loaned Ply-Marts a total of $4.3 million on an unsecured basis in December 2007, and management further reduced operating costs by $1 million by consolidating six additional operating locations and reducing its workforce by an additional 200 positions in January and February of 2008.

18.

Ply-Marts retained GGG, Inc. in January 2008 to provide it with turn around management expertise and to assist it in identifying one or more buyers for its business. Lee N. Katz, a managing director of GGG, began advising Ply-Marts at the inception of the engagement. GGG, Inc. prepared a Confidential Memorandum for Ply-Marts in March of 2008 and contacted a substantial number of potential purchasers. Ply-Marts considered but did not pursue a chapter

11 reorganization for a number of reasons. Management was concerned about administrative insolvency, was unable to predict a stabilized sustainable sales volume as its primary customer base appeared to evaporate, and realized that Ply-Marts could not downsize to profitability. The Agent expressed reservations about continuing to finance Ply-Marts operations in a Chapter 11 case, and other financing alternatives did not materialize. When Ply-Marts management received no acceptable purchase offers for its business, in May of 2008, the board of directors of Ply-Marts appointed Lee N. Katz as Liquidation Manager for Ply-Marts and authorized him to conduct an orderly liquidation of its business. The Receiver understands that simultaneously with the commencement of his duties as Liquidation Manager, all of the officers and directors of Ply-Marts resigned. As he disclosed to the District Court when he was appointed as Receiver for Ply-Marts on June 23, 2008, he had already commenced the orderly liquidation of Ply-Marts as its Liquidation Manager, GGG was willing to waive its success fee as a part of the District Court's appointment of him as Receiver, he would pay his fees and those of his professionals including GGG in accordance with the provisions of the Receivership Order, and he would submit with his Final Report applications for approval of professional fees and expenses including all fees and expenses paid by him during the Receivership.

IDENTITY, LOCATION AND ESTIMATED VALUE OF RECEIVERSHIP ASSETS

19.

As a result of the consolidation of assets, and the sales of the inventory and equipment by the Receiver, the Receiver provided in his August 7, 2008 Preliminary Report a summary of the assets of the Receivership Estate as of that time. The Receiver and his professionals have reviewed the books and records of Ply-Marts and have communicated with former employees of

Ply-Marts, including Chris Williams, the former chief financial officer for Ply-Marts, in order to provide the Receiver's accounting that is attached hereto as Exhibit "A" and the Schedules, Statement of Affairs and Master List of Creditors that the Receiver is filing on behalf of the Debtor together with this Final Report. The status of the assets is as follows:

(a) Bank Accounts:

Balance in accounts (other than Bank of America) at September 3, 2008 as reported to the Chapter 7 Trustee on September 4, 2008: $ 223,577.21

Sale proceeds from sale of unencumbered personal property delivered to the Chapter 7 Trustee on September 18, 2008: $7,505.00

(b) Inventory and equipment

Estimated value: $0.00

(c) The Receiver has executed vehicle lease termination agreements with GE Leasing Company for all of the vehicles that were leased but are no longer needed by Ply-Marts.

Estimated value: $0.00

(d) The Receiver paid rent on the leased facilities that were being used by Ply-Marts in July, 2008. The Receiver did not pay rent on any leased facilities during August except for the first fifteen days of August at the Marietta facility and rent of about $5,000 for the Norcross facility, and the Receiver attempted to negotiate lease termination agreements with the landlords of the Ply-Marts leased properties. The Receiver executed releases of possessory rights under the Four Corners Realty leases and quitclaim deeds in order to facilitate the sale by Four Corners Realty of certain of its real properties that were included in Master Leases with Ply-Marts which properties Ply-Marts no longer was occupying.

Estimated value: $0.00

(e) Ply-Marts holds leasehold interests (listed by landlord) in the following locations:

1. Four Corners Realty

   a. 200 River Street, Ellijay, Gilmer County, Georgia

b. 9121 City Pond Road, Covington, Newton County, Georgia

c. 3548 Post Road, Winston, Douglas County, Georgia

d. 894 Old Hutchinson Mill Road, LaGrange, Troup County, Georgia

e. 2323 Sylvan Road, East Point, Fulton County, Georgia

f. 4955 Buford Highway, Norcross Gwinnett County, Georgia

g. 2009 Dorsey Road, Marietta, Cobb County, Georgia

h. 2700 Hwy 42 North, McDonough, Henry County, Georgia

i. 9605 Jot-Em-Down Road, Gainesville, Hall County, Georgia

j. 2705 Strawn Road, Winston, Douglas County, Georgia

k. 1159 Hog Mountain Road, Winder, Barrow County, Georgia

l. 545 Corinth Road, Newnan, Coweta County, Georgia

m. 25 Boyd Morris Road, Cartersville, Bartow County, Georgia

n. 3812 Cusseta Road, Columbus, Muscogee County, Georgia

o. 330 Industrial Court West, Villa Rica, Douglas County, Georgia

2. Prologis

a. Buford, Georgia (lease to be terminated, assets sold to HNNH, LLC)

b. Greer, SC (lease to be terminated, assets sold to HNNH, LLC)

3. Childress Klein

a. Charlotte, North Carolina (lease terminated, assets sold to CPI Arizona, Inc.)

4. Mortensen Ventures

a. Union City, Georgia (lease to be terminated, assets sold to HNNH, LLC)

5. John T. Mathis

a. Rock Spring, Georgia

6. Linda Davis

a. Rock Spring, Georgia

7. Capes Property Management

a. Covington, Georgia

8. Green Investments

a. Blue Ridge, Georgia (lease to be terminated, assets sold to HNNH, LLC)

9. Elmer Womack

a. Cartersville, Georgia

10. Peter G. Hamilton / Norfolk Southern parcel

a. Norcross, Georgia

11. Additional Real Estate

a. Ellijay parcel (sold to Four Corners but not transferred due to mutual mistake)

b. Rock Spring parcel (rail siding property within the property leased from John T. Mathis (value unknown))

c. Two unimproved lots in Gilmer County, Georgia (value unknown)

12. Accounts Receivable

a. Ply-Marts was collecting accounts receivable and had retained two lawyers to assist it in its accounts receivable collection efforts. The collection attorneys are Todd Hatcher and Susan Howick.

Estimated recovery value: approximately $3,600,000 over the next 24 months unless the number of bankruptcies and business failures of its obligors increases above current levels

The Bankruptcy Court has granted relief from stay to the Agent to permit it to collect Ply-Marts accounts receivables. GGG has been

engaged by the Agent to assist it in its collection of the Ply-Marts accounts receivables which means that Lee Katz will continue to assist the Agent in collecting the Ply-Marts accounts receivables for the present time. GGG has negotiated with Four Corners Realty to provide the Agent with the use of the Norcross Ply-Marts facility to collect the accounts receivables, has hired several former Ply-Marts employees who are familiar with the accounts receivables, and is working with the Chapter 7 Trustee for Ply-Marts to provide rent free storage of the remaining records of Ply-Marts for as long as GGG is permitted to use the Norcross Ply-Marts facility. The Chapter 7 Trustee has filed a motion to reject the Four Corners Realty leases.

13. Causes of Action

a. The Receiver reported in his Preliminary Report that he intended to evaluate and investigate potential causes of action but was not prepared at that point to estimate a value for such claims. He met with the Chapter 7 trustee on September 4, 2008 to provide her with information she may use to evaluate causes of action.

14. Deposits

a. Estimated value: $50,000 in security deposits

b. Estimated value: $360,000 in sales tax deposits

15. Claims against Four Corners Realty

a. contingent contribution claim for any payments made by Ply-Marts that are allocated to its guaranty of the Four Corners term loan.

b. Estimated value: undetermined

c. note receivable from Four Corners

d. Face value: $3,348,292

16. Computer system and related ff&e at Norcross facility

a. Estimated value: $25,000

ESTIMATED AMOUNT OF LIABILITIES OF PLY-MARTS

20.

Based on the books and records of Ply-Marts, the Receiver estimated the liabilities of Ply-Marts as of the August 7, 2008 date of his Preliminary Report as follows. The Receiver and his professionals have reviewed the books and records of Ply-Marts and have communicated with former employees of Ply-Marts in order to prepare the Debtor's Schedules, Statement of Affairs and Master List of Creditors which the Receiver is filing together with his Final Report. The Schedules are based on the assets and liabilities as of July 1, 2008. Based on the books and records of Ply-Marts, the Receiver estimated the liabilities of Ply-Marts as of the August 7, 2008 date of his Preliminary Report. This Final Report updates the Preliminary Report with additional information as of the date of the Final Report, as follows:

1. August 7, 2008 Secured Indebtedness:

a.	Revolver	approximately $3,050,000
b.	Letters of Credit	approximately $1,799,000
c.	Guaranty of Four Corners Term Loan	approximately $17,722,000

September 3, 2008 Secured Indebtedness

d.	Revolver	approximately $1,069,345
e.	Letters of Credit	approximately $1,799,000
f.	Guaranty of Four Corners Term Loan	approximately $13,366,467

2. Unsecured Indebtedness:

   a. approximately $26 million (including $10 to $11 million in accounts payable to vendors, $15 million in notes payable to current and former shareholders, $275,000 in current personal property ad valorem taxes and approximately $250,000 in credit balances due to customers)

   b. lease damage/rejection claims by Four Corners and contingent contribution claims by Four Corners for payments it may make under Four Corners guarantees of the Ply-Marts indebtedness (amount unknown)

21.

The Receiver reported in his Preliminary Report that he had compiled a list of creditors of Ply-Marts from various sources and he attached a list of the names and addresses of the Ply-Marts creditors to his Preliminary Report as Exhibit A. The Receiver delivered that list of creditors to the Chapter 7 Trustee on September 4, 2008. The Receiver supplements that list of creditors with the Master List of Creditors that the Receiver is filing together with this Final Report.

WHEREFORE, the Receiver respectfully requests that after an examination has been made into his administration of the Receivership Estate of Ply-Marts, Inc. as its Receiver, the Court determine the propriety of his administration of the Ply-Marts Receivership Estate, including the reasonableness of all disbursements, after notice and a hearing as contemplated in Rule 6002(b), Federal Rules of Bankruptcy Procedure, and approve payments of his costs and expenses as authorized under Section 543(c)(2) and 503(b)(3)(E), and grant him such other and further relief as may be just and proper.

This 29th day of September 2008.

Respectfully submitted:

By: s/ Lee N. Katz
Lee N. Katz, Receiver

By: s/ J. Michael Levengood
J. Michael Levengood
Georgia Bar No. 447934
Gary W. Marsh
Georgia Bar No. 471290

MCKENNA LONG & ALDRIDGE LLP
Suite 5300, 303 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 527-4000
Facsimile: (404) 527-4198

Attorneys for Lee N. Katz
Receiver for Ply-Marts, Inc.

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing FINAL REPORT OF RECEIVER AND ACCOUNTING upon the following persons by depositing a copy of the same in the United States Mail, with sufficient postage thereon, addressed to, except as otherwise noted:

Tamara Ogier, Esq.
Chapter 7 Trustee for Ply-Marts, Inc.
Ellenberg, Ogier, Rothschild & Rosenfeld, P.C.
170 Mitchell Street SW, #2
Atlanta, GA 30303

Martin P. Ochs
Staff Attorney
Office of the United States Trustee
75 Spring Street, S.W.
Room 362
Atlanta, Georgia 30303

James S. Rankin, Jr.
PARKER, HUDSON, RAINER & DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Avenue NE
Atlanta, Georgia 30303

Frank J. Perch III
HunterMaclean
200 E. Saint Julian Street
Savannah, GA 31412-0048

Wendy L. Hagenau, Esq.
Powell Goldstein LLP
One Atlantic Center, 14th Floor
1201 West Peachtree Street
Atlanta, Georgia 30309

This 29th day of September, 2008.

s/ J. Michael Levengood
J. Michael Levengood
Georgia Bar No. 447934

MCKENNA LONG & ALDRIDGE LLP
Suite 5300, 303 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 527-4000
Facsimile: (404) 527-4198

ATLANTA:5047094.2

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

BANK OF AMERICA, N.A., in its capacity as collateral and administrative agent for certain financial institutions as Lenders,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION FILE NO.** 3 08-CV-0072-JTC
PLY-MARTS, INC.,	)	
Defendant.	)	

ORDER APPOINTING RECEIVER AND
ENJOINING DEFENDANT PLY-MARTS, INC. AND OTHERS

The Verified Complaint for Damages, Appointment of a Receiver, and Injunctive Relief (the "Complaint") and accompanying Emergency Motion for Appointment of a Receiver and for Injunctive Relief and Memorandum of Law in Support (the "Motion") filed by the Plaintiff Bank of America, N.A. ("Plaintiff") in the above-styled action having been read and considered, the matter having been presented for consideration by this Court on June 23, 2008, upon due and sufficient notice to counsel for Defendant Ply-Marts, Inc. ("Ply-Marts"), with arguments and statements of counsel having been presented and having been heard and

considered, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

Plaintiff has averred in its Complaint and Motion that:

A. Plaintiff is the collateral and administrative agent (in such capacity, the "Agent") for certain financial institutions (collectively, the "Lenders") pursuant to a certain Amended and Restated Loan and Security Agreement dated January 24, 2006, among Plaintiff as such Agent, Lenders, Ply-Marts and Four Corners (as any time amended, modified, restated or supplemented, the "Loan Agreement") and related instruments and agreements (collectively with the Loan Agreement, and as at any time amended, the "Loan Documents"). Pursuant to the Loan Agreement, Lenders made loans to Ply-Marts, issued letters of credit for the account of Ply-Marts and made certain term loans to Four Corners. As of the close of business on June 19, 2008, the outstanding principal balance of loans and undrawn letters of credit in respect of which Ply-Marts is primarily liable totaled approximately $9,579,536 (together with all interest, fees and other charges payable in connection therewith, the "Ply-Marts Obligations") and the unpaid principal balance of the term loan to Four Corners totaled approximately

$17,722,289 (together with all interest, fees and other charges payable in connection therewith, the "Four Corners Obligations").

B. To secure the payment and performance of the Ply-Marts Obligations and Four Corners Obligations (collectively, the "Obligations"), Ply-Marts has granted to Agent, for the benefit of itself and Lenders, a security interest in and lien upon substantially all of the real and personal assets of Ply-Marts (collectively, the "Ply-Marts Collateral"). To secure the payment and performance of the Obligations, Four Corners has granted to Agent, for the benefit of itself and Lenders, a security interest in and lien upon substantially all of the real and personal assets of Four Corners (collectively, the "Four Corners Collateral").

C. Ply-Marts has unconditionally guaranteed the payment and performance of all Four Corners Obligations; and Four Corners has unconditionally guaranteed the payment and performance of all Ply-Marts Obligations.

D. The Ply-Marts Collateral consists of, among other things, all of Ply-Marts' presently existing and after-acquired accounts, supporting obligations, inventory, equipment, instruments, chattel paper, documents, general intangibles, deposit accounts, investment property, books and records, and all products and

proceeds of any of the foregoing.[1] Plaintiff perfected its security interests in and liens upon the Ply-Marts Collateral by, among other things, filing a UCC-1 financing statement in a county in the State of Georgia, naming Ply-Marts as debtor and Plaintiff as secured party, and describing the Ply-Marts Collateral.

E. In the fall and winter of 2007, Ply-Marts experienced significant financial difficulties, and by no later than early 2008, Events of Default under (and as defined in) the Loan Agreement had occurred and continue to exist.

F. The maturity of both the Ply-Marts Obligations and Four Corners Obligations has been accelerated, and Plaintiff has demanded payment of all Obligations from Ply-Marts and Four Corners. Plaintiff and Lenders are entitled to exercise all rights and remedies available to them under the Loan Documents and applicable law as a consequence of an Event of Default.

G. Ply-Marts' financial problems have intensified and accelerated to the point that there is imminent danger that Plaintiff's interests in the Ply-Marts Collateral will be irreparably harmed.

H. Ply-Marts has commenced an orderly wind-down and liquidation of its lumber products business. The remaining operating divisions of Ply-Marts have sustained and continue to sustain substantial operating losses.

[1] Terms used to describe categories of either the Ply-Marts Collateral or property of the Receivership Estate (defined later in the text), unless otherwise defined, will have the meanings given to them in the Uniform Commercial Code as in force in the State of Georgia.

I. The Ply-Marts Collateral is in danger of immediate and irreparable damage or loss.

Disclosures of Ply-Marts With Respect to Proposed Receiver

J. Ply-Marts has disclosed to the Court that in January of 2008, it retained GGG, Inc. d/b/a Grisanti, Galef & Goldress ("GGG") to provide, among other things, financial consulting and investment banking assistance. Ply-Marts has also disclosed to the Court that from January through April 24, 2008, GGG also provided such services to Four Corners and that beginning April 25, 2008, GGG only provided such services to Ply-Marts. Ply-Marts has further disclosed to the Court that on May 19, 2008, its board of directors appointed Lee N. Katz, a managing partner of GGG, as Liquidation Manager for Ply-Marts. Ply-Marts has stated that it does not object to the appointment of a receiver as provided herein, but Ply-Marts requests that Mr. Katz be permitted to serve as receiver because he is familiar with the assets and operations of Ply-Marts, because GGG has been instrumental in reducing the indebtedness owed by Ply-Marts over the past few months, and because GGG has been actively engaged in negotiations with potential purchasers of the operating divisions of Ply-Marts. Ply-Marts contends that the continued involvement of Mr. Katz in an orderly liquidation of Ply-Marts business will promote efficiency, avoid duplication of effort and will result in a maximation

of the values to be realized from the remaining assets of Ply-Marts. Ply-Marts has also disclosed to the Court that GGG has agreed to waive its Transaction Fee under its retention agreement with Ply-Marts if Mr. Katz is appointed Receiver. Plaintiff does not oppose Ply-Marts' request that Mr. Katz serve as receiver.

Conclusions of Law

(i) Venue and jurisdiction are proper in this Court.

(ii) Agent and Lenders have no adequate remedy at law to prevent potential irreparable harm and injury to their rights under the Loan Documents and with respect to the Ply-Marts Collateral, and therefore, Plaintiff is entitled to the relief prayed for in the Complaint and Motion as hereinafter provided.

(iii) Adequate notice of the Motion and the relief requested by Plaintiff has been given to all necessary persons.

(iv) Through counsel, Ply-Marts has consented to the relief sought in this Order on the condition that Mr. Katz be appointed to serve as the Receiver.

Order of the Court

IT IS ACCORDINGLY HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Motion is hereby GRANTED, as provided herein.

2. Lee N. Katz be, and hereby is, appointed Receiver, without bond, for Ply-Marts and for all of the Receivership Assets (as defined below), all of which will form a part of the estate of Ply-Marts that is in receivership (the "Receivership Estate"). As used herein, the term "Receivership Assets" shall be construed broadly to include all property of Ply-Marts and interests in property of Ply-Marts, whether real or personal, tangible or intangible and wherever located, including, without limitation, all Ply-Marts Collateral and all of the types and items of property of Ply-Marts described in paragraph 3 below. Except as otherwise provided herein with respect to actions that may be taken by Plaintiff and Lenders, the Receiver shall be exclusively authorized to administer the Receivership Estate and to possess, manage, safeguard and dispose of the Receivership Assets, and no officer, director, shareholder, agent or employee of Ply-Marts, nor any other person or entity claiming to have an ownership interest in or control over Ply-Marts, shall have any authority or control over or with respect to the Receivership Estate or any of the Receivership Assets.

3. Subject only to the rights and liens of Plaintiff (as Agent) and Lenders, the Receiver shall have all powers and rights to administer and manage the Receivership Estate and to assume custody and control over all Receivership

Assets, including, but not limited to, the following property, whether or not such property constitutes Ply-Marts Collateral:

a. all of Ply-Marts' interests as tenant under leases of premises owned by Four Corners or any other person at which any Receivership Assets are located (but neither the Receiver nor the Receivership Estate shall be deemed to have assumed any of the obligations under any lease with Four Corners or any other person, but the use and occupancy of any such premises shall be conditioned upon the Receiver making satisfactory arrangements for the payment of rent with Four Corners or any other landlord in respect of any premises that are used for purposes beneficial to the Receivership Estate) and Ply-Marts' interest in any leasehold improvements on any leased premises (all such business premises and improvements being collectively referred to as the "Facilities");

b. all of Ply-Marts' inventory, including, without limitation, raw materials, work-in-process, finished goods, packaging materials and supplies (collectively, the "Inventory");

c. all items of machinery or equipment owned or used by Ply-Marts or located in, on or about the Facilities, including, without limitation,

all motor vehicles, computer equipment, office equipment and supplies (collectively, the "Equipment");

d. all accounts receivable, promissory notes, payment intangibles, chattel paper, instruments and other rights of Ply-Marts to the payment of money (collectively, the "Accounts");

e. all deposit accounts of Ply-Marts (collectively, the "Deposit Accounts"), including, without limitation, all checking accounts, savings accounts, payroll accounts, payroll tax accounts, petty cash accounts, and escrow accounts;

f. all business records of Ply-Marts, in whatever form or media maintained (collectively, the "Records"), including, but not limited to, all books of accounts, financial statements, balance sheets, ledgers, expense statements, logs, journals, reports, customer lists and other documents relating to the past or future use, operation or maintenance of any Receivership Assets;

g. all of Ply-Marts' investment property, including, without limitation, stocks, bonds, and other securities;

h. all of Ply-Marts' permits and licenses issued by governmental authorities that are necessary for the ownership or use of any of the Receivership Assets or the operation of any of the business of Ply-Marts;

i. to the extent not included in any of the preceding categories, all rights of Ply-Marts under contracts;

j. all causes of action of Ply-Marts;

k. all patents, trademarks, copyrights and other intellectual property of Ply-Marts;

l. all of Ply-Marts' rent deposits, security deposits and other refundable deposits of money or other property;

m. all tax refund claims of Ply-Marts;

n. all rents, income, monies, revenues and profits now existing or hereafter generated from the collection, sale or other disposition of any of the Ply-Marts Collateral (collectively, the "Revenues"); and

o. to the extent not included in any of the previous categories, all general intangibles of Ply-Marts.

4. Except as otherwise expressly restricted in this Order, the Receiver shall have and possess all powers, privileges and prerogatives ordinarily provided

to receivers under law. In addition, and without limiting the generality of the foregoing, the Receiver is hereby authorized and empowered to:

a. take immediate possession of, hold and secure all Receivership Assets;

b. manage, control, operate and maintain the Receivership Estate;

c. receive, collect, sue for, settle or compromise all Accounts, Revenues and other Receivership Assets;

d. conduct the business operations of Ply-Marts, including, without limitation, continuation or termination of any employment arrangement and all other aspects of any active business operation;

e. make such ordinary and necessary payments, distributions, and disbursements as the Receiver deems advisable or proper for the marshaling, maintenance or preservation of the Receivership Assets;

f. sell, rent, lease, encumber or otherwise dispose of any or all of the Receivership Assets;

g. negotiate with any creditors of Ply-Marts for the purpose of compromising or settling any claim, including, without limitation, the surrender of assets to secured creditors;

h. renew, cancel, terminate, or otherwise adjust any pending lease agreements to which Ply-Marts is a party;

i. institute, defend, compromise or adjust such actions or proceedings in state or federal courts now pending and hereafter instituted, as the Receiver in his discretion may deem to be advisable for the protection and administration of the Receivership Estate;

j. institute actions, suits or other proceedings to obtain possession or custody of or control over any Receivership Assets, to pursue causes of action held by Ply-Marts, and to collect any amounts owed to Ply-Marts, including, but not limited to, accounts receivable, whether any such suits or proceedings are instituted in this Court or any other court or tribunal having competent jurisdiction;

k. execute any necessary documents to allow the Receiver to take possession of and control of, and to draw checks on, any Deposit Accounts and to open bank accounts or other depository accounts, in the name of the Receiver on behalf of the Receivership Estate, provided that the Receiver shall provide Plaintiff with at least five (5) business days prior notice before opening any new bank or other depository account;

l. prepare tax returns and related documents regarding the assets and operation of the Receivership Estate;

m. abandon any Receivership Assets (other than the Ply-Marts Collateral, except as hereinafter provided) that, in the exercise of the Receiver's business judgment, are burdensome to the Receivership Estate;

n. engage attorneys, accountants, appraisers, brokers, auctioneers, environmental experts, and other consultants and experts (collectively, the "Consultants"), on terms acceptable to Plaintiff, to assist the Receiver in the performance and discharge of his rights, powers, and duties hereunder and pay such Consultants reasonable retainers and their fees and expenses as such become due and payable; provided, however, that prior to any such payment by the Receiver to a Consultant, the Receiver shall provide copies of the Consultant's invoices to Plaintiff and counsel for Ply-Marts, each of whom shall have a period of five business days after receipt of an invoice within which to send a written objection to payment to the Receiver, and if an objection is timely made by Plaintiff or Ply-Marts, the fees and expenses that are subject to the objection shall not be paid except upon the subsequent written consent of the objecting party or further order of this Court;

o. sell, lease or otherwise dispose of any of the Receivership Assets in the ordinary course of business, as a going concern or in such public sales as the Receiver may deem appropriate; and execute and deliver such bills of sale and other related documents in order to transfer all of Ply-Marts' right, title and interest in and to any of the Receivership Estate to any purchaser thereof;

p. pay from the Revenues (to the extent agreed by Plaintiff) or Protective Advances (defined below) the expenses of the Receivership Estate, including, without limitation, expenses for rent, utilities (gas, electric and water), supplies, wages and salaries, taxes (payroll, sales and personal property ad valorem) and ordinary and necessary repairs and maintenance to any of the Receivership Estate;

q. deal with all existing and prospective subcontractors, vendors, suppliers, distributors, customers, licensors, licensees, landlords, tenants and subtenants of Ply-Marts, including, without limitation, by way of negotiating and executing leases, licenses, and other agreements and any amendments, renewals, extensions, modifications, or waivers of any leases, licenses, or other agreements between Ply-Marts and any such existing or prospective

subcontractors, vendors, suppliers, distributors, customers, licensors, licensees, landlords, tenants and subtenants of Ply-Marts;

r. receive, open, read, and respond to all mail addressed to Ply-Marts, with the exception of mail that is confidential attorney-client correspondence;

s. provide a written statement each month (for the prior month) of cash receipts and cash disbursements to Ply-Marts and Plaintiff as well as any other reports reasonably requested by Plaintiff or required by the Court;

t. request and receive from Ply-Marts' outside accountants and auditors (collectively, the "Auditors") all records and information relating to Ply-Marts' financial performance and condition in 2006, 2007 and 2008, for the purpose of, among other things, filing amended tax returns for Ply-Marts and seeking any tax refund to which Ply-Marts may be entitled (and such Auditors are hereby authorized and directed to turn over all such records and information to the Receiver); and

u. take such other action as may be approved by this Court.

In addition to the powers and instructions set forth hereinabove, the Receiver shall have all of the powers of a receiver that are authorized by law and all other powers necessary or proper to preserve and liquidate the Receivership Estate, including,

without limitation, the Ply-Marts Collateral, and to perform obligations and exercise rights and remedies under existing agreements between or among Ply-Marts and any third parties.

5. Notwithstanding anything to the contrary in this Order, the Receiver shall not be authorized to sell, lease, license, encumber, collect, compromise or otherwise dispose of, or use the proceeds of, any part of the Ply-Marts Collateral without the prior express consent of Plaintiff, which consent may be given or withheld in Plaintiff's sole and absolute discretion and may, if so elected by Plaintiff, be conditioned upon Plaintiff's agreement as to the timing, method, manner and terms of any sale, lease, encumbrance, compromise or other disposition of any Ply-Marts Collateral; and the Receiver shall in all events promptly account for and turn over to Plaintiff, for application to the Obligations, all cash and non-cash proceeds received in connection with any sale, lease, collection or other disposition of any Ply-Marts Collateral.

6. The Receiver shall be empowered, but is not required, to file on behalf of Ply-Marts and the Receivership Estate a voluntary petition for relief under any chapter of the Bankruptcy Code. Without further order of this Court, no officer, director, employee, shareholder, agent or other person, other than the Receiver,

shall be authorized to seek relief on behalf of Ply-Marts under the Bankruptcy Code.

7. Except with respect to lockboxes and other payment addresses in the control of Plaintiff to which account debtors of Ply-Marts make payments in respect of Accounts, the Receiver is hereby authorized to notify the United States Postal Service to forward any mail addressed to Ply-Marts to any Post Office box or other mail depository. Further, the Receiver is authorized to open and inspect all such mail, to determine the location or identity of assets or the existence and amount of claims.

8. Subject to the rights and liens of Plaintiff and Lenders as set forth in this Order, the Receiver may sell any or all of the Receivership Assets, including, without limitation, any of the Ply-Marts Collateral (with the consent of Plaintiff) by one or more public or private sales, as determined by the Receiver in the exercise of his sound business judgment on such terms and conditions as the Receiver determines to be in the best interests of the Receivership Estate, without the necessity of the Receiver having obtained any appraisal of any of the Receivership Assets that are to be the subject of a sale. Without limiting the generality of the foregoing, to the extent that the Receiver elects to sell any of the Receivership Assets by one or more public sales as provided in 28 U.S.C. §§ 2001

and 2004, the Receiver, in the exercise of his discretion, may determine the terms, conditions and procedures for the conduct of any such public sale, including, without limitation, the following: (i) the Receivership Assets to be sold (the "Auctioned Property"); (ii) the terms and conditions of any purchase and sale agreement entered into with an initial bidder (the "Initial Bidder"); (iii) the requirements any person must satisfy to participate in the bidding process; (iv) the requirements any offer must satisfy to qualify as an acceptable bid (a "Qualified Bid"); (v) the amount by which each subsequent bid must exceed the initial or any prior Qualified Bid, and any other terms and conditions with which such subsequent bid must comply, for the bidding process to continue; (vi) the date on which any such sale shall take place, provided that no sale shall be conducted sooner than ten (10) business days after the date on which this Order is entered; (vii) the dollar amount of any deposit (the "Bid Deposit") that a bidder (other than the Initial Bidder) must provide to the Receiver in conjunction with a bid to keep such bid in place as a backup; (viii) the terms and conditions under which a Bid Deposit shall be released; (ix) the amount of the fee (the "Breakup Fee"), if any, payable to the Initial Bidder if a subsequent Qualified Bid by another bidder is approved by the Court and a sale is closed on such Qualified Bid, provided no Breakup Fee shall exceed an amount that is acceptable to Plaintiff; and (x) the

amount, if any, a Qualified Bidder, at the conclusion of the bidding process, must deposit with the Receiver (in addition to the Bid Deposit) to be deemed the successful bidder.

9. For any proposed public sale of the Receivership Assets, the Receiver shall file a notice (the "Sale Notice") with the Court specifying the terms, conditions and procedures for such proposed public sale. The Receiver promptly shall serve the Sale Notice on each of the following persons or their counsel ("Interested Parties"): (i) Plaintiff and Ply-Marts; (ii) all persons who, based on the applicable records of the Georgia Superior Court Clerks' Authority for property located in the State of Georgia, or similar records of jurisdictions outside the State of Georgia for property located outside the State of Georgia, may have or assert an interest in any of the Auctioned Property; (iii) each person who has in writing to Ply-Marts or the Receiver expressed an interest in purchasing the Auctioned Property and provided in writing a name and address for such party in interest; (iv) each person identified on any list of creditors provided by Ply-Marts to the Receiver after the date of this Order; and (v) any other person who has advised the Receiver in writing that such person is a creditor of Ply-Marts and has provided in writing therewith a name and address for such person.

10. If an Interested Party wishes to object to a Sale Notice as being inadequate to give fair notice of the terms and conditions of a proposed public sale, such Interested Party within any deadlines identified in a Sale Notice shall file its written objection in this case, shall state therein, with specificity, its grounds for objecting to such Sale Notice, and shall serve such objection on the Receiver, Plaintiff, and Ply-Marts. The Court shall schedule a hearing to hear and resolve any timely objections. At such hearing, the objecting party shall bear the burden of demonstrating that such Sale Notice fails to provide adequate notice of the terms and conditions of the proposed sale and should be modified. Notwithstanding the filing of any objection to the Sale Notice in accordance with this paragraph, until the Court enters an Order directing otherwise, the Receiver shall be entitled to conduct the proposed public sale in accordance with the Sale Notice.

11. Notwithstanding anything to the contrary contained in the Motion, any Sale Notice or this Order, the final determination of the highest and best bid with respect to any proposed public sale of Receivership Assets shall be made by the Court at a hearing scheduled and noticed for this purpose; provided, however, that, with respect to a proposed public sale of any Ply-Marts Collateral, Plaintiff shall have the right to veto any public sale on terms that are not satisfactory to it (in which event, the Receiver shall have the option to abandon such Ply-Marts

Collateral from the Receivership Estate to Plaintiff for foreclosure or other realization by Plaintiff in accordance with the Loan Documents and applicable law, and the Receiver, for itself and Ply-Marts, shall be deemed to have waived any notices of proposed disposition by Plaintiff of any of the Ply-Marts Collateral otherwise required by applicable law).

12. The Receiver shall be authorized to request and receive from Plaintiff from time to time advances of funds (collectively, "Protective Advances") that are necessary for the Receiver's management, maintenance, marketing, sale, safeguarding, insurance, operation or repair of the Ply-Marts Collateral or other Receivership Assets, including, without limitation, payroll and payroll taxes, purchases of inventory to fill outstanding purchase orders, premiums for insurance and amounts needed to make necessary and essential repairs to the Facilities, all of which Protective Advances by Plaintiff shall be deemed Revolver Loans under (and as defined in) the Loan Agreement to protect and preserve the Ply-Marts Collateral, shall form a part of the Ply-Marts Obligations, shall be deemed to be guaranteed by each guarantor of the Ply-Marts Obligations to Agent and Lenders (including Four Corners) to the same extent as if such Protective Advances had been Revolver Loans made to Ply-Marts, and shall be secured by all of the liens and security interests granted or conveyed by Ply-Marts or Four Corners to or in

favor of Plaintiff as Agent. All Protective Advances may be made by Plaintiff at such times and in such amounts as Plaintiff may elect in its sole and absolute discretion. If Plaintiff elects to discontinue making Protective Advances, Plaintiff shall provide at least one business day prior written notice of such election to the Receiver, and, if such notice is given, Lenders shall fund one final Protective Advance to the Receiver in an amount sufficient to permit the Receiver to pay all unpaid payroll, payroll taxes, and sales taxes that have accrued through and including the date that Plaintiff delivers such notice of termination of funding to the Receiver. The Receiver shall provide prompt written notice to Plaintiff of any payroll, payroll taxes or sales taxes owed by the Receivership Estate that have not been (prior to entry of this Order) or are not (after entry of this Order) paid as and when due.

13. Plaintiff shall be authorized, at any time or times, to enter upon the Facilities (or any other location at which the Receiver maintains any of the Receivership Assets) for the purpose of inspecting the Ply-Marts Collateral or any other Receivership Assets, including all Records, Inventory or Equipment; conferring with officers, employees, or agents of the Receiver; and reviewing and making copies of any and all of the Records and any other documents at any time in the possession, custody or control of the Receiver. The Receiver shall

periodically, at such intervals as Plaintiff, Ply-Marts and the Receiver shall mutually agree upon (but no less frequently than once each month), provide to Plaintiff and Ply-Marts reports of the Receiver's operations, cash receipts, disbursements and maintenance of the Receivership Estate. In no event shall Plaintiff, by virtue of its exercising any right, power or privilege hereunder, be deemed to be in possession or control of any of the Receivership Estate, or to have asserted any supervisory control or decision-making authority with respect to the management, operation, protection or maintenance of any Receivership Assets, and Plaintiff shall not be deemed to have assumed any obligation under Ply-Marts' agreements with any third parties and shall not be liable for the use, maintenance, repair, or operation of any of the Receivership Estate. All officers, attorneys and authorized representatives of Ply-Marts shall be entitled to review, inspect and copy any of the Records during normal business hours and at their own expense.

14. Not later than 45 days after entry of this Order, the Receiver is hereby directed to file with this Court and serve upon the parties, a preliminary report setting out identity, location and estimated value of the Receivership Assets, and the estimated amount of liabilities of Ply-Marts. In preparing this preliminary report, the Receiver shall consider and evaluate the economic viability and benefit

to the Receivership Estate of continuing the operation of any of the Receivership Assets.

15. Ply-Marts and each of its officers, directors, agents, attorneys and employees, and all other persons acting at Ply-Marts direction, and each other person or entity receiving notice of this Order by service or otherwise (but specifically excluding Plaintiff and each Lender), are hereby ordered immediately to (i) turn over to the Receiver possession of all of the Receivership Assets, including, but not limited to, the Ply-Marts Collateral and the Records; (ii) pay over to the Receiver all cash and all funds and deposits in any Deposit Accounts or investments of Ply-Marts, except for funds required to pay checks for expenses of Ply-Marts that have been issued on or before the date of entry of this Order but have not yet been presented for payment; and (iii) turn over to the Receiver all keys and entry cards to all buildings, safes, deposit boxes, or other safeguarded places in, on or about the Facilities and all other tangible or intangible items of Receivership Assets. Notwithstanding the foregoing, (i) any attorneys or other Consultants employed by Ply-Marts prior to the date hereof are authorized to maintain possession of any retainers held by them, and/or to apply all or any part of any such retainer to unpaid fees and expenses owed by Ply-Marts or the Receiver, and (after termination of their employment) to refund any excess to the

Receiver, and (ii) all proceeds of Ply-Marts Collateral shall be remitted by the Receiver (or any other person or entity in possession thereof) to Plaintiff for application to the Obligations.

16. The Receiver may, in his discretion and for the purpose of maintaining going concern value of any Receivership Assets, permit officers or employees of Ply-Marts to collect, sell, possess, manage, protect, market and otherwise deal with some or all of the Receivership Assets on such terms, and subject to such limitations and conditions, as the Receiver deems appropriate, but in all events subject to the prior written consent of Plaintiff and the other provisions of this Order requiring a turnover to Plaintiff, for application to the Obligations, of proceeds of the Ply-Marts Collateral.

17. During the pendency of this Receivership, absent express permission of this Court, all actions by any creditors and other persons seeking money damages or other relief from the Receivership Estate and all others acting on behalf of any such creditors and other persons, including sheriffs, marshals, and all officers and deputies, and their respective attorneys, servants, agents and employees, are, until further order of this Court, hereby stayed. Further, all persons having notice of this Order, including (i) Ply-Marts (and all officers, directors, employees and agents of Ply-Marts), (ii) all creditors of Ply-Marts, and

(iii) all persons or entities acting at the direction or on behalf of any of the persons described in clauses (i) or (ii) (except for governmental authorities exercising their police powers to protect public health or safety and except for Plaintiff and each Lender), including, without limitation, sheriffs, marshals, and all officers and deputies, and their respective attorneys, servants, agents and employees, are hereby **RESTRAINED AND ENJOINED** from (a) destroying, concealing, using, collecting, taking possession of, transferring, asserting dominion or control over, repossessing, seizing, attaching, garnishing, executing upon, seeking to impose a judicial lien upon any Receivership Assets, (b) otherwise interfering with the possession, custody, control, use, or management by the Receiver of any Receivership Assets or with the Receiver's exercise of powers or discharge of duties under this Order, (c) altering any Records or (d) cancelling or terminating any insurance or contract. Accordingly, all such persons or entities are **RESTRAINED AND ENJOINED** from filing or prosecuting any actions or proceedings that involve the Receiver or that affect any Receivership Assets.

18. The Receiver is authorized to register this Order with the appropriate government offices and courts and to serve this Order on any person or entity whom the Receiver reasonably believes to be in custody or control of funds or other assets properly belonging to the Receivership Estate.

19. If the Receiver determines that the aggregate amount of Revenues and Protective Advances available to the Receiver are insufficient to pay the reasonable and necessary expenses of maintaining, preserving, and operating the Facilities in compliance with applicable law, then the Receiver may, on not less than ten (10) business days written notice to Plaintiff and Ply-Marts, file with the Court a resignation and termination of the Receiver's further responsibilities to serve as receiver hereunder, whereupon, subject to a surrender of all of the Ply-Marts Collateral to Plaintiff and the filing of a final report regarding the receivership with the Court, the Receiver shall be discharged. In connection with any such surrender of Ply-Marts Collateral to Plaintiff, the Receiver, for himself, on behalf of the Receivership Estate and on behalf of Ply-Marts, shall be deemed to have waived any notices otherwise required to be given by Plaintiff in connection with any sale or other disposition of any of the Ply-Marts Collateral, including, without limitation, any notices otherwise required under the Uniform Commercial Code.

20. The Receiver is authorized to communicate with all persons as he deems appropriate to inform them of the status of this matter and the Receivership Estate. In connection with any final report, accounting and discharge of the Receiver, the Receiver shall seek and obtain final approval from the Court of the professional fees and expenses of the Receiver, his firm and his counsel.

21. Upon the request of the Receiver, the United States Marshal's Office, in any judicial district, is hereby ordered to assist the Receiver in carrying out his duties to take possession, custody or control of, or identify the location of, any assets, records or other materials belonging to the Receivership Estate.

22. Notwithstanding anything to the contrary in this Order, Plaintiff as Agent is hereby authorized (but not required) to take all actions it deems necessary or appropriate to realize upon any Ply-Marts Collateral, including, without limitation, collection of any Accounts, foreclosure of its liens upon any or all of the Ply-Marts Collateral or exercise any power of sale granted in any of the Loan Documents, and apply the proceeds thereof to the payment of the Obligations. Except as otherwise expressly agreed by Plaintiff, the Receiver shall turn over all proceeds of the Ply-Marts Collateral to Plaintiff for application to the Obligations. Upon any foreclosure by Plaintiff, the Receiver shall cooperate with the Plaintiff and the party purchasing any Ply-Marts Collateral at foreclosure by relinquishing possession of such Ply-Marts Collateral and taking any other actions that may be necessary or desirable in connection with a foreclosure by Plaintiff.

23. The Clerk of the Court is authorized and directed to make certified copies of this Order, at the Receiver's request, for use by the Receiver.

24. Except for an act of gross negligence or willful misconduct, the Receiver and all persons engaged by or employed by him shall not be liable for any loss or damage incurred by Ply-Marts or any other person by reason of any act performed or omitted to be performed by them in connection with the discharge of their duties and responsibilities in this matter.

25. Ply-Marts, Plaintiff and any other person asserting a lien upon any assets in the Receivership Estate, may request, by written motion filed with the Court and with at least five (5) business days notice to Plaintiff and Ply-Marts, a status conference or any other appropriate relief as to the results of the Receiver's management and liquidation of the Receivership Estate, the necessity or appropriateness of continuing the receivership, or whether any of the terms and conditions of this Order should be amended or modified in any way.

26. The Receiver shall be authorized to apply to this Court, with notice to Plaintiff and Ply-Marts, for issuance of such other orders as may be necessary and appropriate in order to carry out the mandate of this Court.

27. This Court shall retain jurisdiction of this matter for all purposes, including, without limitation, for the purpose of amending, interpreting and enforcing any of the provisions of this Order.

SO ORDERED at 11:40 A.M. o'clock _____.m., this 23 day of June, 2008.

HONORABLE JACK T. CAMP
CHIEF JUDGE, UNITED STATES DISTRICT COURT

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