TURNOVER RECEIVERSHIPS “101"

by
Peter E. Pratt, Jr., and
Jon Malone
Court Appointed Receivers

(Updated September 30, 2012)

FORWARD

SELECTED REMARKS FOR FURTHER CONSIDERATION OF THE COLLECTION OF JUDGMENTS USING TURNOVER RECEIVERSHIPS

The strategic implementation of escalating conflict typically results in increased pressure, stress and anxiety on a judgment debtor to bring about the resolution to an aging judgment indebtedness. Conflict, appropriately applied and strategically managed by a Receiver, tends often to breaks that status quo which has impeded the payment of a judgment.

Jon Malone (B.S. Degree, Chemical Engineering)

Conflict causes resolution.

Peter Pratt (B.A. Degree, History)

"[D]elinquencies in payments on the part of some... would result from a diversity of other causes—the real deficiency of resources; the mismanagement of their finances; accidental disorders...; and, in addition to the rest, ***the reluctance with which men commonly part with money for purposes that have outlived the exigencies which produced them, and interfere with the supply of immediate wants****."* (Emphasis Added)

Federalist Number 7
For the Independent Journal. Thursday, November 15, 1787
ALEXANDER HAMILTON

"Some debts are fun when you are acquiring them, but none are fun when you set about retiring them."

American Proverb - Source Unknown

Pretend inferiority and encourage (the debtor's) arrogance.
(The word "debtor" replaces "his" in actual translation)

"The Art of War" (476 B.C.)
SUN TZU

Thus it is that in war the victorious strategist only seeks battle after the victory has been won, whereas he who is destined to defeat first fights and afterwards looks for victory

"The Art of War" (476 BC)
SUN TZU

(With regard to Investigating, Locating, and Tracing Assets, particularly those held in financial institutions...)

"By indirections find directions out"

"Hamlet"
Act 2, Scene 1
WILLIAM SHAKESPEARE

TURNOVER RECEIVERSHIPS "101"

TABLE OF CONTENTS

Page	Section	Topic Description
1	1.	A VERY BRIEF HISTORY OF RECEIVERSHIPS
1	A.	The Origin of Receiverships in England
1	(1)	Introduction
1	(2)	A Growing Need for Receivers
1	(3)	The Effect of Appointing Receivers in English Chancery Courts
2	(4)	The Utility of British Precedent
2	B.	The Origin of Receiverships in the United States
2	(1)	The Necessity of Receivers to Protect Railroads
2	(2)	The Beginning of Use of Receiverships to Protect Railroads
2	(3)	The Failure of Federal Bankruptcy Law to Protect Railroads
2	C.	The Texas Turnover Statute
2	(1)	Introduction to the Turnover State
3	(2)	Authority for the Implementation of the Turnover Statute
3	2.	TURNOVER RECEIVERSHIPS
3	A.	The Texas Turnover Statute - Tex. Civ. Prac. & Rem. Code §31.002, et seq.
4	B.	Appointing a Receiver as Opposed to Designating a Sheriff or Constable
4	(1)	Intractable Problems Designating a Sheriff or Constable under a Turnover Order
4	(2)	Appointing a Receiver Instead of a Sheriff or Constable
4	C.	Custodia Legis and the Creation of the Receivership Estate
4	(1)	The Doctrine of Custodia Legis
5		RECEIVER'S PRACTICE NOTE
5	(2)	Custodia Legis Precludes Interference by Other Courts
5		RECEIVER'S PRACTICE NOTE
6	(3)	The Receivership Does Not Abrogate Pre-existing Third Party Contract Rights
6		RECEIVER'S PRACTICE NOTE
6		RECEIVER'S PRACTICE NOTE
6	3.	RECEIVERSHIP TACTICS AND STRATEGIES FOR COLLECTING JUDGMENTS
6	A.	Obtaining Reliably True Asset Information From Third Party Sources
6	(1)	Introductory Comment from Sun Tzu
7	(2)	The Futility of Obtaining True Information from a Judgment Debtor
7	(3)	Obtaining Transcripts of Tax Returns and Tax Returns
7	(4)	Obtaining Information from Lenders and Other Sources of Credit
7	(5)	Obtaining Information from Landlords
7	(6)	Obtaining Information from Third Party Vendors
7	(7)	Other Valuable Fonts of Information
8	B.	Holding the Judgment Debtor in Contempt of Court
8	(1)	Failure to Comply Identify Assets and Produce Documents
8	(2)	Failure to Comply with a Receiver's Order to Turn Over Property
8	C.	Levying on Bank Accounts and Investment Accounts
8	(1)	The Levy Process and the Judgment Debtor's Burden to Contest a Levy
9	(2)	Levies Are Superior, Safer and Cheaper Than Garnishments
9	(3)	The Levy Stays in Place Until It Has Been Released
9	(4)	Levy Procedural Requirements Are Less Onerous Than For A Garnishment
9	(a)	No Liability for Garnishment Answer Fees
10	(b)	Nominal Costs for Responding to the Levy
10	(c)	Faster Response Time for a Levy Than a Garnishment
10	(d)	Faster Resolution Time for a Levy than a Garnishment
10	(e)	One Instance When a Garnishment is Preferable to a Levy
10	(3)	Money in the Bank - Exempt and Non-Exempt Property
10	(a)	Examples of Exempt Property
10	(b)	Money in the Bank is Generally Free Game

11 (c) Federal Benefits are Exempt Unless Commingled With Other Non-Exempt Funds and Traced Out of the Account
11 (d) Funds Already in Custodia Legis
11 RECEIVER'S PRACTICE NOTE
11 (e) IRA Distributions and the Exception for Purchases of Property with Funds from an IRA Distribution
11 (f) Defeating the Argument that Turnover of Wages Deposited in a Bank Account are Exempt
12 RECEIVER'S PRACTICE NOTE
12 (g) Proceeds from the Sale of a Homestead and Abandonment of the Exemption
13 RECEIVER'S PRACTICE NOTE
13 D. Selling the Judgment Debtor's Non-Exempt Real Estate
13 (1) Introduction
13 (2) Constable or Sheriff's Sales and Various Issues Raised by Them
13 (a) Execution and Order of Sale of Real Property
13 (b) The Problem of Transferred Property Subject to the Judgment Lien
14 RECEIVER'S PRACTICE NOTE
14 (c) Collecting the Receiver's Fee from an Execution Sale
14 (3) Private Sales of Non-Exempt Real Property
14 (a) A General Procedure to Follow
14 (b) Setting The Sale Price
15-16 (c) Procedures for Safely Selling the Judgment Debtor's Non-Exempt Real Property
16 (d) Selling property Free and Clear of Liens
16 E. Selling the Judgment Debtor's Non-Exempt Personal Property
16 (1) Execution Sales
16 (2) Alternative Sale Procedure One - Application and Order of Sale
16-18 (3) Alternative Sale Procedure Two - Follow the Procedure Used by Storage Companies under the Transportation Code
18 F. Seizing and Selling Non-Exempt Vehicles
18 (1) Execution and Sale of Vehicles by a Sheriff or Constable
18 (a) Execution Sales in General
18 (b) Problems with Execution Sales
19 RECEIVER'S PRACTICE NOTE
19 (2) Recovery of Vehicles by Theft by Conversion, Unauthorized Use of a Motor Vehicle, and Repossession
19 (a) Establishing a Violation of the Penal Code
19 (b) Repossession
19 G. Seizing and Selling Airplanes
20 H. Seizing and Selling Navigable Maritime Vessels
21 RECEIVER'S PRACTICE NOTE
21 I. Turnover of Medicaid Reimbursements
21 (1) Medicaid Reimbursements are Not Exempt
21 (2) Statutory Authority for Levying on Medicaid Reimbursements
21 RECEIVER'S PRACTICE NOTE
22 J. Turnover of Stock in Corporate Entities
22 (1) Levying on Stock in General
22 (2) The Two Types of Corporations
22 (a) In General
23 (b) The Legitimate Corporation
24 (c) The Illegitimate Corporation
24 (d) Voting the Judgment Debtor's Shares in a Corporation
25 K. Turnover of Accounts Receivable and Judgments Owned by the Judgment Debtor
25 L. Taking Control of Internet Domain Names
25 (1) In General
25 (2) The Steps for Obtaining Control of an Internet Domain Name
26 M. Seizing and Exercising a Judgment Debtor's Rights with Respect to Causes of Action

(1) Causes of Action are Within the Purview of the Turnover Statute
(2) Causes of Action Against Vendors Who Owe the Judgment Debtor
(3) Causes of Action the Judgment Debtor has Against the Judgment Creditor
N. Obtaining Property Outside of Texas
O. Charitable Contributions Made from Property in Custodia Legis
P. Miscellaneous Property that Ought to be Turned Over
4. HOW TO GET A TURNOVER ORDER GRANTED
A. The Four Simple Steps for Getting a Turnover Order Granted
B. Tex. Civ. Prac. & Rem. Code §31.002(a)(1) and (2) - Elements for a Turnover Order
(1) Requirements for the Foundation for a Court to Grant a Turnover Order.
(2) Tanner v. McCarthy - Evidentiary Requirements for a Turnover Order
(3) Tex. Civ. Prac. & Rem. Code §31.002(h) Does Not Relieve the Applicant of the Evidentiary Requirements of §31.002(a)(1) and (2)
(4) Ex Parte Turnover Orders
(5) Appealing a Turnover Order with a Receivership Appointment
(a) A Turnover Order is a Final, Appealable Judgment
(b) Interlocutory Appeals
(c) Restricted Appeals
RECEIVER'S PRACTICE NOTE
5. Procedural Issues After the Receiver is Appointed
A. Widespread Confusion About the Receiver's Bond - Whether and How Much to Set It For
B. The Receiver's Relation to the Parties and His Derived Judicial Immunity
(1) The Receiver is Neither an Agent for the Plaintiff or the Defendant
(2) The Receiver Has Derived Judicial Immunity
(3) The Receiver's Fee
(4) Turnover Against Third Parties
(a) In General
(b) Turnover of Assets Held by a Third Party Acting in a Representative Capacity
(c) Turnover of Assets Held by a Spouse as Sole Management Community Property
(d) Turnover Against Corporations Owned or Controlled by a Judgment Debtor
(1) Authorities for Reaching Assets Held by the Third Party Corporation
(2) Effectuating the Turnover Against the Third Party Corporation
(5) The Uninvited Judgment Creditor Intervenor
6. DRAFTING CONSIDERATIONS
A. In General
B. The Harris County Courts' at Law Form
7. FINAL TIDBITS OF INFORMATION
A. When the Judgment Debtor Files for Bankruptcy
B. Multiple Receiverships Against the Same Judgment Debtor
C. Justice Court Judgments Appealed to County Court With A Surety Bond
D. Reserving Corporate Names
E. IRS Issues and Who Has Priority
F. Recording the Turnover Order with the Secretary of State of Texas, UCC Division
G. Calculating Post Judgment Interest and the Total Due Under the Judgment
8. CONCLUSION

TURNOVER RECEIVERSHIPS "101"

by
Peter E. Pratt, Jr., and
Jon Malone,
Court Appointed Receivers and Attorneys at Law

1. A VERY BRIEF HISTORY OF RECEIVERSHIPS

A. The Origin of Receiverships in England

(1) Introduction

It is impossible to tell exactly when the first court receiver was appointed, but following the practice of granting injunctions to stay waste and preserve property, which was quite common during the reign of Queen Elizabeth (September 7, 1533 to March 24, 1603), cases readily presented themselves wherein the remedy of enjoining the party in possession from committing waste or doing harm to the property was not sufficient protection. See Clark, Ralph Ewing "A Treatise on the Law and Practice of Receiverships", 1918, §4, at 4. (Clark is considered to be the authority on receiverships.) In other words, the court at times was doubtful whether or not the party in possession of property, or collecting the rents and profits from the property, could or would properly obey the injunction and physically protect the property and the rents and profits for those ultimately entitled to receive it, i.e., the remaindermen. Id.

(2) A Growing Need for Receivers

If the injunction was not heeded the party disobeying the Court's injunction might be punished, but the punishment would not restore property irreparably destroyed or lost. Id. The property, if funds, was therefore ordered paid into the court. If the property was personal, other than money, or real property, it could not be paid into court. Id. The court itself, recognizing that it could not physically care for the property, therefore appointed an officer of the court to act for the court. Id. The practice of appointing a Receiver first developed in England in order to protect real estate for the benefits of a remainderman as well as infants as against those in possession. Clark on Receiverships at §5. This was usually the case where a surviving spouse was granted a life estate in the property with an heir as a remainderman. Id. The remainderman, seeing his estate being denuded by the widow, applied for a receiver to preserve the estate for his own benefit and tie the hands of the widow as to what she could legally do with the life estate and the proceeds generated therefrom. Id. Some examples of improper denuding of the life estate include selling all the timber to be harvested or leasing the mineral rights without limitation on the mining of any of the minerals on the property. The real estate itself was not taken into possession by the Receiver, but the fruits of the real estate, namely the rents and profits, were collected by the receiver and held by him subject to the orders of the court. Id.

(3) The Effect of Appointing Receivers in English Chancery Courts

The appointment of receivers of rents and profits was very common in the reign of Queen Elizabeth." In the case of The Duchess of Marlborough, et al., v. The Duke of Marlborough," decided between 1740 and 1741, Lord Hardwick ordered the Duke to have possession of the estate and said if certain annuities were not paid, the court could appoint a receiver. Id. Many other cases are found in the early reports where receivers were appointed over the property, both real and personal, of infants, and other wards of the chancery court. Id. In England the appointment of receivers was, until very recently, confined to courts of chancery. Id. However, the Judicature Act of 1873 " extended the jurisdiction to appoint a receiver to all divisions of the high court, to the court of appeals, and to every inferior court having jurisdiction in equity, or at law and in equity, and the admiralty respectively, as regards all causes of action within their jurisdiction. Id.

(4) The Utility of British Precedent

Any English decisions can be cited as precedents for American courts because, before the time of Chancellor Kent, no American cases covering receivers were printed which are readily available today. In addition, many modern English cases have been cited, because the English courts of highest authority today are more prone than American courts to go at length into the whys and wherefores of their rulings, while the American courts are accustomed to cite numerous authorities as precedents for their decisions. It can be very useful in many cases to point out and indicate the differences in the law and practice of receivers in England and America. This assists the Court, the American Practitioner, and law students that a vast storehouse of valuable precedent on the law of receivers can be found in the English Reports. Clark on Receivers, Chapter 1, §§1-10.

B. The Origin of Receiverships in the United States

(1) The Necessity of Receivers to Protect Railroads

Continuing the evolution of the law of Receiverships under the precedents set by the Chancery Courts of England, Receiverships began to be employed in American Courts when the great industrialist robber-baron tycoons of the 19th Century such as Cornelius Vanderbilt, Andrew Carnegie, John D. Rockefeller, and J.P. Morgan, sought to take control of insolvent railroads during the Panic of 1873 and subsequent Panics thereafter. The law of receivers thus began to evolve in the United States in English courts of equity, or Chancery Courts. See Stern, Jeffery, "Failed Markets and Failed Solutions: The Unwitting Formulation of the Corporate Reorganization Technique, "90 Column. L.Rev. 783, 789 (1990). Railroads suffered from a malaise known to many of today's Chapter 11 debtors, i.e., valuable assets but no operating cash. See Lubin, Stephen J., "Railroad Receiverships and Modern Bankruptcy Theory,"(89 Cornell L. Rev. 1420, 1441), 2004. Thus, late 19th Century American courts utilized equity receiverships from the common law of the Chancery Courts of England, the remedy that became the historical antecedent to modern chapter 11 bankruptcy. Id. The courts devised the model of equity receiverships as a way to reorganize insolvent railroads by adjusting the rights of all creditors under one unified proceeding, thus denying the robber-baron tycoons their opportunity for further inflating their already vast wealth. Id. Clark on Receivers, Chapter 1, §§1-10.

(2) The Beginning of Use of Receiverships to Protect Railroads

In the landmark case of Macon & Western Railroad v. Parker, 9 Ga. 377 (1851), the Georgia Supreme Court placed an insolvent railroad into the hands of a court-appointed trustee. The court of equity created an estate that consisted of all of the assets of the railroad, i.e., the "receivership estate." The railroad brought its own motion to enjoin execution by judgment creditors. By bringing the property before the court, the railroad obviated the need for disparate proceedings in Courts of other jurisdictions with different rules and procedures governing the appointment of a receiver and disposition of property. Id. At 393-394. See also Farmers Loan Trust Co., *infra.*

(3) The Failure of Federal Bankruptcy Law to Protect Railroads

Congress's introduction of federal bankruptcy legislation, the Bankruptcy Act of 1889, did not slow down the use of receiverships for two reasons. First, that act did not permit the reorganization of large corporations and exempted railroads from its coverage altogether. Second, there was less need for a federal solution to insolvency when most commerce was *intrastate*. Thus, receiverships continued to be widely used until the mid-1930s, when Congress finally added the corporate reorganization provisions to the Bankruptcy Act, "essentially codifying receivership practice for corporations."

C. The Texas Turnover Statute

(1) Introduction to the Turnover State

Once upon a time the only practical (though practically useless) remedies for collecting a judgment in

Also available as part of the eCourse
[Collecting Debts and Judgments 2012: State Court Exemptions and Other Property Issues; Post-Judgment Remedies; plus Turnover Receiverships]

First appeared as part of the conference materials for the
2012 Collecting Debts and Judgments session
"Turnover Receiverships"