

# **12<sup>th</sup> ANNUAL CONSUMER BANKRUPTCY PRACTICE**

July 15, 2016  
Galveston, Texas

## **Use and Abuse of State Court Receiverships to Collect Consumer Debts**

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The opinions expressed herein are solely those of the author. Nothing contained herein may be held against Judge Isgur in any present or future proceeding.

The common fact scenario:

- (1) Debtor defaults on a credit card debt.
- (2) Creditor (or more commonly assignee of original creditor) files a state court collection lawsuit seeking judgment for the amount of the debt plus attorneys fees.
- (3) Debtor/Defendant fails to answer and a default judgment is taken.
- (4) Judgment Creditor waits until judgment is final then sends post-judgment discovery.
- (5) Judgment Debtor fails to respond.
- (6) Judgment Creditor files motion to compel discovery and order is entered ordering Judgment Debtor to respond.
- (7) Judgment Debtor fails to respond.
- (8) Judgment Creditor files an application for turnover order **and** for appointment of receiver.
- (9) Judgment Debtor fails to respond and an order for turnover and appointing a receiver is entered.
- (10) Receiver contacts Judgment Debtor and demands compliance with turnover order and for delivery of assets and financial records.
- (11) Judgment Debtor makes appointment with bankruptcy attorney.

Variation of the common fact scenario:

- (10) Same as above, but instead of demanding turnover the receiver garnishes the Judgment Debtor's bank account(s).

Although the focus of this article is the use of state court receiverships to collect consumer debts, there are related bankruptcy law issues that we, as practitioners, should be aware of.

- The bankruptcy filing trumps the state court receivership. See, e.g., *Roxwell Performance Drilling, LLC*, Case No. 13-50301-RLJ-11 (Bankr.N.D.Tex.2013). See also Sec. 105(a) and (b).
- Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Sec. 541(a)(1). If the receiver has seized property of the debtor and it is still in the possession of the receiver, it is property of the estate.
- The automatic stay prohibits "the enforcement against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title," 362(a)(2), "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," 362(a)(3), and "any act to

collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title” 362(a)(6).

- A transfer of an interest of the debtor in property to or for the benefit of a creditor on account of an antecedent debt, made while the debtor was insolvent, made within 90 days prior to filing of the petition..... constitutes a preference. Sec. 547(b). If there was a seizure of property of the debtor within 90 days of filing by a receiver (for the benefit of a creditor), that transfer should be avoidable as a preference, assuming the receiver is unwilling to comply with Sec. 543(b). (See below.)
- A custodian is **required** to deliver to the trustee any property of the debtor and any proceeds or profits of property of the debtor as of the date the custodian acquires knowledge of the filing of the bankruptcy case. Sec. 543(b). A custodian with knowledge of the case **may not** disburse any property from or administer any property of the debtor. Sec. 543(a). Custodian is defined to include a receiver. Sec 101(11)(A).
- **Assuming** that there is some form of debt collection violation which arises out of the state court receivership, that claim would typically have arisen pre-petition and would be property of the estate.
  - If the debtor uses Texas exemptions, that claim would not be exempt.
  - If the debtor uses federal exemptions, it might be claimed as exempt under the “wildcard” of 522(d)(5).
    - Valuation might be an issue.
    - In a joint case where the receivership involves only one of the debtors, the non-judgment debtor may not be allowed to claim an exemption in this asset as it involves only the other debtor and a debtor has to have some interest in property to claim an exemption.

### **The Texas Receivership Statute**

I have included the following sections of the Texas statutes which appear to be most relevant in the consumer debt post-judgment receivership cases which come into my office. Bold print was added by me and does not appear in the statute.

Texas Civil Practice and Remedies Code, Title 3. Extraordinary Remedies, Chapter 64: Receivership. Note that in the statutory description, receiverships fall under the category of “**extraordinary remedies**.”

Sec. 64.001. Availability of Remedy.

- (a) A court of competent jurisdiction may appoint a receiver:
  - (2) in an action by a creditor to subject any property or fund to his claim;

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First appeared as part of the conference materials for the  
12<sup>th</sup> Annual Consumer Bankruptcy Practice session

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