Using Receiverships to Maximize the Value of Distressed Assets

by Brian S. Dervishi and Steven E. Seward

The decline in the real estate market has hit not only consumers hard, but also businesses and lenders throughout the nation. While much is made of the surging tide of foreclosures clogging the nation's courts and dispossessing Americans from their homes, the burst of the real estate bubble and its effect on developers and financial institutions is no less pernicious. Recognized homebuilders such as TOUSA,[1] Levitt & Sons,[2] and WCI Communities[3] have declared bankruptcy, and many smaller developers are facing financial crises created by excess supply and marginal demand.

The effect on lenders is equally dramatic. Lenders are faced with the unappealing choices of keeping bad loans on the books, financing a developer through a Ch. 11 bankruptcy, or foreclosing and selling the real estate for pennies on the dollar. Consequently, the financial woes for lenders have increased, resulting in heavy losses and, in some cases, financial collapse or the need for government aid to stay afloat.

Desperate times call for creative measures, and one potential solution for lenders mired in heavy real estate lending is rooted deep in American law: a state court receiver. In the real estate context, receivers are often viewed as passive custodians of real property, maintaining the value of an otherwise depreciating asset while another primary action, such as a foreclosure, is being prosecuted. But a receiver can also be an active manager of the property, selling units and paying back the debt owed to the lender either in concert with a foreclosure or independent of any other action. This article discusses the application of active receiverships in the real estate context of home and condominium builders to create value for lenders above and beyond what a foreclosure action can bring. This article also discusses the limitations of this concept, as well as venue, due process, and other considerations for a lender facing nonperforming real estate loans.

Passive Versus Active Receiverships

A state court receivership is an amalgamation of certain principles inherent in both bankruptcy and agency law. The receiver is an officer of the court[4] whose powers flow from statute,[5] common law, applicable rules of civil procedure, the order appointing the receiver, and those acts expressly authorized by the appointing court.[6] Receivers also share traits with bankruptcy trustees, overseeing an estate composed of the property of the entity in receivership and inheriting certain rights from the debtor, such as pursuing causes of action.[7]

There are two types of receiverships, one of which will be called "passive" and the other "active."[8] Passive receiverships are crafted to simply conserve the property, while active receiverships employ broader powers, such as the power to sell and to contract.[9] It follows that passive receiverships need minimal cash flow to maintain necessary utility services and insurance on the property, whereas active receiverships require a more significant "start-up" cash flow from the lender and the employment of professionals and consultants.

Although active receiverships have higher costs, the upside reward can be significantly greater. Whereas passive receiverships are limited by design to ensure that the asset in receivership does not depreciate during the pendency of the primary action, active receiverships are meant to enhance the value of the assets and generate income for

distribution to creditors of the receivership estate in accordance with their priority, which usually means that all or most of the proceeds will be applied against operational expenses of the estate and towards repayment of the first priority mortgage.

Active Receiverships in Practice

To illustrate the concept of an active receivership, consider the case of Builder with a single development under construction in South Florida. Builder owes $15 million to Lender and is currently in default, and it owes another $2 million to a variety of contractors and subcontractors, some of whom have filed liens against unsold homes due to nonpayment. Lender extended a loan to Builder during the peak of the real estate market. Builder has constructed approximately 100 of the 200 homes intended to be built in the project, and these homes sell for an average of $225,000. Another 20 homes are substantially complete, but still require some work before a certificate of occupancy can issue. An additional $5 million is required to complete the amenities and infrastructure-related construction (usually referred to as "horizontal" construction in developer parlance) on the remainder of the development. Overall, Builder has sold and conveyed 65 homes, but many of its larger competitors are underselling it, and it has no sales currently pending. Out of the remaining 35 completed homes, 10 are fully furnished models for showing to prospective purchasers.

For a variety of reasons, Lender is unenthusiastic about the prospects of Builder. Lender does not feel that Builder will be able to reorganize successfully either inside or outside of bankruptcy and does not wish to restructure the loan given Builder's outlook. However, Lender is also skittish about filing a foreclosure action against Builder, because the market for a successor developer to come in and complete the development is minimal. Lender expects it could sell the development for about $6 million under prevailing market conditions, most likely to an investor that will hold the property while the market recovers before reselling it at an appreciated value.

If Lender foreclosed and appointed a passive receiver to simply maintain the properties, there would be minimal costs associated with utilities for the completed homes as well as day-to-day maintenance of the community. Lender could possibly complete the foreclosure process in six months to one year depending on the number of parties involved in the action. Lender would spend approximately $200,000 in fees and costs in preserving the property, in addition to its own attorneys' fees in prosecuting the foreclosure.

However, a case such as this would be a prime candidate for an active receivership. Given the inventory of homes, and based on an average price of $200,000 per home (factoring in a discount due to the distressed nature of the property), there is approximately $7 million in homes that can be sold to existing and new purchasers. Even if $200,000 proved to be an unattainable price because of the market, the receiver can undersell competitors because the receiver will not profit from the sales — whatever profit the developer would make in an ordinary course sale would simply go to the creditors. As discussed above, because of the requirement that proceeds are applied in order of priority, the court would order the proceeds be applied to satisfy existing receivership debt and the bank's mortgage prior to claims made by construction lienors and unsecured creditors; the lienors' claims would not be reached unless proceeds exceeded the $15 million first mortgage debt in addition to administrative expenses incurred by the receiver. Moreover, there are other steps an active receiver can take to generate a profit margin that a similarly situated developer could not attain. For example, a certain percentage of profits from a sale by a developer would need to be reinvested in the project to complete amenities and other horizontal development. Because a property in receivership necessarily contemplates the existence of a future successor developer, these major costs can be apportioned between the receiver and a successor developer, or simply put off by the receiver and later taken into account in the receiver or Lender's sale of the development to a successor developer. If the receiver's sales program is successful, Lender may consider authorizing the receiver to complete the partially constructed homes using the sale proceeds at no additional cost to Lender.

It is important to note that the sale of individual units in a condominium or subdivision often do not bear a negative impact on the sale of the development as a whole. In the above-referenced hypothetical, the floorplans and other unique aspects of the community may be trademarked and not subject to disposition by the receiver, or the particular models used in the community may be simply outdated and subject to replacement by a successor developer with distinct models that still conform to the identity of the community. Regardless, the community's value is approximately $10 to 13 million with the inventory sold by an active receiver prior to the foreclosure sale, which represents considerable additional value to Lender over and above the $6 million value of the property as is.

Because active receivers can play a major part in creating additional value for lenders, it is important to look at the mechanics of a receivership: the venue of the receiver, the methods by which a receiver may be appointed, the powers an active receiver should be given, the reasons an active receiver should be appointed rather than a workout situation with the current lender or an assignment for the benefit of creditors, and finally, the limitations on the concept of the active receivership. The remainder of this article will discuss these concepts in detail.

Appointment of Receiver and Other Procedural Considerations

Under Florida law, the appointment of a receiver is in the sound discretion of the court and is inherent in the equitable powers of the court.[10] Because the appointment of the receiver is a significant request, it is available only in extraordinary situations to those who have a legal

or equitable claim to the property.[11] The appointment is not exercised simply because it can do no harm or because the parties consent to the appointment.[12] The rationale for the heightened requirements for the appointment of a receiver is that the court must balance the owner's right to own and possess the property against the lender's right to protect its security in the property and prevent waste.[13] Thus, there must be some showing that the property is susceptible to deterioration or that the receiver is necessary for preservation of the property.[14] Despite this evidentiary requirement, practitioners in receivership proceedings are well aware that a contractual provision for the appointment of a receiver is accorded great weight by the court and, although it is alone insufficient to justify the appointment receiver, may provide a basis for the appointment of a receiver where, without it, a receiver might not be appointed.[15]

Receivers are generally appointed as ancillary relief, typically in a foreclosure case.[16] However, there is precedent for filing a complaint that only seeks to appoint a receiver (hereinafter "primary relief"); one basis for this is substantive and the other of which is arguably required in certain foreclosure proceedings. Substantively, a complaint for the appointment of a receiver requires the existence of rare and unusual instances, which is separate and distinct from the showing required to obtain a receiver as ancillary relief.[17] Appointment of a receiver as ancillary relief is predicated on evidence of wasting of the property requiring a receiver to be appointed by the court for the purpose of stemming the depreciation, whereas appointment of a receiver as primary relief action appears to require a showing of what necessitates the appointment of a receiver and what prevents the petitioning party from filing a complaint to foreclose the property.[18] This standard has not been developed by case law, but one situation that may give rise to a receivership as primary relief is where the facts that would establish that the primary cause of action for a foreclosure are absent[19] or otherwise deficient and the need for a receiver is paramount.[20]

Procedurally, a separate action for receivership may be necessary under Florida's venue statutes for foreclosure and receivership actions. To illustrate the application of these two statutes in practice, suppose that a developer has property located in Miami-Dade, Monroe, and Palm Beach counties. However, the developer's principal place of business is located in Broward County. The receivership venue statute provides:

> When an application is made for receiver of property and it is located in more than one judicial circuit, the court appointing the receiver has jurisdiction over the entire property for the purposes of that action but the application for the receiver must be made to the circuit court in which the principal place of business, residence or office of defendant is located.[21]

The foreclosure venue statute provides that actions shall be brought only in the county where the property in litigation is located.[22] In the event of a mortgage encumbering land in multiple counties, such as the above hypothetical, the foreclosure may be brought in any county where the land is located.[23] Thus, applying these statutes to the above hypothetical creates a situation where receivership venue is only proper in Broward County, whereas foreclosure venue is only proper in Miami-Dade, Monroe, or Palm Beach counties. If a lender seeks to foreclose the property and also appoint a receiver, these statutes appear to dictate the filing of two separate actions.

Finally, it is important to note that the court appointing the receiver acquires jurisdiction over the property subject to the receivership proceedings, and it withdraws jurisdiction from other courts that may otherwise have jurisdiction to issue judgments that affect receivership property.[24] Thus, creditors may obtain *in personam* judgments against the debtor (assuming the debtor is not in bankruptcy), but to make any claims against receivership assets, they must obtain leave from the appointing court.[25] This provides an orderly method for creditors to make claims against receivership assets without the receiver appearing in numerous forums and creating unnecessary expense for the receivership estate as well as the potential for conflicting outcomes that may occur with multiple judges considering the same issues.[26]

Powers of an Active Receiver

Unlike bankruptcy cases, which are governed by the U. S. Bankruptcy Code that establishes the powers of a trustee or debtor-in-possession,[27] or assignments for the benefit of creditors that are governed by a chapter of the Florida statutes devoted to their administration,[28] the powers and constraints of a receiver are typically dictated by the order appointing the receiver and Florida case law.[29] Thus, the order appointing the receiver is a critical document that shapes what the receiver may do without further court authorization, what the receiver cannot do, and what the receiver may do pursuant to a subsequent court order.[30]

Active receiverships necessarily contemplate a broad array of powers for the receiver's disposal.[31] It is necessary for the receiver to be able to exert these powers without further order of the court; otherwise, there will be delays and unnecessary expense in liquidating the inventory of units for sale.[32] A lender's protection in a receivership is not to provide for lender approval of certain acts, since this is arguably inconsistent with the receiver's role as a court-appointed, neutral party,[33] but to instead provide clear and consistent channels of communication that allow the receiver to know exactly what the lender will and will not fund. Insulating the lender from the acts of the receiver is also important because it protects the lender from attacks by other interested parties that may assert that the lender in fact controls the property, thus, creating a risk of lender liability in the event acts taken during the receivership give rise to a cause of action by a third party.[34] Moreover, a receiver is entitled to judicial immunity,[35] although the receiver will be personally liable if its actions fall outside the scope of its powers.[36]

Important powers inherent in an active receivership are the power to sell receivership property;[37] to operate the property as necessary to protect and preserve the collateral;[38] to assume or reject contracts of the estate being administered;[39] to settle and compromise claims with the approval of the court;[40] and to assert rights held by a developer or commercial enterprise.[41] Commensurate with these broad powers, an active receiver is tasked with stringent reporting duties to the appointing court, the lender, and the debtor.[42] Additionally, there should be procedures in place for the review and approval or disapproval of funding requests to streamline the payment of fees and expenses incurred in preserving and disposing of the collateral.

One of the most important powers of a receiver is the ability to sell property free and clear of existing liens, with these liens to attach to the proceeds of the sale. The legal underpinning of a receiver's ability to sell is that the appointment of a receiver places the property under control of the appointing court and empowers that court to resolve all questions concerning title and disposition of the property.[43] Because the appointing court has custody over the property, it possesses the power to approve a sale of the property under appropriate circumstances.[44] Homes or condominium units may be subject to construction liens in addition to the lender's mortgage encumbering the property. Some of these liens may be for work done on that specific unit, whereas other liens may encumber the whole property (such as for earthwork or other development-wide construction). A receiver can sell the property free and clear of all liens with the liens transferred to the proceeds of the sale.[45] The receiver delivers a receiver's deed to the buyer and can generally obtain insurable title, a critical inducement for purchasers of an individual unit in a distressed property. In many ways, this procedure is analogous to bankruptcy sales under 11 U.S.C. §363(f) of the U. S. Bankruptcy Code, without the limitations provided by that provision.[46] The appointing court can subsequently order distribution of the proceeds in accordance with the priority of creditors.[47]

In many situations, the free and clear partial liquidation of property subject to receivership is similar to a foreclosure, only on a dramatically reduced time frame. A receiver can take a heavily liened property and dispose of it via a judicial sale to a third party with proceeds of the sale applied to the claims of creditors. Given the size of the senior mortgage in these situations, most or all of the proceeds will be distributed to this claim, leaving little or no money for junior lienholders or unsecured creditors.[48] Considering the similarities to a foreclosure action, it is important that the receiver observe the principles of due process when selling property free and clear of existing liens.

Finally, active receiverships are team efforts. Projects that are appropriate for an active receiver are often bloated with excess payroll, which will be greatly reduced shortly before or after the project goes into receivership. Receivers, above all else, are motivated by short-term concerns on how to maximize the value of the property for the benefit of the lender and other creditors. Therefore, staffing needs on the project side may vary widely with principal support being provided by consultants, accountants, and attorneys. Some cases will require a construction budget by the receiver, whereas other cases will focus on legal and financial issues associated with sales and regulatory issues. Thus, the receiver will also need to be empowered to employ and pay these professionals and consultants as necessary.[49]

Limitations on the Use of Active Receivers

Active receivers are not a panacea for all commercial real estate loans. They require a lender that takes a long-term view on obtaining payment of its loan (at least a year, depending on the size of the inventory and the steps necessary to begin the sales procedure, although some large mortgage foreclosures with dozens of defendants may take just as long to obtain a final judgment of foreclosure), and further require a sometimes significant upfront funding from the lender for a period of time before the operation and disposition of the property begins to fund receivership operations and repayment of the lender's mortgage. Most importantly, the project needs to be at a point where at least some of the receivership property is ready to be sold without significant sums needed to finish the project. If, for example, a condominium tower is half

complete and in foreclosure, a receiver may not be in a position to do anything more than preserve the value of the asset and assist in marketing the project as a whole.

A second limitation is judicially created. Some courts have held that a sale by a receiver is only proper when the character of the property or the surrounding circumstances are such to render a sale necessary for the adequate protection of the parties, and only then when it is for a reasonable price as determined by the court.[50] However, in the context of home and condominium builders, adequate protection is precisely the reason for the sale of individual homes and condominium units. Without these sales, receivership costs would simply add to the amount owed by the debtor and result in the lender growing further undersecured with each passing month. Furthermore, when residents are already living in a community development or condominium, the surrounding circumstances of the property create a strong public interest in a receiver's sale, since these sales add additional residents which will help defray costs and move the community or condominium forward towards completion.

Finally, the appointment of a receiver does not preclude a debtor from declaring bankruptcy. The filing of a bankruptcy will displace the receiver and further require the receiver to turnover property of the debtor to the bankruptcy trustee or debtor-in-possession.[51] However, in the real estate context, a bankruptcy filing may be a bump in the road to an active receivership instead of the end of the road. For example, bankruptcy law makes it easier for a secured creditor to obtain relief from stay against single-asset real estate.[52] Moreover, if there is an accompanying foreclosure action and it appears that the petition was filed simply to stave off a foreclosure sale from taking place, the bankruptcy filing may be found to be in bad faith and subject to dismissal.[53] If the lender plans to seek dismissal of the bankruptcy case, it should move to excuse the receiver from turning over assets and providing an accounting to the bankruptcy court.[54] In making this determination, the lender should also keep in mind that a debtor-in-possession or bankruptcy trustee may be able to generate recoveries through preference actions[55] and fraudulent transfer actions[56] that a receiver cannot bring.

Advantages of an Active Receiver Versus Other Alternatives

There are four primary solutions to the plight of the distressed commercial loan: 1) The lender and developer work out an extra-judicial solution that changes the terms of the financing so that the loan can continue to be serviced; 2) the developer files for an assignment for the benefit of creditors; 3) the developer files for Ch. 7 or Ch. 11 bankruptcy; or 4) the lender exercises its remedies under the loan documents — namely foreclosure and the appointment of a receiver.

From a lender's perspective, the advantage that a receiver has over the other three alternatives is the amount of control the lender can exercise over the process. Restructuring a loan is a continuation of business as usual with modified terms. The other three alternatives all involve court oversight. However, assignments for the benefit of creditors allow for the debtor to choose the assignee of the debtor's assets,[57] and the assignee may only be removed for good cause.[58] Similarly, a Ch. 7 liquidation will typically be controlled by a randomly selected bankruptcy trustee,[59] and in Ch. 11 the debtor is entitled to remain in possession of the assets.[60] Only in a receivership can a lender nominate who will control the receivership property during the course of the proceedings. This power is meaningful, as a lender will nominate a receiver that it trusts, and courts generally appoint the recommended receiver absent extraordinary circumstances, such as a receiver's inability to act impartially.

Moreover, unlike bankruptcy, where an undersecured lender will only receive a pro rata share of its deficiency under a plan or distribution, and often must make other financial concessions to unsecured creditors in the financing of a Ch. 11 case and sales under §363(b) of the bankruptcy code, receiverships strictly adhere to creditor priorities.[61] This allows the benefits of the active receivership to directly flow to the lender.

Furthermore, active receivers may play a critical role when there are substantial risks in making a credit bid for the property at a foreclosure sale. If environmental hazards or other regulatory or liability problems are present, a lender may forego completing a judicial sale on the property because the risk of liability inherent in being in the chain of title is simply too great. Similar considerations exist where substantial developer rights exist that a lender does not want to sacrifice, but also where substantial liabilities exist that the lender does not wish to incur. In this situation, a receiver's sale allows for the property to be purchased by a third party with proceeds applied to the lender's mortgage without the lender taking control of the property at a foreclosure sale, and preserving the developer rights that are part of the sale.

Conclusion

Active receiverships are an important remedy to a lender mired in a bad situation on a nonperforming loan. If the developer has an inventory of completed units to be sold, the receiver can sell the properties, even if they are encumbered by other liens, with all proceeds to be distributed to the lender (and only to junior lienholders and unsecured creditors if there is a surplus). These partial sales will supplement the final sales price to a successor developer and will bring the lender far closer to realizing a reasonable return on its loan than it would obtain in a straightforward foreclosure and sale of the property to a successor developer. These sales will also reduce the obligations owed by the debtor and will allow the development to continue progressing toward completion during the pendency of the receivership or foreclosure action. Considering the real estate woes currently suffered throughout Florida, we can expect active receivers to play an increasingly larger role in assisting lenders in crisis.❑

[1] *In re TOUSA, Inc.*, No. 08-10928-JKO (Bankr. S.D. Fla. Jan. 29, 2008).

[2] *In re Levitt & Sons LLC*, No. 07-19845-RBR (Bankr. S.D. Fla. Nov. 9, 2007). The authors represented receiver.

[3] *In re WCI Communities, Inc.,* No. 08-11642-KJC (Bankr. D. Del. Aug. 4, 2008).

[4] *See S.E.C. v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992).

[5] The Florida statutes contain numerous sections providing situations where a receiver may be employed, but generally gives little guidance to a receiver's substantive powers and duties. *See* FLA. STAT. §608.4492 (providing procedures for receivership of limited liability company and short nonexclusive list of powers receiver may possess); *see also* FLA. STAT. §617.1432 (similar statute for non-profit corporations).

[6] *See Sec. Pac. Mortgage & Real Estate Servs., Inc. v. Philippines*, 962 F.2d 204, 211 (2d Cir. 1992).

[7] Sometimes a receivership may only encompass the property owned by the debtor entity, as opposed to the entity itself. In these situations, the receiver's ability to control the debtor entity or take certain actions may be partially or completely abrogated, but does not impair the ability to sell the property if other prerequisites are met.

[8] *See In re Chira*, 343 B.R. 361, 367 (Bankr. S.D. Fla. 2006).

[9] *Id*.

[10] *See Edenfield v. Crisp,* 186 So. 2d 545, 548 (Fla. 2d D.C.A. 1966); *see also Carolina Portland Cement Co. v. Baumgartner,* 128 So. 241, 247 (Fla. 1930).

[11] *See Warrington v. First Valley Bank,* 531 So. 2d 986, 987 (Fla. 4th D.C.A. 1988).

[12] *See Edenfield*, 186 So. 2d at 548.

[13] *See ANJ Future Invs., Inc. v. Alter*, 756 So. 2d 153 (Fla. 3d D.C.A. 2000).

[14] *See Electro Mech. Prods., Inc. v. Borona*, 324 So. 2d 638 (Fla. 3d D.C.A. 1976).

[15] *See Baumgartner,* 128 So. at 247.

[16] *Id*.

[17] *Id.*

[18] *Compare Alter,* 756 So. 2d at 153, *with Armour Fertilizer Works v. First Nat. Bank of Brooksville*, 100 So. 362 (Fla. 1924).

[19] For example, presume that a bankrupt developer abandons real estate assets to the lender, which is subject to a motion for reconsideration by the committee of unsecured creditors. The real estate assets are rapidly depreciating because the debtor has abandoned them, but foreclosure is not an option because the bankruptcy court's order is not final. In that situation, obtaining limited relief from the automatic stay to obtain the appointment of a receiver as the sole relief of an action may be the most sensible option while further negotiations and arguments continue in the bankruptcy court.

[20] *See, e.g., Armour Fertilizer Works,* 100 So. at 365.

[21] *See* FLA. STAT. §47.031 (2008).

[22] *See* FLA. STAT. §47.011 (2008).

[23] *See* FLA. STAT. §702.04 (2008).

[24] *See Adams v. Burns*, 172 So. 75 (Fla. 1936).

[25] *See Haire v. Overseas Holding Ltd. P'ship*, 908 So. 2d 580, 583 (Fla. 2d D.C.A. 2005).

[26] *See In re Huff*, 109 B.R. 506, 510 (Bankr. S.D. Fla. 1989) (noting that receivers are tasked with the responsibility of marshalling all available assets to enable an equitable distribution to creditors).

[27] 11 U.S.C. §§101-1532 (2008).

[28] *See* FLA. STAT. Ch. 727.

[29] *See, e.g., Sec. Pac. Mortgage & Real Estate Servs., Inc. v. Philippines,* 962 F.2d 204, 210 (2d Cir. 1992).

[30] *See, e.g., O'Neal v. Gen. Motors Corp.,* 841 F. Supp. 391, 398-399 (M.D. Fla. 1993).

[31] *See In re Chira*, 343 B.R. 361, 367 (Bankr. S.D. Fla. 2006).

[32] If the sales are made free and clear of liens, it will be necessary to give adequate notice to parties whose lien rights will be extinguished to ensure due process is provided.

[33] *See Sunland Mortgage Corp. v. Lewis*, 515 So. 2d 1337, 1338 (Fla. 5th D.C.A. 1987).

[34] Florida law does require leave of court to sue a receiver unless a party is asserting that the receiver acted in his or her personal capacity or outside the scope of authority granted by the court. *See Prop. Mgmt. & Inves. v. Spencer (In re Prop. Mgmt. & Inves.)*, 20 B.R. 319 (M.D. Fla. 1982). This permission is granted as a matter of course. *See Dunscombe v. Loftin*, 154 F.2d 963, 966 (5th Cir. 1946).

[35] *See Prop. Mgmt. & Inves., Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. 1985).

[36] *See Murtha v. Steijskal*, 232 So. 2d 53, 54 (Fla. 4th D.C.A. 1970).

[37] *See Chira,* 343 B.R. at 367.

[38] *See Knickerbocker Trust Co. v. Green Bay Phosphate Co.,* 56 So. 699, 701 (Fla. 1911). *Knickerbocker Trust* limits the operation of receivership property for the benefit of creditors to special circumstances and conditions, such as public service corporations; however, in real estate cases, a condominium or subdivision may be partially occupied and, thus, the receiver must be able to operate the debtor's business in order to serve the public interest.

[39] *See Real Estate Marketers, Inc. v. Wheeler,* 298 So. 2d 481, 483 (Fla. 1st D.C.A. 1974); *see also Athanason v. Hubbard,* 218 So. 2d 475, 477 (Fla. 2d D.C.A. 1969).

[40] This right is incidental to the receiver's power to sue. *See, e.g., O'Neal v. Gen. Motors Corp.*, 841 F. Supp. 391, 398 (M.D. Fla. 1993). However, the receiver does not take a general assignment of claims owned by creditors. *See Freeman v. Dean Witter Reynolds, Inc.,* 865 So. 2d 543, 550 (Fla. 2d D.C.A. 2003).

[41] *See O'Neal*, 841 F. Supp. at 398-399.

[42] *See* FLA. R. CIV. P. 1.620.

[43] *See Murtha v. Steijskal,* 232 So. 2d 53, 55 (Fla. 4th D.C.A. 1970).

[44] *See Fugazy Travel Corp. v. State by Dickinson*, 188 So. 2d 842, 844 (Fla. 4th D.C.A. 1966).

[45] *See, e.g., Arzuman v. Saud*, 964 So. 2d 809, 811 (Fla. 4th D.C.A. 2007) (affirming trial court's decision to approve sale of receivership property encumbered by homeowner association and taxing authority liens, transferring claims against title to proceeds of the sale); *see also People's Pittsburgh Trust Co. v. Hirsch*, 65 F.2d 972 (3d Cir. 1933) (affirming trial court's order to sell property in receivership free and clear of all encumbrances and deny mortgagee the right to foreclose its mortgage).

[46] *See* 11 U.S.C. §363(f) (2008).

[47] *See Scheiner v. Adamco, Inc.*, 81 So. 2d 205, 208 (Fla. 1955).

[48] *Id*.

[49] A receiver may still receive reasonable attorneys' fees even where it does not obtain court approval prior to the retention; however, the better practice is to seek court approval. *Creative Prop. Mgmt., Inc. v. Gen. Elec. Credit Corp. of Ga.,* 314 So. 2d 807, 808 (Fla. 3d D.C.A. 1975).

[50] *See Fugazy*, 188 So. 2d at 844.

[51] *See* 11 U.S.C. §543 (2008). A state court receiver is considered a custodian under bankruptcy law. *See* 11 U.S.C. §101(11).

[52] *See* 11 U.S.C. §362(d)(3) (2008).

[53] *See In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394-1395 (11th Cir. 1988).

[54] *See* 11 U.S.C. §543(d)(1) (2008); *see also Dill v. Dime Sav. Bank (In re Dill),* 163 B.R. 221 (E.D.N.Y. 1994) (discussing factors to be used in applying §543(d)(1)).

[55] *See* 11 U.S.C. §547 (2008).

[56] *See* 11 U.S.C. §548 (2008).

[57] *See* FLA. STAT. §727.104 (2008).

[58] *See* FLA. STAT. §727.115(1) (2008).

[59] *See* 11 U.S.C. §701 (2008). However, creditors may vote for a candidate as trustee under a rarely used section of the bankruptcy code. *See* 11 U.S.C. §702 (2008).

[60] *See* 11 U.S.C. §1107 (2008).

[61] *See Scheiner v. Adamco, Inc.*, 81 So. 2d 205 (Fla. 1955).

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