American Bankruptcy Institute

Anything but Bankruptcy!—Revisited: Nonbankruptcy Alternatives

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NEGOTIATING A WORKOUT – BORROWER/DEBTOR PROFESSIONAL'S PERSPECTIVE

BE PREPARED

I. Prenegotiation "Do's"

A. Know Your Client – Company, subsidiaries, guarantors, principals

(a) Is there potential conflict among clients, need for special counsel?
(b) Any fraud or misrepresentation?

B. Understand the business and the deal:

(a) What is the value of the business? (going concern, orderly liquidation, forced sale)
(b) Is your function to be a workout facilitator or a damage control officer to limit personal liability?
(c) Make sure you have an accurate history of the company's relationship with lenders and vendors.

(i) Any previous workouts?
(ii) If so, why are you back at the table?

(d) Where is market headed/future prospects/projections

1. Is there a viable market for the company's product at a price that is profitable?

2. How did business get to the point that it needs a workout?

3. Is management trustworthy?

4. Who are the principals – Do they really run the business? If not, who does?

5. What are the strengths and weaknesses of:

(a) Management
(b) Production
(c) Product
(d) Sales
(e) Margins

(f) Profitability

6. Is new management needed? Turnaround professionals?

   (a) Is management credible with trade creditors, lenders, key vendors, customers?

7. Can the existing management change and adjust?

8. What are ownership/management's goals (e.g., continue the business or minimizing personal exposure)?

9. Evaluation:

   (a) Loan documents/covenants
   (b) Secured creditor relationship
   (c) Vendor relationship
   (d) Customer relationship
   (e) Employee or union (if applicable) relationship

10. What is status of financial records?

   (a) Does the accountant have credibility/loyalty?
   NOTE: The old accountant if credible or a new accountant with new credentials must be part of the negotiating team if the client is an operating business.

   (b) Even if not an operating business, you may need the accountant relative to an evaluation and verification of the company's and guarantor's assets and cash flow.

11. Are there up-to-date financial reports?

12. Are there credible financial projections?

13. Are there non-business operations issues that have to be addressed?

   (a) Environmental
   (b) Accounting irregularities
   (c) Illness
   (d) Potential criminal matters
   (e) Family issues
   (f) Off balance sheet items

14. Who are the key vendors and can they help in the negotiations with the bank, other vendors and other constituencies such as secured creditors, debentureholders, government agencies?

    (a) Should Company assist in organizing ad hoc trade group?

15. Explore maximizing value through possible sale of business.

    (a) Outright sale
    (b) Merger
    (c) Strategic alliance

16. Who is the institutional lender(s)? Has the original lender sold the loan?

    (a) Who are the officers representing the institution?

    (b) Who are the attorneys representing the institution?

    (c) What is the institution's cultural approach to workouts?

    (d) What is the credibility factor of the company with the institution?

        (i) Previous negotiations
        (ii) Previous workouts
        (iii) Status of current workout negotiations

    (e) Can you present the proposal so that it is advantageous to the lender as compared to other alternatives?

    (f) Consider transferring bank accounts to non-lender bank to avoid set-offs and levies.

Alternatives to Examine:

17. Are there any "chips" you can call in on a psychological, business or political basis to encourage continuation of business?

    (a) Necessity of operations in the geographic or business area in which it operations.

    (b) Effect of termination of business on local or regional economy.

18. Look for any immediate sources of funds, other than existing lenders

    (a) Additional equity or collateral.
    (b) Public agencies – EDA, County Improvement Authority, UDAG, S.B.A.
    (c) Minority Lender if applicable

19. Are there any 800 pound gorillas in the case – competitor who controls a constituency or creditor who has guarantees with collateral?

20. Risk of operating while insolvent – "D&O" liability to creditors and stockholders.

    (a) Who advises D's and O's?

21. Valuation of assets and business on a liquidation versus "going concern" basis.

22. Tax problems in a workout versus Chapter 11, forgiveness of debt, use of NOL, tax attributes, tax basis of depreciable property, debt for equity.

23. Are there labor problems?

24. Does anybody have any money to invest? (Will you be throwing good money after bad?)

25. Is Chapter 11 a threat or viable alternative?

26. Are there investors or predators out there looking for all or part of the business?

27. Tax considerations of out of court resolution.

II. Meeting With The Adversaries.

A. Credibility of the negotiators is paramount.

1. Be realistic. Don't promise what you can't deliver.

2. If you are not ready to negotiate, don't.

3. If you need time to present a plan, get it.

4. At the initial meeting with the vendors and/or lenders, present the new team or the old team with new religion and why.

5. If an interim plan is needed, prepare it and present it.

6. Consider use of moratorium to buy time to stabilize or for presentation of plan.

7. Try to anticipate every objection and be able to deflect every possible criticism for past sins.

8. Set a time schedule for a second meeting with agenda and production schedule of information.

9. The "three meetings" syndrome with creditors – especially trade:

   Meeting #1: Everyone is mad;
   Meeting #2: Start talking about offer; and
   Meeting #3: Start negotiating deal

   (a) The noninvasive taking of temperature and pulse of adversaries

       (i) check with others
       (ii) try to see what are the other side's real objectives

   (b) Perception is everything. The other side must believe that you want to help the situation and are capable of doing it.

   (c) The illusion of reality. Everyone wants to recoup – they want to believe.

   (d) Avoid knee jerk responses to real or imagined slights.

   (e) Present an initial plan to bridge the period from the initial meeting to the second meeting.

   (f) Keep creditor constituencies apart.

   (g) Plan a second meeting(s) – Don't try to rush the process. Standstill agreement, if possible – Don't give up causes of action.

   (h) Consider a new face with good credentials to deface anger with old management

10. Second meetings with creditors and/or lenders:

(a) Presentation of a credible plan and projection

(b) New Faces. Either old management has gotten religion or present management a crisis manager or workout specialist.

(c) Present good numbers and good projections broken down monthly over the next year and quarterly or annually thereafter. Justify and quantify why the projections will work. "Why are these projections different from all other projections?"

(d) Make sure you have a fall back position to your proposal. Decide whether to present it right away or save for another day after you check viability.

(e) Do not get caught bluffing – know your case.

(f) Stress every positive factor.

(i) New management if applicable. Otherwise new ideas for survival
(ii) New Orders
(iii) Better terms from vendors
(iv) Market projections of outside experts, if possible
(v) Industry analyses
(vi) New equity financing
(vii) Try to present your settlement proposal as being in the lender and/or creditor's best interest by maximizing recovery

-- Lender wants to get the greatest return of its loan; interest is secondary
-- Creditors are looking for payment of old debt, but also strong future business

(g) Discount versus throwing the keys on the table. Will anyone pick them up?

(h) Make sure you have enough money or credit or both to do the job right.

(i) Save something to give at subsequent meetings.

11. Third meeting or more.

(a) Normally if you get to this point, the chances are that you have a deal to put to bed.

DON'TS

1. Don't get caught bluffing. Consider having a Chapter 11 petition prepared and present for inspection or emphasis.

2. Don't be unprepared.

3. If you can't sell the deal, get someone who can.

4. Don't try to make your own deal if you are old management. In almost every case, the debtor/obligor is better off having someone else negotiate for it rather than existing management or equity.

AMERICAN BANKRUPTCY INSTITUTE

MID-ATLANTIC BANKRUPTCY WORKSHOP

JULY 31, 2008 – AUGUST 2, 2008

ANYTHING BUT BANKRUPTCY! – REVISITED: A DISCUSSION OF NON-BANKRUPTCY ALTERNATIVES

ASSIGNMENT FOR THE BENEFIT OF CREDITORS ("ABC")

I. INTRODUCTION

1. An assignment for the benefit of creditors ("ABC"), unlike federal bankruptcy proceedings instituted under 11 U.S.C.A. §101 *et seq.*, is a liquidation of a debtor's property pursuant to state statutes. The assignment statutes generally will codify common law rights of a debtor for the benefit of all of the debtor's creditors. The basic purpose of an ABC is to benefit the creditors of the debtor ("assignor" or "debtor") and the interests of the creditors, under all circumstances. This basic purpose is paramount. ABC's have been codified throughout the United States and is governed by state statute. Attached is a table prepared for previous ABI conferences entitled "Assignment for the Benefit of Creditors" prepared by Neil D. Colton of the law firm of Cozen O'Connor setting forth references to the various state statutes in New York, New Jersey, Pennsylvania, Delaware, Ohio, Maryland, Virginia and West Virginia. ABC's have been in existence for close to 200 years. For example the first assignment act adopted in New Jersey was passed in 1820, and remained unchanged in theory until 1899. It was based upon the idea of a judicial regulation of a trust created by the assignor/debtor and impressed upon the debtor's property. Generally, the ABC statutes will permit an individual, a corporation,

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partnership or other legal entity to make a voluntary general assignment for the benefit of its creditors.

2. While the law in each state will differ, generally an ABC empowers the assignee who serves in a capacity similar to a federal bankruptcy trustee. However, it is important to note that ABC's are governed by the laws of the state where the ABC was instituted. Therefore, procedural and statutory differences between each state must be noted.

3. Typically, the ABC is initiated by the issuance of a "deed of assignment" executed by the assignor/debtor to an assignee. The deed transfers all of the assignor/debtor's assets to the assignee. The deed of assignment typically attaches a schedule of inventory of all real and personal property and will list all of the known creditors and amounts of their respective claims.

II. POWER AND OBLIGATION OF THE ASSIGNEE

4. Once the assignee has accepted the deed of assignment, the assignee is required to provide a public notice to all creditors and normally to mail out a notice of the assignment. Title to the assignor/debtor's property vests in the assignee subject to all valid liens and mortgages. The assignee has authority to sell and dispose of all property of the assignor/debtor. The assignee also has the power to sue on behalf of the debtor/assignor's estate, to settle or compromise all claims and disputes and to take all other actions that an assignor could have taken including collection of accounts receivable and other causes of action.

5. The assignee will normally seek authorization to employ legal counsel and other professionals. In certain instances, subject to authorization by the appropriate state court, the assignee will have the right to continue to operate temporarily a business. Typically the assignee must seek court confirmation of public or private sales of personal or real property.

6. The assignee is a representative of all creditors. The assignee will typically have the power to set aside conveyances as a judgment creditor. An assignee may under certain state statutes avoid and recover preferential transfers. Each state statute will normally provide for a priority of claims such as, tax claims, wage claims, and general unsecured claims.

7. In order to close a particular case the assignee is required to file a final accounting. In the course of the final accounting the assignee will seek permission from the applicable court to issue dividends to creditors. For example, a secured creditor will first be paid out of collateral subject to the liens of a secured creditor. Thereafter payment to other creditors will follow the state statute priority scheme.

8. The assignee will file a fee application on behalf of his professionals. An assignee will be paid normally based upon a commission calculated as a percentage of all sums received by the assignee during the course of the ABC.

III. GENERAL COMPARISON OF THE PROS AND CONS OF THE ABC VERSUS A FEDERAL BANKRUPTCY PROCEEDING

9. An assignee has the power to examine and depose persons regarding the assignee's affairs. This is similar to the authority vested in a bankruptcy trustee pursuant to U.S.C. §341 and Federal Bankruptcy Rule of Procedure 2004.

10. The assignee can not sell assets free and clear of liens if secured creditor does not consent. Compare to 11 U.S.C. §363(f).

11. As noted above an assignee may continue the assignor/debtor's business upon order of the court. Compare to the authority of a Chapter 7 Trustee pursuant to 11 U.S.C. §721 and §363.

12. Preference claims: Compare the trustee in bankruptcy authority pursuant to 11 U.S.C. §547, avoidance powers. Preference avoidance powers for an assignee vary by state.

13. Equitable subornation: Bankruptcy trustee powers pursuant to 11 U.S.C. §510. Typically, there is no similar provision under the ABC statutes.

14. Fraudulent conveyances: bankruptcy trustee causes of action outlined under 11 U.S.C. §548. State statues will permit an assignee to pursue such a claim.

IV. DISADVANTAGE OF ABC

a. Jurisdiction of the Bankruptcy Court extends throughout the entire United States. ABC may only be enforceable with regards to property that only is within the jurisdiction in which the assignment is made and not for property in other jurisdictions. The ABC is given only such effect as the laws of that particular state will permit.

b. For an individual a federal bankruptcy proceeding provides for a discharge of debt. There is no similar discharge provision for an individual in an ABC.

c. As noted above a federal bankruptcy trustee may sell assets "free and clear" of liens. Typically, ABC's will not permit a sale free and clear of liens.

V. ADVANTAGES OF ABC VERSUS FEDERAL BANKRUPTCY PROCEDURE

a. The ABC cost factor is typically far less then a federal bankruptcy procedure.

- The cost associated with a bankruptcy liquidation proceeding may be prohibitive to a small or medium sized company versus the cost of an ABC.

b. The time and length of an ABC is typically much shorter then a federal bankruptcy proceeding.

c. ABC's are more flexible then a federal bankruptcy proceeding. The federal bankruptcy proceedings have detailed procedures formulated by both the United Sates Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. There appears to be more flexibility for an assignee in the typical ABC.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS

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<u>**Assignment for the Benefit of Creditors**</u>

	New York	Pennsylvania	Delaware	West Virginia
Execution and Filings	• Assignor must file assignment with county court clerk in the county where assignor has its principal place of business and the assignment must be acknowledged before an officer authorized to acknowledge deeds • The assignment must be in writing stating the assignor's kind of business and the address • Assignor must file a schedule of assets and a list of creditors with the county clerk and the assignee within twenty days of the assignment • Assignor must deliver books, papers and records to assignee	• Assignee must file assignment in office of recorder of deeds in the county where the assignor resides or the assignor's principal place of business is located • Assignee must file assignment with court of common pleas where the assignor resides or the assignor's principal place of business is located within five days of filing with the recorder of deeds • Assignor must file schedule of assets and their value in court of common pleas where the assignor resides or the assignor's principal place of business is located • Assignor must deliver assets to assignee	• Delaware law does not specify requirements for filing assignment but does require assignee to file inventory within thirty days of assignment with the Register of Chancery	• Assignor must file assignment five days after the execution of the assignment in the office of the county court clerk • The assignment must be in writing, stating the assignor's kind of business, the address, and include a list of the assignor's assets • Assignee must file a schedule of assets and a list of creditors with the county clerk within ten days of the assignment • Assignor must deliver books, papers, records and transfer property outside of West Virginia to the assignee

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	New York	Pennsylvania	Delaware	West Virginia
Assignee Duties	Assignee must: • Post bond to the state in an amount ordered by the court • Give notice to creditors of all proposed sales of property, payment of dividends, filing of an interim report and filing of a final report • File a list of creditor claims with the court and make appraisals of assignee property • Sell property of estate • File an interim report with the court six months after assignment unless estate is already distributed • File final report with the court • Pay dividends • Close assignor's estate	Assignee must: • Post bond to the state in an amount at least double the value of the insolvent's estate • Give notice to creditors that a meeting of all creditors will be held within twenty days after appointment of assignee • Give notice to creditors to make claims within six months of the close of creditors' meeting • Sell all property at public sale within one year of appointment • Sell all securities at public or private sale within one year of appointment • Collect all moneys due to assignor within one year of appointment unless court grants extension of time Assignee may: • Carry on the assignor's business upon authorization from the court and subject to the court's control	Assignee must: • Post bond to the state in an amount approved by the court and in an amount not less than the total of the inventory and appraisement of the assigned property • File inventory of the assignor's assets and an affidavit with Register in Chancery within thirty days of assignment • Provide a yearly account of his activities to Register in Chancery	Assignee must: • Post bond to the state in an amount at least double the value of the insolvent's estate • Publish notice in newspaper and mail notice to all creditors within ten days of filing schedule with the county court clerk • Specify in notice date when creditors must file claims, no more than thirty and no less than sixty days from date of first publication notice • Promptly report any false claims or non-provable claims to creditors • Sell property of estate and distribute proceeds among creditors • File report with fiduciary commissioner showing names and claims of creditors and assignee's disposition of property

	New York	Pennsylvania	Delaware	West Virginia
Powers of the Court	• Upon a showing of cause, the court may remove the assignee and appoint another • Court may authorize assignee to continue assignor's business • Court may allow or disallow claims • Court may direct distribution of dividend • Court may authorize private sales • Court may require further security wherever the bond on file is not adequate • Court may authorize creditors to present claims to the assignee by a specified date advertised in a newspaper	• Upon a showing of cause, the court may extend beyond one year the time which the assignee has to sell all of the assignor's assets • Court can adjudicate objections to creditor claims • Court may compel filing of the assignment if the assignee fails to file the assignment within fifteen days of delivery to assignee • Court may authorize sales for proceeds other than cash	• Upon a showing of cause, the court may remove the assignee and appoint another • Court must provide notice to creditors setting forth the time for filing exceptions with the Register in Chancery after assignee provides a yearly account of his activities • Court must appoint two disinterested and competent persons to appraise estate after assignee files inventory of assets with the court	• Clerk may increase amount of bond needed, or require further security • Fiduciary commissioner may allow further time for assignee to file schedule. If schedule not filed in further time allotted, fiduciary commissioner may remove assignee and a meeting of creditors may be called to elect substitute assignee • Fiduciary commissioner shall preside over all meetings of creditors • Fiduciary commissioner must file report at first meeting of creditors discussing disputed claims

	New York	Pennsylvania	Delaware	West Virginia
Sale of Assets	• All sales of assignor's assets must occur at public auction for cash unless otherwise authorized by court	• Sales of securities may occur at public or private sale • All sales of real or personal property must occur at public auction • All sales must be for cash unless otherwise authorized by the court	• Delaware law does not address the sale of assets by the assignee	• West Virginia law does not address the sale of assets by the assignee
Creditor Claims	• Creditors must present claims within six months of assignment • Assignee must notify known creditors by mail at least ten days before the sale of assets • Verified creditors claims must include what securities are held for the claim and what payments have been made	• Creditors must present claims within six months of receiving notice from assignee requesting claims • Insolvent assignors who execute an assignment do not discharge liability to creditors who do not file claims • Creditors filing claims before the assignee are barred from suit for claims existing at the time of assignment except for fraudulent activity	• Delaware law does not address creditor claims	• Creditors must present claims no less than thirty days and no more than sixty days after notice from assignee requesting claims • Creditor claims must be itemized and verified by affidavit

	New York	Pennsylvania	Delaware	West Virginia
Order of Payments	• Before paying other creditors, assignee must pay employees amounts contributed to retirement plan plus interest • Before paying other creditors, assignee must pay wages for services rendered three months prior to assignment up to a maximum of $1,000 each • Before paying other creditors, assignee must pay for the purchase of merchandise purchased within six months of assignment up to a maximum of $300 • Aside from wages and payment for merchandise, no other creditor claims are given priority	• The assignment for the benefit of creditors does not affect priority regarding any lien, claim for wages, rent, or mechanics or material men, granted by other Pennsylvania statutes • Before paying other creditors, if assignor is an insolvent tenant, the landlord is entitled to owed rent to be paid from the sale of assignor's assets • All priorities and conditions contained in the assignment are void	• Delaware law does not address the order of payment	• West Virginia law does not address the order of payment
Preference Payments	• If the assignor makes a preference payment to a creditor within four months of making an assignment, the preference payment is void	• If the assignor makes a preference payment to a creditor within four months of making an assignment, the preference payment is void	• If the assignor makes a preference payment to a creditor, the preference payment is void	• West Virginia law does not address preference payments
Fraudulent Transfers	• Assignee is authorized to bring action against any person who receives assignor's property in fraud of assignor's creditors	• Pennsylvania law does not address fraudulent transfers	• Delaware law does not address fraudulent transfers	• West Virginia law does not address fraudulent transfers

	New Jersey	Ohio	Maryland	Virginia
Execution and Filings	• Assignor must deliver a deed of assignment assigning title to assignee • Assignee must file assignment in the county where the assignor resides in the office of the register of deeds or in the office of the county clerk, depending on county • Assignee must file a schedule of assets and creditor claims in the county where the assignor resides	• Assignor must deliver a deed of assignment assigning title to assignee • Assignee must file a schedule of assets and creditor claims in the county where the assignor resides	• Maryland law does not address how or where to file a voluntary assignment	• A deed of assignment must be filed with the name of the assignee • Virginia law does not address where the assignment should be filed or who should file the assignment

	New Jersey	Ohio	Maryland	Virginia
Assignee Duties	Assignee must: • Post bond with state in a sum approved by the court • Give notice in a newspaper to allow creditors to file claims • Within thirty days of assignment, mail notice of the assignment to creditors • File inventory and valuation of estate with the Superior Court • File a list of creditors with clerk of the court • Pay proportionate dividends to creditors • File final account of assignee activities with Superior Court	Assignee must • Post bond with state in a sum approved by the court • Give notice in a newspaper to allow creditors to file claims • Thirty days after posting bond, file inventory of estate and schedule of debts and liabilities with probate judge • File a list of all creditor claims with the probate court • Convert assets into money and sell property assigned at a public auction for cash • File an account of the assignee's activities and the amount of claims not collected • File a report of the sale of assets and proceeds with the probate court	Assignee must: • Post bond with state as the Maryland Rules require • Acquire title to the property of the assets and property of the insolvent	Assignee must: • Give notice of the assignment to creditors as to: sale of assets, when, where, and how the sale will occur • Give written notice to any party that is or may be indebted to the assignor • Make written reports to the court as the court directs

	New Jersey	Ohio	Maryland	Virginia
Powers of the Court	• Upon a showing of cause, the court may remove the assignee • Court may authorize assignee to continue assignor's business • Court may direct distribution of dividends • Court may extend and fix time for assignee to give notice of creditor claims • Court may adjudicate a creditor exception to a claim or demand • Court may direct a partial distribution of assets • Court may order the assignee to file an intermediate account of activities • Court must direct assignee to give additional security	• Upon a showing of cause, the court may remove the assignee and appoint a trustee • Court may authorize assignee to continue assignor's business • Court must publish notice of a hearing regarding the account after the assignee files an account of his activities • Court must appoint three suitable disinterested persons to appraise the estate after the assignee files bond	• Court must ratify the assignment in order for it to become valid	• The court may nullify or revoke the assignment • The court must discharge the assignee when the assignee fully complies with the assignment

	New Jersey	Ohio	Maryland	Virginia
Sale of Assets	• All sales of assignor's assets must be at public or private sale	• All sales of assignor's assets must be at public auction unless otherwise authorized by the court • The assignee must advertise the sale of real property for four consecutive weeks in the county where the property is located • The assignee must advertise the sale of personal property for at least ten days before the sale • Property cannot be sold for less than two thirds of the appraised value	• Maryland law does not address the sale of assets by the assignee	• Virginia law does not address the sale of assets by the assignee

	New Jersey	Ohio	Maryland	Virginia
Creditor Claims	• Creditor must present claims within three months of the general assignment or during a time the court fixes • If a creditor claim is rejected for failure to present within three months, the creditor may share in payment by presenting the claim to the assignee under oath • Within sixty days after assignee notices the list of creditors, a creditor may file exceptions to the assignee's allowance or rejection of a creditor claim • Creditor may present any debt due or any debt to become due	• Creditors must present claims and an affidavit within six months of assignee's notice of appointment • If creditor's claim is rejected, creditor has thirty days to bring suit against assignee • Creditors may bring suit if assignee knows of fraudulent conveyance of assignment	• Maryland law does not address creditor claims	• Within thirty days of recording the assignment, the creditor may file a claim questioning the inclusion of another creditor • If the deed of assignment so requires, a creditor accepts payment as full satisfaction of a claim

	New Jersey	Ohio	Maryland	Virginia
Order of Payments	• Before paying any other creditors, wages of clerks, mechanics and laborers are paid first, up to a maximum of $300 • If assignor is a tenant, landlord holds a lien on goods and chattels on premises • The assignee must sell the goods and chattels. From the proceeds, assignee must first satisfy rent owed, in an amount not to exceed one year's rent	• Before paying any other creditors, taxes on personal property must be paid • Any encumbrances and liens on the property sold at auction must be paid out of the proceeds according to their priority • Before paying any remaining creditors, the assignee must pay persons who have performed labor for the assignor twelve months before the assignment	Payment of proceeds must be distributed in the following way: • Administrative costs and expenses • Employee wages and contributions contracted for in place of wages within three months before assignment • Lien claims of the state or a state subdivision perfected or recorded before assignment • Unsecured claims of individuals not exceeding $900 • Rent for any interest in real property due not more than three months before assignment • Charges for transportation of goods accrued not more than three months before assignment • Taxes not included in "lien claims" section • Claims of unsecured creditors	• Before paying any other creditors, persons having a statutory priority are paid first, including persons holding a lien • The payment covers only the value of the property upon which there is a lien • Virginia law does not further address the order of payment

	New Jersey	Ohio	Maryland	Virginia
Preference Payments	• If the assignor makes a preference payment to a creditor within four months of making an assignment, the preference payment is void	• Ohio law does not address preference payments	• If the assignor makes a preference payment that is void under federal bankruptcy law, the preference payment is void under Maryland state law	• Virginia law does not address preference payments
Fraudulent Transfers	• New Jersey law does not address fraudulent transfers in the context of an assignment for the benefit of creditors	• Probate judge may make and enforce orders necessary to prevent fraudulent transfers	• If the assignor makes a preference payment that is fraudulent under federal bankruptcy law, the preference payment is fraudulent	• Virginia law does not address fraudulent transfers

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TRUST MORTGAGES

I. SUMMARY

The Trust Mortgage is a quasi-statutory framework under which the assets of an insolvent (or otherwise failed) company (the "Trust Mortgagor" or "Debtor") can be transferred to its creditors in satisfaction of creditors' claims. While the Trust Mortgage is similar to a traditional out-of-court workout, there is typically a compromise of creditors' claims with an additional degree of enforcement against a non-performing Debtor, making the Trust Mortgage a "workout with teeth", more similar to an Assignment for the Benefit of Creditors ("ABC") than to a traditional out-of-court workout. In addition, the degree of insolvency of a Trust Mortgagor is generally of sufficient degree that unsecured creditors of the Debtor would not receive any proceeds from liquidation under a Chapter 7 bankruptcy or an ABC, hence this mechanism's attractiveness to Creditors. The enhancement of the traditional out-of-court workout comes in the form of a party appointed to act as a Creditors' representative (the "Trust Mortgagee" or "Trustee") for purposes of overseeing the transfer of assets through the Debtor's compliance with whatever mechanism is determined to yield optimum results (the "Plan"). This mechanism generally leaves the Debtor's management and Board of Directors (or other governance authority) in place and in control throughout the liquidation process, making it an attractive option for those companies that desire neither the cost nor the oversight of a bankruptcy process, while still providing the Trustee the option of foreclosure to enforce the terms of the Plan for the benefit of creditors.

II. THE DEBTOR

A. Cause and Degree of Distress

A typical Trust Mortgagor is a company that has either experienced a failed business plan or (an) external event(s) that leave the Debtor without a viable core business necessary to effectuate a successful turnaround. With no practical prospects for reorganization, the company is in the position of having to affect either a sale of its operations, a liquidation of its assets, or some combination of the two. As a Trust Mortgage provides only two alternatives – compliance with a Plan to provide a distribution to creditors or foreclosure by the Trustee, the Trust Mortgage is generally not used to provide a structure for the reorganization of a Debtor that will survive post-process in substantially the same form. Not to say that it *cannot* be done, just that it is *rarely* done, as a viable reorganization generally mitigates toward use of an out-of-court workout or a Chapter 11 proceeding.

B. Capital Structure

The capital structure of a successful Trust Mortgagor is generally straightforward. Often there will be a single secured creditor (or single tranche of secured debt), generally in the form of one or more Private Equity groups (funds, etc…) and/or investors who have been funding the business; there may be a traditional secured lender as well. Beyond the secured debt, there will generally be only one other tranche of debt, all of which is unsecured (both priority and non-priority). Unless the parties are able to agree to a complex structure of priorities and distribution schemes, it is rare for Debtors with senior, second lien, subordinated or mezzanine debt and unsecured debt to pursue a Trust Mortgage, given the relative rarity of having numerous parties across the capital structure agree on so many points of the Debtor's disposition.

III. IMPLEMENTATION AND STRUCTURE OF THE TRUST

A. The Plan

After examination of the Debtor's balance sheet and general financial structure and position, as well as negotiations with the Debtor's secured creditors and an estimation of the potential recoveries to be received by liquidation, a plan is created wherein unsecured creditors are provided a recovery on allowed claims in an amount and priority of payment that is articulated in a Creditors Composition Agreement, or Plan. In nearly all cases, these recoveries come in the form of a carve-out from the collateral of the secured lenders since, as previously mentioned, in most cases the secured lenders of a Trust Mortgagor are under-secured. One compelling incentive for the secured lenders to consent to a carve-out is the lack of an adversarial creditor body, as might be found in a traditional bankruptcy proceeding. Especially in cases of private equity funds, where fund managers populate the Boards of Directors of a Debtor, the ability to provide a return to creditors in excess of what unsecured creditors would realize in a Chapter 7 or Chapter 11 proceeding, in exchange for the releases that would accompany such a scheme, becomes an attractive option.

Generally, the Composition Agreement will include the following information:

1. Description of the requirements for a valid assent;
2. Articulation of the payment scheme, for example:

- Payment of Expenses of the Liquidation (administrative expenses);

- Repayment of Secured Lenders for Loan to fund wind-down, tax or employee obligations (i.e., priority claims);

- Repayment to secured lenders in amount of $_______________ as reimbursement for legal expenses related to the creation of the Plan and Trust Mortgage;

- Payment of ____% of allowed unsecured claims;

- Payment to secured lenders up to the amount of $___________, representing payment in full of secured lenders principal and interest as of ____________ date;

- Payment on a *pro rata* basis on secured and allowed unsecured claims until paid in full, and;

- Remaining funds paid to the Company

3. Discharge of Claims upon fulfillment of plan;

4. Articulation of any remedies available to individual creditors upon default by the Debtor (if any);

5. Typical miscellaneous contract provisions governing choice of law and venue, execution requirements, successors and assigns, etc…

The framework and payment priority of the plan is enforced by the creation of a Trust Mortgage and the appointment of a Trust Mortgagee, or Trustee.

B. The Trust Mortgagee

The Debtor will select a Trust Mortgagee or Trustee, the party in whose favor a lien will be granted on all of the Debtor's assets through the execution of a Trust Mortgage and Indenture Agreement (the "Trust Documents"), to "stand in the shoes of all creditors" to ensure compliance with the Plan. The company will generally select a party that is a trusted neutral party to the company and both secured and unsecured creditors – an advisor with liquidating trustee experience is optimal. The structure of the Trust Mortgage requires the voluntary subordination of the secured creditors' liens to the lien granted to the Trust Mortgagee, thus ensuring that the distribution scheme can be fully effectuated if the company fails to comply with the plan and a foreclosure becomes necessary (failure to secure subordination of the secured creditor would prevent a distribution to unsecured creditors before the secured creditor was paid in full, thus breaching the Plan. Those experienced with Trust Mortgages will be able to make recommendations on the components of the Composition Agreement, Trust Documents, payment priorities and the overall management of the process.

Timing of the execution of the Trust Documents is crucial, as the process and the necessary filings must be done in a manner so timely as to allow the liens to fully perfect before any challenges might arise. Because of this practical requirement, a Trust Mortgage is not a remedy to the "race to the courthouse steps" found among insolvent Debtors who have waited too long to attempt a compromise with its creditors.

The Trust Documents should contain the following elements:

1. Language articulating the creation of the Trust

2. Language detailing the characteristics of an assent on the part of an assenting creditor, including the requirements for participation in the Trust and the determination of allowed claims;

3. Grant of security interests to the Trust Mortgagee/Trustee by the Debtor and articulation as to the voluntary subordination of prior liens;

4. Recitation of Debtor's representations, covenants an warranties

5. Rights and Duties of the Trust Mortgagee//Trustee;

6. Articulation of Default on part of the Debtor and statement as to what occurs upon occurrence of an event of Default;

7. Articulation of the distribution priorities under the Plan;

8. Indemnification of the Trustee by the Trust as allowed by law;

9. General contract provisions regarding execution, choice of law and venue, etc…

Once the Trust Documents are executed and the liens are filed with the appropriate authorities, the materials to be mailed to creditors are assembled and sent to the creditors, often by the Trustee. These documents generally include a balance sheet; a Creditors Composition Agreement which details the Plan, the disbursement scheme and includes the releases necessary to effectuate the Plan; a Ballot or Assent Form; a self-addressed envelope for return of the Assent form and a copy of the Trust Documents, establishing the Trust Mortgage relationship and articulating the liens granted as part of the process.

IV. PERFORMANCE UNDER THE PLAN

Once the Trust Documents are executed, the filings are completed and confirmed and the required documents have been sent to creditors (with a reasonable response deadline, such as 30 days); the company engages in those activities required to fulfill the plan. As funds from the sale/liquidation of the company's assets are received, they are generally placed in a segregated bank account established for the Trust. Distributions under the plan can be made by either the Debtor's remaining personnel (usually a senior manager or appointed "wind-down officer"), or by the Trustee. The Board or secured creditors may require periodic reporting from both management and the Trustee as to performance under the Plan. Once final distributions have been made (depending upon the case, in as little as 120 days and as much as 24-36 months or longer after execution of the Trust Documents), a notice to creditors as to the successful completion of the Debtor's and Trust's obligations under the plan, including a discharge of claims, isn't a bad idea.

V. CONCLUSION

The Trust Mortgage provides a useful mechanism for the liquidation of assets and the compromise of claims without the expense, complexity and potential litigation risk of a bankruptcy proceeding while avoiding the complexity and potential liabilities of an assignment for the benefit of creditors. The capital structure of the Debtor must be relatively simple and any secured creditors must voluntarily subordinate their liens to the Trust established for the benefit of all creditors – however, the benefits of releases and a controlled process often outweigh the “pain” of voluntary subordination. The time to complete a Trust Mortgage is dependent entirely upon the individual Debtor’s business and relative ease/speed of sale or liquidation, but in nearly all cases, this structure requires less time to complete and/or yields superior recoveries to other liquidation structures such as bankruptcy, assignment for the benefit of creditors and other schemes. Key to the overall success of the Trust Mortgage as a bankruptcy alternative is early recognition of the company’s inability to reorganize and quick action to formulate a plan and file the liens necessary to establish the Trust.

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A CRITICAL EXAMINATION OF THE MERITS AND LIMITATIONS OF BANKRUPTCY ALTERNATIVES

SECTION I

1. Out of Court Restructurings

   (a) forbearance periods

   (b) stock for debt

   (c) soft notes

   (d) covenant waivers/control covenants

   (e) slow business cannibalizations

   (f) right sizing

   (g) capital infusions/preferred positions

   (h) injection of CRO, new management, consultants

   (i) best practices/lean manufacturing

   (j) claims purchasing

   (k) corporate governance upgrades

   (l) other

2. UCC Sale

   (a) voluntary surrender of possession

      (i) benefits

      (ii) deficiencies

   (b) secured party sales

      (i) risks and uncertainties

      (ii) difficult assets

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(iii) what if no one bids?

(c) the short form plan approach (i.e. assumed debts & contracts, dividends, SPM carve-outs)

3. Trust Mortgages

(a) strict foreclosure

(b) foreclosure by sale (public, private)

(c) ancillary proceedings for personality

(d) speed; court approval; appeals

(e) other considerations (i.e. title insurance, fraudulent transfer issues)

4. Assignment for the Benefit of Creditors

(a) advantage

(b) disadvantages

(c) special circumstances/certainty

5. State Receivership

(a) access & proficiency of the court

(b) Receiver's immunity and authority

(c) legal limitations of the remedy/terms of appointment order

(i) sales free and clear

(ii) DIP and cash collateral lending

(iii) taxes

(iv) state of jurisprudence/procedural issues

(v) scope of stay; extra-territorial problems

(vi) jurisdictional limitations

(vii) avoidance actions

(viii) in re pari delecto

(ix) advisory opinions/instructions to the Receiver

(x) transactions outside the ordinary course

(xi) scope of common law surcharge of the lender

(xii) special problems (releases, executory contracts, cure, appellate rules)

(xiii) transparency; creditor participation

(xiv) "a circumvention of BAPCPA concerns?"

6. Federal Receivership/Other Mechanisms

(a) Suitable for diversity cases

(b) Federal law receivers

(c) court appointed monitors

(d) material considerations

SECTION II

7. General Issues

(a) Are alternatives driven by BAPCPA or control/speed?

(b) Are alternatives driven by transaction costs or special needs?

(c) Are alternatives driven by less or more transparency/participation?

(d) Are alternatives driven by size of case or nature of the business?

(e) What are the Practical vs. liquidation considerations?

(f) Are the alleged benefits of the alternatives reasonably achievable?

(g) Will the courts be guided by BAPCPA or the Bankruptcy Code?

8. Where is bankruptcy decidedly better?

(a) state of jurisprudence/sophistication

(b) sales free & clear

(c) avoidance actions

(d) priorities

(e) third party releases

(f) DIP/cash collateral issues

(g) “big” and multi-jurisdictional debtors

(h) public companies

(i) other advantages?

9. What is the province of the middle market case?

10. Orders, blessings, releases, exoneration, finality and *res judicata*

11. Special Problems – Who pays for winddown costs; tax filings; business clean up; termination of pensions; environmental issues? How?

12. How much of the alternatives is really driven by a lender’s lack of patience, regulations, absence of workout bench, “attitudes” and theoretical disadvantages of Chapter 11?

13. Questions, Questions andn More Questions For The Panel.

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RECEIVERSHIP

	OHIO	NEW YORK	NEW JERSEY
Applicable Statute(s)	• OHIO REV. CODE ANN. §§ 2735.01 et seq. (2005) • OHIO REV. CODE ANN. §§ 1701.90 et seq. (2005) • OHIO REV. CODE ANN. §§ 1313.56 et seq. (2005)	• N.Y. BUS. CORP. LAW §§ 1201 et seq. (Consol. 2005) • N.Y. PARTNERSHIP LAW §§ 63 et seq. (Consol. 2005) • N.Y. LTD. LIAB. CO. LAW §§ 703 et seq. (Consol. 2005)	• N.J. STAT. ANN. §§ 14A:14 et seq. (2005)
Appointment of Receiver	• Receiver not appointed until notice given to all parties in interest and a hearing is held • Party seeking Receiver must prove need for Receiver by clear and convincing evidence • Receiver must execute a bond with surety • Appointment of Receiver is an equitable remedy that must be ancillary to relief sought in the proceeding • Court appoints Receiver when	• Receiver appointed by court in an action brought under Article 10 (non-judicial dissolution), Article 11 (judicial dissolution) or in an action brought by a judgment creditor seeking to sequester corporate property • Notice of the appointment of a Receiver shall be given to the Attorney General and such other parties as the court directs • Receiver must file with the Court Clerk an oath that the Receiver will faithfully discharge the duties of the Receiver and file a bond	• Appointment made by Superior Court • Receiver appointed where the corporation is insolvent, it has suspended ordinary business operations or loss prejudicial to creditors and shareholders is imminent

	OHIO	NEW YORK	NEW JERSEY
	corporation is dissolved, insolvent, in imminent danger of insolvency or has forfeited its corporate rights		
Order of Payment	• Expenses incurred by Receiver in preserving assets of the estate are accorded first priority • Taxes incurred by the Receiver or on the corporation's property after the appointment of the Receiver are accorded first priority	• All distributions are to be made out of unencumbered assets (a) Costs and expenses of administering receivership (b) Laborer's wages (c) All debts due to the United States (d) All debts entitled to priority treatment under U.S. laws (e) Judgments against the corporation to the extent of the value of the real property on which they are liens (f) All other creditors in proportion to their demands	• All distributions are to be made out of unencumbered assets (a) Payment of Receiver's costs and expenses of administering the receivership (b) Employee wages, not to exceed $600 per employee, for work performed within the three month period prior to the commencement of the receivership (c) General creditors paid a pro-rata portion of their respective debts (d) Any surplus funds remaining are first paid to preferred stockholders and then general stockholders according to their respective shares
Preference Payments	• Receiver may sue to recover transfers made by an insolvent corporation and distribute the property so transferred for the benefit of all creditors provided that the corporation made the	• Receiver may sue to recover transfers of any property of the corporation when the corporation is insolvent or insolvency is imminent with the intent to give a preference to one creditor over another	A preference has occurred when: • a corporation, while insolvent, and within four months of the commencement of the receivership action, transfers any

	OHIO	NEW YORK	NEW JERSEY
	transfer with the intent to defraud, hinder or delay its creditors		property to a creditor on account of a previously incurred debt; and • the transfer allows the creditor to obtain a greater percentage of its debt than another creditor of the same class; and • the creditor has, at the time the transfer is made, reasonable cause to believe that the corporation is insolvent • New Jersey law allows the creditor to setoff against any preference liability, the amount of unsecured credit extended by the creditor to the insolvent corporation after the creditor's receipt of the preferential transfer(s)
Presentation of Creditor Claims	• Varies according to county rules of court	• As part of the notice described above, Receiver instructs claimants to present their claims at a specified place and by a specified day. Furthermore, the Receiver must mail a copy of the notice to each person the Receiver believes to be a creditor of the corporation	• Receiver shall, within 30 days of the appointment, give notice (in a newspaper of general circulation) requiring all creditors to submit their claims in writing at a place and time to be named in the notice • On or before publication of the notice described above, the

	OHIO	NEW YORK	NEW JERSEY
		• Claims disputed by the Receiver may be submitted to the court for determination • The filing of a claim pursuant to the notice does not effect any defense to the claim the Receiver may have, including the statute of limitations defense • Any claim not timely filed is forever barred unless the creditor demonstrates to the court a satisfactory reason for the untimely filing • Federal and New York state tax claims are not required to be filed by the deadline stated in the notice	Receiver must mail a copy of the notice to each known creditor • Any creditor who does not timely file their proof of claim will be forever barred from recovering on the claim, except to the extent that the creditor can demonstrate to the court "good cause" for not timely filing the claim • The Receiver can orally examine, under oath, all creditors and require any creditor to provide written evidence of their claim • The Receiver shall allow or disallow any claim filed against the corporation • Any creditor who timely filed a claim and whose claim is disallowed, in whole or in part, by the Receiver, is entitled to a jury trial on any issue triable of right by jury

	DELAWARE	PENNSYLVANIA	VIRGINIA
Applicable Statute(s)	• DEL. CODE ANN. tit. 8, §§ 280 et seq. (2005)	• 39 PA. CONS. STAT. §§ 31, 71, 100 (2005) • 15 PA. CONS. STAT. §§ 1981 et seq. (2005)	• VA. CODE ANN. § 13.1-748 (2005)
Appointment of Receiver	• Any shareholder or creditor may seek the Court of Chancery to appoint a Receiver as an ancillary remedy to the primary relief sought by the shareholder or creditor	• Upon application by a shareholder or director, the court may appoint a Receiver to wind up the corporation if: (a) those controlling the corporation are acting illegally, oppressively or fraudulently; (b) corporate assets are being wasted and it is in the interests of the shareholders to wind up the corporation; or (c) the directors are deadlocked, the shareholders are unable to break the deadlock and the deadlock is causing or may cause irreparable injury • Upon application of a creditor whose claim has been reduced to judgment, returned unsatisfied after execution or admitted by the corporation, the court may appoint a Receiver to wind up the corporation	• In a proceeding to dissolve a corporation, a court may appoint a Receiver

	DELAWARE	PENNSYLVANIA	VIRGINIA
Powers and Duties of Receiver	• Take charge of assets, business and affairs of corporation • All title of insolvent's property must be transferred to Receiver • Sell unencumbered property of the corporation • Sell encumbered property of the corporation if the encumbrance(s) are disputed and pay the proceeds of the sale, after deducting the costs of the sale, into court. Such proceeds will be disposed of as the court directs • Collect outstanding debts, claims and property • Sue and be sued in Receiver's own name as Receiver of the corporation • After receiving court approval, operate the business in an attempt to return the corporation to solvency • Terminate executory contracts	• Collect assets of the corporation • Dispose of all or any part of the assets of the corporation at either public or private sale • Sue and be sued in Receiver's own name as Receiver of the corporation • Court's order appointing the Receiver shall state the Receiver's powers and duties more specifically	• Court will describe the Receiver's powers in its order appointing the Receiver • Among other powers, the Receiver may dispose of assets of the corporation, by public or private sale, sue and be sued in Receiver's own name as Receiver of the corporation

	DELAWARE	PENNSYLVANIA	VIRGINIA
	• File full and complete itemized inventory of assets and liabilities • Report on progress of receivership within three months of appointment • Resolve disputes regarding the creditors' claims		
Order of Payment	• All distributions are to be made out of unencumbered assets • Employees are given a lien on the corporation's assets in the amount of the wages due, not to exceed two months' wages. Employee wage claims are paid before any other debt of the corporation	• All distributions are to be made out of unencumbered assets (a) Costs and expenses of receivership (includes pre-receivership, not post-receivership, federal tax liabilities and interest) (b) Employee wage claims under the Pennsylvania Wage Act (c) Claims of general unsecured creditors	• Costs and expense of receivership receive first priority payment • Receivership does not alter a third party's liens or security interests in property of the corporation or the priority of those liens or security interests. Encumbrance holders are given priority of payment over general unsecured creditors
Preference Payments	• While in receivership, a director may not prefer one creditor over another. However, no state statute or common law precedent exists regarding the Receiver's ability to recover allegedly preferential payments	• Receiver may file suit to recover any property transferred to a creditor in an attempt to give one creditor preference over another	• Absent fraud, a transfer by an insolvent debtor to a creditor that gives the creditor a greater percentage recovery than other creditors of the debtor is valid and will not be avoided

	DELAWARE	PENNSYLVANIA	VIRGINIA
	Instead of a rigid test to determine if a transfer of property prefers one creditor over another, Delaware courts have recognized an "equitable jurisdiction" to ensure equal treatment of creditors of the same class • In addition to their "equitable jurisdiction," Delaware courts look to the Fraudulent Conveyances Act as another basis upon which certain transfers can be avoided and recovered		
Presentation of Creditor Claims	• All creditors must file proofs of claim, under oath, in the Register in Chancery of the county in which the proceeding is pending • The proofs of claim must be filed by a deadline fixed by the court and published in a manner approved by the court. The Register of Chancery, not the Receiver, is responsible for giving any notice to creditors or shareholders required by the court during the receivership	• Court may require all creditors to file, with the Clerk of the Court or with the Receiver, verified proofs of claim. If the court requires the filing of proofs of claim, the court will fix a deadline by which all claims must be filed • Creditors that fail to file claim by the deadline fixed by the court may be forever barred from recovery • The court may order that 15 Pa. C.S. §§ 1991-1998 (Subchapter H – Postdissolution Provision for	• No statutory or case law guidance regarding the procedures and processes for the filing of claims and the claims allowance process

	DELAWARE	PENNSYLVANIA	VIRGINIA
	• All creditors that fail to file their claims by the court established deadline may be barred from recovery • After the claims bar date, the Register of Chancery will notify the Receiver of the claims so filed. Within 30 days of receiving this notice, the Receiver will examine the claims. If the Receiver disputes any of the claims, the Receiver must notify the creditor or shareholder of the dispute • In the event of a dispute, the Receiver may orally examine the creditor and require the creditor to provide written evidence of the validity of the claim • The Receiver may allow or disallow any claim. Creditors can appeal the Receiver's decision to disallow, in whole or in part, their claim within 30 days after receiving notice of the Receiver's decision	Liabilities), apply in receiverships. If such an order is entered, Subchapter H contains a statutory scheme for notice to creditors, the filing of proofs of claim, the allowance or disallowance of claims against the corporation, the payment of claims and the reservation of monies by the Receiver for future, known and contingent claims against the corporation	

	WEST VIRGINIA	MARYLAND
Applicable Statute(s)	• W. VA. CODE ANN. §§ 31D-14-1430 et seq. (2005)	• MD. CODE ANN., CORPS. & ASS'NS §§ 3-411 et seq. (2004) • MD. CODE ANN., COM. LAW I § 15-101 (2004)
Appointment of Receiver	• After notice and a hearing, the Circuit Court may appoint one or more Receivers to wind up and liquidate the business and affairs of the corporation	• In an involuntary dissolution proceeding, except on the grounds of insolvency, after notice and a hearing, the court may appoint a Receiver to operate the business and preserve the assets of the corporation until a final determination of dissolution is made • In an involuntary dissolution proceeding on the grounds of insolvency, if the court orders the corporation dissolved, the court shall direct that the corporation be liquidated under court supervision by a Receiver • In a voluntary dissolution proceeding, the court for "good cause" may order the corporation liquidated under court supervision by a Receiver

	WEST VIRGINIA	**MARYLAND**
Powers and Duties of Receiver	• Receiver may be required to post bond • Court will describe the Receiver's powers in its order appointing the Receiver • Among other powers, the Receiver may dispose of assets of the corporation, by public or private sale, sue and be sued in Receiver's own name as Receiver of the corporation	• Vested with full title to all assets of corporation • Has full power to enforce obligations or liabilities in its favor • Shall liquidate assets and wind up the corporation's affairs under the supervision of the court, and has all powers necessary for that purpose
Order of Payment	• Not clearly addressed in state statutes or applicable case law	(a) Claims of third parties with valid encumbrances on property of the corporation recorded at least three months prior to the appointment of the Receiver (b) Payment of costs and expenses of administering the estate (c) Claims of state taxing authorities (d) Employee wages earned not more than three months prior to the appointment of the Receiver (e) Claims of general unsecured creditors

	WEST VIRGINIA	MARYLAND
Preference Payments	• Except for in liquidation of insurance providers, common law preference action rarely used by a Receiver	• Receiver has the power of a trustee in bankruptcy to avoid a preferential transfer • Generally, Maryland adopts the federal Bankruptcy Code's definition of what constitutes a preferential transfer. See 11 U.S.C. § 547
Presentation of Creditor Claims	• Receiver will provide notice of deadline by which creditors must file claims • Receiver will send proof of claim forms to known creditors • Creditors must file a proof of claim form setting forth the amount and basis of the claim, the entitlement to priority of payment, if any, as well as all relevant evidence and documentation of the claim including a verified affidavit	• The process and procedures for creditors to present their claims against the insolvent corporation are contained in Maryland Rule of Court 13-201 • Rule 13-201 contains three forms of notice that a Receiver may use and the requirements that each notice must meet (i.e. periodic publication in a newspaper of general circulation) • The notice will also state the time and place where creditors must file their claims against the corporation • Creditors who fail to timely file their claims may be forever barred from recovery