MANAGING A SAFE LANDING: DEALING WITH DISTRESSED UNIVERSITIES & COLLEGES

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INTRODUCTION

Distressed universities and colleges[1] present several challenges that make them more complex than typical corporations to move through the workout process. As discussed thoroughly elsewhere in the *American Bankruptcy Institute Law Review*'s Bankruptcy and Education Symposium, bankruptcy is the last and most dire option available to address financial and other forms of distress in higher education institutions.[2] But there are other restructuring tools available to guide a distressed institution to safe ground. These include chief restructuring officers, monitors, and court-appointed receivers.

To ensure we have a common understanding of how these tools can work, I will describe briefly some of the scenery against which this discussion takes place. This includes a quick look at distress and some key attributes of not-for-profit and for-profit, or proprietary higher education, institutions that come into play here. Finally, I will fold in certain aspects of the Higher Education Act and its attendant regulations, the Bankruptcy Code, and the common law to complete the landscape for this discussion.

The balance of this Article will illustrate and expand on the understanding of the non-bankruptcy tools available when dealing with distressed higher education institutions. I will focus on how chief restructuring officers (or in some circumstances, special trustees), monitors, and receivers can help a higher education institution and its stakeholders move to safer ground. I will also address some of the approaches common to each, and the benefits, limitations and misconceptions about each of these tools.

One final note about safe landings. In the context of this Article, a safe landing means nothing more than getting students, faculty, and other community stakeholders to a place where they can make new choices about their education, employment, or financial interests. Safety in this context is not necessarily a successful reorganization, the preservation of equity, or the continued existence of a particular higher education institution. I believe that every organization has to work hard to remain relevant and competitively viable, and that no organization has a right to survive simply because it exists.

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* University of Denver, Daniels College of Business. The author would like to thank Ted Hartl at Lindquist & Vennum PLLP and Roy Peterson at the author's company, Western Receiver, Trustee & Consulting Services Ltd., and the editor and staff of the *American Bankruptcy Institute Law Review* for all their help in pulling together the background materials for this Article. I know their efforts made this Article much better than it was without their help.

[1] For simplicity, the author will refer to these schools as higher education institutions throughout the balance of this Article.

[2] As explained in greater detail by others, the exclusion of accreditation as an asset of the estate, and the exception to the automatic stay of termination of eligibility under federal student loan programs makes reorganization under the Bankruptcy Code all but impossible.

I. THE NATURE OF HIGHER EDUCATION INSTITUTIONS

Higher education institutions come in a variety of models and colors. There are vocational, two-year, four-year, and post-graduate models.[3] The for-profit (proprietary) models are simply businesses that sell education and, mostly, can be discussed much like any other for-profit business that becomes distressed. The not-for-profit models are more complex because: (1) they have different motivations and metrics than their proprietary cousins, (2) they may have some or all of their assets impressed with express or implied charitable restrictions, and (3) they may have some significant portion of their assets, namely endowments, held separately from the operating unit, in affiliated foundations or the like. Success (or the lack of it) in the for-profit arena is measured by typical business metrics, while the not-for-profit arena is measured by media rankings, admission statistics, endowments, and similar metrics.[4]

Not-for-profits strive to "maintain excellence, prestige and influence" often without regard to profit or even positive cash flow.[5] At many such schools, an infinite amount of money could be spent in pursuing excellence. Put simplistically, the challenge faced by most not-for-profit institutions is "finding the balance between limited revenue and unlimited spending possibilities."[6]

Decision-making in the not-for-profit arena does not necessarily follow traditional paths. For example, many not-for-profit schools are more willing than their for-profit brethren to shift surplus cash generated by more successful operating divisions to subsidize other parts of the institution as part of the educational mission.[7]

Balance sheets for higher education institution are straightforward. The assets are comprised of tangible assets (real estate; fixtures, furnishings and equipment; and investments and any direct gifts or endowments), and intangible assets (brand equity, intellectual property, faculty, accreditation, and rights to participate in federal student aid programs).[8] Liabilities are typically comprised of real property mortgages, capital and operating leases, direct or indirect state or local governmental financing (bonds, other grants), qualified pension plans, collective bargaining agreements, and obligations

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[3] *See* Peter D. Eckel & Jacqueline E. King, *An Overview of Higher Education in the United States: Diversity, Access, and the Role of the Marketplace*, AM. COUNCIL ON EDUC. 1–2 (2014), *available at* http://www.acenet.edu/news-room/Documents/Overview-of-Higher-Education-in-the-United-States-Diversity-Access-and-the-Role-of-the-Marketplace-2004.pdf (providing an overview of major characteristics of American higher education).

[4] *See* Robert J. Morse & Samuel Flanigan, *Best Graduate Schools 2015*, U.S. NEWS & WORLD REP., 2015 Edition, at 18 (explaining criteria considered in ranking, including admission test scores, and data collected from a school's faculty and students).

[5] *See* Kimberly M. Allen, The Response of Small Private Colleges to Financial Distress in the Nineties, 11 (1999) (unpublished Ph.D. dissertation, University of Pennsylvania).

[6] *See id.* at 16; *see also* HOWARD R. BOWEN, THE COSTS OF HIGHER EDUCATION: HOW MUCH DO COLLEGES AND UNIVERSITIES SPEND PER STUDENT AND HOW MUCH SHOULD THEY SPEND? (1980).

[7] *See* Allen, *supra* note 5, at 11 (suggesting since "[a]n infinite amount of money could be spent in the pursuit of excellence" colleges prioritize their resources since revenue is limited).

[8] *See* Charles J. Woelfel, *Financial Statement Analysis for Colleges and Universities*, 13 J. EDUC. FIN. 86, 93 (1987) (providing a sample statement); Rudy Fichtenbaum, *Understanding College and University Financial Statements* 4, *available at* http://www.hawaii.edu/uhmfs/Understanding%20University%20%20College%20Financial%20Statements%20updated.pdf (discussing general assets that will be provided on balance sheets of a higher education institution).

under federal student aid programs.[9] Many not-for-profit institutions elect to hold endowments, gifts, intellectual property, and rights under technology transfer agreements in separate foundations under separate management.[10] While those assets, or the income derived from them, may be made available to the not-for-profit institution, their use may be greatly restricted. In most jurisdictions, these foundations are governed by probate or similar codes, and are often outside the reach of general creditors of the institution.

The path to financial distress for most higher education institutions is both generic and specific to each institution. The common elements include:

- substantially all of the operating revenue comes from tuition;
- tuition is supported or subsidized through student aid programs;
- the institution has a small or declining endowment;
- retrenchment efforts (cost-cutting, maintenance deferrals, salary and hiring freezes, etc.) have been exhausted or failed;
- discounting and similar self-generated financial aid resources for students are maxed out;
- there are initiatives to focus efforts on doing the same old things in other market segments, with little success;[11]
- there is a serious lack of organizational leadership; and[12]
- the faculty is resisting change.

As the institution's financial condition becomes impaired, accreditation and federal student aid authorities become concerned about the institution's viability. This is relatively easy to discern in the proprietary higher education institutions. Most follow generally accepted accounting principles and may be public companies that report their financial results to shareholders, regulators and other interested parties. Non-profit higher education institutions have no meaningful analogs to earnings per share, price/earnings ratios, or profit and loss statements, which makes it more difficult to discern financial distress from the outside. This becomes more complicated when significant assets are held off-balance sheet, in separate foundations, or significant assets or gifts are subject to operational or other constraints or out-of-date use covenants.

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[9] *See* Fichtenbaum, *supra* note 8, at 5.

[10] *Id*. at 10–11 (addressing ways in which colleges can use endowments and gifts, the use of which is often restricted, to free up revenue).

[11] The strategy aspects of distress and ways to address them are simply beyond the scope of this Article. That said, most distressed higher education institutions will manifest serious strategic issues, such as:

- generic product offerings, and a failure to be "famous" for anything;
- serious disconnect between the costs and benefits of attending that institution;
- significant disparity in revenue generation among departments or internal divisions; and
- attempting to be too many things to too few people.

[12] The organizational leadership issues and ways to address them are also beyond the scope of this Article.

II. Legal Environments Governing Higher Education Institutions

It is critical to have a clear understanding of the financial and legal landscape for the distressed institution to manage a safe landing.

Governance, operation and liquidation of higher education institutions, both proprietary and not-for profit, are determined initially by the state corporation codes under which the institution was created. Probate codes may also come into play for not-for-profits who have significant portions of their assets subject to or impressed with charitable or donor restrictions, including reversionary rights if the institution ceases operations.[13]

Federal securities, employment, and education statues directly modify or influence significant aspects of an institution's operational latitude. Taking a higher education institution into bankruptcy can only be viewed as the last and most desperate effort to liquidate the institution. The exclusion of accreditation from the estate and the loss of eligibility under the federal student aid programs prohibit reorganizations or sales of going concerns under bankruptcy law.[14]

Effectively, this means that restructuring or reorganizing a higher education institution will occur under state law and, with luck, in conjunction and cooperation with state and federal authorities.

III. Dealing with Distress Outside Bankruptcy

It is a sad truth and basic human nature that most organizations do not face or try to solve their problems until way too late in the game and when compelled to do so by some outside force. On rare occasions, major donors or the governing board of the institution will determine that it needs outside help to put the institution back on safe ground.

More typically, pressure to act comes from: (1) financing sources who feel their interests in the higher education institution's operations are threatened; (2) accreditation authorities, who feel the current state of the institution is unsustainable or violates core requirements and purposes of the accreditation system; (3) the Education Department, which determines that the institution no longer meets the federal student aid programs; or (4) law enforcement, through a state attorney general, a U.S. Attorney's office or an agency like the Securities and Exchange Commission, which determines that the institution is not operating in the public interest (or worse), and seeks to compel the institution to cease operating or restore itself to acceptable norms.[15] In the worst cases, several combine to bring the institution to its knees.

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[13] *See, e.g.*, N.Y. Est. Powers & Trusts L. § 8-1.2 (McKinney 2014) (providing statutory direction regarding charitable trust establishment and structure of "charitable trusts").

[14] An excellent recent example can be seen in the articles describing fallout from Anthem College's bankruptcy filing. *See* Charlie Tyson, *Anthem Bows Out*, Inside Higher Ed (Aug. 29, 2014), https://www.insidehighered.com/news/2014/08/29/profit-anthem-education-abruptly-closes-campuses-after-filing-bankruptcy (describing circumstances surrounding Anthem College's decision to file bankruptcy and its inability to obtain federal funding).

[15] *See id.* (considering pressures felt by Anthem prior to filing for bankruptcy).

The target institution has few choices in responding to these outside forces. They cannot be stopped by the automatic stay of the Bankruptcy Code and, absent the most extraordinary circumstances, they cannot be stopped by preemptive actions (temporary restraining orders) in state or federal district court. That leaves the target institution with four choices: (1) it can offer to restructure itself to address the stated concerns, (2) it can accept some form of outside oversight, (3) it can be placed in the legal custody of a court of competent jurisdiction, or (4) do nothing and hope, which rarely works.

Obviously, the target institution's governing board and management can propose that they be permitted time to resolve the problems they face. This is often permitted when it is the first time there have been problems at the target, management retains significant credibility with the outside forces, and the problems are serious but not yet acute. If it works, then everyone is pleased and the institution returns to normal operations, and the value of the going concern is preserved.

The next least intrusive solution is for the institution's governing board to seek time and an opportunity to repair its credibility through the appointment and delegation of substantial authority to a chief restructuring officer ("CRO"), who is brought in specifically to address and resolve the problems and their root causes that led to the current situation. CROs are common outside of higher education, and are an accepted and viable tool by which the organization can take responsibility for solving its problems, and rebuild its credibility and standing with key stakeholders.[16] If successful, the CRO can guide the institution back to proper operations or oversee the orderly transfer of the business to new management or others owners, by sale or merger, so as to minimize as much as possible stress and disruption to students, faculty and other key stakeholders.

This is the choice that the trustees of City College of San Francisco made by appointing a "special trustee" who supersedes the existing management structures, and to whom the board delegated all or substantially all of their authority for the duration of the crisis.[17] The City College trustees determined it was the only way they could overcome the organizational dysfunctionality that paralyzed critical decision-making, led CCSF to the brink of financial disaster, and put CCSF at risk of losing its accreditation.[18]

These "voluntary" choices are supported under federal statutes. The change of control, provisional eligibility, and waiver of waiting periods after a change in control[19] support responsible choices that protect financial viability and the best interest of students.

There may come a point when the target institution has lost sufficient credibility with the moving forces—particularly regulators like the Education Department's Office of Federal Student Aid—that more intrusive measures are required. The Education

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[16] *See* Tommy Onich, *The Chief Restructuring Officer: What Does He or She Do?*, COM. BANKR. ALTERNATIVES (Nov. 19, 2013), http://commercialbankruptcyalternatives.com/articles/the-chief-restructuring-officer-what-does-he-or-she-do.

[17] *See* Nanette Asimov, *City College SF 'Special Trustee' Picked*, SFGATE (Oct. 23, 2012, 10:06 PM), http://www.sfgate.com/education/article/City-College-SF-special-trustee-picked-3976120.php.

[18] *See id.*

[19] *See, e.g.*, 20 U.S.C. § 1099c(h)–(i) (2012) (providing for "[p]rovisional certification of institutional eligibility" and treatment of changes in ownership of a higher education institution).

Department (the "ED") may have issued a notice of revocation, or a cease and desist order to the target, and the ED and the institution may negotiate an interim resolution to the ED's concerns. As is often the case with government agencies, a memorandum of understanding (an "MOU") is executed by the parties outlining the remedial steps that the target institution will take.[20] If the situation is serious, the department may require an outside monitor to report to the department on the target institution's efforts to comply with and complete the MOU's requirements.

Corinthian Colleges, Inc., and its subsidiaries have signed such an MOU with the ED after some months of the ED trying to get information out of Corinthian, and finally blocking payment of title IV Student Aid Funds.[21] The MOU sets out a course of action by which Corinthian must sell some of its schools and teach-out others, all while under the close supervision of the selected monitor, Skadden, Arps, Slate, Meagher & Flom LLP, under the leadership of former U.S. Attorney, Patrick Fitzgerald.[22] Skadden's job is to ensure Corinthian carries out the MOU.[23] Unlike a CRO, Skadden reports to the ED, not the Corinthian board.[24]

The broad authority granted to the monitor can be seen in the following excerpts from the ED's July 18, 2014 press release:

> Mr. Fitzgerald and his team will play a critical role in making sure that the Department is provided with an accurate accounting of Corinthian's operations to ensure students are protected and protecting the integrity of taxpayers' investment . . . . The monitor will strengthen our efforts to ensure prudent financial management while overseeing an orderly process for students to complete their education — rather than students being left in the lurch because of an abrupt closure.
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> As articulated in the operating agreement the Department signed with Corinthian Colleges on July 3[,] the monitor will have full and complete access to Corinthian personnel and budgets for the company, review all sales processes, and ensure that teach-out plans, which allow students to complete their program, are followed. The monitor will also confirm that Corinthian complies with the production of documents and will review Corinthian's rosters prior to their submission for the drawdown of Title IV Student Aid Funds and will also review campus eligibility. In addition, the monitor — which is fully funded by Corinthian — will see that students and Corinthian employees have multiple ways to submit feedback and complaints.

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[20] The use of MOUs is common in a wide range of enforcement actions by the federal government. The enforcement agency will agree to defer further enforcement action, perhaps agree to permit the release of payments to the target, and lay out remedial steps that must be taken to prevent further or more severe enforcement actions.

[21] *Education Department Names Seasoned Team to Monitor Corinthian Colleges*, U.S. DEP'T EDUC. (July 18, 2014), http://www.ed.gov/news/press-releases/education-department-names-seasoned-team-monitor-corinthian-colleges-0 (describing agreement between U.S. Department of Education and Corinthian Colleges).

[22] *See id.*

[23] *See id.*

[24] *See id.* (stating "[t]he monitor reports solely to the [U.S. Department of Education]").

> The monitor reports solely to the Department and will do so on a regular basis.[25]

The monitor is there to ensure compliance with the MOU and to assist certain stakeholders, such as students and student aid programs, to safe ground—the monitor is not interested in what happens to Corinthian once those goals have been achieved.[26] This is a far cry from the CRO that CCSF put in place to persuade the accreditation authorities it would address their concerns. But the ultimate goals of the CRO and the monitor are similar—move the target institution toward the agreed-upon outcomes.

There are times the parties cannot come to agreement, or the target institution is beyond the point where it can be allowed to address its problems on its own, without more drastic intervention. At that point, a receiver can be appointed to run, restructure, or liquidate, or all of the above, the target institution.

Receivers are appointed by a court of competent jurisdiction at the request of a party in interest.[27] Most jurisdictions permit the appointment of a receiver to be the sole cause of action, eliminating the need for the request for a receiver to be ancillary to other claims being asserted against the target.[28] Jurisdiction is an important consideration, particularly if the case crosses state lines.[29]

Federal courts have the power to appoint receivers, but only when they have proper jurisdiction over the parties.[30] Practically speaking, unless the action arises out of federal law or the federal government is an indispensable party, it is very unlikely the federal district court will have diversity jurisdiction over the target institution and the other parties. All that said, the value of the nation-wide reach of a federal district court cannot be discounted, and all reasonable efforts should be made to try to have a federal district court act as the appointing court.[31]

There are different kinds of receivers, and they are not fungible. Most people have experience with receivers appointed to aid, or in lieu of, a foreclosure. This is a limited form of receiver, whose authority is derived from the underlying contract being enforced. A limited receiver holds property for the benefit of the parties, while the

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[25] *Id.* (internal citations and quotation marks omitted).

[26] *See id.* (stating U.S. Department of Education's priority is protecting the interests of students).

[27] *See* FED. R. CIV. P. 66; *see also* § 2983 Appointment of Receivers, 12 FED. PRAC. & P. § 2983 (2d ed.) ("The appointment of a receiver by a federal court may be sought by any person or class having an interest in property that a statute or one of the general principles of equity authorizes the court to protect by this remedy.").

[28] *See, e.g.*, COLO. R. CIV. P. 66(d)(1) ("The appointment of a receiver may be the sole cause for relief in an action.").

[29] The complexity of receivers acting across state lines is beyond the scope of this Article. Suffice it to say that it can be very complicated to domesticate a receivership order for a receiver in another state or to pursue assets across jurisdictional boundaries.

[30] *See* FED. R. CIV. P. 66; *see also* § 2985 Jurisdiction in Actions Involving the Appointment of a Receiver, 12 FED. PRAC. & P. CIV § 2985 (2d ed.) (providing if the federal court does not have "jurisdiction of the action, the receivership necessarily is improper; the appointment of the receiver is a nullity and receiver has no power to act").

[31] It should be noted that, in many districts, federal district court judges will go to extraordinary lengths to avoid accepting a complex, long-lasting civil case on their dockets. Conversely, without the active presence of a moving federal agency, receivers should understand that an appointing federal judge has many other demands or his or her time, and it may be difficult to get the support necessary to move the case to a successful conclusion.

moving party enforces its rights against the assets under its contract.[32] A limited receiver is not likely to have the authority to operate the target institution for the benefit of other stakeholders of a target institution and will be limited to acting only regarding the assets encumbered by the underlying contract.

Outside of foreclosures, appointment of receivers is not routine. It is viewed as an extraordinary exercise of a court's equitable powers that is done only if there are real risks of irreparable harm and no other viable remedies at law or equity.[33] In most circumstances, notice to all necessary parties and a hearing are required before the court will act on a request to appoint a receiver.[34]

It is worth pausing to remember that receivers are unusual creatures. The court appointing the receiver acts in equity to take possession and control of the property.[35] But as the court itself cannot take direct control of the property, it appoints a person to receive possession on its behalf: a receiver. The receiver is not a litigant or party to the action, but instead embodies the court's possession and control of the assets. The appointment does not change legal title to the property.[36]

Certain statutes (e.g. state corporation or probate codes) and the common law permit the appointment of a general or equity receiver in certain situations.[37] A court may act at the request of a recognized stakeholder under the state corporation code to appoint a receiver when: (1) the governing board is deadlocked, (2) the board and management have abandoned the corporation, (3) the underlying charitable purposes of the institution have been abandoned or threatened, (4) economic waste is occurring to detriment of the public interests or charitable purposes, or (5) parties want a neutral party to oversee the dissolution and winding up of the affairs of the target institution.[38] With respect to not-for-profit institutions, the appropriate state attorney general has both statutory and common law authority to seek the appointment of a receiver to preserve

[32] *See, e.g.*, Jesse G. Reyes, *The Swinging Pendulum of Equity: How History and Custom Shaped the Development of the Receivership Statute in Illinois*, 44 LOY. U. CHI. L.J. 1019, 1059 (2013) ("[T]he property placed in the hands of the receiver is in legal custody of the court for the benefit of all parties in interest.").

[33] *See* § 2983 Appointment of Receivers, *supra* note 27.

[34] Ex parte hearings can occur, particularly when the movant is the state attorney general or a state or federal law enforcement agency. However, almost all courts treat the ex parte appointment similar to a temporary restraining order, and set the matter for a full hearing soon thereafter.

[35] *See* 1 RALPH EWING CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 250, at 362 (3d ed. 1959) ("The appointment of a receiver is an equitable remedy.").

[36] Contrast the role of the receiver to that of a chief restructuring officer (appointed by the governing board) or a monitor (appointed by agreement or in conjunction with administrative enforcement action). Similarly, a chapter 11 trustee steps into the role of management of the debtor, but the appointment of a trustee does not alter how the property or the trustee interacts with the bankruptcy court. The debtor and its assets are subject to the jurisdiction of the bankruptcy court, but that court has not seized custody of either the debtor or its assets. The unique nature of an equity receiver's duties to the appointing court is at the heart of the turnover provisions of section 543 of the Bankruptcy Code. A debtor under the control of a receiver creates a situation where the jurisdiction of the bankruptcy court overlaps and may contradict the jurisdiction of the court appointing the receiver. The fiduciary duties of the trustee run to creditors and not directly to the court, whereas the receiver's duties run directly to the appointing court. American law does not like situations where two courts could come into conflict. The Bankruptcy Code embodies the presumption that the receiver (and thus the appointing court) must, absent extraordinary circumstances, cede the assets in its control to the jurisdiction of the bankruptcy court.

[37] *See* CLARK, *supra* note 35, § 135.3, at 208–09 ("Most states have also passed statutes providing for the appointment of a receiver of corporations and in supplementary proceedings, in proceedings in aid and other proceedings and by various courts.").

[38] *See* Paula Whitney Best, Note, *Corporate Receiverships and Chapter 11 Reorganizations*, 10 CARDOZO L. REV. 285, 292–93 (1988) (noting reasons corporate shareholders may seek court appointment of a receiver).

and protect the charitable institution for all stakeholders and the public interest.[39] Finally, regulators or law enforcement can seek the appointment of a receiver to take control of an institution that has violated the law, is party to criminal activity, or is under the dominion or control of individuals believed to be breaking the law.[40]

The receiver acts under the appointing court's orders.[41] The order appointing the receiver is the critical, organic document that sets out authority granted by the court to the receiver regarding the assets in the court's control. It is essentially the receiver's operating agreement. There are limited statutory, case and common law structures for receivers to draw against for guidance, and most are too general to be of much use. So it is not uncommon for the order appointing the receiver to be ten to fifty pages in length.[42] Even then, it can be challenging to understand the full scope of the receiver's authority.

One of the great benefits of receivership is the flexibility and discretion afforded the receiver. The absolute priority rule embedded in the Bankruptcy Code[43] does not apply in receiverships. The receiver has great latitude to formulate outcomes that best suit the situation, which can mean that special classes of creditors (e.g. students) can be moved up in priority.[44] In addition, there is a reasonable chance that the court could extend the receivership over entities related or ancillary to the operation of the target institution.

A great example can be found in *People v. Riverside University*.[45] There, the receiver was appointed at the request of the attorney general in an effort to enjoin the university and certain officers "from engaging in unlawful and fraudulent business practices and to secure compliance with terms of the charitable trust with which its assets were impressed."[46] By the end, the trial court faced reviewing and approving the actions of the receiver, which were being challenged by various defendants. The trial court was reluctant to exercise its equitable powers to the degree requested by the receiver, and the receiver appealed. The California Court of Appeals wrote:

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[39] *See e.g.*, Jane Heath, *Who's Minding the Nonprofit Store: Does Sarbanes-Oxley Have Anything to Offer Nonprofits?*, 38 U.S.F. L. REV. 781, 790 (2004) (examining instance in California where a receiver was appointed for a non-profit public benefit corporation and explaining "[e]very state has some form of oversight of nonprofit charitable organizations, typically through the state attorney general's office").

[40] *See* Megan Smith, *SEC Receivers and the Presumption of Innocence: The Problem with Parallel Proceedings in Securities Cases and the Ever Increasing Powers of the Receivers*, 11 HOUS. BUS. & TAX L.J. 203, 212–13 (2011) (considering role of an SEC receiver and reasons why one may be appointed, such as if "an alleged Ponzi scheme is discovered before it has collapsed," thereby allowing the receiver to "prevent further dissipation of . . . assets").

[41] *See e.g., id* at 212 (explaining "[t]he receiver is . . . an officer of the court, responsible only to the appointing judge").

[42] Many judges complain that lawyers drafting appointment orders tend to go overboard. But reality has shown us that a lot of planning and forethought is required for the receiver to be able to carry out the court's orders efficiently and effectively, without constantly returning for further instructions or clarifications.

[43] *See* 11 U.S.C. § 1129(b)(2)(B) (2012) (requiring, under chapter 11 plan of reorganization, dissenting class of unsecured creditors must be paid in full before holders of any junior claims or interests receives or retains any property on account of such junior claim or interest).

[44] This is part of the reason that some regulatory agencies, such as the SEC and state securities commissions, prefer receiverships over bankruptcy proceedings. The appointing court has the power and right to arrange and approve outcomes that are the most equitable under the circumstances, and are not necessarily bound by distribution hierarchies that do not fit the facts.

[45] 35 Cal. App. 3d 572 (Ct. App. 1973).

[46] *Id*. at 576.

> This was not an ordinary receivership ancillary to proceedings for the dissolution or liquidation of a private corporation or a receivership in aid of execution on a judgment. The present action was brought by the Attorney General in exercising his historical right and duty, recognized by statute, to supervise and enforce charitable trusts and to maintain such actions as may be appropriate to protect the public interest. The asset of the university was impressed with an educational trust and the public had a right to its continued use for the purpose for which it was dedicated. In an ordinary receivership over private business concerns, a receiver, in the absence of specific authority, has only limited powers and in doubtful or important matters must apply to the court for instruction and advice. However, when a receiver is appointed to take possession of and operate a quasi-public corporation obligated to render continued service to the public (such as a public utility), he may in the first instance be vested with broad authority to "do anything the corporation might have done to make the most out of the assets in his hands."'[47]

The Court of Appeals concluded that the receiver had the authority to sell assets to pay operating expenses, the trial court's subsequent confirmation of those sales ratified the acts of the receiver, and the complaints of the objectors were groundless.[48]

An equity receiver has or can have broad powers regarding the assets placed into his or her hands. This is true as we return to look at issues that cause such consternation for higher education institutions under the Bankruptcy Code. First, the appointment of a receiver for a higher education institution does not appear to *automatically* terminate its eligibility under applicable Education Department and federal student aid program regulations.[49] Second, accreditation remains intact and a part of the institution, absent further action by accrediting authorities.[50] It is important to note that neither the institution nor the receiver is protected by the receivership analog to the automatic stay (there is no such thing), but the subject is open for discussion (in the form of temporary injunctive relief). Finally, the purchaser of a higher education institution in receivership may qualify for waiting period waivers to ensure that operations continue uninterrupted.

It would be unwise for the receiver of a higher education institution to try to force the ED to do anything, but the receiver appears to have the latitude opportunity to navigate the institution and all of its stakeholders to safe ground.

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[47] *Id*. at 580 (internal citations omitted).

[48] *See id.* at 582–83.

[49] *See* 34 C.F.R. § 600.7(a) (2013) (setting forth conditions of institutional eligibility under the Higher Education Act).

[50] Seeking some form of acquiescence from the proper authorities to the change in operating control would be important.

CONCLUSION

There are many higher education institutions who will face distress in the coming years. The economic and strategic red flags cannot be missed. We also know that Congress and the courts have made it clear that these institutions will not have the protections of the Bankruptcy Code, except under the most dire circumstances.

Hopes of restructuring or redistributing the assets of these institutions in an effective manner will require governing boards to act early and decisively if they wish to retain any sense of control of the restructuring process. The opportunity to bring in a CRO can be fleeting, particularly if the institution has lived in denial and lost credibility. It will interesting to see if City College of San Francisco acted soon enough, or whether its CRO will ultimately be replaced with a monitor or receiver. The use of monitors is likely to grow. It is an effective tool for regulators to ensure program compliance and force changes needed to protect students and the underlying FSA programs.

Receivership is not a perfect alternative to bankruptcy, but it is flexible and robust enough to ensure that a troubled institution, and all of its constituent parts, can be delivered into safe hands without taking excessive risks with key operating assets. There have been few receiverships of higher education institutions, but is likely to change in the coming years. Finally, there is an ultimate option to seek protection under the Bankruptcy Code, with all of the consequences that flow from that decision.