

**Baker Donelson's  
Financial Institution Advocacy Group  
Webinar Series:**

**Receivership Powers and Remedies Across the  
Southeast**

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# Introduction – Receivership Basics

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## Strategic Goals:

- Immediate control of collateral
- Alternative to foreclosure
- Fills “gap period” in advance of foreclosure
- Environmentally sensitive property
- Stopping “rogue” borrowers and property managers

Different than regulatory receiverships (e.g., FDIC, insurance departments) but with similar purposes and powers

## Introduction – Receivership Basics (continued)

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### Most common types of collateral/loan arrangements:

- Hotel/hospitality properties
- Multi-family properties
- Standing businesses
- Franchises
- Single-family rental groups
- Active farming operations

# Basic Legal Principles

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- Purposes of a Receivership

“[T]he appointment of a receiver pending a suit for foreclosure, rests upon the general principle that the appointment is necessary for the preservation of the property and its appropriation to pay the mortgage....”

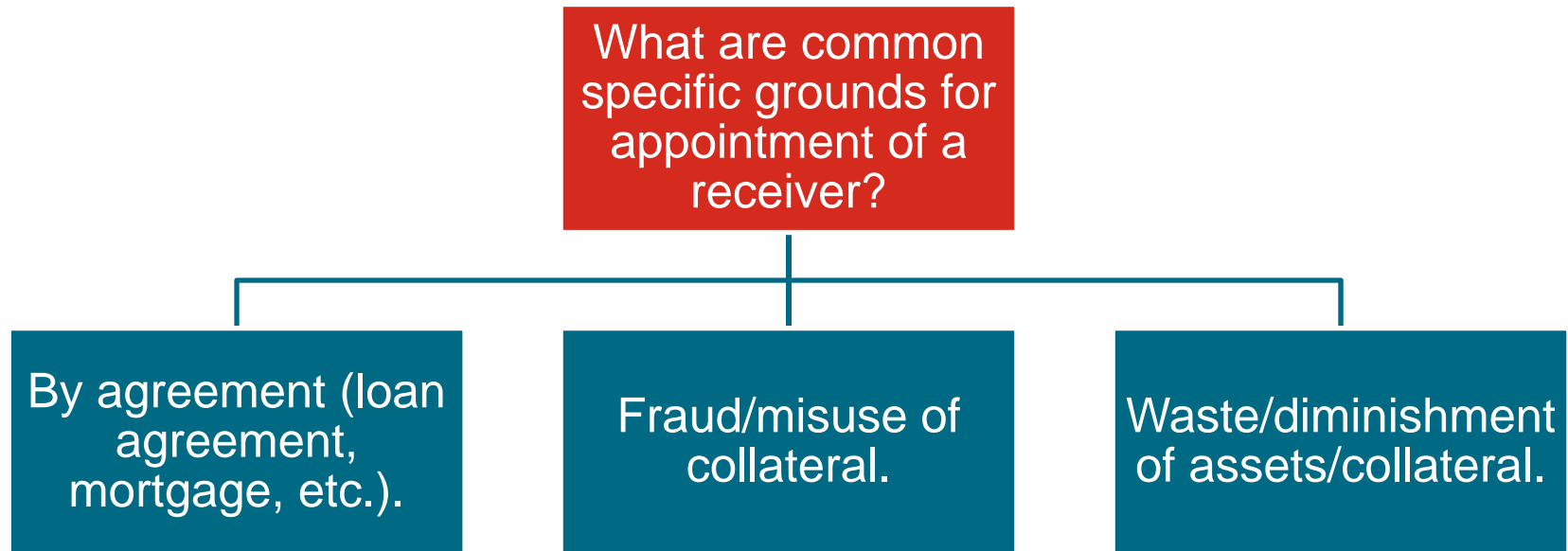
Meyer v. Thomas, 131 Ala. 111, 116, 30 So. 89, 90 (1901)

“[I]dentifying, marshalling, receiving, and liquidating” assets in furtherance of court order, judgment or loan agreement.

Menchise v. Akerman Senterfitt, 532 F.3d 1146, 1148 (11th Cir. 2008)

# Basic Legal Principles

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# Receiverships

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How is a receiver appointed?

- By court order
- After filing of complaint and, usually, a hearing

Who selects the receiver?

- Court appoints the receiver
- The party seeking appointment of a receiver should have proposed receiver in mind before initiating the process

# Receivership Orders

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## Authority invested in receiver.

- A receiver only has the authority or power as conferred on the receiver by statute or order of the court.
- A good receiver order should give the Receiver:
  - Discretion.
  - Power to delegate.
  - Full power to manage and control property.
  - Power to sell.

# Receiver Orders

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## Receiver orders (cont'd).

- Accounting requirements.
- Compensation – should be specific and set forth in terms of the order.



# Alabama

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Alabama law provides for the appointment of a receiver to safeguard property.

The appointment of a receiver under Alabama law is specifically governed by Ala. Code § 6-6-620, *et seq.*, customary practice, and the rules promulgated by the Supreme Court of Alabama. See Rule 66, Ala. R. Civ. P.

Alabama Code § 6-6-620 provides that "[r]eceptors may be appointed by the circuit court judge . . . upon application in writing." *Wood v. Phillips*, 823 So. 2d 648 (Ala. 2002).

## Alabama (continued)

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The appointment of a receiver is an "extraordinary remedy;" a receiver may be appointed when: (1) "there is a clear legal right to be protected;" (2) "no other adequate remedy" exists; and (3) there is "a showing that the complainants will otherwise sustain irreparable damage." *Id.* at 652 (citing *Carter v. State ex ret. Bullock County*, 393 So. 2d 1368, 1371 (Ala. 1981)).

## Alabama (continued)

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It is universally recognized that the power of appointment of a receiver is a delicate one, to be exercised with great caution and to be resorted to only in extreme cases, where it appears complainants will sustain irreparable loss.

Lost Creek Coal & Mineral Land Co. v. Scheuer, 222 Ala. 400, 01, 132 So. 615, 616 (1931)

Where, as here, the receivership is rested upon a preservation of the estate, there must be made to appear “imminent danger to the property, the subject of the suit.”

Lost Creek Coal, 132 So. at 615

## Alabama (continued)

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Application for appointment of a receiver is made to the circuit judge, and notice must be given to the opposing party.

Receiver must post bond in amount set by circuit court.

Alabama Supreme Court has held that a receiver has the power to sell property free and clear of liens and encumbrances prior to the resolution of litigation regarding the validity and priority of liens, when such sale is necessary to protect the interests of all parties. Darley v. Alabama Public Utilities Co., 183 So. 2d 447 (Ala. 1938)

# Mississippi

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Mississippi law vests its Chancery courts with discretionary authority to appoint receivers for the purpose of "protecting the rights of all the parties interested in the controversy and the subject matter . . . ." Clark v. Fleming, 94 So. 458, 460 (Miss. Sup. Ct. 1923); Miss. Code Ann. §11-5-151.

A receivership, however, "can never be the primary object of a suit; it must be ancillary or not at all", i.e. the request for appointment of a receiver "must show a cause of action . . . to which cause of action the receiver is a necessary auxiliary or aid." Engleburg v. Tonkel, 106 So. 447, 448 (Miss. Sup. Ct. 1925).

## Mississippi (continued)

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To justify the appointment of a receiver, the party seeking the appointment must show both:

That it has a clear right to the property or that it has some lien upon the property, or that the property constitutes a special fund to which it has a right to resort for the satisfaction of its claim, and

That the possession of the property by the defendant was obtained by fraud, or that the property itself (or the income arising from the property) is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant. *Clark*, 94 So. at 460.

## Mississippi (continued)

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Mississippi law requires that at least five days notice of a request for appointment of receiver be given to the party opposite, "unless it shall appear that an immediate appointment is necessary or good cause can be shown for not giving notice." Miss. Code. Ann. §11-5-153.

Under Mississippi law receivers are required to post a bond as security that the receiver "will in all things faithfully discharge the duties of his office as receiver . . . ." Miss. Code. Ann. §11-5-159. The amount of the receiver's bond is left to the discretion of the Chancery court.

## Mississippi (continued)

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Mississippi law permits the Chancery court to authorize the receiver to sell, lease or otherwise dispose of receivership property (Miss. Code. Ann. §11-5-117), but the receiver does not have any inherent authority to sell or otherwise act outside the authority granted in the court's order appointing the receiver.

The receiver's compensation is set by the Chancery court, with the receiver having a lien upon the receivership assets as a source of payment of the receiver's fees and expenses. Miss. Code Ann. §11-5-167.



# Georgia

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Georgia law also provides for the appointment of a receiver by the Superior Court when any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected or when there is a fund or property having no one to manage it. Ga. Code Ann. § 9-8-1 (2009).

# Georgia

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The appointment of a receiver is only appropriate in "clear and urgent cases" and should be "prudently and cautiously exercised." Ga. Code Ann. § 9-8-4.

In deciding whether to appoint a receiver, courts consider whether "a receivership is necessary for the preservation of the subject matter of the suit or for the protection of the interests of the parties therein pending the litigation." *Warner v. Warner*, 228 S.E.2d 848 (Ga. 1976).

# Tennessee

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Tennessee courts are vested with power to appoint receivers "for the safekeeping, collection, management and disposition of property in litigation in such court, whenever necessary to the ends of substantial justice." Tenn. Code Ann. § 29-1-103.

Receiverships are "actions in equity" which look to the "discretion of the Court." *Tenn. Pub. Co. v. Carpenter*, 100 F.2d 728, 732 (6th Cir. 1938), *cert. denied*, 306 U.S. 659 (1939).

Tennessee courts have traditionally appointed receivers "to curtail waste of property in order to protect the rights of secured parties." *Gwynne v. Memphis Appeal Avalanche*, 30 S.W. 23 (Tenn. 1894).

## Tennessee (continued)

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A court should appoint a receiver "where there is danger of property upon which the petitioner has a lien being misused or some injury done to it." *Pugh v. Burton*, 166 S.W.2d 624, 626 (Tenn. Ct. App. 1942). In Tennessee, a receiver may be appointed in equity "when necessary for the purpose of preserving the property in controversy, pending the litigation, for the benefit of the successful party." *In re Armstrong Glass Co, Inc.*, 502 F.2d 159, 163 (6th Cir. 1974) (citing *Johnston v. Hanner*, 70 Tenn. 8, 11 (Tenn. 1878)).

Application for appointment of a receiver is made to the chancery court, and notice must be given to the opposing party.

## Tennessee (continued)

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### Other requirements:

- Cannot be stand-alone motion / must seek other remedy through complaint.
- Complaint must be Verified
- Attach FIAT to Complaint (to be executed by Chancellor immediately following filing of Complaint).
- Prepare double writ which clerk will issue once FIAT is executed by the chancellor.
- Prepare Certification setting forth notice given to defendants in accordance with Tennessee Rules of Civil Procedure 65.03.

# Florida

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Receivership in Florida is determined by Florida common law instead of by statute. For real property, there is no statute governing receiverships.

It is more difficult to obtain as receiver in Florida than most other states, but it is fairly easy to get a rents sequestration order. There is a presumption against depriving an owner of possession of its property.

The factors that are usually heavily considered by courts – (1) the right for appointment of a receiver under the loan documents, and (2) the existence of a default – are not as determinative in Florida cases. Those are prerequisites before the court will consider other factors (waste, use of rents, etc.).

## Florida (continued)

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There is a large degree of judicial discretion in Florida receiverships and the focus of the Court is primarily on whether the appointment will prevent the subject property from being wasted or subject to significant risk of loss.

Another important factor is whether the borrower is collecting rents and failing to remit them to the lender, either as a result of written demand for rents under F.S. s697.07 or an order directing the sequestration rents.

If a borrower can prove there is equity in the property, it will be almost impossible to get a receiver appointed. This is the borrower's burden, however.

The selection of the actual Receiver is also subject to the Court's discretion. The receiver must be an individual, but is permitted to hire his/her management company.

## Florida (continued)

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Timing of appointment is determined by the Court's schedule – an expedited hearing within 24 to 48 hours can be requested for emergencies such as abandonment of property and immediate danger to property or public, but it will depend on the county and the judge.

Receivership sales are possible but rare – the process would be specified in the Receivership order (there is no statutory provision).

The real problem is that most title companies in Florida will not insure a receiver's sale unless the borrower joins in the deed.

Receiver Bond is required and amount is set by the Court, and is typically equal the maximum amount of revenue the receiver will have in his/her possession at any given time.



## Florida (continued)

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**Florida conclusion:** appointment of a receiver is difficult but possible under the right set of facts, but the “rents order” remedy is easily obtained if loan documents have an assignment of rents provision.

# Louisiana

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In its ever eager way to distinguish itself from the crowd, Louisiana law does not provide for the appointment of receivers.

Instead, Louisiana uses keepers appointed and defined by La. RS 9:5136 et seq.

To the seizing creditor may appear the same, but there are some important distinctions.

The role of keeper is defined by statute:

- Keeper can't sell property
- Keeper shall perform duties as a prudent administrator and may operate property in the ordinary course of business

# Louisiana

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Keeper can be and should be named in security documents.

Court can appoint keeper if sheriff can't or won't administer the property or if seizing creditor asks for a keeper.

# Louisiana

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Revenues and other amounts received shall be applied to keeper's costs.

Compensation of keeper is not recoverable unless provided for in the security documents or the court appoints because the sheriff failed, refused or declined to operate property.

# Federal Receiver Law

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A receiver is a “neutral court officer appointed by the court to take control, custody, or management of property that is involved in or is likely to become involved in litigation for the purpose of undertaking any . . . appropriate action.” *Sterling v. Stewart*, 158 F.3d 1199, 1201 n.2 (11th Cir. 1998) (quoting Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice & Procedure*, § 2981, at 5 (1973)).

The appointment of a receiver is “an extraordinary remedy that should be employed with the utmost caution and granted only in cases of clear necessity to protect plaintiff’s interests in the property.” *Solis v. Matheson*, 563, F. 3d 425, 437 (9th Cir. 2009)

## Federal Receiver Law - continued

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A federal district court has the power in equity to appoint a receiver. Fed. R. Civ. P. 66; *Nat'l P'ship Inv. Corp. v. Nat'l Hous. Dev. Corp.*, 153 F.3d 1289 (11th Cir. 1998).

Appointment of a receiver is committed to the sound discretion of the district court. See *Santibanez v. Wier McMagon & Co.*, 105 F.3d 234, 241 (5th Cir. 1997)

Appointment of a receiver in a diversity case is a procedural matter governed by federal law and federal equitable principals. *Nat'l P'ship Inv. Corp.*, 153 F.3d at 1291-92.

## Federal Receiver Law - continued

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Pursuant to Fed. R. Civ. P. 66, anyone demonstrating an interest in the property or a relationship to the owner or party in control of the property may seek the appointment of a receiver. *Santibanez*, 105 F.3d at 241.

“Creditors with a security interest in real property have a well-established interest in the property sufficient to support the appointment of a receiver.” *Brill & Harrington Investments v. Vernon Sav. & Loan Ass’n*, 787 F.Supp. 250, 253 (D.D.C. 1992); *Williams v. Southern Cotton Oil Co.*, 45 F.2d 387, 388 (5th Cir. 1930); see also *View Crest Garden Apartments v. United States*, 281 F.2d 844 (9th Cir. 1960)

## Federal Receiver Law - continued

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Differences from state law receiverships

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graph TD; A[Differences from state law receiverships] --- B[Sales governed by specific procedures set forth in 28 U.S.C. Sections 2001-2002.]; A --- C[Federal receivers have explicit control over property located in other states. 28 U.S.C. Section 754.]
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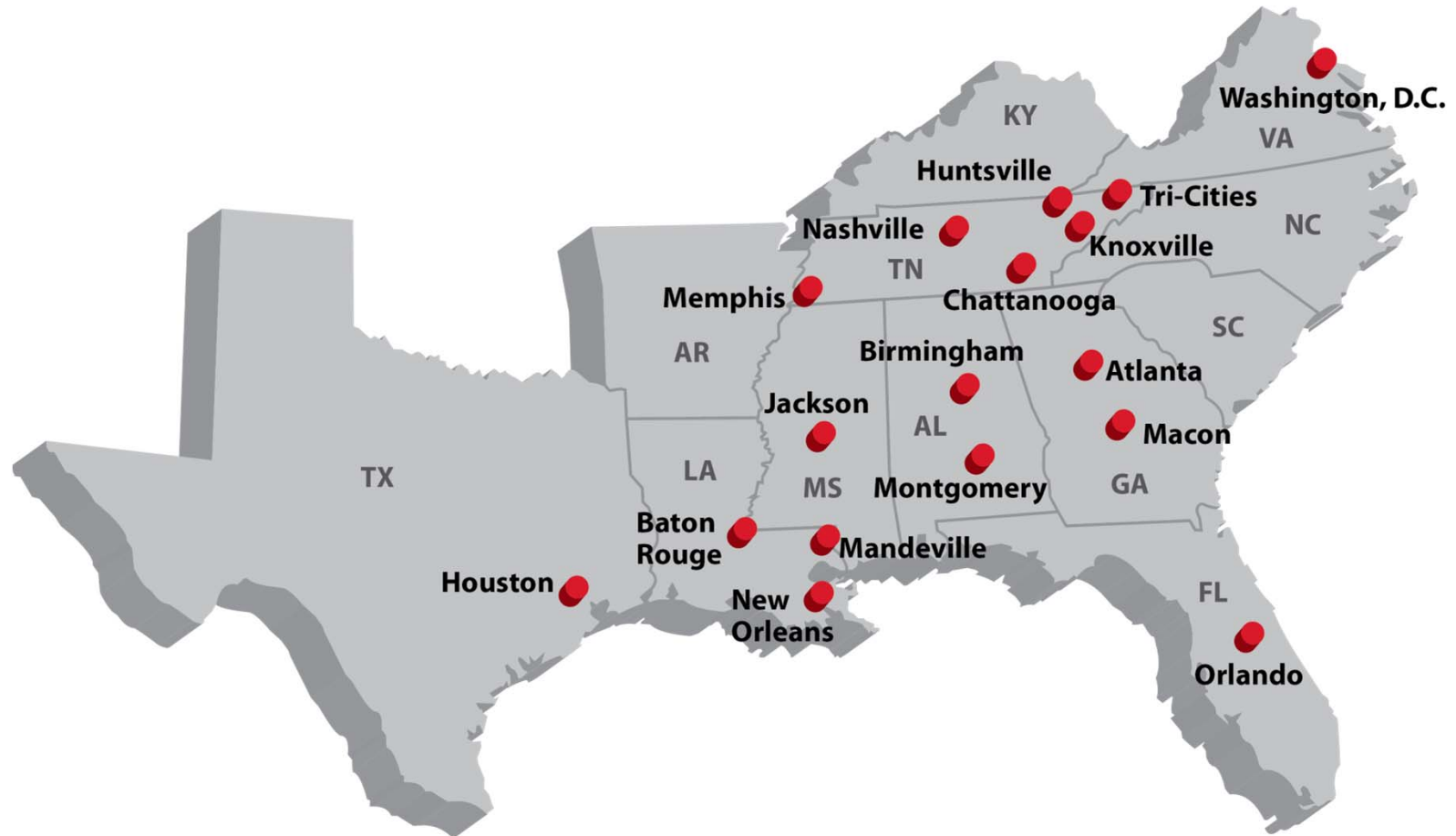


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**QUESTIONS?**

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Matters in 40+ states

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