

The
HOSPITALITY LAW
CONFERENCE

HOU — TEX

Trends in Hotel Receiverships

Annual Hospitality Law Conference: Houston, produced by HospitalityLawyer.com®

Alissa M. Nann, Of Counsel

Foley & Lardner LLP

APRIL 5-6, 2022



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State of Play (cont'd.)

Bankruptcies in the hotel industry haven't been as prevalent as predicted at the beginning of the pandemic. Instead, there has been an uptick in receiverships, which are faster, cheaper and more flexible.

Receivership can:

- Be a tool for a lender to gain control of the property pending foreclosure, put in new management (if needed), address performance issues, and possibly sell through a court fiduciary.
- put pressure on a borrower to find new financing/come up with financial proposal to address delinquencies.
- We are seeing this play out with very short receiverships – quick sale or dismissal, or borrower refinancing at last minute.

Advantages of Receivership over Bankruptcy

Advantages of a receivership versus a bankruptcy are control, timing, and cost.

Receivership:

- Loan documents provide for a Receiver after default.
- Courts will enforce the loan documents and appoint the Receiver if a default exists.
- Borrower typically consents to the Receiver, unless it contests the default.
- Lender has a lot of influence in the selection of the Receiver.
 - However, a court may not select the lender's choice for receiver.
 - Certain franchisors require pre-approval of a receiver (and management company).

Advantages of Receivership over Bankruptcy (cont'd.)

Receivership (cont'd.)

- If the parties negotiate a consensual receivership order in advance, some courts don't require a hearing (varies from court to court).
- Receivership requires fewer hearings and fewer motions - costs are significantly less than a bankruptcy.
- Receivers are entitled to “quasi-judicial immunity.” In 2021, the Third Circuit upheld a decision finding that, just as judges cannot be held liable for their decisions, court-appointed receivers deserve immunity “when they act with the authority of the court.” The Supreme Court recently denied cert to hear an appeal of that decision, which now stands as good law. *Lan Tu Trinh v. David Fineman*, case number 20-1727, in the Supreme Court of the United States.

Advantages of Receivership over Bankruptcy (cont'd.)

Bankruptcy:

- A borrower can file a voluntary bankruptcy petition to stay a foreclosure proceeding; or
- Lender can file an involuntary proceeding against a borrower, if they meet certain criteria required by the Bankruptcy Code, e.g., may need other creditors to join to file.
- Bankruptcy cases generally require more court hearings, and require borrowers to disclose a lot of information, which can be timely and expensive to prepare, and require additional professionals, which up the cost.
- In a bankruptcy case, there may be other creditors or a creditor committee looking for ways to monetize the debtor's assets to pay creditors.

Advantages of Receivership over Bankruptcy (cont'd.)

Bankruptcy (cont'd.):

- In a bankruptcy sale process, lender has limited control. Debtor has to accept “highest and best” offer, which doesn’t necessarily mean the most money.
- If the case is converted to a chapter 7 (or a chapter 11 trustee is appointed), a third party is appointed by the court to control/liquidate assets of the debtor, and is statutorily entitled to 3% of sale proceeds of debtor assets.

Lender Considerations

Lenders need to be mindful of when financing options are available to borrowers – a borrower may be more likely to file a bankruptcy to stay a foreclosure or receivership.

In a bankruptcy, a borrower can “cram down” a plan sale on a lender. Lenders need to decide if they’re willing to provide new money to a borrower to avoid bankruptcy and have some control over the process.

If an owner can recapitalize, that’s a benefit to both parties, and something that the lender can’t get through foreclosure of the real estate.

Need for Skilled Receivers

Hotels are different from other forms of commercial real estate, with unique characteristics:

- 24/7 operation
- Rents reset daily
- Can be subject to franchise and management agreements, subordination and non-disturbance agreements.
- Can be subject to union collective bargaining agreements

If the receiver doesn't understand these unique characteristics of the hotel, s/he will have difficulty facing them.

Need for Skilled Receivers (cont'd.)

- Review state and local requirements.
- Receiver should have specific skills and experience related to the hospitality industry.
- In most states, the bar is relatively low - a receiver does not need a particular degree or qualification. Cannot be conflicted with respect to the matter at hand.
- Some states require registration and training, but most do not.

Unions/CBA Issues

For certain union hotels that closed due to Covid, it can be cheaper to remain closed.

Active vs. Closed

- Does the hotel employ bargaining unit employees?
 - If not, might not be obligation to recognize union.
 - If not, when anticipated operations will resume?
- Size of workforce.
 - Can hotel operate under CBA with reduced staff?
- Is CBA impediment to profitability?
 - Determine whether hotel can afford union wages and benefits.
 - If not, consider seeking concessions to remain open.

Questions?



WE APPRECIATE YOUR
TIME AND ATTENTION!



Thank you!

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Thank you!