Franchisees in Federal Receivership: Strategic Considerations for Franchisors

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Most franchisors are familiar with the detailed federal statutory scheme governing a franchisee's filing for bankruptcy protection. As a result, franchisors and their counsel can usually develop an informed strategy to respond to a franchisee's anticipated or actual bankruptcy filing. Less understood are the implications for the franchisor of an action under federal law filed by a franchisee's primary lender for the appointment of a receiver to manage and/or sell the collateral pledged on its loan. The rules governing such a proceeding are murkier than those in a bankruptcy, but the consequences for a brand's market presence and the franchisor's continued ability to control locations that have become identified with its mark can be equally critical. A basic understanding of those rules is, therefore, also important to franchisors.

The issue is likely to arise, for example, when a large, multiunit franchisee located in several states defaults on the financing agreement that yielded the proceeds used to purchase the franchised units. The land, building, and equipment of all of the units may have been pledged as collateral for the loan.[1] To protect its interest in all of the collateral in a single proceeding, the bank sues the franchisee in federal court for the amount owed and for appointment of a receiver to take custody of the franchisee's assets. This article discusses the impact of franchise receiverships on franchisors and what they can do to protect their interests.

Appointment of the Receiver

The purpose of an equity receivership is to preserve and protect property whose disposition is sought to satisfy the substantive rights at issue in litigation.[2] Thus, the appointment of a receiver, although denominated an "extraordinary remedy," is generally within a court's discretion where the disposition of property is at issue and some potential for loss of or harm to the property during the proceeding is demonstrated.

Although no precise formula governs the decision to grant the remedy,[3] courts have identified certain factors that are generally considered in determining whether to appoint a receiver:

(1) Probability of fraudulent conduct by the defendant that would frustrate the valid claim of the party seeking appointment
(2) Imminent danger that the property at issue will be lost, concealed, squandered, or diminished in value
(3) Inadequacy of available legal remedies
(4) Unavailability of a less drastic equitable remedy
(5) Balance of hardships favoring appointment of a receiver
(6) Likelihood that appointing the receiver will do more good than harm[4]

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The presence of contractual language providing that the lender "shall be entitled" to the appointment of a receiver, although relevant to the court's determination, is not dispositive. Because the remedy is equitable in nature, the court retains discretion to determine whether it is warranted under the circumstances.[5]

The appointment of a receiver brings the subject property within the custody, control, and exclusive jurisdiction of the appointing court.[6] Although "the care of the property in dispute" officially rests with the court itself, of which the receiver is "but the creature,"[7] the order of appointment usually grants the receiver broad authority over management of the property.[8] Federal statutory law facilitates exercise of that authority by enabling federal receivers to control property outside the territorial jurisdiction of the receivership court,[9] although they remain accountable to the court that appointed them.

Management by the Receiver

Federal law expressly requires receivers appointed by a federal court to manage and operate the property placed in their possession "according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."[10] This provision, however, has been limited to requiring receivers to comply with tax, licensing, or other state regulatory laws.[11] Although its terms would permit a broader construction, the statute has not been construed to require the receiver to perform preexisting contracts involving the subject property. Moreover, the prevailing common law rule is to the contrary: a receiver generally is not bound by the executory contracts of an entity under his control unless he affirmatively adopts them.[12]

Suing the Receiver

Another subsection of the same statute in the U.S. Code governs suits against receivers. It provides that receivers "may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property . . . subject to the general equity power of such court so far as the same may be necessary to the ends of justice."[13] Read literally, this language appears to permit a plaintiff with virtually any claim arising out of a receiver's operation of a business to file suit in an otherwise appropriate forum without first obtaining leave of the receivership court.[14]

In practice, however, litigants who for strategic, logistical, or other reasons contemplate suing federal receivers outside the receivership court face obstacles that are not apparent on the face of the statute. First, courts have held that the statute does not authorize suit on claims that arise from the receiver's activities in "administering or liquidating" the receivership

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estate, as distinguished from his "carrying on business."[15] Second, suits on claims that are deemed to implicate the "administration or liquidation process" by seeking possession or control of receivership property have been held not to be authorized by the statute, even if they arise from the receiver's "acts or transactions in carrying on business."[16] These decisions are predicated on the assumption that § 959(a) (and its predecessor) "was not intended to embrace within its terms suits which seek to establish . . . rights to property in . . . custody [of the receiver]" because such property is within the exclusive jurisdiction of the receivership court.[17]

Although the cases do not clearly define the scope of claims that impermissibly seek to establish rights in receivership property, it is clear that the prohibition extends beyond pure claims of ownership or possessory rights. Claims that involve the management of property have been held to be unauthorized by the statute,[18] as have claims for injunctive relief against the receiver.[19] Some courts have suggested that claims seeking only monetary damages are permissible,[20] but even that distinction has been questioned.[21]

When litigation against a receiver is at issue, it is also important to recognize that the receivership court has "inherent power" to stay or enjoin suits in other courts, even those that are properly filed under § 959(a), and that such orders are effective against nonparties to the receivership proceeding.[22] This inherent power derives from the court's authority to protect its jurisdiction over the property in its custody and to accomplish the purposes of the receivership,[23] and this power is often exercised by issuing a blanket stay of all proceedings against the entities or properties in receivership in conjunction with the order appointing the receiver.[24] The second sentence of § 959(a) authorizes the appointing court, following the commencement of the receivership, to invoke its "general equity power" to enjoin a particular lawsuit, including one filed under the authority of the first sentence.[25]

The Need to Act Promptly

The impending appointment of a receiver for a franchisee or a significant portion of its assets requires a prompt response from the franchisor.[26] Otherwise, the receiver may, depending on the terms of his appointment, acquire control over the franchised business without having any corresponding obligation to abide by the terms of the franchise agreement. Most franchisors have two options for preventing such an action: (1) terminate the franchise agreement and take immediate measures to enforce the termination, or (2) negotiate an interim agreement with the receiver that allows the receiver to continue to operate the business under the franchisor's marks and system for a designated period.

The Franchisor's Termination Rights

Unlike the situation in bankruptcy, where the governing law overrides contractual automatic termination provisions, no statute prohibits automatic termination of a franchise agreement upon appointment of a receiver for the franchisee or its assets. Thus, contractual provisions for termination if a receiver is appointed for a franchisee or its assets are enforceable.[27] Most franchise

Practice Pointer

Dealing With Receivers

#1 Move Fast
You may be able to avoid the appointment of a receiver in the first place if you can demonstrate to the court that a receivership would threaten your goodwill in the affected area.

#2 Find Out What Is Happening
Learn about the party seeking the appointment of the receiver, the substance of its claims against the franchisee, and its goals for the receivership.

#3 Make Your Concerns Known
Ensure that the receiver, the party who moved for his appointment, and any other significant participants are aware of your concerns. Appear early and often during any court proceedings.

#4 Set Your Own Goals
Evaluate the market(s) served by the franchisee at issue and rank your priorities if more than one is involved. Locations that are not significant sources of revenue or unimportant from a market penetration perspective may be good candidates for termination.

#5 Pick Your Battles
Don't wage a costly battle for termination rights other than basic trademark deidentification unless the locations are valuable to the franchise system.

#6 Consider Negotiating
Consider negotiating with the receiver for continued operation of a high-volume or strategically significant franchise location.

#7 Consider a Contract
If #6 is successful, consider a temporary franchise agreement under which the receiver assumes the obligations of the former franchisee.

#8: Cut Your Losses
Do a cost-benefit analysis and consider buying the franchise assets, even if a buyout means paying a higher price than specified in the original franchise agreement. A buyout will avoid the costs and risks of litigating termination and the danger of losing the property at a later auction.

#9 Get the Court's Seal of Approval
Obtain court approval of any agreement with the receiver, even if not required. The court's imprimatur could provide a significant advantage in the event of any subsequent challenge to the agreement's enforcement.

#10 Keep Your Eyes Open
Monitor the receivership proceeding to ensure that the receiver does not breach or threaten to breach contractual commitments.

agreements contain such provisions, providing franchisors with a contractual basis on which to extricate themselves from their relationship with a franchisee that has been put into receivership.[28]

The formerly licensed mark is not an asset of a franchisee whose license has been properly revoked,[29] and where the franchise agreement has been terminated, neither the receiver nor any subsequent purchaser of receivership assets has any right to use that mark.[30] Thus, a franchisor faced with an infringing use of its mark by a receiver has a right to injunctive relief and should seek that relief promptly. Delay or acquiescence in the unauthorized use of a mark by a receiver can erode a franchisor's rights in the receivership context just as in any other.[31]

Enforcement and the Receivership Proceeding

The existence of the receivership may, however, present procedural challenges to the franchisor in enforcement of its termination rights, including its basic right to enjoin trademark infringement. First, the franchisor will likely have to seek enforcement of those rights from the receivership court rather than in a forum of its choice. This is likely to be true even if the franchise agreement includes a forum selection clause and even if the franchisor's claim for trademark infringement plainly arises "with respect to [the receiver's] acts . . . in carrying on business connected with" receivership property and thus would appear to be properly filed in a forum of the franchisor's choice pursuant to 28 U.S.C. § 959(a).

The reluctance of federal courts to permit any claim that arguably implicates the administration of the receivership estate to proceed outside of the receivership court gives rise to a substantial likelihood that such a suit would be dismissed upon motion of the receiver, notwithstanding the language of the statute.[32] A claim in which the franchisor seeks injunctive relief against the receiver would be particularly susceptible to that result.[33] Even if the franchisor found another court willing to accept jurisdiction, the receiver could persuade the appointing court to enjoin the franchisor's action.[34]

In short, an effort to obtain relief against a receiver outside the receivership court may provoke a futile battle. Thus, the best course for a franchisor may be to seek enforcement of its termination rights from the receivership court in the first instance.

The first step in that process is filing a motion for intervention of right in the receivership proceeding pursuant to Fed. R. Civ. P. 24(a). That provision requires that intervention be granted, upon timely application, to an applicant who "claims an interest relating to the property or transaction which is the subject of the action," where the applicant "is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."[35] In the absence of unusual circumstances, most cases where a franchisor seeks to enforce termination rights against a franchisee in receivership would appear to satisfy those requirements.[36]

Because timeliness is a requirement for intervention, the franchisor should file its motion promptly upon the occurrence of the events that give rise to its claim for judicial relief. Further, a franchisor whose motion is denied for any reason should pursue an expedited appeal.[37] Otherwise, it may find itself in a situation where the only available forum for relief on its claims has been foreclosed.

Enforcement of Post-Termination Obligations

Assuming the franchisor is allowed to intervene in the receivership proceeding, the next question is whether and to what extent the franchisor may obtain enforcement of its post-termination contractual rights beyond basic deidentification and the return of proprietary materials. Those rights generally include one or more of the following:

(1) Restriction of the franchisee's right to compete with the franchisor for some specified period following the termination
(2) Restriction of the franchisee's right to engage in competition-related activities, such as selling or leasing franchise assets to a competitor
(3) Requirement that the franchisee assign its leases,telephone numbers, and/or customer lists to the franchisor
(4) Provision for the franchisor to purchase the business premises and other assets under some contractually specified pricing mechanism

The few reported cases that have arisen in the context of federal franchisee receiverships have not involved the enforceability of such provisions. If the receivership encompasses the franchisee entity itself (rather than merely its assets), however, franchisors may find the abundance of bankruptcy case law on this issue to be helpful.[38] As noted above, common law authorizes a receiver to adopt or reject an executory contract of an entity under his protection. This authority may be analogized to the power granted to a trustee or debtor in possession under the Bankruptcy Code to assume or reject an executory contract.[39] The prevailing trend of bankruptcy courts has been to hold post-termination covenants against competition enforceable by franchisors, notwithstanding the debtor franchisee's rejection of the franchise agreement.[40] The rationale is that "[r]ejection does not cause a contract magically to vanish,"[41] but "the rights and obligations of the parties remain intact after a rejection,"[42] which is treated as a breach of the contract. Although the usual remedy for such a breach is to enable the injured party to seek damages in the bankruptcy proceeding, the Bankruptcy Code contains no language "which provides that a claim for damages is the only shred of effect from rejection of an executory contract."[43] A post-termination covenant against competition, whose "very purpose . . . is to govern the relationship between the parties *after* the demise of the underlying contract," therefore, is enforceable to the same extent it otherwise would be under applicable law.[44]

This rationale arguably should permit enforcement by a franchisor of a post-termination noncompetition covenant against a receiver who controls a franchisee corporation.[45] Although the effect of rejecting a contract in receivership is much less clearly defined than the effect in bankruptcy, there is no obvious basis on which a receiver's power to reject should be found broader than that of a bankruptcy debtor in possession.

In other words, a receiver can no more "cause a contract magically to vanish" by rejecting it than can a bankruptcy debtor. The franchisor could argue, as well, that once the franchise agreement has been terminated, "there is no contract for a [receiver] to reject."[46] Either way, the bankruptcy precedents provide at least colorable support to a franchisor that ventures into the uncharted territory of enforcing a post-termination noncompetition covenant against a federal receiver. Recent precedent suggests, moreover, that the rationale of the bankruptcy noncompetition cases could arguably extend to other post-termination obligations as well.[47]

The likelihood of succeeding in the enforcement of such provisions, of course, is another matter entirely, and one subject to productive assessment only in the context of the particular circumstances of a specific case. Nevertheless, certain practical considerations should be kept in mind, most notably, the fact that the driving force behind any receivership is the extraction of money from the available assets to satisfy the claims of one or more creditors. This means that a franchisor that enters the fray seeking to exercise a contractual purchase option is likely to be in a better practical position than one who seeks to enforce a contractual right to assignment. The latter type of provision, although enforceable as a matter of contract law in the context of a standard franchise termination,[48] will generally face considerable resistance from any party to a receivership proceeding who regards the objects of assignment as salable assets.

Strategic Considerations

Gain Knowledge and Become Known

Information and involvement are key to the protection of an interest in property that has been transferred to a receiver. A franchisor should learn as much as possible, as soon as possible, about the party who moved for the appointment of the receiver, the substance of its claims against the franchisee, and the goals it seeks to attain through the appointment.[49] The franchisor should also obtain information about the receiver himself and the identities and interests of any other parties likely to become involved in the proceeding. At the same time, the franchisor should make itself known to the receiver, to the party who moved for his appointment, and to any other significant participants. Most importantly, the franchisor should make itself and its interests known to the court by entering an appearance as early as possible in the proceedings and continuing that presence at ongoing status conferences and hearings.

A franchisor that becomes involved at a sufficiently early stage in the proceedings may be able to prevent the receivership entirely. As noted above, the determination of whether to appoint a receiver depends on equitable considerations, including the balance of hardships.[50] If the appointment threatens injury to an innocent party, that circumstance is relevant to the court's equitable calculus. Consequently, a franchisor that faces a specific risk of injury (e.g., the loss of goodwill in an affected market) from the appointment of a receiver for a franchisee or its assets may oppose the motion for appointment on that basis, either by moving to intervene or simply seeking to be heard as an interested party.

Achieve Goals Through Negotiation

Once the requisite information has been gathered, the franchisor should set its own goals for the outcome of the process. Usually this will involve an internal valuation of the market or markets served by the franchisee at issue and, in the event there are multiple markets, a ranking of priorities. Affected franchise locations that are not significant sources of revenue, or that are relatively unimportant from a market penetration perspective, may be good candidates for termination. Moreover, for such locations, there may be little incentive to wage a costly battle for termination rights other than basic trademark deidentification. Resources should be focused instead on locations that are valuable to the franchisor and the franchise system.

When a high-volume or strategically significant franchise location is involved in a receivership, negotiation with the receiver for continued operation on mutually acceptable terms may be desirable to maintain the value of the location for the benefit of the franchise system. In a situation where the franchised business is a profitable one, the receiver as well may perceive an incentive to negotiate because continuing the operation of the business would enable him to generate income for the receivership estate. Another incentive from the perspective of both parties would be the potential for the receiver to sell the location as an ongoing business to the franchisor or a successor franchisee approved by the franchisor.

Contract with the Receiver, if Appropriate

If negotiations are successful, the franchisor and receiver may agree to enter into a contract, in the nature of a temporary franchise agreement, whereby the franchisor would authorize the continued operation of the business under its marks and business method in exchange for the receiver's agreement to assume the obligations of the former franchisee. Ideally, the agreement would incorporate and make binding on the receiver the termination provisions of the former franchise agreement; thus, when the receiver's continued operation of the business comes to an end, the franchisor will have the same rights to acquire the business assets and the same protections against post-termination competition and related activities as it would have had against the original franchisee.

Of course, the real world is not always conducive to the most ideal outcome. In particular, a receiver may resist undertaking post-termination obligations that would restrict his sale of assets in the future. Other issues may also arise on which the franchisor and receiver will not agree. For example, a receiver whose custody encompasses the franchisee's assets but not the franchisee entity itself may refuse to accept responsibility for operating expenses, such as employee payroll and inventory, that accrued prior to the commencement of the receivership but which must be paid if the business is to continue operating.

In such cases, the franchisor may wish to consider other contractual solutions, including, where feasible, buying the franchise assets itself. This may be a desirable choice under a cost-benefit analysis, even though it would entail paying a higher price than that for which the franchisor would have been entitled to acquire the assets under the original franchise agreement, because it would avoid the costs and risks of litigating termination issues. In addition, a franchisor that is able to negotiate a purchase from the receiver at an early point in the proceeding and obtain the necessary approval of the sale from the court would avoid the prospect of competing with other bidders at a subsequent auction of the receivership assets.

Depending on the franchisor's needs and priorities, and the circumstances of the receivership, other middle-ground approaches could also be explored. These include obtaining the receiver's agreement to more limited termination protections than the franchisor would have been entitled to enforce under the original franchise agreement or to the franchisor's right to match the highest bid at any subsequent auction of the franchise assets.

Whatever agreement is ultimately reached, the franchisor should, as in any contractual context, assure that the terms of the agreement are committed to writing in the clearest possible language. Further, where the agreement entails continued operation of the franchised business by the receiver, it is imperative that it contain or incorporate by reference from the original franchise agreement all of the franchisor's standard rights and requirements regarding trademark use and quality controls.

Depending on the terms of the receiver's appointment order, it may be necessary to obtain court approval of an agreement with the receiver. Moreover, it is generally desirable to obtain court approval even when it is not required by the appointment order because the court's imprimatur on the agreement could prove a significant advantage to the franchisor in the event of any subsequent challenge to the agreement's enforcement.

Keep Watch

Finally, even when an interim franchise agreement with the receiver has been executed, the franchisor should continue to monitor the receivership proceeding as long as it retains an interest in the outcome of that proceeding. In the event that the receiver breaches or threatens to breach his contractual commitments, it will become necessary for the franchisor to seek intervention to enforce those commitments, just as it would have done to enforce its rights in the original franchise agreement.

Conclusion

The receivership of a franchisee poses unique challenges to a franchisor accustomed to relying on the protections of its contracts. Receivership proceedings can both undermine the effectiveness of those protections and narrow the franchisor's options for their enforcement. These difficulties, however, are not insurmountable. Through preparation and prompt decisive action, the franchisor can salvage the benefits of the affected relationship and move on with its positive agenda.

Endnotes

1. Franchise agreements ordinarily prohibit pledging of stock in the franchise as collateral.

2. Gordon v. Washington, 295 U.S. 30, 37 (1935); Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 497 (1923).

3. Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316 (8th Cir. 1993).

4. *Id.* at 316–17; Consol. Rail Corp. v. Fore River Ry. Co., 861 F.2d 322, 326–27 (1st Cir. 1988); *see also* Santibanez v. Wier McMahon & Co., 105 F.3d 234, 241–42 (5th Cir. 1997); *In re* McGaughey, 24 F.3d 904, 907 (7th Cir. 1994).

5. Citibank, N.A. v. Nyland Ltd., 839 F.2d 93, 97 (2d Cir. 1987); Fed. Home Loan Mortgage Corp. v. Jerwin Realty Assocs., No. CV-92-4626 (CPS), 1992 WL 390264, at *2 (E.D.N.Y. 1992).

6. Fed. Sav. & Loan Ins. Corp. v. PSL Realty Co., 630 F.2d 515, 521 (7th Cir. 1980); SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980).

7. Booth v. Clark, 58 U.S. 322, 331 (1854).

8. *See, e.g.*, SEC v. Capital Consultants, LLC, 397 F.3d 733, 747–48 (9th Cir. 2005); U.S. Commodity Futures Trading Comm'n v. Lake Dow Capital, LLC, No. 05-CV-2709, 2005 WL 3741510 (N.D. Ga. 2005).

9. Under 28 U.S.C. § 754, a duly appointed receiver in an action involving property located in different districts is "vested with complete jurisdiction and control of all such property with the right to take possession thereof" and retains such jurisdiction upon filing copies of the complaint and order of appointment in the district court for each district where the subject property is located. See also 28 U.S.C. § 1692 (providing that, where a receivership encompasses property in different districts, "process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts").

10. 28 U.S.C. § 959(b).

11. *See, e.g., In re* San Vicente Med. Partners Ltd., 962 F.2d 1402, 1408 n.5 (9th Cir. 1992); Borock v. City of New York, 268 F.2d 412, 415–16 (2d Cir. 1959); State of California v. Gillis, 69 F.2d 746, 748 (9th Cir. 1934), *aff'd*, 293 U.S. 62 (1934); United States v. Schroeder, 204 F. Supp. 199, 204 (S.D. Iowa 1962).

12. Citibank, N.A. v. Nyland Ltd., 839 F.2d 93, 98 (2d Cir. 1987); Hamilton Gas Co. v. Inland Gas Corp., 102 F.2d 131, 135 (6th Cir. 1939); N. Kan. City Bridge & R.R. Co. v. Leness, 82 F.2d 9, 12 (8th Cir. 1936); Gen. Fin. Corp. v. N.Y. State Rys. Sec. Trust Co., 54 F.2d 1008, 1009 (2d Cir. 1932).

13. 28 U.S.C. § 959(a). The statute also applies to "trustees" and "managers of any property, including debtors in possession." Thus, cases construing the statute in a bankruptcy context are likely to be applied as precedent in an action filed against a receiver, notwithstanding the clear differences between bankruptcy and federal equity receivership.

14. With respect to procedure in such an action in federal court, Fed. R. Civ. P. 66 provides, in pertinent part:

> The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

15. Muratore v. Darr, 375 F.3d 140, 145 (1st Cir. 2004) (suit by the owner of a bankruptcy debtor against a bankruptcy trustee based on nonfulfillment of his fiduciary responsibilities as trustee); *In re* DeLorean Motor Co., 991 F.2d 1236, 1241 (6th Cir. 1993) (suit against a bankruptcy trustee for malicious prosecution arising out of his unsuccessful suit for fraudulent conveyance); Austrian v. Williams, 216 F.2d 278, 285 (2d Cir. 1954) (trustees' suit against officers and directors of a debtor).

16. *See In re* Cinematronics, Inc., 11 B.R. 892, 897 (S.D. Cal. 1990) (suit for breach of contract and misappropriation of trade secrets by an alleged video game inventor seeking to enjoin its distribution by a trustee); Am. Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 10 F. Supp. 512, 518–19 (S.D.N.Y. 1935), *aff'd*, 76 F.2d 1002 (2d Cir. 1935) (city transit authority's suit for breach of contract based on a railroad receiver's proposed disaffirmance of its lease); *see also* Field v. Kan. City Refining Co., 9 F.2d 213, 216 (8th Cir. 1925) (property owner's suit to eject railroad receivers from property occupied by the railroad).

17. *Field*, 9 F.2d at 216; *see also Am. Brake Shoe*, 10 F. Supp. at 518 ("[T]o allow" suits "directly affecting the administration of the receivership res, or property rights therein . . . to be instituted without leave of the court which has the property in its custody would divest it of its exclusive jurisdiction thereover and lead but to conflict and confusion in administration. Such was not the legislative purpose.").

18. *Am. Brake Shoe*, 10 F. Supp. at 518; Dickinson v. Willis, 239 F. 171, 174 (S.D. Iowa 1916).

19. *See Dickinson*, 239 F. at 174; *see also In re Cinematronics*, 111 B.R. at 897.

20. *See In re* Cinematronics, Inc., 11 B.R. 892, 897 (S.D.Cal. 1990); *Dickinson*, 239 F. at 174.

21. Diners Club, Inc. v. Bumb, 421 F.2d 396, 400 (9th Cir. 1970) (noting that some suits, "even though only money damages are demanded, could conceivably so embarrass administration of the debtor corporation . . . as to make it proper that they be stayed").

22. United States v. Acorn Tech. Fund, 429 F.3d 438, 443 (3d Cir.

2005) ("The purposes of a receivership are varied, but the purpose of imposing a stay of litigation is clear. A receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant.").

23. SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980); *Diners Club*, 421 F.2d at 398.

24. *Acorn Tech. Fund*, 429 F.3d at 443; *Wencke*, 622 F.2d at 1363.

25. Such an injunction may be issued in order "to prevent interference with the orderly administration of the estate" if the appointing court determines that the other action will significantly burden that process. *Diners Club*, 421 F.2d at 400–01.

26. As noted below, the consequences of a receivership will vary depending on whether the receiver is given control of the franchisee entity itself or only of the assets of that entity.

27. *See, e.g.*, Golden City Rest., Inc. v. Pike, 246 F.2d 684, 685 (D.C. Cir. 1957) (ruling that a license agreement was validly terminated when the licensee was determined to be insolvent and a receiver was appointed).

28. Alternative grounds for termination are also likely to exist in many cases because a franchisee that has been forced into receivership by a creditor will frequently have defaulted on its financial obligations to the franchisor as well.

29. *Golden City Rest.*, 246 F.2d at 685; A.I.M. Percolating Corp. v. Ferrodine Chem. Corp., 124 S.E. 442, 446 (Va. 1924).

30. Ramada Inns, Inc. v. Apple, 482 F. Supp. 753 (D.S.C. 1980) (enjoining use of franchise mark by purchaser of receivership assets); Int'l Am. Co., Inc. v. La. State Employees Ret. Sys., 412 So. 2d 140 (La. Ct. App. 1982) (awarding damages for infringing use of mark by a purchaser).

31. In *American Dirigold Corp. v. Dirigold Metals Corp.*, 125 F.2d 446, 454–55 (6th Cir. 1942), a European trademark owner that granted an American corporation broad rights to the use of its mark was held to have waived its contractual right to revoke the license if the licensee was liquidated when it acquiesced in the use of the mark by the licensee's receiver and subsequently by the purchaser of its assets. Though the *Dirigold* case involved a grant of an "exclusive, unlimited and perpetual right to the use of the trademark," which would distinguish it from the trademark licenses found in most franchise agreements, it is obviously best for a franchisor to avoid any situation where the waiver holding in that case could be cited as precedent. *See also Ramada Inns, Inc.*, 482 F. Supp. at 758 (granting an injunction against infringement but denying damages to a franchisor that acquiesced in the use of its mark by the franchisee's receiver and the purchaser of its assets).

32. Because the issue is one of subject matter jurisdiction, a court might also dismiss such a suit sua sponte. It is also possible that such a suit would be precluded at the outset by a blanket stay of litigation issued by the receivership court.

33. *See* Hardee's Food Sys., Inc. v. Hoffman, No. 4:05cv2264 (TCM), Bus. Franchise Guide (CCH) ¶ 13, 263 (E.D.Mo. 2006). In *Hardee's*, the court dismissed a franchisor's suit to enforce, by preliminary injunction, the obligations of a receiver under a temporary license agreement in which the franchisor had authorized the receiver to continue operating the franchised business for the benefit of the receivership estate. Although a suit seeking compliance with the receiver's voluntarily assumed contractual obligations would seem to arise "with respect to" the receiver's "acts or transactions in carrying on business connected with" receivership property, the court nevertheless concluded that, inasmuch as the franchisor sought injunctive relief rather than damages, "the requested relief would interfere with the business of liquidating and administering the estate as ordered" by the receivership court and therefore was outside the scope of the authorization provided in § 959(a).

34. *See* Eller Indust., Inc. v. Indian Motorcycle Mfg., Inc., 929 F. Supp. 369 (D. Colo. 1995) (holding that another court's injunction purporting to enjoin trademark use by a receivership entity and impose a constructive trust on its assets was not binding on the receivership court or the receiver, and staying "all other foreign equitable actions").

35. FED. R. CIV. P. 24(a).

36. A motion for intervention of right under Rule 24(a) will generally be accompanied by an alternative request under subsection (b) of the rule, which authorizes the court to grant "permissive intervention" to a party when its "claim or defense and the main action have a question of law or fact in common." A motion for permissive intervention requires the court to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24(b).

37. The denial of a motion to intervene is generally held to be a final appealable order. *See, e.g.*, Acree v. Republic of Iraq, 370 F.3d 41, 50 (D.C. Cir. 2004); Cotter v. Mass. Ass'n of Minority Law Enforcement Officers, 219 F.3d 31, 33 (1st Cir. 2000); Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of the Interior, 100 F.3d 837, 839 (10th Cir. 1996).

38. The covenants in question bind only the franchisee, not its assets, even though they may affect the disposition of those assets. Therefore, the principles discussed here apply only when the receivership encompasses the promisor (the franchisee), not merely its assets.

39. *See supra* note 12 and accompanying text.

40. Sir Speedy, Inc. v. Morse, 256 B.R. 657, 660 (D. Mass. 2000); *In re* Steaks To Go, Inc., 226 B.R. 35, 38 (Bankr. E.D. Mo. 1998); *In re* Klein, 218 B.R. 787, 791 (Bankr. W.D. Pa. 1998); *In re* Printronics, Inc., 189 B.R. 995, 1000 (Bankr. N.D. Fla. 1995). *But see In re* Register, 95 B.R. 73, 74 (Bankr. M.D. Tenn. 1989) (holding that rejection of the contract encompassed rejection of the covenant not to compete); *In re* Rovine Corp., 6 B.R. 661, 666 (Bankr. W.D. Tenn. 1980) (same).

41. *Sir Speedy*, 256 B.R. at 659.

42. *In re* Ground Round, Inc., 335 B.R. 253, 261 (Bankr. 1st Cir. 2005).

43. *In re* Don & Lin Trucking Co., Inc., 110 B.R. 562, 567 (Bankr. N.D. Ala. 1990).

44. *In re Klein*, 218 B.R. at 790–91 (emphasis in original).

45. A different and, for the franchisor, less favorable situation is presented where the receiver controls only the assets of the former franchisee and not the franchised business entity itself. In that situation, the receiver may be regarded as simply a stranger to the franchise agreement and therefore impervious to its restrictions.

46. *In re* Hughes, 166 B.R. 103, 105 (Bankr. S.D. Ohio 1994).

47. In *In re Ground Round, Inc.*, 335 B.R. 253, 261 (Bankr. 1st Cir. 2005), the Bankruptcy Appellate Panel of the First Circuit, relying in part on *Sir Speedy, Inc. v. Morse*, 256 B.R. 657, 660 (D. Mass. 2000), upheld the right of a landlord to specific performance of a debtor lessee's obligation to retransfer a liquor license to the landlord upon termination of the lease, notwithstanding its rejection by the debtor.

48. *See, e.g.*, Dunkin' Donuts Inc. v. Taseski, 47 F. Supp. 2d 867, 878 (E.D. Mich. 1999) (enforcing the franchisee's obligation to transfer lease of business premises to the franchisor upon termination of the franchise agreement); Dunkin' Donuts Inc. v. Dowco, Bus. Franchise Guide (CCH) ¶ 11,374 (N.D.N.Y. 1998) (same).\

49. Where the party seeking the appointment of a receiver financed the purchase of the franchised units, the franchisor often will have had prior dealings with that party. Indeed, a franchisor may have a preexisting contract in the nature of an intercreditor agreement with the franchisee's primary lender, and the terms of that agreement may bear significantly on the position the franchisor is able to take in the receivership proceeding. For franchisors that contemplate such agreements in the future, the issue of potential receivership if the franchisee defaults is an important one to address in negotiating terms with the primary lender.

50. *See supra* note 4 and accompanying text.