THE LITIGATION RECEIVER: THE DELAWARE COURT OF CHANCERY'S "DRASTIC," "HEROIC" AND "EXTRAORDINARY" REMEDY

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The Court of Chancery possesses a potent, "heroic," yet seldom used power: the authority to appoint a receiver when necessary to protect an entity or preserve property involved in litigation. This interim remedy operates as an adjunct to the claims being asserted and is not decisive on the ultimate merits of the case. The remedy is nonetheless extremely powerful, as it can temporarily strip management of its ability to operate the business or manage the assets. While the litigation receiver may appear less frequently in Delaware jurisprudence than other types of receiverships, the Court of Chancery has not hesitated to appoint litigation receivers when necessary. Nevertheless, because it is such a potent interim remedy, the Court of Chancery only deploys it in truly egregious situations or true emergencies, such as those involving fraud or gross mismanagement.

This article describes the development of the litigation receiver in Delaware jurisprudence and summarizes the principles that the Court of Chancery has developed to evaluate applications for this extraordinary remedy. To show the extraordinary nature of this relief and the relative infrequency with which it is used, this article explores the small number of reported decisions in which such relief was granted and discusses several reasons that have caused the courts to reject such an application. Drawing from the cases, this article then lays out practical considerations for serving as a litigation receiver.

The Court of Chancery possesses a potent, "heroic," yet seldom used power: the authority to appoint a temporary receiver *pendente lite*[1] when necessary to protect an entity or preserve property involved in litigation. This interim remedy operates as an adjunct to the claims being asserted and is not decisive on the ultimate merits of the case. The remedy is nonetheless extremely powerful, as it can temporarily strip management of its ability to operate the business or manage the assets. The litigation receiver contrasts with other, more familiar types of receivers such as those appointed for insolvent companies.[2] Although practitioners typically think of receivership and insolvency going hand-in-hand, the Delaware Court of Chancery has authority to appoint receivers for solvent entities in certain circumstances, including litigation receivers.[3] While the litigation receiver may appear less frequently in Delaware jurisprudence than other types of receiverships, the

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1. Traditionally, Delaware courts have referred to receivers appointed in litigation as "receivers *pendente lite,*" which means "receiver pending litigation." In an attempt to update the Latinism and make the discussion more accessible to (and less of a mouthful for) practitioners, this article uses the term "litigation receiver." We commend its use to the Delaware Court of Chancery.

2. *See* 8 Del. C. § 291 (2021) (providing that a stockholder or creditor of an insolvent corporation can petition the Court of Chancery for the appointment of a receiver). For a general discussion of statutory receiverships, *see* J. Travis Laster, *The Chancery Receivership: Alive and Well*, 28 Del. Law. 12 (Fall 2010); Jack B. Jacobs, *Delaware Receivers and Trustees: Unsung Ministers of Corporate Last Rites*, 7 Del. J. Corp. L. 251 (1982); Jack. B. Jacobs, *Receivership Practice in the Delaware Courts*, 6 Del. J. Corp. L. 487 (1981) [hereinafter *Receivership Practice*].

3. Other situations include when a corporation fails to comply with a court order, *see* 8 Del. C. § 322 (2021), or where a corporation labors under a board-level or stockholder-level deadlock, *see* 8 Del. C. § 226 (2021). Parties can also seek to have a receiver appointed to liquidate a solvent corporation. *See, e.g.*, Tansey v. Oil Producing Royalties, Inc., 133 A.2d 141 (Del. Ch. 1957); Vale v. Atl. Coast & Inland Corp., 99 A.2d 396 (Del. Ch. 1953). Parties may also agree contractually to the appointment of a receiver under specified circumstances. *See* Dover Assocs. Joint Venture v. Ingram, 768 A.2d 971 (Del. Ch. 2000).

Court of Chancery has not hesitated to appoint litigation receivers when necessary.[4] Nevertheless, because it is such a potent interim remedy, the Court of Chancery only deploys it in truly egregious situations or true emergencies, such as those involving fraud or gross mismanagement.

The first part of this article describes the origins of the litigation receiver in the early twentieth century and summarizes the principles that courts developed to evaluate the applications. The second part examines the relatively few reported cases in which the court has appointed litigation receivers. The third part discusses two examples of the far more numerous cases in which the court has declined to appoint litigation receivers. The fourth part draws lessons from the cases. The fifth part of this article sets forth practical considerations for serving as a litigation receiver. The sixth part concludes.

I. THE ORIGINS AND DEVELOPMENT OF THE COURT OF CHANCERY'S EQUITABLE POWER TO APPOINT A LITIGATION RECEIVER

The role of the litigation receiver appears to have evolved from the equitable power of courts to appoint a receiver for a solvent entity, which equitable power has its roots in decisions of the English Court of Chancery. At the time of the separation of the colonies, however, the English Court of Chancery would never have appointed a receiver for a solvent company.[5] Over the next century, the jurisprudence on both sides of the Atlantic evolved, and by the late nineteenth century, both English and American courts recognized the power of a court to appoint a receiver for a solvent company.[6]

Although courts recognized the existence of the power to appoint a receiver for a solvent entity, they exercised that power sparingly. From the start, Delaware cases emphasized that the court would appoint a receiver for a solvent corporation only upon proof of egregious facts, such as gross mismanagement, serious misconduct, or fraud.[7] A concise summary of the rule provides as follows:

> [C]ourts of equity do independent of statute appoint receivers of corporations, and through them do take possession of the property of the corporation to administer their affairs, enjoin interference by their officers, collect their assets, convert their property into money, wind up their affairs and distribute the assets among the creditors and stockholders. These powers are exercised with great caution and only as exigencies of the case appear. It will be found that the basis of such interference is gross mismanagement, positive misconduct, or other grounds showing a breach of trust on the part of the officers of the corporation.[8]

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4. Ross Holding and Mgmt. Co. v. Advance Realty Grp., LLC, 2010 WL 3448227, at *6 (Del. Ch. Sept. 2, 2010) ("As a general matter, 'the appointment of a receiver is an extraordinary, a drastic and ... an [sic] "heroic" remedy.'") (quoting Maxwell v. Enter. Wall Paper Mfg. Co., 131 F.2d 400, 403 (3d Cir. 1942)).

5. Lichens Co. v. Std. Comm. Tobacco Co., 40 A.2d 447, 451 (Del. Ch. 1944) ("[W]hen Delaware became a state, the English Court of Chancery would not entertain a bill, filed by a minority stockholder, to wind up the affairs of a solvent corporation and appoint a receiver for that purpose, on the ground of fraud and gross mismanagement by its officers . . . .").

6. Williamson's Adm'r v. Washington City, Va. Midland & Great S. R.R. Co., 74 Va. 624, 635-36 (Va. 1881).

7. *See, e.g.*, Thoroughgood v. Georgetown Water Co., 77 A. 720, 723 (Del. Ch. 1910) (discussing the appointment of a receiver for a solvent company and stating, "It will be found that the basis of such interference is gross mismanagement, positive misconduct, or other grounds showing a breach of trust on the part of the officers of the corporation, and probably, except in rare cases, only when insolvency has resulted from such misconduct."); Ross Holding and Mgmt. Co. v. Advance Realty Grp., LLC, 2010 WL 3448227, at *6 (Del. Ch. Sept. 2, 2010) ("[A] court may utilize its equitable powers to appoint a receiver only 'when fraud and gross mismanagement by corporate officers, causing real imminent danger of great loss, clearly appears, and cannot be otherwise prevented.'") (quoting Drob v. Nat'l Mem'l Park, 41 A.2d 589, 597 (Del. Ch. 1945)).

8. *Lichens Co.*, 40 A.2d at 451-52.

In this setting, the court appointed a receiver as a remedy on the merits, after the petitioner had proven its case and demonstrated that gross mismanagement, positive misconduct, or other wrongdoing was occurring.

The next step in this evolution was the recognition of the power of a court to appoint a litigation receiver for a solvent company as an interim measure pending the outcome of the litigation. In 1910, the Delaware Court of Chancery held that this authority could be deployed in a rare case for the purpose of "preserving the property [of a solvent corporation] pending the litigation which is to decide the right of the litigant parties."[9]

By addressing a request for a litigation receiver, the court acts at an early stage of the case, before the trial on the merits and actual proof of wrongdoing. The showing that a petitioner must make to obtain a litigation receiver is thus necessarily higher, and the need for judicial discretion even greater. Commenting on such an application in 1911, the Delaware Court of Chancery noted that the appointment of a litigation receiver "is an exceedingly delicate and responsible duty, to be discharged with the utmost caution and only under special and peculiar circumstances …."[10]

As the case law developed, certain additional parameters around the remedy emerged. First, a litigation receivership is temporary and of an "auxiliary and incidental nature," meaning that it cannot be the only relief being sought by a plaintiff.[11] Second, the litigants' dispute must involve conduct that has (and may continue) to occur—"mere apprehension of future misconduct is not enough."[12] Third, before appointing a litigation receiver, the Court of Chancery will consider whether appointing a receiver would prevent the actual or threatened harm.[13] Egregious behavior alone, therefore, is not enough—there must be an imminent threat of irreparable harm that the appointment of a litigation receiver can prevent. Fourth, once a receiver has been appointed, that receiver acts as an "arm" of the Court of Chancery, and the court has broad discretion over the receivership, including the receiver's authority, its charge, the procedures that the receiver will follow, and when the receivership will end.[14]

II. THE RARE CASES INVOLVING APPOINTMENTS OF LITIGATION RECEIVERS

Through the years, litigants have petitioned the Delaware courts many times to appoint a litigation receiver to oversee the assets or operations of a company, but the Court of Chancery has only opted to do so on a

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9. *Thoroughgood*, 77 A. at 723.

10. Ellis v. Penn Beef Co., 80 A. 666, 667 (Del. Ch. 1911).

11. *Lichens Co.*, 40 A.2d at 451.

12. *Id.* at 452.

13. Beal Bank, SSB v. Lucks, 1998 WL 778362, at *3 (Del. Ch. Oct. 23, 1998). Earlier cases generally looked to the same factors, *e.g.*, whether there would be harm to the company and whether appointment of a receiver would be beneficial and prevent such harm. *See, e.g.*, Whitmer v. William Whitmer & Sons, 99 A. 428, 431 (Del. Ch. 1916) ("Where a [litigation receiver] is sought other than for an insolvent corporation, there must be shown to be a reasonable apprehension of danger and irreparable loss to the subject-matter of the suit ….").

14. *See* Jagodzinski v. Silicon Valley Innovation Co., 2015 WL 4694095, at *7 (Del. Ch. Aug. 7, 2015) (noting that a court may discharge a receiver if the corporation "has attained a condition in which it can meet its obligations in the usual course of business, or that there is a reasonable prospect that its business can be successfully continued, notwithstanding any deficiency of assets.") (quoting Badenhausen Co. v. Kidwell, 107 A. 297, 297 (Del. 1919)).

handful of occasions.[15] In almost every case, the decision emphasizes that the relief sought was extraordinary and rarely granted.[16] Like all superheroes with extraordinary powers, the members of the Court of Chancery (wearing robes instead of capes) abide by the Peter Parker Principle: With great power comes great responsibility.[17] In exercising its great responsibility, the Court of Chancery will only appoint a litigation receiver to avoid serious and imminent injury. When warranted, however, the litigation receiver is a "very beneficent remedy" that "should be used boldly."[18]

The situations in which the Court of Chancery has appointed a litigation receiver are highly fact-specific. The leading cases in which court has appointed a litigation receiver illustrate both the nature of the threatened harm that has warranted appointment of a receiver and how the court has fashioned the interim remedy to fit the situation at hand.

A. *Gray v. Council of Newark*[19]

In what appears to be the earliest Delaware case to witness the appointment of a litigation receiver, the court initially denied the appointment in favor of issuing a preliminary injunction secured by a bond. After the enjoined party failed to comply with the court's order, however, the parties agreed to the appointment of a litigation receiver, and the court approved the stipulation.

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15. *Whitmer*, 99 A. 428 (petition denied); Moore v. Assoc. Producing & Refin. Corp., 121 A. 655 (Del. Ch. 1923) (petition denied); Frantz v. Templeman Oil Corp., 134 A. 100 (Del. Ch. 1926) (petition granted); Baker v. Conway, 135 A. 596 (Del. Ch. 1926) (petition denied); Satterthwaite v. E. Bankers' Corp., 154 A. 475 (Del. Ch. 1931) (petition granted); Salnita Corp. v. Walter Holding Corp., 168 A. 74 (Del. Ch. 1933) (petition denied); Lichens Co., 40 A.2d 447 (petition denied); Drob v. Nat'l Mem'l Park, 41 A.2d 589 (Del. Ch. 1945) (petition denied); Trincia v. Testardi, 52 A.2d 871 (Del. Ch. 1947) (petition denied); Vulcan-Cincinnati, Inc. v. Burnside Corp., 1962 WL 69570 (Del. Ch. July 13, 1962) (petition denied); Vredenburgh v. Jones, 1975 WL 1264 (Del. Ch. Oct. 3, 1975) (petition granted); Farland v. Wills, 1975 WL 1960 (Del. Ch. Nov. 12, 1975) (petition denied); Greenfield v. Caporella, 1986 WL 13977 (Del. Ch. Dec 3. 1986) (petition denied); Delaware State Hous. Auth. v. Hillside Ass'n, L.P., 1992 WL 127503 (Del. Ch. June 9, 1992) (petition denied); Arbitrium (Cayman Islands) Handels AG v. Johnston, 1995 WL 606310 (Del. Ch. Oct. 6, 1995) (petition denied in connection with a Section 225 action); Beal Bank, 1998 WL 778362 (petition denied); Ross Holding and Mgmt. Co. v. Advance Realty Grp., LLC, 2010 WL 3448227, at *6 (Del. Ch. Sept. 2, 2010) (petition denied pending trial on underlying facts); Jagodzinski v. Silicon Valley Innovation Co., 2012 WL 593613 (Del. Ch. Feb. 14, 2012) (petition granted); TVI Corp. v. Gallagher, 2013 WL 5809271 (Del. Ch. Oct. 28, 2013) (petition denied); GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, 2019 WL 1501553 (Del. Ch. Apr. 4, 2019) (petition granted in earlier order).

16. Berwald v. Mission Dev. Co., 185 A.2d 480, 483 (Del. 1962) ("The extreme relief of receivership to wind up a solvent going business is rarely granted. To obtain it there must be a showing of imminent danger of great loss resulting from fraud or mismanagement."); *see also* Thoroughgood v. Georgetown Water Co., 77 A. 720, 723 (Del. Ch. 1910) (noting that appointment of a receiver on the grounds of mismanagement will "except in rare cases" involve insolvency); Ellis v. Penn Beef Co., 80 A. 666, 667 (Del. Ch. 1911); *Ross Holding*, 2010 WL 3448227, at *5; *Jagodzinski*, 2012 WL 593613, at *2 ("The appointment of a receiver, however, is an 'extraordinary remedy.'") (quoting Roth v. Laurus U.S. Fund, L.P., 2011 WL 808953, at *5 (Del. Ch. Feb. 25, 2011)).

17. Spider-Man (Columbia Pictures 2002); *accord* Cirillo Family Trust v. Moezinia, 2018 WL 3388398, at *7 (Del. Ch. July 11, 2018) (quoting Withrow v. Williams, 507 U.S. 680, 716 (1993)); *see also Penn Beef Co.*, 80 A. at 667 ("[The appointment of a litigation receiver] is an exceedingly delicate and responsible duty, to be discharged with the utmost caution and only under special and peculiar circumstances ...."); Jagodzinski v. Silicon Valley Innovation Co., 2015 WL 4694095, at *7 (Del. Ch. Aug. 7, 2015) ("Although the appointment and discharge of a receiver rests in the discretion of the court, the cases also suggest that such discretion should be exercised sparingly and with caution.").

18. *Penn Beef Co.*, 80 A. at 667.

19. 79 A. 739 (Del. Ch. 1911).

The *Gray* case, a decision from 1911, involved a dispute over the operation of utilities owned by the City of Newark. Delaware's Attorney General, Andrew Gray, learned that the City Council intended to lease the city's electric and water plants to Newark Water and Electric Company, a newly formed utility company established by a former member of the City Council. On behalf of certain citizens and taxpayers, the Attorney General filed suit and obtained an order enjoining the city from completing the transaction. Before the order could be served, however, the City Council signed the lease and delivered possession of the plants.

With the preliminary injunction thwarted, the Attorney General returned to the Court of Chancery. No one moved formally for the appointment of a litigation receiver. Although the Attorney General ultimately sought to unwind the transaction and deny the utility company the right to operate the plants, everyone agreed that the plants should continue operating pending the outcome of the suit. The Attorney General therefore suggested that the facts warranted appointing a receiver to operate the plants and preserve them in their current condition pending a final hearing on the merits of the case.

The court began its analysis by confirming that it had the power to appoint a litigation receiver, provided the facts and circumstances justified it. The court noted that the power to appoint a litigation receiver was "a necessary incident to the power of granting an injunction."[20] The more difficult question was whether the facts of the case justified appointing a receiver. To evaluate this question, the court addressed five arguments that the Attorney General advanced in favor of appointing a receiver.

First, the Attorney General alleged that the newly formed utility company was likely insolvent and therefore potentially unable to satisfy a judgment if the plants suffered damage pending the outcome of the litigation. The court rejected this argument due to a lack of evidence of insolvency. The fact that the company had been formed just before the transaction was not enough.[21]

Second, the Attorney General argued that the interests of the citizens and taxpayers were not protected by suitable or adequate bond. The court rejected this argument because the utility company had posted a substantial bond in connection with the lease, and the Attorney General offered only speculation that the bond might be inadequate.

Third, the Attorney General noted a general concern that the finances of the parties involved would become hopelessly comingled. While acknowledging that risk, the court found that the danger of loss from any comingling was insufficiently clear to support the appointment of a litigation receiver. [22]

Treating the fourth and fifth arguments together, which were that a receiver should be appointed because it would hasten the resolution of the dispute and obviate the need for the parties to use a master to settle accounts, the court remarked that no case had ever held that a receiver should be appointed simply for these reasons. Instead, given the extraordinary and severe nature of the remedy, the court commented that a litigation receiver should never be appointed except in a "clear case" that such relief is "needful."[23]

After carefully considering all the facts, the court found that the appointment of a receiver was unwarranted and would involve added and unnecessary expense. The court instead issued a preliminary injunction prohibiting the utility from disposing of, abusing, injuring or altering the properties that were subject to the litigation, and requiring the utility to post a bond of $20,000.

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20. *Id.* at 739.

21. *Id.*

22. *Id.*

23. *Id.* at 740.

That ruling might have ended the matter, but the utility company failed to post the bond within ten days, as required by the court's order. At this point, the Attorney General made a formal application for the appointment of a litigation receiver, and the utility company consented to the request. The court then entered the order.[24]

The *Gray* decision thus culminated in the appointment of a litigation receiver, but with the appointment coming by stipulation. It seems unlikely, however, that the utility would have agreed to the appointment unless the court was likely to grant it. On the facts presented, the utility had failed to comply with a court order, and its inability (or unwillingness) to post the bond supported the Attorney General's assertions about the company's lack of financial resources. The renewed application thus implicated potential insolvency, evidenced by the inability to pay a debt (i.e, the bond) when due, which is a factor that generally supports the appointment of a receiver. It also involved the failure to comply with a court order, where the Delaware General Corporation Law now codifies the availability of a receiver as a remedy.[25]

B. *Ellis v. Penn Beef Co.*[26]

Later in 1911, the Court of Chancery issued what appears to be the second decision appointing a litigation receiver. This time, however, the application was granted over the defendants' opposition.

The *Ellis* case involved a dispute over the ownership of a Penn Beef Company, a Delaware corporation formed to sell meat on commission. Ashworth and Kramer formed Penn Beef and issued themselves shares of stock in return for a refrigerator, certain appliances, and office furniture that they valued at $20,000. They then issued shares to a third stockholder, Ellis, in exchange for $20,000 in cash. Ellis became president of the corporation based on a commitment that Ashworth and Kramer would finish furnishing the meat plant at their expense. Ashworth and Kramer failed to fulfill their commitment, resulting in Ellis investing another $4,800 in the company, and the company paying for the furnishings.

The business was unprofitable, and disputes arose between Ashworth and Kramer, on the one hand, and Ellis on the other. Ashworth and Kramer terminated Ellis as president, and Ellis responded by filing suit against Ashworth and Kramer to cancel their shares for lack of consideration.

Ellis also sought to have a litigation receiver appointed to oversee the affairs of the company pending the outcome of the litigation. The court received evidence from the parties in the form of affidavits, and the record indicated that Ashworth and Kramer had engaged in fraud. The court noted that the property that Ashworth and Kramer claimed to have contributed could not have been worth more than $8,000, that there was no evidence that they had paid anything for it, and that they had not provided any other consideration for their shares.

The court granted the application for a litigation receiver given "the deep-seated dissensions" between the parties "which are or are likely to be injurious to the continuance of the business of the company, and the … disproportion of the material interests of … Ellis, on one side and of Ashworth and Kramer on the other."[27] At the time, the Delaware Constitution required that a corporation receive consideration for the issuance of shares, so Ellis's suit for cancellation was

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24. *Id*. at 742 ("The Newark Water & Electric Company failed to file the bond within the time specified and upon motion of the solicitors for the complainants, the solicitor for the Newark Water & Electric Company assenting thereto, a receiver pendente lite was appointed on May 1, 1911.").

25. 8 Del. C. § 322 (2021).

26. 80 A. 666 (Del. Ch. 1911).

27. *Id*. at 669.

quite strong.[28] In addition, the failure to appoint a receiver would leave Ashworth and Kramer in charge of the corporation, and they had not previously managed it. The court took these factors into account, observing that Ashworth and Kramer's continued operation of the company could be harmful, that they appeared to be unable to satisfy a judgment, and that they might not even be stockholders. The court also noted that any loss resulting from the receivership would fall entirely on Ellis, because he was the only individual who had contributed capital to the business.

The court directed the receiver "to take charge of and administer the assets, effects, business and affairs of … said Penn Beef Company, during the pendency of [the] suit and until a final decree shall have been entered in the same."[29] The court stressed that it had not made any final determinations, only granted temporary relief pending the ultimate decision on the merits of the case regarding Ashworth and Kramer's share of corporate ownership.[30]

The *Ellis* decision stands as the first reported case in which the court appointed a litigation receiver in a contested application. The decision exhibits several features that contributed to the successful application: it was a control dispute where the party seeking a receiver appeared to have a very strong claim, the preliminary record suggested fraud, and the individuals who would run the corporation pending the outcome of the litigation in the absence of a receiver seemed both likely to cause harm and unable to satisfy a judgment.

C. Frantz v. Templeman Oil Corp.[31]

It is not until 1926, a decade and a half later, that the reported decisions of the Court of Chancery next reflect the appointment of a litigation receiver. The plaintiffs were stockholders of Templeman Oil Corporation, a controlled subsidiary of the Producers' and Refiners' Corporation. The plaintiffs alleged that F.E. Kistler, the president of Producers, owed Templeman money, but that the Templeman board was not pursuing the claim. The plaintiffs further asserted that a litigation receiver was needed because the statute of limitations on the claim was about to expire.

The Court of Chancery granted the application. The court observed that Templeman was itself a holding company, so the receiver would "not in any manner interfere with the operations of an active producing or manufacturing enterprise."[32] The court observed that because of this fact, it would "act with less reluctance in the exercise of the extraordinary relief asked for than it would were the proposition one to take from the chosen and presumably skilled managers of a rather technical enterprise the management and control and place it in the hands of an outsider with possibly less experience in the business and less aptitude for its management."[33]

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28. Del. Const. art. 9, § 3 (repealed 2004) ("No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation."). In 2004, the constitutional requirement cited by the *Ellis* court was repealed and the Delaware General Corporation Law was amended shortly thereafter to provide additional flexibility with respect to forms of consideration that can support a stock issuance. *See* 8 Del. C. § 152 (2021).

29. *Penn Beef Co.*, 80 A. at 671.

30. *Id.* at 670.

31. 134 A. 100 (Del. Ch. 1926).

32. *Id.* at 101.

33. *Id.*

The court also cited "more important considerations," including evidence of fraud.[34] The court explained that when the plaintiffs had invested in Templeman, Kistler had agreed to contribute certain leases to Templeman, which he instead held through Producers. The dispute over the leases had arisen six years before, and there was a risk that Producers would attempt to invoke the doctrine of laches. The court also noted that it would be dangerous not to appoint a receiver, because Kistler and Producers had attempted to use their control over Templeman to prejudice the plaintiffs' claims, including by attempting to have Templeman's operating subsidiary adjudicated as bankrupt and by allowing Templeman's charter to become void for nonpayment of taxes.

Given these facts, the court found that an impartial receiver should be "placed in charge of the [the company's] affairs with the view of protecting its rights and the rights of its stockholders and creditors before time [had] worked to their prejudice."[35] As in the *Ellis* case, the court noted that it was making an interim ruling, such that its description of the facts was "based on the evidence now before me at this interlocutory stage, and is subject to be overcome on final hearing."[36]

Like *Ellis*, the *Templeman* case exhibits several features that contributed to the successful application. The plaintiffs appeared to have a very strong claim, and the preliminary record suggested fraud. The facts also suggested that without a receiver, the parties in control of the company would seek to harm it.

D. *Satterthwaite v. Eastern Bankers' Corp.*[37]

Six years after the *Templeman* case, in 1931, the Delaware Attorney General sought to have a litigation receiver appointed for Eastern Bankers' Corporation. Unlike in previous cases, the Attorney General sought a liquidating receiver for the company as a form of final relief. According to the Attorney General, the managers of the company had falsified its books and claimed fictitious profits, then declared significant dividends based on the false profits. The Attorney General sought to prove the fraud, revoke the corporation's charter, and have a receiver wind up its affairs.

The application for an interim receiver became necessary because the corporation had paid income taxes to the United States based on its fictitious profits. The Attorney General wanted a receiver to apply for a tax refund before an upcoming deadline for making that claim. If the deadline passed, then the value of the claim would be lost.

The Court of Chancery granted the application for a litigation receiver. The court reasoned that the corporation was entitled to have its claim for a refund presented and that the corporation's management could not be relied upon to seek the refund because doing so ran contrary to their interests in defending against the charges of fraud.

Like the *Gray* case, *Satterthwaite* involved an application by the Attorney General. Its facts, however, resembled a blend of the *Ellis* and *Templeman* decisions. As in both of those precedents, the case involved allegations of fraud, and as in the *Templeman* case, the *Satterthwaite* decision involved a timeliness issue that a receiver could solve.

E. *Morford ex rel. Gray v. Trustees of Middletown Academy*[38]

In 1940, the Delaware Attorney General sought the appointment of a litigation receiver in a third case. This time the dispute involved the Middletown Academy, a charitable corporation which had operated a school from 1827 until 1929

34. *Id*.

35. *Id*. at 102.

36. *Id*.

37. 154 A. 475 (Del. Ch. 1931).

38. 14 A.2d 382 (Del. Ch. 1940).

and which continued to own a tract of land and the former school building. In 1939, a majority of the trustees voted to sell the bulk of the land to the United States to use as a post office. Before the transaction closed, the Attorney General challenged the conveyance, contending that the purpose of the corporation was to operate a school and the transfer of the land ran contrary to and would prevent the corporation from fulfilling its purpose. As final relief, the Attorney General sought to have the corporation's charter revoked and, if necessary, to recover damages for the unlawful sale.

The Attorney General sought the appointment of a litigation receiver as interim relief after learning from the minority trustees that the majority wanted to consummate the sale. The purpose of the litigation receiver was to protect the corporation's interests, initially by not completing the sale and, if necessary, by asserting a claim for damages. The corporation opposed the application on the grounds that the United States already had equitable title and the right to possess of the land.

The court agreed with the Attorney General and appointed a litigation receiver "to preserve the present situation so that the land disposed of [would] not be put beyond recall, or, if this [was] impossible, to obtain the full measure of compensation for the land."[39]

The court seemingly viewed the Attorney General as having a strong case, noting:

> The corporate purpose of defendant is the establishment and operation of an academy in Middletown as a seminary of useful learning. Aside from bald assertions to the contrary by the majority trustees, I find nothing in the record to show how the disposal of the lot to the United States could do anything but prevent the use of the academy building and remaining property to carry out the corporate purpose.[40]

The court also expressed concern about the consideration that the corporation was receiving in the sale, noting that the United States initially offered $8,000, but that the final offer was for $5,000 and that a portion of that amount would go to the City of Middletown.[41] The court noted that the corporation might have a claim for damages and that the trustees might face liability if the corporation received inadequate consideration. Because of their potential liability, the trustees could not be expected to make an impartial decision regarding the corporation's litigation asset and an impartial receiver was necessary to evaluate it.[42] Finally, the court noted that the corporation had been generally inactive for the past ten years, such that "there should be less reluctance to appoint a [litigation receiver] than in the case of an active producing or manufacturing enterprise."[43]

The *Morford* case differs from earlier decisions in that it lacks the strong sense of fraud present in the *Ellis*, *Templeman*, and *Satterthwaite* cases. The court also seems to have questioned whether a litigation receiver could maintain the status quo, observing that the receiver "could not, of course, prevent the United States from taking immediate possession of the land …"[44] In addition, compared to *Templeman* and *Satterthwaite*, the court's discussion of the need for a receiver

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39. *Id*. at 386.

40. *Id*. at 383.

41. *Id*. at 385.

42. *Id*.

43. *Id*.

44. *Id*.

to address the litigation asset also seems less compelling, because there does not appear to have been any time pressure on the assertion of the claim. Instead, the language of the decision suggests that the court believed a receiver might be able to help broker a settlement that would resolve a difficult situation.

F. *Vredenburgh v. Jones*[45]

After the *Morford* case, the Court of Chancery does not appear to have issued a ruling appointing a litigation receiver until 1975.[46] The thirty-five-year drought came to an end in the *Vredenburgh* case, where the plaintiffs sought to have a litigation receiver appointed for Arundel Mining Co., Inc. to stop a pending sale of substantially all of the company's assets, including its mining lease and all of its on-site equipment. On the same day that the court heard argument on the application, the defendants completed the sale. They notified the court the following day that the transaction had closed.

Even though the litigation receiver could no longer stop the pending transaction, the court granted the application. The court gave only a relatively cursory explanation, stating that "the circumstances seem to dictate that a receiver should be appointed to investigate the situation, take charge of the corporate assets and report to the court pending the outcome of the present litigation."[47] The court noted that as a result of the sale, the company likely possessed only cash and a stock portfolio that had not been sold. Although the court did not say so explicitly, that state of affairs meant that the court was not appointing a litigation receiver for an operating concern. Rather, as in the *Templeman, Satterthwaite*, and *Morford* cases, the court was appointing a litigation receiver for a non-operating entity.

There is also a sense from the decision that the court had concerns about how the defendants had chosen to proceed. The court did not seem pleased to have been "advised that the closing of this transaction in fact took place yesterday afternoon at or about the same time the Court was being asked to appoint a receiver to look into this proposed sale of assets."[48] The court also noted that "those presently in control of the corporation as officers and directors are defendants in this litigation, some of whom refused to submit themselves to jurisdiction in this State."[49] The defendants who contested jurisdiction took the position that they did not have to respond to the court's orders.

The solution to these problems was to appoint a litigation receiver in whom the court had confidence. The court chose to appoint Andrew G.T. Moore, II, the future Delaware Supreme Court justice, who was then serving as Delaware counsel for Arundel Mining Co. The court cited Moore's "existing knowledge of matters, with all their attendant complications, and the commendable service and professional courtesy he has extended to the corporation, the court and other counsel throughout."[50] It seems likely that the court believed that Moore would be able to get to the bottom of what had happened.

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45. 1975 WL 1264 (Del. Ch. Oct. 3, 1975).

46. It is possible that the court appointed a receiver in a ruling that is no longer readily accessible, such as in an order or a transcript ruling, but research has not revealed it.

47. *Vredenburgh*, 1975 WL 1264, at *1.

48. *Id.*

49. *Id.*

50. *Id.*

The *Vredenburgh* case stands with the *Morford* case as an idiosyncratic situation for the appointment of a litigation receiver. As in *Morford*, the case lacks a strong suggestion of fraud, and the closing of the transaction prevented the litigation receiver from preserving the status quo as originally intended. The court nevertheless appointed the receiver anyway, seemingly in an effort to examine why the transaction had closed while a hearing on interim relief was ongoing.

G. *Jagodzinski v. Silicon Valley Innovation Co., LLC* [51]

After the *Vredenburgh* decision, there was another multi-decade drought before the Court of Chancery again granted an application for a litigation receiver.[52] The concept of a litigation receiver resurfaced visibly in 2012 in a decision involving Silicon Valley Innovation Co., LLC, a Delaware limited liability company. The plaintiff, a member of the LLC, sought books and records under Section 18-305 of the Delaware Limited Liability Company Act, and the court had issued several orders requiring the company to produce the relevant documents and obtain Delaware counsel. The company did not produce all of the documents or obtain Delaware counsel, and the plaintiff moved to hold the company in contempt. As a remedy, the member sought a receiver with the broad authority to conduct the company's business and pursue any claims belonging to the company.

The court agreed that the company was in contempt and also agreed that a receiver was appropriate, but the court did not appoint the broadly empowered receiver that the unit holder sought. Instead, the court appointed a litigation receiver for the limited purpose of curing the contempt by causing the company to produce the required documents. The court granted that the receiver "may collect, review, and produce documents in Defendant's files and storage facilities[,] . . .[and] attempt to obtain the documents at issue from third parties where [the company] reasonably can claim to have control over such documents."[53] The receiver would be discharged after collecting and producing the documents required.

After being appointed, the receiver diligently found or recreated, as necessary, the documents that the court ordered to be produced. In doing so, the receiver discovered evidence of widespread self-dealing and looting at the company. The court therefore elevated the receiver to the status of a "full-blown receiver" with the power to manage the company and protect its assets.[54] The court also changed the receiver's compensation structure from an hourly rate to a monthly fee plus a contingent bonus equal to 10% of amounts recovered by the company.[55]

Over the next two years, the receiver filed sixteen lawsuits against former managers and advisors to the company. In the most significant case, the receiver asserted claims that could entitle the company to recover over $100 million.

Ironically, the plaintiff who originally sought the appointment of the receiver petitioned to have the court terminate the receivership and allow the plaintiff to pursue the litigation. Alternatively, the plaintiff asked the court to modify the receiver's compensation so that he would not potentially receive a $10 million fee.

The court denied the plaintiff's petition to terminate the receivership, finding that the purpose of the receivership had not yet been fulfilled. The court concluded that the receiver remained the best person to oversee the litigation

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51. 2012 WL 593613 (Del. Ch. Feb. 14, 2012).

52. It is again possible that an order or transcript ruling granted that relief, but research has not revealed it.

53. *Jagodzinski*, 2012 WL 593613, at *3.

54. Jagodzinski v. Silicon Valley Innovation Co., 2015 WL 4694095, at *2 (Del. Ch. Aug. 7, 2015).

55. *Id*.

because (1) the current receiver had the greatest institutional knowledge of the company and lawsuits, (2) the plaintiff was the party who originally requested that particular individual to serve as receiver, (3) the plaintiff had shown little respect for the court's orders and tried to act as though he was the receiver, which was a "brazen affront" to the court, and (4) the court was concerned that ending the receivership would deprive the company of the benefits of the receivership, and likely would place the company at risk for bankruptcy.[56] The court did, however, modify the receiver's compensation structure to make clear that the receiver would receive 10% of any net recovery, after the payment of all expenses.[57]

The *Jagodzinski* case marks what appears to be the first use of a litigation receiver to enforce an order in a books and records case. In doing so, the court followed the well-established path of appointing a receiver to enforce a court order, traceable initially to the *Gray* case.[58]

H. *GMF ELCM Fund L.P. v. ELCM HCRE GP LLC* [59]

In 2019, the Court of Chancery appointed a litigation receiver in what is presently the most recent example of the court's exercise of that authority. The case involved a failing business, risk of harm to vulnerable people, and a defendant who appeared to be playing games with the court.

The Delaware entities at issue in the case were part of a complicated web of companies that operated senior living facilities. The plaintiffs were minority investors in the entities. An individual named Andrew White controlled the entities.

The plaintiffs filed suit in Delaware asserting claims for breach of fiduciary duty and breach of contract. They also filed a motion seeking the appointment of a litigation receiver. Prior to the hearing on that motion, the court entered an interim status quo order.

As the court pithily described the situation, the entities were "in trouble."[60] They faced litigation in multiple jurisdictions, including proceedings initiated by state regulators. Moreover, because of the nature of the business, there were broader concerns in play:

> The nature of this business is nursing care, and as a result, negligent or incompetent leadership affects vulnerable people, whose lives are affected by these [entities'] fates; residents at the nursing homes, whose health, care, and wellbeing depend on the [entities'] proper management. Though yet unproven in this case, there are allegations that the delivery of food for the residents has been interrupted. There is evidence that residents' rent checks have gone uncashed, leaving them to question whether their housing is assured. There is evidence that residents have been "evacuated" from certain facilities. There is evidence that employees who provide direct

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56. *Id.* at *11.

57. *Id.*

58. *See, e.g.*, Deutsch v. ZST Digit. Networks, Inc., 2018 WL 3005822, at *4 (Del. Ch. June 14, 2018) (describing earlier order appointing receiver as contempt sanction); Williams v. Calypso Wireless, Inc., 2012 WL 424880, at *1 (Del. Ch. Feb. 8, 2012) (appointing receiver to address corporation's "protracted failure to comply with an order of this Court").

59. 2019 WL 1501553 (Del. Ch. Apr. 4, 2019). The receiver in this case was represented by Wilson Sonsini Goodrich & Rosati. The opinions expressed in this article are the authors' own and do not represent the views of the receiver or Wilson Sonsini Goodrich & Rosati.

60. *Id.* at *1.

> care to residents have, on multiple occasions, not been paid on time—sometimes days or even weeks late. I note this not to suggest that cases involving other business entities lack importance, nor that they cannot also be disruptive of human lives—they can be, and often are. What I do mean to suggest is that the exigencies of this particular business compel especially focused attention.[61]

The nature of the business thus made the potential need for a litigation receiver more compelling.

The court also had reason to question White's actions. The court noted that on the evening before an evidentiary hearing on the application for a litigation receiver, the defendants' counsel informed the court that White could not attend the hearing and would not be able to testify. The court dryly commented on this development:

> Given that the hearing had already been rescheduled (by my count, at least three times, and on at least one occasion due to Mr. White's schedule and preferences), and given that Mr. White's counsel was present and ready to proceed, I informed the parties that the evidentiary hearing would commence without Mr. White.[62]

At the conclusion of the hearing, based on the record presented, the court appointed former Chancellor William B. Chandler III as an interim receiver. The court specifically ordered White to cooperate with the receiver. The court also held that as soon as White could travel and testify, the court would hold a further hearing to consider the appointment.

White did not cooperate with the receiver.[63] He delayed transferring control over the entities and their assets, and he failed to provide information when requested.[64] Eventually, White's lack of responsiveness caused the receiver to request leave to withdraw.[65] The court granted the application and appointed an entity associated with the plaintiffs as a replacement receiver.[66] The court held White in contempt, ordered him to pay the plaintiff's attorneys' fees and expenses for a hearing White failed to attend, and ordered White to pay the receiver's fees and expenses that were incurred as a result of his uncooperative behavior.[67]

The *GMF* decision stands as a unique case that combines the threats present in prior litigation receiver decisions. It begins with the element of a failing enterprise, where a receiver may be warranted, then adds the special dimension of senior living centers involving vulnerable individuals. As in the *Vredenburgh* case, where the court appointed a litigation receiver after the defendants closed a transaction on the same day that the court was holding a hearing, the court in *GMF*

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61. *Id.* at *2.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, C.A. No. 2018-0840-SG, Order (Del. Ch. Apr. 5, 2019).

67. *GMF*, 2019 WL 1501553, at *5.

seems to have been influenced in part by White's seemingly disingenuous efforts to avoid a hearing in Delaware. Eventually, the case involved a lack of cooperation that resulted in contempt.

III. REPRESENTATIVE CASES DENYING APPLICATIONS FOR THE APPOINTMENT OF A LITIGATION RECEIVER

The preceding section discussed the few cases in which Delaware courts have appointed litigation receivers. Given the extraordinary nature of the remedy, there are far more cases denying petitions to appoint litigation receivers. To chronicle all of them in detail would be unhelpful. Modern decisions denying requests for the appointment of a litigation receiver have largely dispensed with the more instructive discussions that often characterized the Court of Chancery's earlier decisions. Even in the absence of such detail, however, these cases continue to demonstrate the hesitancy of the court to appoint a litigation receiver in all but the clearest of cases. Moreover, these recent cases provide some additional context for situations in which a litigation receiver is inappropriate.

A. *TVI Corp. v. Gallagher*[68]

In 2013, the Court of Chancery declined to appoint a litigation receiver in *TVI Corp. v. Gallagher*.[69] This case involved iCueTV, Inc., a closely-held corporation founded by Gallagher, Huegel and Singley, which had patented a system that allowed television viewers to interact with program content. The company was primarily owned by the plaintiffs and their families and friends, and in exchange for their investments, Thompson, Katcher, Khichadia, and Harrington all were given board seats. The founders also were members of the board.[70]

Despite marketing its interactive technology over several years, the company did not generate significant revenue and was churning through its cash reserves, such that one of the founders notified the stockholders that without substantial capital infusions from its investors, the company would not have the funds to continue its operations.

Regardless, however, of the company's financial troubles, Huegel caused the company to enter into a lucrative employment contract with its CEO, Gates. Gallagher, as iCueTV's Chairman, entered into similarly lucrative employment agreements on behalf of the company with Huegel and Singley. The company's board did not have prior notice of, or approve, any of these agreements. Plaintiffs alleged that collectively, these agreements created $7 million in liabilities for the company and "carried interests" of shares of iCueTV stock provided to Huegel and Singley under the employment agreements enabled the founders to obtain greater voting control over company.

Thompson, a director of the company and the Chair of the Audit Committee, discovered these agreements. He complained that they were not approved by the board and requested an outside audit of the company's financial records. Gallagher, Huegel, and Singley thereafter organized a board meeting and but did not give notice of the meeting to Thompson. At the meeting, the board purported to remove Thompson as a director. Another board meeting was then held approving the Huegel and Singley employment agreements, but the Gates agreement was never approved.

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68. 2013 WL 5809271 (Del. Ch. Oct. 28, 2013).

69. *Id*.

70. The number of authorized directorships and full composition of the board are not included in the recitation of facts.

Thompson later brought a Section 220 demand, and subsequently, non-founder directors Katcher, Khichadia, and Harrington requested the formation of a committee to investigate allegations of waste and misappropriation of the company's assets. Gallagher quickly called a special meeting of stockholders at which Katcher, Khichadia, and Harrington were removed as directors. Even though Katcher, Khichadia, and Harrington were stockholders, they were not provided with notice of the purpose of this meeting. At that meeting, a committee composed of two non-founder directors was appointed to investigate wrongdoing and the committee requested that a third party be retained to conduct a full investigation, but Gallagher determined (without inquiry) that there was no merit to the allegations and ended the investigation.

In addition to these corporate governance issues, Gallagher had also provided unspecified funding to the company, which the board did not approve in the first instance. The board later retroactively approved the funding and provided Gallahager with a convertible note that permitted him to choose, at the time of repayment, how his funding would be treated. If he chose to have his advances treated as debt, he would be entitled to be repaid in full with interest before payment to any of the other investors.

Among other things, the plaintiffs challenged the employment agreements and preferential terms of Gallagher's funding and, in August 2012, brought a derivative suit, which included a claim for breach of fiduciary duties and waste, a claim for declaratory and injunctive relief, and a claim for the appointment of a custodian or a litigation receiver to: "(1) direct and supervise iCueTV's business and affairs pending a decision on the merits of Plaintiffs' claims; (2) sell off for fair value the Company's assets; and (3) distribute the proceeds from that sale in accordance with the creditors' and shareholders' interests as determined by the Court."[71] By October 2012, Gallagher had stopped providing funding to the company, and the company defaulted on its lease, was unable to make payroll, had its internet servers shut off, and could not fulfill various other obligations. It was within this context that the plaintiffs further alleged that Gallagher, Huegel, and Singley were trying to sell or divest the company's assets for less than fair value with the intention of keeping the proceeds for themselves, purportedly as repayment of their employment compensation and Gallagher's prior loans to the company. The court granted a stipulated status quo order prohibiting defendants from selling any of the company's principal assets, repaying Huegel or Singley compensation under the employment agreements, or repaying any amounts that the defendants had loaned to the company without first providing twenty days written notice to plaintiffs.

The court was clearly concerned about the actions that had taken place, which is evidenced by its holding that demand futility had been established by the facts of the case and the court's denial of the defendants' motion to dismiss the duty of loyalty claims. The court noted that if the plaintiffs prevailed on their fiduciary duty claims, it was feasible that the court would appoint a receiver at that time, but that the plaintiffs did not show that appointment of a litigation receiver was necessary prior to a decision on the merits of the case. The court's reasoning was that the status quo order created a 20-day window during which the plaintiffs could challenge any specific transaction that defendants intended to consummate.[72] This outcome can be contrasted against the *GMF* litigation, where the court appointed a litigation receiver despite there being a status quo order in place. The result in *TVI Corp*. shows that the court will rely on the other, less extreme, equitable tools at its disposal prior to appointing a litigation receiver. That said, *GMF* serves as a reminder that in egregious situations, a status quo order alone my not provide enough protection.

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71. TVI Corp. v. Gallagher, 2013 WL 5809271, at *19 (Del. Ch. Oct. 28, 2013).

72. *Id.*

B. *Beal Bank, SSB v. Lucks*[73]

The second representative case provides a more fulsome discussion of the specific facts that could lead a court to deny an application for the appointment of a litigation receiver. This 1998 decision involved a request by a bank for the appointment of a litigation receiver during the pendency of a dispute over the right to collect rent from a tenant. The bank claimed that the developer of commercial real estate granted the bank assignment of its right to collect rent from tenants and that the bank provided financing to the developer based in part on the assignment. The developer then sold the property to a new owner, which claimed it had been sold free and clear of any encumbrances. After the developer declared bankruptcy, the bank sought to recover on the assignment of rent, and the new owner disputed the bank's claim.

The bank sought a litigation receiver to collect and hold the rents. The bank contended that the new owner was a shell entity that would disburse any rents it collected and declare bankruptcy as soon as the bank obtained a judgment. The defendants countered that the bank could not demonstrate a sufficient right to collect the rents in question. The bank conceded that it was not concerned about the day-to-day upkeep of the property itself, which was managed by a responsible tenant.

The court framed the inquiry as whether the bank had shown a threat of imminent irreparable injury and the need for a litigation receiver that could prevent that loss. The court found that the claimed harm was insufficient, noting that it merely represented a "common place business risk that one may not be paid that to which one is entitled before a debtor declares insolvency."[74]

The court also found that the facts of the case were insufficiently clear to support the appointment of a litigation receiver. The court regarded the record as presenting a "tangled web of factual confusion [that] hardly meets even a minimum threshold of clarity."[75] Rather than presenting a clear case, the bank had offered "only a possibility that [it] may not be ultimately paid and may accordingly suffer a monetary loss …."[76] The case also involved a situation where only money was at issue; neither the property nor the tenancy was threatened.[77]

IV. LESSONS FROM THE CASE LAW

The cases involving the appointment of litigation receivers are largely fact-specific. There are few cases in which the court has appointed litigation receivers, and many where it has not. Because the cases are so fact dependent, it is difficult to find consistent principles. It nevertheless remains possible to make some observations.

First, a party seeking a litigation receiver needs a strong claim, grounded on compelling facts. As suggested by the references in the decisions to fraud or gross mismanagement, the court's equitable heartstrings will most likely respond to situations that appear to involve egregious misconduct, such as the fraud in the initial *Ellis* case.

Second, a party seeking a litigation receiver will need to point to a threat of irreparable harm that cannot be addressed through other forms of interim relief. In the early decisions, parties seem to have used a request for a litigation

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73. 1998 WL 778362 (Del. Ch. Oct. 23, 1998).

74. *Id.* at *3.

75. *Id.*

76. *Id.*

77. *Id.*

receiver as a means of maintaining the status quo. Under current Chancery practice, it is customary for the court to address situations involving threats of interim harm through the use of a status quo order or other form of injunction. To obtain a litigation receiver, a party would need to show why a status quo order would be inadequate. The cases suggest that to make such a showing, the petitioner must convince the court that the defendant is a bad actor who cannot be trusted.

Third and more broadly, the court approaches a request to appoint a litigation receiver with the practical considerations of running a business in mind. For example, the cases indicate that the court will be more willing to appoint a litigation receiver for a holding company or other simple entity structure than for an operating enterprise with complicated and ongoing business.[78] At the same time, the court will take into account the nature of the business and the risk of harm to others. The *GMF* decision involving senior care facilities demonstrates that the court will more readily appoint a receiver to ensure that a company in charge of others' wellbeing continues to operate than to simply ensure that a bank receives rent payments it is due.[79]

Fourth, the conduct of the parties and their credibility seems to play a role. It is noteworthy how many of the successful applications for litigation receivers have involved the Delaware Attorney General. It is perhaps unsurprising, however, that the court would give credit to applications by an elected official charged with protecting Delaware's citizens.[80] At the other extreme, parties who appear to be playing games with the court seem to have given the court a push towards the appointment of a litigation receiver. In the *Vredenburgh* case, the parties closed the challenged transaction on the same day that the hearing on the appointment of a litigation receiver was taking place, which seems to have troubled the court. Similarly, in the *GMF* case, the principal defendant forced the court to reschedule the hearing on a litigation receiver on three occasions, then announced on the day before the scheduled hearing that he would not attend. The court proceeded with the hearing and appointed a litigation receiver.

Finally, perhaps the easiest way for a party to trigger the appointment of a litigation receiver is to fail to comply with a court order, resulting in a finding of contempt. Both as a matter of statute and under the common law, the Court of Chancery can appoint a litigation receiver to enforce its orders. The cases demonstrate that the court is willing to take this step.[81]

Taken together, the Court of Chancery's approach to requests for litigation receivers has been thoughtful and holistic. Just as Spiderman would not use his superhuman strength to move a car simply because the parking meter had expired, the Court of Chancery will not deploy the extraordinary remedy of a litigation receiver for typical corporate disputes. Instead, the court uses its equitable Spidey-sense[82] to consider the conduct at issue and its real-world implications.

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78. *See* Frantz v. Templeman Oil Corp., 134 A. 100 (Del. Ch. 1926).

79. *Compare* Beal Bank, SSB v. Lucks, 1998 WL 778362 (Del. Ch. Oct. 23, 1998) *with* GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, 2019 WL 1501553 (Del. Ch. Apr. 4, 2019).

80. *See* Gray v. Council of Newark, 79 A. 739 (Del. Ch. 1911); Morford *ex rel.* Gray v. Trustees of Middletown Academy, 14 A.2d 382 (Del. Ch. 1940); Satterthwaite v. Eastern Bankers' Corp., 154 A. 475 (Del. Ch. 1931).

81. *See, e.g.*, *Gray*, 79 A. 739; Jagodzinski v. Silicon Valley Innovation Co., 2015 WL 4694095 (Del. Ch. Aug. 7, 2015); *GMF*, 2019 WL 1501553.

82. The authors propose that this remarkable ability, which the Court of Chancery has demonstrated throughout its existence, henceforth be referred to as "equi-sense."

V. THE NUTS AND BOLTS OF LITIGATION RECEIVERS

Obtaining a ruling appointing a litigation receiver is only the first step. The parties must also assist the court in crafting the details of the receivership.

The Court of Chancery Rules that govern all receiverships—Rules 148 through 168—do not provide much guidance for a litigation receivership.[83] Many of these rules envision a receiver that takes charge of a liquidation, which is typically not the role of a litigation receiver. There are also reporting and financial requirements that generally do not make sense for litigation receivers.

Because the scope of a litigation receivership is specifically tailored to the particular facts of each individual case, the Court of Chancery often will not require adherence to the default rules. Chancery Rule 148 provides that "the court may relieve the receivers or trustees from complying with all or any of the duties and procedures set forth in Rules 149 through 168 and may impose such other duties or prescribe such other procedures as the court may deem appropriate."[84] The order appointing a litigation receiver will trump the default rules.

The contents of an order appointing a litigation receiver will vary from case to case. The following is a brief discussion of the topics that the order will usually address as well as sample language drawn from the Court of Chancery's order appointing a litigation receiver in the *GMF* action.

A. Scope of Authority

A litigation receiver is an agent of the Court of Chancery, and the receiver's power and authority are limited to what is set forth in the appointment order.[85] In fashioning the order, the Court of Chancery will consider "the character of the business and property of the corporation, and the object to the accomplished" by the receivership.[86] Because the Court of Chancery can (and does) tailor the receivership to the particular needs in a specific case, the power and authority granted to receivers will vary. In some instances, the court has granted full power and authority to the litigation receiver to run the corporation's business, protect or dispose of its assets, oversee litigation, and the like.[87] In other cases, the court has granted more limited authority, such as only the power to respond to books and records requests[88] or to preserve the status quo with respect to a sale of specific assets.[89]

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83. Rules of the Delaware State Courts, Court of Chancery Rules 148-168 (2021).

84. Court of Chancery Rule 148.

85. Clark v. State, 269 A.2d 59, 61-62 (Del. 1970) (noting some differences between receivers appointed for corporations pursuant to provisions of the Delaware General Corporation Law and other receivers appointed "pursuant to the general powers of the Court of Chancery" to conserve debtor's assets for later payment of creditors, including that statutory receivers obtain by operation of law title to corporate assets and records, while other receivers enjoy only power specified in order appointing them).

86. Ellis v. Penn Beef Co., 80 A. 666, 670 (Del. Ch. 1911).

87. *See, e.g., Jagodzinski*, 2015 WL 4694095, at *2.

88. Jagodzinski v. Silicon Valley Innovation Co., 2012 WL 593613, at *3 (Del. Ch. Feb. 14, 2012).

89. Morford *ex rel.* Gray v. Trustees of Middletown Academy, 14 A.2d 382, 386 (Del. Ch. 1940).

As the case law makes clear, what may appear to be a relatively straightforward task for the litigation receiver at the outset can turn into something far more complex than expected. This can be due to members of management failing to cooperate with (or actively hindering) the work of the receiver, or the uncovering of additional issues as the receiver peels back the proverbial layers of the onion.[90] In such a case, the receiver can file a motion to modify the order.[91]

An example of the language a receivership order may contain can be found in *GMF*. As noted above, the receiver in that case was granted broad authority, including the power to make an evaluation concerning the continued need for a litigation receiver and report back to the court:

> The Receiver shall have all power, authority and discretion to [marshal and preserve assets and operate the business]. In furtherance of the foregoing, the Receiver shall: (a) direct the operation of the business … in accordance with the terms of each entity's governing documents, (b) marshal the assets of the Companies by identifying available funds and discharging debts of the Companies, and (c) take any and all actions necessary to preserve the value of the assets of the Companies. In addition to the foregoing, promptly following appointment, the Receiver shall evaluate whether a continuing receivership *pendente lite* is necessary … and shall report his findings on these issues to the Court….[92]

B. Ability to Hire Advisors

Depending on the breadth of the receiver's power and authority, it may be advisable for the receiver to engage advisors. For example, if a receiver is charged with complete power and authority with respect to the company, the receiver may wish to engage an accountant to help review the company's financial statements and other records to determine if there are any issues to be addressed and to put the books and records in order, handle tax issues, and otherwise provide guidance on the money side of the business.[93] Similarly, if the company is involved in litigation or corporate transactions, the receiver may wish to hire legal counsel.[94] The Court of Chancery can grant the receiver the power and authority to hire advisors in the initial order, or, if it was not included in the initial order, the receiver can seek a modified order from the court allowing the receiver to engage advisors. The order in *GMF* contained the following language relating to the retention of advisors:

> For the avoidance of doubt, the Interim Receiver may retain such counsel to advise it with respect to its duties under this Order as it deems appropriate. The fees of counsel so retained shall be calculated on the same hourly rate charged by such counsel to clients represented outside of this matter and as the expenses shall be calculated

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90. GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, 2019 WL 1501553, at *2 (Del. Ch. Apr. 4, 2019); *Jagodzinski*, 2015 WL 4694095, at *2.

91. *GMF*, 2019 WL 1501553, at *2; *Jagodzinski*, 2015 WL 4694095, at *2.

92. GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, C.A. No. 2018-0840-SG, Order (Del. Ch. Feb. 7, 2019).

93. *Receivership Practice*, *supra* note 2, at 497.

94. *Id*.

> for such other clients. The fees and expenses of such counsel shall be paid by the Companies in accordance with the same procedure established herein for payment of the fees and expenses of the Interim Receiver.[95]

C. Limitation of Liability

As an agent of the court, so long as the receiver acts in accordance with the order, the receiver should be protected from liability.[96] Even so, as the case law has revealed, receiverships can be contentious (often because potentially recalcitrant managers of the company are being forced to cede their power and authority to the receiver, often in the face of misconduct allegations). Further, operating a business involves multiple layers of applicable laws and regulations beyond general Delaware corporate law (e.g., employment law, etc.), which could lead to potential foot faults for a receiver who is unfamiliar with the particular business and industry. A receiver can request that the appointing court order include broad indemnification and limitation from liability language in the order.

As expected, the *GMF* order provides such language:

> The Receiver shall not have any liability to the Companies or any person for acts taken in good faith in accordance with the terms of this Order. None of the parties to this action, nor any other person purporting to act in their capacity as a director, officer, employee, representative, agent, general partner, limited partner, manager, member, managing member, stockholder, equityholder or creditor of the Companies, shall institute any legal proceeding challenging any action or decision by the Receiver in performing his duties hereunder in any forum other than in the Court. The Companies shall jointly and severally indemnify the Receiver and hold him harmless from any liability to the fullest extent permissible by Delaware law and any other applicable law. In addition, at the Receiver's request, the Companies shall procure and maintain for his benefit adequate liability insurance coverage or such other protection from liability as the Receiver may reasonably require. Expenses, including attorneys' fees, incurred by the Receiver in defending any civil, criminal, administrative or investigative action, suit or proceeding shall be paid by the Companies in advance of the final disposition of such action, suit or proceeding, subject only to the repayment of such amount, if any, that it is determined by this Court in a final unappealable order to have been beyond that which could lawfully be paid pursuant to Delaware law or other applicable law. For the avoidance of doubt, the Companies' obligation to reimburse the Receiver for all expenses, including attorneys' fees, as provided in this paragraph or otherwise in this Order, shall be joint and several among the Companies during the time that each such entity is under receivership, and shall extend to and cover expenses, including attorneys' fees, incurred by the Receiver in connection with any action, motion or other proceeding

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95. GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, C.A. No. 2018-0840-SG, Order (Del. Ch. Apr. 15, 2019).

96. *Receivership Practice*, *supra* note 2, at 491 ("So long as there is full disclosure to the court of all relevant facts, the order authorizing any given act by the trustee or receiver operates as a defense to any claim that the trustee or receiver acted improperly as a fiduciary.").

> brought by Defendants, or at their behest, to challenge any act, conduct or decision by the Receiver, unless the Court determines that such act, conduct or decision was taken or made in bad faith.[97]

D. Jurisdiction

Generally speaking, the Court of Chancery will retain jurisdiction to hear applications from the litigation receiver for assistance from the court. Such assistance is often necessary given the extreme fact patterns that characterize most actions involving litigation receivers. For example, in GMF, the court's order contained this simple language: "The Court retains jurisdiction over this action to consider any applications that the Receiver may make for the Court's assistance in dealing with any problems encountered by the Receiver in performing his duties hereunder."[98] The court may—as it does in other receivership contexts—also order that any actions brought against the receiver must first be approved by the Court of Chancery. Such language can be helpful in deterring aggrieved parties from harassing the receiver with frivolous lawsuits. The following is an example of such language from an order appointing a receiver for an insolvent corporation pursuant to 8 Del. C. § 291:

> The parties in this case and their respective attorneys, servants, agents, and employees, are, jointly and severally, enjoined and stayed from commencing any action at law or suit or proceeding in equity in any Court or to prosecute any claim against [the Receiver], or any entity in which he holds an interest, or any of his agents, relating to the Receiver's actions with respect to the Corporation, without prior approval of the Court. The Court will undertake a review of the facts and circumstances, and determine whether such action is meritorious or interposed for the purpose of harassment of the Receiver.[99]

E. Fees And Expenses

Another important matter that is typically covered in the order relates to the receiver's fees and expenses, including the issue of who pays the fees and expenses and the amounts of such fees. In *GMF*, the receiver was entitled to be compensated at his standard professional hourly rate and was to be reimbursed for all reasonable, documented, out-of-pocket expenses, including travel expenses and fees associated with retaining any consultants or outside advisors. The court also ordered that the nominal defendants (*i.e.*, the entities that the receiver was overseeing) would be jointly and severally liable for such fees:

> The Receiver shall be compensated for his time at his standard hourly rate and shall be promptly reimbursed for all reasonable, documented, out-of-pocket expenses, including, without limitation, travel expenses and outside counsel fees and expenses, as well as the fees and expenses of any consultants and other advisors retained by

97. GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, C.A. No. 2018-0840-SG, Order at 6-8 (Del. Ch. Feb. 7, 2019).

98. *Id* at *8.

99. Wheeler v. CTPartners Exec. Search Inc., C.A. No. 11389-VCL, Order at 11 (Del. Ch. Nov. 12, 2015).

> the Receiver (as he determines in good faith to be necessary). For the avoidance of doubt, the Receiver may retain such counsel to advise him with respect to his duties under this Order as he deems appropriate, which counsel may include the law firm of Wilson Sonsini Goodrich & Rosati, P.C. The fees of counsel so retained shall be calculated on the same hourly rate charged by such counsel to clients represented outside of this matter and as the expenses shall be calculated for such other clients. The retention of the services of such counsel, advisor(s) and/or consultant(s) shall not require the prior approval of the Court, provided that the Receiver is satisfied that any fee to be charged is reasonable and in accordance with the terms of this Order. The Companies shall be jointly and severally responsible for all such fees and expenses during the time that each such entity is under receivership.[100]

The parties' responsibilities to pay the receivers expenses should include indemnification, advancement, and insurance obligations.[101]

VI. CONCLUSION

Though it is not often granted, the litigation receivership is alive and well in Delaware. The case law, with its interesting and pugnacious fact patterns, reveals that the Court of Chancery will use this remedy when warranted while also exercising restraint to avoid its abuse. When circumstances call for a litigation receiver, the court will tailor the receivership to the facts of the case to avoid overstepping the bounds of what is necessary to achieve equity. Perhaps the most interesting aspect of the litigation receivership, though, is that the broad scope of available powers and the standards used to evaluate a request for such relief today have remained virtually unchanged for over a century. The fact that no decisions have sought to radically alter this approach serves as a testament to both the utility of this superpower of equity and the court's wisdom in using it sparingly.

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100. GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, C.A. No. 2018-0840-SG, Order at 6 (Del. Ch. Feb. 7, 2019).

101. *See* text accompanying note 97, *supra*.