

Ask the Receiver: Corporation filed bankruptcy, can I demand payment for the cost of turning over the asset?

Q: I was appointed as receiver for some major assets owned by a corporation. I just learned the corporation filed for bankruptcy. I know I have to eventually turnover the assets to the representative of the bankruptcy estate. Can I wait to see if the bankruptcy sticks or if a trustee is appointed? Can I demand the corporation pay for the cost of my turning over the assets?

A: No and no (although you may have a claim for the cost). As most receivers know, if a bankruptcy is filed that involves an entity or assets in receivership, the receiver must turnover any property of the debtor in the receiver's possession to the debtor or, if one is appointed, the trustee. 11 U.S.C. §543(a). The exception to turnover is if, after notice and a hearing, the bankruptcy court excuses compliance with the turnover requirement. 11 U.S.C. §543(d). While there is nothing in §543 which specifies the time within which the receiver must deliver possession of the property, cases hold the receiver must act promptly. *In re Billy Joe Watkins*, 63 B.R. 46, 47 (Bankr. D.Colo. 1986); *In re 245 Assocs.*, 188 B.R. 743, 753 (Bankr. S.D.N.Y. 1995). The court in *In re 245 Assocs.*, held that the failure to promptly turnover estate property "prevents the debtor from administering its property for the benefit of the estate." *Id.* Indeed, the failure to promptly turnover estate property may be a violation of the automatic stay. 11 U.S.C. § 362(a)(3) ("a petition... operates as a stay, applicable to all entities, of any act ... to exercise control over property of the estate"); But see, *City of Chicago. Ill. v. Fulton*, 141 S.Ct. 585, 590-92 (2021) (passive retention of estate property, absent a turnover order or demand, does not violate the automatic stay).

Acting too quickly can raise issues as well. In *In re Billy Joe Watkins*, the Court ruled that if a receiver acts too quickly he will moot any request to excuse turnover compliance, because if turnover has occurred, the court cannot excuse compliance with the requirement. (*In re Billy Joe Watkins*, *supra*, 63 B.R. at 48.) A receiver, therefore, may retain possession for a short period to see if "a motion is timely filed", in which case the receiver may refrain from turnover pending determination of the motion. *Id.*; 5 *Collier on Bankruptcy*, ¶ 543.05 (16th ed. 2022). A new case, *In re Preferred Ready-Mix Llc*, 647 B.R. 158 (Bankr. S.D.Tex. 2022) illustrates the trouble a receiver can get into for failure to promptly turnover estate property. A creditor obtained a default judgment in state court and a receiver was appointed, who seized the assets of Preferred Ready-Mix ("Ready-Mix") on October 1, 2021. On October 14, 2021, Ready-Mix filed a Chapter 11 bankruptcy. The receiver admitted that by October 21 he had actual notice of the bankruptcy. (The court found that the receiver knew of the bankruptcy on the day of the filing.) The receiver did not automatically turnover the Ready-Mix assets, which consisted mainly of cement mixing trucks. On November 10, 2021, counsel for Ready-Mix made demand on the receiver to turnover the Ready-Mix assets. Because the trucks had not been used since the receiver's seizure, a number of them had battery, tire and mechanical issues. The receiver stated he needed \$5,565 prior to turnover to pay for tow fees, but stated: "I'll do \$2,500 with the rest of my expenses accepted as an administrative expenses..." Ready-Mix paid the \$2,500

demanded and the turnover took place on November 20, 2021. Ready-Mix then sued the receiver for turnover, violation of the automatic stay and to deny the receiver's \$7,000 administrative claim.

The court found for Ready-Mix. It held it may sanction a party for violation of §§ 542 or 543 (the turnover provisions) and the receiver's failure to promptly turnover the trucks when demanded and conditioning the turnover were violations. The court found the damages were \$500 per day per truck for a total of \$35,000 for the receiver's 10-day delay in turning over the trucks. It also found the receiver violated the automatic stay by exercising control over the trucks after the turnover demand was made (§362(a)(3) discussed supra.) and imposed punitive damages of \$10,000. The court also denied the receiver's \$7,000 administrative claim, finding his demand and receipt of estate funds, without court approval, was cause to disallow the claim.

The court rejected the receiver's claim that the turnover delay was caused by the receiver being on a cruise, stating: "As a claimed 'expert' receiver he cannot simply disappear for ten days on vacation and not have any associate counsel to which to turn emergency matters, like the one in this case, to during any absence." *Id.* at 162 fn. 13. The court also noted the receiver was lucky his liability was not higher, being capped due to the tardy turnover demand; which was caused by Ready-Mix's initial counsel's unresponsiveness and disappearance, which resulted in the court ordering her to disgorge her retainer, her arrest when she failed to do so and her own bankruptcy to avoid the disgorgement order. *Id.* at 161.

The take away – be careful. If a bankruptcy is filed, turnover should be effectuated promptly, unless a timely motion is filed to excuse turnover compliance.