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Navigating New Landscapes in Debtor Creditor Law: Select Provisions of the Missouri Commercial Receivership Act Compared to Federal Bankruptcy Law

*Keith H. Holland & John M. McKenzie**

ABSTRACT

Two momentous legislative overhauls dealing directly with debtor-creditor relations were enacted in the latter half of the 2010s. First, in 2016, the Missouri General Assembly enacted the Missouri Commercial Receivership Act. This act, signed into law by Governor Jeremiah “Jay” Nixon on July 13, 2016, constitutes a significant overhaul of Missouri’s statutory mechanism empowering the circuit courts of the state to appoint receivers for the collection and preservation of a financially distressed debtor enterprise’s assets. Prior to the enactment of Missouri Commercial Receivership Act, creditors, debtors, and interested third parties were guided only by three sparse statutory provisions dating to the 19th century and over 150 years’ worth of common law glosses from Missouri courts on the law of receivership.

The second significant legislative change came in August of 2019 when President Donald J. Trump signed the Small Business Reorganization Act of 2019. The Small Business Reorganization Act may be viewed as the culmination of several previous attempts by Congress to make reorganization under the federal bankruptcy code more effective and affordable for small businesses—a class of debtors that typically experienced difficulties attempting to reorganize under Chapter 11.

These two new laws, each addressing distressed businesses, are naturally of great interest to the business community. The authors anticipate that much will be written about the Small Business Reorganization Act due to its nationwide applicability. This article considers the Missouri Commercial Receivership Act as a state-law complement to bankruptcy and seeks to highlight innovations contained in the Missouri Commercial Receivership Act that constitute modernizations of Missouri’s receivership remedy. Throughout this article, comparisons will be drawn between the Act and the Bankruptcy Code, including the Small Business Reorganization Act, in order to contribute to a fuller picture of the changing landscape of debtor-creditor law impacting Missouri businesses.

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I. INTRODUCTION

Generally, a receivership is “an equitable remedy used by a court to place property under the control of a receiver so that it may be preserved for the benefit of affected parties.”¹ In many respects, a receivership under state law is similar to a bankruptcy under the federal bankruptcy code. Missouri courts have long recognized the equitable remedy of receivership for creditors of corporations.² Despite its common law origins, the General Assembly has from time to time enacted statutes related to receiverships. These statutes most often set forth the circumstances under which a receiver may be appointed, the receiver’s powers with respect to property of the receivership estate, and procedural matters related to receiverships. But these statutes suffered from a lack of definitiveness that often left the courts (along with advocates for debtors, creditors and third parties alike) reaching for doctrinal understanding.

The Missouri Commercial Receivership Act (“MCRA”) contains numerous innovations when compared to prior law. Part II of this article will focus on the historical development of the receivership remedy under Missouri law in order to provide a better understanding of the context that informed the drafters of the MCRA. Part III will begin the consideration of the MCRA in earnest by addressing the threshold question of when a circuit court is authorized to appoint a receiver. The MCRA’s approach in this regard will be compared to prior law to highlight the improvements supplied by the MCRA. Part III will also consider the special case of “standalone receiverships” before concluding with a comparison between the commencement of a case under the MCRA and commencing a case under federal bankruptcy law. Finally, Part IV will closely examine two particular innovations contained in the MCRA that were inspired by bankruptcy law: the automatic stay and the establishment of priorities among creditors.

II. DEVELOPMENT OF THE REMEDY OF RECEIVERSHIP IN MISSOURI: 1849-2016

Before the MCRA, Missouri’s receivership statutes applying to general business corporations were last revised in 1939.³ Comprised of three short sections, these statutes were as brief as their predecessors.⁴ These sentence-long statutes first provided that the court has the power to appoint a receiver “whenever such appointment shall be deemed necessary.”⁵ Next, the receivership statutes required a receiver to give bond and delineated the power of the office: the receiver, upon appointment by the circuit court, has “the same powers and [is] subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by

1. STEVEN H. GIFIS, BARRON’S LAW DICTIONARY 424 (5th ed. 2003).

2. *See infra* Part II.

3. MO. REV. STAT. 515.240–260 (1939) (repealed 2016); *See infra* pp.8–20 and accompanying text. As used here, the word “revised” refers to the decennial “revision” of Missouri statutes. It was with the revision of the statutes in 1939 that the receivership statutes, sections 515.2X0 through 515.2X0, obtained the section numbers that would persist until the MCRA’s enactment. This “revision” involved the renumbering of the three sections comprising the receivership statutes but made no substantive changes to the law.

4. But not as brief as Missouri’s first receivership statute. *See infra* pp.8–20 and accompanying text.

5. MO. REV. STAT. § 515.240 (1939) (repealed 2016).

virtue of the law providing for suits by attachment.”⁶ Finally, the law stated that a receiver is allowed compensation for “reasonable and just” services and expenses connected with the receivership.⁷

As this part will show, the brevity of the receivership statute that constituted the law of Missouri since (essentially) 1849 is due to the origin of receivership as an equitable remedy and not a statutory action. This could explain the General Assembly’s demonstrated reluctance to legislate in the area of receivership laws, at least with respect to receiverships concerning general business corporations and other business enterprises.⁸ The discussion of the history of pre-MCRA receivership law in Missouri will also assist in understanding the monumental changes made by the MCRA.

While Missouri has had receivership laws in its statute books since before the Civil War, these enactments offered precious little guidance to creditors, businesses, attorneys, and judges. As the scope and complexity of Missouri businesses exploded in the latter half of the 20th century, the receivership law remained unchanged. This part examines the history of receivership law in Missouri in order to understand the reasons behind the MCRA so as to provide a foundation for understanding the innovations contained in the MCRA and to highlight the impact the system created by the MCRA will have on debtors and creditors taking part in general commercial receiverships under Missouri law.

Receivership as an equitable remedy has existed in some form or another in the English common law for centuries.⁹ Some historians believe the remedy developed during the reign of Queen Elizabeth I of England in the mid-to-late 16th century.¹⁰ Missouri’s early judiciary was divided into “numerous courts, each separate and distinct. These courts included, but were not limited to, municipal courts, magistrate courts, juvenile courts, probate courts, courts of common pleas, and the St. Louis Court of Criminal Corrections.”¹¹

As an equitable remedy, early Missouri receivers would have been appointed by the chancery courts.¹² This system was soon deemed too cumbersome for the effective administration of justice, and Missouri’s courts of law and equity were

6. MO. REV. STAT. § 515.250 (1939) (repealed 2016).

7. MO. REV. STAT. § 515.260 (1939) (repealed 2016).

8. There are numerous Missouri statutes providing for the appointment of a receiver in specific contexts. *See* MO. REV. STAT. § 375.954 (1976) (authorizing the appointment of a receiver in “delinquency proceedings for an insurer domiciled in this state”); *See also* MO. REV. STAT. 369.349 (1994) (authorizing the circuit court to appoint the director of the division of finance as a receiver of a liquidating savings and loan association); *See also* MO. REV. STAT. 393.145 (2005) (authorizing the appointment of a receiver for sewer or water corporations under certain circumstances); *See also* MO. REV. STAT. 388.250 (2019) (contemplating the appointment of a receiver for railroad companies).

9. *See* Jesse G. Reyes, *The Swinging Pendulum of Equity: How History and Custom Shaped the Development of the Receivership Statute in Illinois*, 44 Loy. U. Chi. L.J. 1019, 1032 (2013).

10. Peter A. Davidson, *Wise Receivers: While Receiverships Are Often Viewed As A Luxury, They Can Achieve the Purpose of Preserving Assets in A Wide Variety of Disputes*, L.A. LAW., Mar. 2008, at 24 (“Receiverships were created in the chancery courts in England as early as the reign of Queen Elizabeth I.”).

11. Jeffrey A. Burns, 2 Mo. Prac., *Methods of Prac.: Litigation Guide* § 1.1 (4th ed.).

12. M.O. CONST. art. V, § 10 (1820) (“The court of chancery shall have original and appellate jurisdiction in all matters of equity.”).

merged into a single circuit court.¹³ Thereafter, one court using a single system of procedure was charged with the administration of all law.¹⁴

The Practice Act of 1849 included the first reference to a “receiver” in Missouri statutes,¹⁵ which is found in Article 10.¹⁶ As quoted by the Missouri Supreme Court in the 1878 case of *State ex rel. Fichtenkamm v. Gambs*,¹⁷ this law stated that “[u]ntil the Legislature shall otherwise provide, the court may appoint receivers and direct the deposit of money or other thing in court, and grant the other provisional remedies now existing according to the present practice, except as otherwise provided in this act.”¹⁸ The 1849 law’s opening phrase shows that the legislature contemplated more detailed legislation on the topic of receiverships.¹⁹ In the middle of the following decade, the General Assembly indeed revisited the law of receiverships, but not in detail.

By 1855, the legislature had passed an act codifying the remedy of receivership in what would essentially be its final form until the passage of the MCRA in 2016.²⁰ Section 53 of that act, “regulating practice in civil cases,” stated the rule for receiverships:

[t]he court shall have power to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in court, or that may be the subject of a tender, subject to the order of court.²¹

The next section of the same act provided that

[s]uch receiver shall give bond and have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed in virtue of the law providing for suits by attachment.²²

By 1855 the legislature had also adopted an attachment law (to which the receivership statute refers), which reiterated the court’s power to appoint a receiver “in a proper case,”²³ and gave the receiver power to “settle and collect” debts owed to the insolvent business, including by way of actions on the debts in the receiver’s name.²⁴

13. *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462, 470 (Mo. 2004); Thomas Jean O’Neil, *Law or Equity: The Right to Trial by Jury in a Civil Action*, 35 MO. L. REV. 43, 45 (Winter 1970).

14. *Id.*

15. An Act to Reform the Pleading and Practice in Courts of Justice in Missouri, 1849 Mo. Laws 5–88.

16. *State ex rel. Fichtenkamm v. Gambs*, 68 Mo. 289, 290–91 (1878).

17. *Id.*

18. *Id.*

19. Likewise, providing that the courts “may appoint receivers” without elaboration, coupled with the law’s subsequent reference to “the other provisional remedies now existing according to the present practice” seems to indicate that the chancery courts were already quite familiar with the equitable receivership remedy. *Id.*

20. *Id.* at 290.

21. *Id.* at 291.

22. *Id.*

23. *Id.* at 290.

24. *Id.*

In 1878, when the Missouri Supreme Court's opinion in *Fichtenkamm* was written, the 1855 law had already been the law of the land for more than 20 years. The opinion's author, Judge Hough,²⁵ commented that "[t]hese several provisions in the laws of 1855 are carried bodily, in the very same phraseology, into the revision of 1865, and are to-day in full force and parts of the law of the land."²⁶

Indeed, "the very same phraseology" of the receivership law of 1855 persisted for many decades thereafter. In *City of St. Louis v. St. Louis Gaslight Co.*,²⁷ the Missouri Court of Appeals quoted "Section 3660 of the Revised Statutes of 1879": "[t]he court shall have power to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in court, or that may be the subject of a tender, subject to the order of the court."²⁸ The court notes also that "Section 3661" and "Section 3662" relate to "the powers of such receiver" and the allowance of compensation for the receiver's services, respectively.²⁹ These three sections and their topical divisions were still found in Missouri's receivership statutes immediately before the enactment of the MCRA.³⁰

In 1881, the General Assembly updated the receivership law to apply more specifically to businesses.³¹ According to the opinion of the Missouri Supreme Court in *Thompson v. Greeley*,³² the legislature adopted updated language related to the receiver's duties.³³ In addition to "keep[ing] and preserv[ing] any money or other thing deposited in court, or that may be the subject of a tender, subject to the order of the court,"³⁴ the 1881 law also established a duty of the receiver "to keep and preserve all property and protect any business or business interest intrusted [sic] to him pending any legal or equitable proceeding concerning the same, subject to the order of the court."³⁵ This language, including the characteristic spelling of "entrusted," is also found in the 1909 revision of Missouri statutes.³⁶ The statute found in the statutes of 1919 is substantially identical as well,³⁷ as is the law as it appears in the 1929 Revised Statutes.³⁸

By the 1939 revision of Missouri's statutes, the law of receiverships for general business corporations was fixed. Section 515.240 codified the familiar section pertaining to the court's authority to appoint a receiver and setting forth the receiver's duties with respect to the receivership estate as it existed after the 1881 amendment.³⁹ The next section required the receiver to give bond and defined the

25. *Id.* at 292.

26. *Id.* at 291.

27. *City of St. Louis v. St. Louis Gaslight Co.*, 11 Mo. App. 237 (1881), *aff'd sub nom. City of St. Louis v. St. Louis Gas Light Co.*, 87 Mo. 223 (1885).

28. *Id.* at 240.

29. *Id.*

30. See Burns, *supra* note 11 and accompanying text.

31. See *Thompson v. Greeley*, 17 S.W. 962, 964 (Mo. 1891).

32. *Id.* at 962.

33. *Id.* at 964.

34. *St. Louis Gas Light Co.*, 11 Mo. App. at 240.

35. *Thompson*, 17 S.W. at 964.

36. *Abramsky v. Abramsky*, 168 S.W. 1178, 1179–80 (Mo. 1914).

37. *State ex rel. Elam v. Henson*, 217 S.W. 17, 18 (Mo. 1919).

38. *Aetna Ins. Co. v. O'Malley*, 118 S.W.2d 3, 17 (Mo. banc 1938) (Tipton, Judge, dissenting).

39. The section reads in its entirety: "The court, or any judge thereof in vacation, shall have power to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in court, or that may be subject of a tender, and to keep

receiver's powers with reference to the law of attachment, as did the statute of 1855.⁴⁰ The third and final section of the prior statutes concerning general commercial receiverships provided for the compensation of the receiver for the receiver's "services and expenses as may be reasonable and just."⁴¹

III. COMMENCING THE RECEIVERSHIP – THE POWER OF THE CIRCUIT COURT; THRESHOLD ISSUES UNDER BANKRUPTCY LAW CONSIDERED

A few conclusions may be drawn from the preceding review of the history of statutory treatments of the law of receiverships as applied to general business corporations in Missouri. First, it is apparent that the legislature intended, at least initially, to simply make overt that which was previously assumed: Missouri courts are authorized to utilize the equitable remedy of receivership "whenever such appointment shall be deemed necessary,"⁴² leaving the circuit court with broad discretion. However, as commerce became ever more complex as the decades wore on, the Missouri legislature left the task of crafting a workable receivership remedy to the courts. The discussion that follows will highlight a selection of innovations made by the MCRA, with reference to key opinions under prior law—both those from which the MCRA's drafters drew inspiration and those that served as warnings.

A. *The Circuit Court's Authority to Order Receivership: Section 515.510, RSMo.*

As one may imagine, the "whenever ... appointment [is] deemed necessary" standard was quite broad and consequently open to interpretation. Under what circumstances should a court deem the appointment of a receiver necessary? This question remained unanswered by the legislature, forcing the courts to supply their own—sometimes disparate—answers.⁴³ As the following part will show, the MCRA has now provided Missouri judges with clearer standards when evaluating whether a receiver may properly be appointed in a given case.

Given the historical development of receiverships under Missouri law (or the lack thereof), it is unsurprising that one of the MCRA's first improvements to the law of receiverships in Missouri was to provide clear, workable standards to determine whether a receiver may properly be appointed in a case. While the circuit court still has considerable discretion concerning the appointment of a receiver, it now also may find a non-exhaustive list of the circumstances under which the

and preserve all property and protect any business or business interest entrusted to him pending any legal or equitable proceeding concerning the same, subject to the order of the court." MO. REV. STAT. § 515.240 (1939) (repealed 2016).

40. The full text of this section reads: "Such receiver shall give bond, and have the same powers and be subject to all the provision, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment." MO. REV. STAT. § 515.250 (1939) (repealed 2016).

41. In full, this section reads: "The court shall allow such receiver such compensation for his services and expenses as may be reasonable and just, and cause the same to be taxed as costs, and paid as other costs in the cause." MO. REV. STAT. § 515.260 (1939) (repealed 2016).

42. MO. REV. STAT. § 515.240 (1939) (repealed 2016).

43. See *supra* Part III, Subpart B.

appointment of a receiver is appropriate.⁴⁴ These standards will be contrasted with the eligibility requirements for a debtor filing a small business reorganization case under the federal Small Business Reorganization Act (“SBRA”).

Section 515.510, RSMo, enacted as part of the MCRA, provides more detailed standards related to when the appointment of a receiver is authorized.⁴⁵ In its opening lines, § 515.510 states that the MCRA is Missouri’s default commercial receivership law by acknowledging the other provisions of Missouri statutes that allow for the appointment of a receiver in particular situations or industries.⁴⁶ For example, Missouri statutes already provide for the appointment of a receiver in several circumstances related to a political subdivision defaulting on bonds.⁴⁷ Likewise, the attorney general is authorized to petition for the appointment of a receiver to take control of a nursing home in certain circumstances.⁴⁸ Cooperative associations,⁴⁹ health services corporations,⁵⁰ nonprofit corporations,⁵¹ and credit unions⁵² are among entities for which Missouri statutes make other provisions for the appointment of a receiver and are consequently excluded from the scope of the MCRA.⁵³

Section 515.510.1 next sets forth the court’s power to appoint a receiver, using familiar language:

the court or any judge thereof in vacation, shall have the power to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in court, or that may be subject of a tender, and to keep and preserve all property and protect any business or business interest entrusted to the receiver pending any legal or equitable action concerning the same, subject to the order of the court...⁵⁴

This language delineating the courts power generally to appoint a receiver is identical to the language enacted in the receivership statute of 1855.⁵⁵

Section 515.510.1’s true modernization immediately follows the age-old grant of authority. The section continues with a non-exhaustive list of instances where the court has the power to appoint a receiver, which constitutes a major innovation of the MCRA.⁵⁶ For example, the MCRA makes clear that a court has the power to appoint a receiver “[i]n an action brought to dissolve an entity,”⁵⁷ with such receiver having “the powers of a custodian to manage the business affairs of the entity and

44. MO. REV. STAT. § 515.510 (2016).

45. *Id.*

46. *Id.* at subsection 1.

47. *See, e.g.*, MO. REV. STAT. § 49.555 (receiver appointed following default on bonds issued to acquire a building by a county); MO. REV. STAT. § 91.730 (receiver appointed following default on bonds by a municipality).

48. MO. REV. STAT. § 198.099 (1979).

49. MO. REV. STAT. § 351.1189 (2011).

50. MO. REV. STAT. § 354.357.

51. MO. REV. STAT. § 355.736 (1995).

52. MO. REV. STAT. § 370.154.

53. MO. REV. STAT. § 515.510.1 (2016).

54. *Id.*

55. *See supra* Part II.

56. MO. REV. STAT. § 515.510.1(1)-(14) (2016).

57. *Id.* § 1(1).

to wind up and liquidate the entity.”⁵⁸ Additional grounds for appointing a receiver include when a party “demonstrates it has no other adequate remedy to enforce a judgment,”⁵⁹ “[t]o dispose of property according to provisions of a judgment dealing with its disposition,”⁶⁰ and “at the instance of a judgment creditor ... to preserve [,] protect [,] or prevent [the] transfer of” property not exempt from execution.⁶¹

B. *The Circuit Court’s Authority Under Prior Law*

Behind § 515.510.1’s recitation of 14 specific instances where the court has the power to appoint a receiver lurks more than a century of judge-made law. For example, § 515.510.1(2) allows for the appointment of a receiver in an action by the holder of a lien on property in three specific circumstances: to keep and preserve the encumbered property;⁶² where a contract provides that the lienholder is entitled to the appointment of a receiver;⁶³ or when a receivership would be necessary to give effect to “or enforce an assignment of rents or other revenues from the property.”⁶⁴ Consider this provision, along with the other subdivisions of § 515.510.1, in the discussion of the court’s authority to appoint a receiver before the MCRA’s enactment.

Section 515.510 may be properly viewed as an innovation in the Missouri law of receiverships, especially compared to the prior “necessary” standard.⁶⁵ It has long been recognized in Missouri that the standard for when a receiver could be appointed is within the discretion of the court: “[t]here are many cases in the State holding that the power to appoint a receiver rests within the sound discretion of the trial court.”⁶⁶ As explained by the Missouri Supreme Court, “[i]f the statutory words

58. *Id.*

59. *Id.* § 1(3).

60. *Id.* § 1(4).

61. *Id.* § 1(5). Other grounds for appointing a receiver under section 515.510.1 include: “(6) If and to the extent that property is subject to execution to satisfy a judgment, to preserve the property during the pendency of an appeal, or when an execution has been returned unsatisfied, or when an order requiring a judgment debtor to appear for proceedings supplemental to judgment has been issued and the judgment debtor fails to submit to examination as ordered; (7) Upon attachment of real or personal property when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction or where a debtor has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly, or when the court determines that the nature of the property or the exigency of the case otherwise provides cause for the appointment of a receiver; (8) In an action by a transferor of real or personal property to avoid or rescind the transfer on the basis of fraud, or in an action to subject property or a fund to the payment of a debt; (9) In an action against any entity if that person is insolvent or is not generally paying the entity’s debts as those debts become due unless they are the subject of bona fide dispute; (10) In an action where a mortgagee has posted and the court has approved a redemption bond as provided pursuant to section 443.440; (11) If a general assignment for the benefit of creditors has been made; (12) Pursuant to the terms of a valid and enforceable contract or contract provision providing for the appointment of a receiver, other than pursuant to a contract or contract provision providing for the appointment of a receiver with respect to the primary residence of a debtor who is a natural person; (13) To enforce a valid and enforceable contractual assignment of rents or other revenue from the property; and (14) To prevent irreparable injury to the person or persons requesting the appointment of a receiver with respect to the debtor’s property.” *Id.* §§ 1(6)-(13).

62. *Id.* § 1(2)(a).

63. *Id.* § 1(2)(b).

64. *Id.* § 1(2)(c).

65. *Id.* § 1.

66. *Goll v. Kahler*, 422 S.W.2d 359, 362 (Mo. Ct. App. 1967) (collecting cases).

‘whenever such appointment shall be deemed necessary,’ do not vest in a circuit judge a discretion... in such behalf so broad as only to be a matter of review by us in case of palpable abuse, we fail to read it correctly.”⁶⁷ As the following case illustrates, however, parties seeking to attack a circuit court’s appointment of a receiver would often argue that the court had no such power despite the statute’s discretionary grant of authority.

In *Robinson v. Nick*,⁶⁸ the Missouri Court of Appeals considered such an attack in the context of a receivership ordered by the circuit court in an action by members of a labor union against representatives of the union.⁶⁹ In their initial petition, the union members alleged that the union, through its representatives, had

unlawfully, fraudulently, and maliciously conspired together for the purpose of depriving plaintiffs of their rights as members of the local and of their rights in and to its assets, in that said defendants had been guilty of gross mismanagement and abuse of authority in conducting the affairs of the local union; had refused to permit plaintiffs and the other members to elect officers; had refused to permit plaintiffs and the other members to meet together and discuss matters of common interest to themselves and the local union; and, in conducting the affairs of the local union, had not only failed to manage the same for the benefit and best interests of the local union and its officers, but on the contrary had been guilty of such acts of misconduct as to bring plaintiffs, the said local union, and labor organizations in general, into public disfavor and disrepute.⁷⁰

Among other relief requested, the plaintiffs requested that the circuit court appoint a receiver.⁷¹ The circuit court entered an order to show cause why a receiver should not be appointed in the case.⁷² Following a hearing on the show-cause order, the circuit court ordered that the defendant-managers of the union be removed and a receiver appointed to manage the union’s “affairs, assets, operations, business, effects, and property, with all the rights, powers, and duties appropriate to receivers in equity, including the rights, powers, duties, and obligations hereinafter referred to.”⁷³

On the defendants’ challenge that the circuit court improperly appointed a receiver in the case, the Court of Appeals disagreed.⁷⁴ In reaching its conclusion, however, the court in *Robinson* appeared to elaborate on the standard for when a circuit court may properly appoint a receiver:

[W]here property not otherwise in the custody of the law is involved in litigation which has for its primary purpose some character of distinct equitable relief, and it appears that through fraud, mismanagement, misconduct, or otherwise, there is a likelihood that without the interposition of the

67. *Abramsky v. Abramsky*, 168 S.W. 1178, 1180 (Mo. 1914).

68. *Robinson v. Nick*, 136 S.W.2d 374 (Mo. Ct. App. 1940).

69. *Id.* at 376–377.

70. *Id.* at 377.

71. *Id.* at 377–378.

72. *Id.* at 378.

73. *Id.* at 378–379.

74. *Id.* at 387.

court the property will be squandered, wasted, misappropriated, or unlawfully diverted, then the court will be authorized to appoint a receiver to take charge of and hold the property pending the litigation, if there is a reasonable probability that the plaintiff will ultimately succeed in securing the relief which he seeks in the suit in which the receivership is asked.⁷⁵

The court likewise outlined the circumstances under which the appointment of a receiver *would not* be appropriate:

But absent any threatened destruction or dissipation of the property, or where there is no good cause to believe that a benefit would result from the appointment of a receiver, then the court should of course decline to make such an appointment, and instead leave the possession of the property undisturbed until such time as it may finally be affected by the decision of the main case on the merits.⁷⁶

Ultimately, the *Robinson* court upheld the circuit court's refusal to revoke its order to appoint a receiver, which had been challenged by the defendant-managers of the union, reasoning that "it is merely our duty on this appeal to review the action of the court, and determine from the law and the facts of the case whether the court exercised a sound discretion in refusing to revoke the order of appointment it had made."⁷⁷ This case shows that, under prior law, the power to appoint a receiver was understood to be broad and subject only to the discretion of the appointing court.

However, that discretion was not always recognized. For example, in *Miller v. Perkins*,⁷⁸ the Missouri Supreme Court held that the circuit court's appointment of a receiver was unauthorized in a case where the plaintiff had requested only a money judgment, and nothing more.⁷⁹ This decision was based in part on the character of receivership as an *equitable* remedy.⁸⁰ The court reasoned that

if the case pending in the ... circuit court had been of that class, the appointment of the receiver by [the circuit court judge] would have been within the jurisdiction of that court, and the appointment impervious to attack in this proceeding. But that suit was not of that class ... Circuit courts in actions at law have no inherent power to appoint a receiver.⁸¹

Turning to the text of the general receivership statute, the court conceded that "[t]his statute was evidently intended to apply to suits in equity as well as to actions at law, and to confer express authority upon the circuit court, and the judge thereof in vacation, to appoint a receiver in any case belonging to either class pending in such courts."⁸² However, the *Miller* court interpreted the statutory phrase imposing a duty on the receiver "to keep and preserve any money or other thing deposited in

75. *Id.* at 385.

76. *Id.*

77. *Id.* at 388.

78. *Miller v. Perkins*, 55 S.W. 874 (Mo. 1900).

79. *Id.* at 876.

80. *Id.*

81. *Id.*

82. *Id.* at 877.

court, or that may be subject of a tender” as limiting the court’s power to appoint a receiver in cases where no “money or other thing” had been deposited into the court.⁸³

This conclusion is in apparent contravention of the next clause of the statute, which states the receiver’s duty as an obligation “to keep and preserve *all* property and protect *any business or business interest [e]ntrusted to him* pending any legal or equitable proceeding concerning the same, subject to the order of the court.”⁸⁴ Nevertheless, the court concluded that “[j]urisdiction of the res is essential to the power to appoint a receiver thereof, without which such power cannot exist.”⁸⁵ Therefore, the appointment of a receiver by the circuit court was improper.

C. *Standalone Receivership*

Under prior law, a receivership had to be ancillary to some other action. As one opinion clearly declared, “[t]here is no such thing as a pure receivership case. An equity court may appoint a receiver only when the appointment is ancillary to a pending action.”⁸⁶ Instead of being a standalone action, “[t]he appointment of the receiver was merely in aid of dissolution, the receiver being merely a portion of the machinery the court was allowed to use to effect dissolution.”⁸⁷

Laumeier v. Sun-Ray Products Co. is a good example of a common law decision finding that a circuit court lacked the power to properly appoint a receiver where no final relief was requested in the plaintiff’s petition.⁸⁸ In this case, plaintiffs were minority stockholders of defendant corporation.⁸⁹ They filed a petition alleging mismanagement of the company and stating that the company “has been drifting rapidly towards insolvency” as a result.⁹⁰ For relief, the plaintiffs requested that the court “appoint one or more receivers to take charge of the business, property and effects of the defendant . . . with power in such receiver or receivers to manage and operate the business of the corporation.”⁹¹ The circuit court, following “considerable testimony,” appointed a temporary receiver.⁹² Defendant filed “a motion to vacate the court’s order appointing the temporary receiver” on the grounds that the court was without authority to make the appointment, rendering the appointment void.⁹³ Defendant appealed the court’s order overruling its motion.⁹⁴

The Missouri Supreme Court agreed with the defendant corporation and held that the circuit court lacked authority to appoint a receiver where no other definitive relief was prayed for in the plaintiffs’ petition:

We find the settled rule in this and other states to be that a court of equity has inherent power to appoint a receiver . . . only when such appointment

83. *Id.*

84. *Id.* at 876–877 (emphasis added).

85. *Id.* at 877.

86. *Milgram v. Jiffy Equip. Co.*, 247 S.W.2d 668, 674 (Mo. 1952).

87. *Id.*

88. *Laumeier v. Sun-Ray*, 50 S.W.2d 640 (Mo. 1932).

89. *Id.* at 641.

90. *Id.*

91. *Id.* at 642–43.

92. *Id.* at 643.

93. *Id.*

94. *Id.*

is ancillary to and in aid of an action pending for some other purpose, and in which there is a prayer for other and final or ultimate relief which the court has power and jurisdiction to grant.⁹⁵

Even though “[t]he petition filed in the instant case vividly portrays numerous alleged actual and impending ills of defendant corporation, mismanagement and unfaithful conduct of its officers, and wrongs to plaintiffs resulting therefrom,” still, the “petition disclose[d] no allegation that would authorize any final relief to plaintiffs as against defendant, even under the general prayer for relief.”⁹⁶ Therefore, the Missouri Supreme Court concluded that the circuit court had improperly appointed the receiver in the case, as it was without the power to do so. Interestingly, the Missouri Supreme Court did indicate that the circuit court could be granted such authority under these circumstances by action of the legislature.⁹⁷

Monticello Bldg. Corp. v. Monticello Inv. Co.,⁹⁸ decided by the Missouri Supreme Court mere months after *Laumeier*, again held that a circuit court was without the power to appoint a receiver in a commercial case, but in a decidedly different factual context.⁹⁹ Unlike the plaintiffs in *Laumeier*, the plaintiffs in *Monticello* did in fact include requests for final and definitive relief, specifically an injunction against the defendant corporation and an accounting of its finances in addition to the appointment of a receiver.¹⁰⁰ Based on the plaintiffs’ petition, the circuit court appointed a temporary receiver whose appointment was later made permanent over a motion to vacate the appointment.¹⁰¹ This appeal arose from the denial of this motion to vacate.¹⁰²

The Missouri Supreme Court held that, although plaintiffs requested classic equitable relief—injunction and accounting—it was the substance of their petition that was inadequate: “[w]hile the relief prayed for was an injunction, the real relief sought was a moratorium” on the enforcement of and foreclosure under a first deed of trust on real estate owned by the defendant corporation.¹⁰³ Citing *Laumeier*, among other cases, the court held that plaintiffs’ original petition “wholly failed to state a cause of action” and, therefore, “there is no main case pending, and the court is without power and jurisdiction to appoint a receiver.”¹⁰⁴

Forty-five years after the *Laumeier* and *Monticello* cases, the Missouri Court of Appeals held that the appointment of a receiver was authorized under circumstances closely related to those that did not confer such authority in *Monticello*. In *MIF Realty v. Pickett*,¹⁰⁵ the plaintiff was the holder of a promissory note, secured

95. *Id.*

96. *Id.* at 644.

97. *Id.* at 645 (concluding that certain authorities cited by the plaintiffs “do not hold, however, that, in the absence of statutory authority, a court of equity has inherent power to appoint a receiver where such appointment is ancillary to a main proceeding which states a cause of action for final relief against a party defendant.” (emphasis added)).

98. *Monticello Bldg. Corp. v. Monticello Inv. Co.*, 52 S.W.2d 545 (Mo. 1932).

99. *Id.* at 552.

100. *Id.* at 547–48.

101. *Id.* at 548.

102. *Id.* at 549.

103. *Id.* The plaintiffs were the holders of second and third priority deeds of trust who instituted the action giving rise to this case upon the holder of the first-priority deed of trust threatening to take possession of the company’s building. See *id.* at 547.

104. *Id.* at 548.

105. *MIF Realty v. Pickett*, 963 S.W.2d 308 (Mo. Ct. App. 1997).

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by a deed of trust in defendant's commercial real estate and an assignment of rents.¹⁰⁶ When the corporation defaulted on its obligations under the promissory note (and after an abandoned attempt to foreclose under the deed of trust following the defendant's remonstrations that it would obtain refinancing sufficient to allow it to redeem the property), the plaintiff filed suit alleging that the defendant had breached his agreement concerning the assignment of rents and prayed for the appointment of a receiver.¹⁰⁷ The defendant contended that this petition was insufficient to support the appointment of a receiver:

There is no underlying cause of action in this case, not only because the document which ostensibly forms the basis of the suit is itself merely ancillary to and a method of enforcing a real estate loan, but because by the evidence presented by [plaintiff] ... there has never been any breach of the agreement to assign rents.¹⁰⁸

Furthermore, the defendant posited that a receiver cannot be appointed in "an ordinary action at law to recover a money judgment."¹⁰⁹ This argument appears on its face to be right in line with *Laumeier* and *Monticello*, as well as cases holding that a suit for a money judgment is insufficient to support the appointment of a receiver like in *Miller v. Perkins*.¹¹⁰ Nevertheless, the Missouri Court of Appeals held that the circuit court had authority to appoint a receiver on surprising grounds.

In upholding the appointment of a receiver, the court noted that the defendant "contracted in the assignment of rents agreement for appointment of a receiver in the event the he defaulted on payment of the promissory note."¹¹¹ This reasoning at first appears to be in direct conflict with *Laumeier*. There, the plaintiff argued that the defendant was estopped from challenging the appointment of the receiver because the defendant had consented to the appointment of the same receiver in an ancillary proceeding in Kansas.¹¹² In rejecting this argument, the Missouri Supreme Court held that

[j]urisdiction to appoint a receiver cannot be conferred by consent or stipulation; that the parties in interest have agreed to the appointment does not relieve the Court from looking at the question of jurisdiction, and especially from inquiring whether the application is with the view of obtaining final relief or merely for the purpose of securing a receivership.¹¹³

The Court of Appeals in *MIF Realty* distinguished prior cases holding that the parties cannot agree to the appointment of a receiver where the court otherwise lacks authority to make such an appointment, with reference to the fact that the agreement

106. *Id.* at 309.

107. *Id.*

108. *Id.* at 310.

109. *Id.*

110. *See supra* notes 82-89 and accompanying text.

111. *MIF Realty*, 963 S.W.2d at 310.

112. *Laumeier v. Sun-Ray Products Co.*, 50 S.W.2d 640, 643 (Mo. 1932). The defendant corporation had assets in Wyandotte County, KS, necessitating the filing of an ancillary receivership action there.

Id.

113. *Id.* (quoting 53 C.J. 52, s 40.).

had been made at arms-length prior to any default and resulting legal action among the holder of the assignment of rents and the debtor.¹¹⁴ The court reached its conclusion based, in part, on “the freedom of contract,” which “Missouri courts are committed to” upholding.¹¹⁵ The court did point out that “Missouri courts have not addressed directly the issue of whether a contract which provides the basis for appointment independent of compliance with ... § 515.240 is enforceable.”¹¹⁶ The court cites several cases—*Laumeier* among them—holding that the parties’ consent to the appointment of a receiver cannot confer the power to appoint one on the circuit court where grounds for such relief do not otherwise exist.¹¹⁷ Nevertheless, the court in *MIF Realty* dispenses with these precedents because they “did not involve a pre-existing agreement providing for appointment of a receiver.”¹¹⁸

This is not to say that the *MIF Realty* opinion was unprincipled or otherwise ill-decided. Instead, the preceding discussion is included to highlight the extent to which the MCRA is an improvement over prior law. Indeed, under § 515.510, the appointment of the receiver in *Laumeier* likely would have been authorized because the statute allows for the “appointment of a receiver with respect to the property or its revenue-producing potential is necessary to keep and preserve the property or its revenue-producing potential or to protect any business or business interest concerning the property or its revenue-producing potential.”¹¹⁹ Likewise, the holders of junior deeds of trust in *Monticello* could have argued (and likely succeeded) under § 515.510.1(9), which allows for a receivership where an entity “is insolvent or is not generally paying the entity’s debts as those debts become due unless they are the subject of bona fide dispute.”¹²⁰ This is because the plaintiffs’ petition in that case included an allegation that the corporation had not paid taxes on the real estate, which itself constituted a default of the senior deed of trust.¹²¹

D. The MCRA Contrasted: Commencing the Bankruptcy Case, Including Under the SBRA

Section 515.510 provides certainty for parties requesting receiverships and the judges tasked with determining whether granting such relief is appropriate—a certainty that was lacking under prior law. Because this is a threshold issue in the law of receivership, it is appropriate to consider the requirements for a debtor (or a debtor’s creditor) filing a case under the Bankruptcy Code to appreciate the circumstances under which bankruptcy law could be brought to bear in the case of an

114. *MIF Realty*, 963 S.W.2d at 311.

115. *Id.* at 310.

116. *Id.* at 311.

117. *Id.*

118. *Id.*

119. MO. REV. STAT. § 515.510.1(2)(a) (2016). This section requires that the person seeking appointment of a receiver on these grounds must have “a lien on or interest in property or its revenue-producing potential.” *Id.* As minority shareholders of the defendant corporation, the plaintiffs in *Laumeier* would surely have been able to demonstrate an interest in the revenue-producing potential of the defendant corporation’s property.

120. MO. REV. STAT. § 515.510.1(9) (2016).

121. *Monticello Bldg. Corp. v. Monticello Inv. Co.*, 52 S.W.2d 545, 547 (Mo. 1932).

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insolvent business.¹²² This part will pay particularly close attention to the Small Business Reorganization Act of 2019 (“SBRA”).

The recently enacted SBRA does not modify how a Chapter 11 bankruptcy is filed with the court; rather, it makes provisions for the filing of such a case with reference to existing law.¹²³ Like a receivership under Missouri law, a bankruptcy is commenced by filing a petition with the court.¹²⁴ Under the Bankruptcy Code, a case may either be voluntarily initiated by the debtor,¹²⁵ or commenced on an involuntary basis by a debtor’s creditors.¹²⁶

Along with the petition, a debtor seeking bankruptcy protection must also file additional documents to initiate the proceeding.¹²⁷ Certain schedules and statements are required to be filed along with the petition:

[s]chedules of assets and liabilities;¹²⁸ a schedule of current income and expenditures;¹²⁹ a schedule of executory contracts and unexpired leases;¹³⁰ a statement of financial affairs;¹³¹ copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition, with redaction of all but the last four digits of the debtor’s social-security number or individual taxpayer-identification number;¹³² and a record of any interest that the debtor has in an account or program of the type specified in § 521(c) of the Code.¹³³

A debtor filing a bankruptcy petition under the SBRA is also subject to the filing requirements for a “small business case” under 11 U.S.C. § 1116.¹³⁴

Furthermore, in order to be eligible to file as a “small business debtor” under the SBRA at all, a debtor must meet certain eligibility requirements. Because the SBRA defines a “debtor” as “a small business debtor,”¹³⁵ the commencement of a case thereunder is subject to the requirements for the filing of a small business case. A “small business debtor” for purposes of the SBRA is defined as

[a] person engaged in commercial or business activity ... that has aggregate noncontingent liquidated secured and unsecured debts in an amount not

122. Although individuals and businesses may file bankruptcy (or have an involuntary bankruptcy filed against them), the primary focus of this article is bankruptcy as it may apply to commercial enterprises.

123. See Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 STAT. 1079.

124. See 11 U.S.C. §§ 301 & 303.

125. See *id.* While the MCRA does not directly address whether a debtor may file a “voluntary receivership” under Missouri law, at least one debtor in Missouri has done so. *Vatterott Educational Centers, Inc., et al.*, (E-Case) 17SL-CC02316 (2017).

126. See 11 U.S.C. §§ 301 & 303.

127. See Fed. R. Bankr. P. 1007(b)(1).

128. *Id.* § 1007(b)(1)(A).

129. *Id.* § 1007(b)(1)(B).

130. *Id.* § 1007(b)(1)(C).

131. *Id.* § 1007(b)(1)(D).

132. *Id.* § 1007(b)(1)(E).

133. *Id.* § 1007(b)(1)(F).

134. Small Business Reorganization Act of 2019, P.L. 116-54, 133 STAT. 1079, 1081.

135. *Id.* at 1079.

more than \$2,000,000,¹³⁶ not less than 50% of which arose from commercial or business activities of the debtor.¹³⁷

This definition of “small business debtor” was created under the Bankruptcy Reform Act of 1994.¹³⁸ However, the requirement that 50% or more of the debt threshold arise from commercial or business activities was created under the SBRA.¹³⁹

For an involuntary case to be initiated under Chapter 11, three creditors must file a petition against the debtor.¹⁴⁰ In some circumstances, the Bankruptcy Code adds additional conditions as to who is qualified to initiate an involuntary Chapter 11 case. If there are fewer than 12 creditors seeking to initiate an involuntary case, they must hold, in the aggregate, “noncontingent, undisputed claims [of] at least [\$16,750]¹⁴¹ more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.”¹⁴² Special eligibility requirements also inhere when the debtor is a partnership.¹⁴³

Given the foregoing, it appears that the filing requirements under the federal Bankruptcy Code are much more stringent and detailed than those under the MCRA. However, it should be noted that beyond the standards set forth with respect to when the remedy may be granted, the MCRA contains certain requirements concerning information the debtor must provide for purposes similar to the schedules and statements required under bankruptcy law.¹⁴⁴ However, the MCRA allows the debtor to provide such information after the case has commenced and a receiver has been appointed, rather than requiring the information at the commencement of the case.¹⁴⁵

IV. SELECT MCRA INNOVATIONS WITH ANALOGUES IN THE FEDERAL BANKRUPTCY CODE

There are many similarities between a state-law receivership and federal bankruptcy proceedings. The MCRA represents a significant step toward improving the receivership remedy in Missouri by making the process more in line with principles familiar to bankruptcy practitioners. This part will focus on two particular provisions in the MCRA that illustrate the inspiration taken from the Bankruptcy Code, which is surely a conscious decision by the MCRA’s drafters to import familiar administrative principles from bankruptcy law. Specifically, this part will begin by

136. Per 11 USC § 104(a), this amount has been adjusted to \$2,725,625 as of the writing of this article. See Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(a) of the Code 84 FR 3488-01 (Feb. 12, 2019).

137. 11 U.S.C. § 101(51D)(A) (2019); 133 STAT. 1079, 1085.

138. J. Arthur B. Federman, *The Bankruptcy Reform Act of 1994*, 51 J. MO. B. 105, 107 (1995).

139. 133 Stat. 1079, 1085.

140. 11 U.S.C. § 303(b)(1) (2010).

141. Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(a) of the Code, 84 FR 3488-01 (Feb. 12, 2019).

142. 11 U.S.C. § 303(b)(1) (2010).

143. 11 U.S.C. § 303(b)(3) (2010). 11 USC section 303(b)(4) provides for the filing of a petition for an involuntary case “by a foreign representative of the estate in a foreign proceeding concerning such person.” *Id.*

144. See, e.g., MO. REV. STAT. § 515.555.1(3) (requiring the debtor to “[s]upply to the receiver information necessary to enable the receiver to complete any schedules or reports that the receiver may be required to file with the court, and otherwise assist the receiver in the completion of the schedules.”).

145. MO. REV. STAT. § 515.560.1(1)-(2) (2016); see also MO. REV. STAT. § 515.555.1(1)-(5) (2016).

considering § 515.575, which provides a stay of other proceedings upon the appointment of a general receiver.¹⁴⁶ This effect of the appointment of a general receiver is inspired by the “automatic stay” under federal bankruptcy law—one of the most critical features of federal bankruptcy for insolvent businesses. Secondly, this part will take a close look at the MCRA’s ranking of priorities among secured and unsecured creditors, which are established by § 515.625. This section of the MCRA is comparable to §§ 506 and 507 of the federal Bankruptcy Code. Similarities and differences between the MCRA’s ordering of priorities and the hierarchy of claims under federal law are examined. Finally, the gap in prior Missouri receivership law related to the priority of claims is illustrated through a review of several Missouri Supreme Court cases—all involving the same secured creditor—that exhibit the need fulfilled by the MCRA.

A. When Appointment of a Receiver Operates as a Stay under § 515.575; The Automatic Stay Compared

Section 515.575 provides that, unless the court orders otherwise, “the entry of an order appointing a general receiver shall operate as a stay, applicable to all persons.”¹⁴⁷ This section specifies that the appointment of a “general receiver” operates as a stay. Section 515.515 clarifies that “[a] receiver shall be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a debtor’s property and provided the power to liquidate such property.”¹⁴⁸ The stay provided for by § 515.575 expires, with respect to three categories of potential creditor actions, “sixty days after the entry of the order of appointment unless ... the debtor or receiver, for good cause shown, obtains an order of the court extending the stay.”¹⁴⁹ This section also allows a person affected by the stay to file a motion requesting relief therefrom.¹⁵⁰

The prior law of commercial receiverships did not provide for such a stay. Although, under certain general circumstances, the circuit court was (and is) empowered to order a stay in particular cases: “a trial court generally possesses discretion to grant or refuse a stay of proceedings, and we will not disturb the trial court’s ruling absent an abuse of that discretion.”¹⁵¹ As the following discussion of § 515.575 will show, this discretion by the circuit court is limited by the MCRA: under certain circumstances, the appointment of a general receiver operates to stay automatically, without an exercise of discretion by the judge presiding over the case.

The stay provided by § 515.575 halts the following five categories of actions against the debtor or property of the receivership estate:

146. MO. REV. STAT. § 515.575 (2018).

147. *Id.*

148. § 515.515 (contrasting this with a limited receiver, which is defined by section 515.515 as a receiver that “is appointed to take possession and control of only limited or specific property of a debtor, whether to preserve or to liquidate such property.”).

149. § 515.575.2.

150. *Id.*

151. *Lunsford v. Deatherage*, 518 S.W.3d 890, 897 (Mo. Ct. App. 2017); *see also* *Ryan v. Campbell Sixty-Six Exp.*, 276 S.W.2d 128, 131 (Mo. 1955).

The commencement or continuation, including the issuance, employment, or service of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the entry of the order of appointment, or to recover a claim against the debtor that arose before the entry of the order of appointment;

The enforcement against the debtor or any estate property of a judgment obtained before the order of appointment;

Any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over, estate property;

Any act to create, perfect, or enforce any lien or claim against estate property except by exercise of a right of setoff, to the extent that the lien secures a claim against the debtor that arose before the entry of the order of appointment; or

Any act to collect, assess, or recover a claim against the debtor that arose before the entry of the order of appointment.¹⁵²

Subdivisions (1) through (5) of § 515.575.1 are in almost all respects similar to the actions stayed under 11 U.S.C. § 362(a)(1)-(5).¹⁵³ There are, however, some notable differences. For instance, § 515.575.1(4) stays actions to “create, perfect, or enforce any lien or claim against estate property.”¹⁵⁴ Section 362(a) has two provisions that stay the creation, perfection, or enforcement of liens when the debtor is in bankruptcy, but one of these sections applies to the property of the bankruptcy estate,¹⁵⁵ while the second applies to the property of the debtor.¹⁵⁶ The MCRA makes no such distinction, perhaps because the stay automatically applies when a general receiver is appointed,¹⁵⁷ and a general receiver takes “possession or control of all or substantially all of a debtor’s property.”¹⁵⁸ Presumably, if a general receiver is appointed and takes possession and control of only “substantially all” of the debtor’s property, whatever property remains in the debtor’s possession would not be protected by the stay, unless the action otherwise constituted “the commencement or continuation ... of a[n] ... action or proceeding against the debtor” under § 515.575.¹⁵⁹ Section 515.575.1(4) contains a further departure from the automatic stay under 11 U.S.C. § 362. Whereas § 362(a)(7) prohibits “the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor,”¹⁶⁰ “the exercise of a right of setoff” is specifically exempted from the prohibition contained in § 515.575.¹⁶¹

152. § 515.575.1(1)-(5).

153. *Id.*; 11 U.S.C. § 362(a)(1)-(5) (2010).

154. § 515.575.1(4).

155. 11 U.S.C. § 362(a)(4) (2010).

156. *Id.* at § (a)(5).

157. § 515.575.1.

158. MO. REV. STAT. § 515.515 (2016).

159. § 515.575.1(1).

160. 11 U.S.C. § 362(a)(7) (2010).

161. § 515.575.1(4).

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Finally, § 515.575 may be further distinguished from the stay under federal law (in terms of what it actually prohibits) by noting that the stay under the MCRA does contain a provision similar to § 362(a)(8), which stays

the commencement or continuation of a proceeding ... concerning a tax liability of a debtor that is a corporation for a taxable period the ... court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief.¹⁶²

This is a policy choice by the drafters of the MCRA, as neither “[t]he commencement or continuation of an action or proceeding by a governmental unit to enforce its police or regulatory power”¹⁶³ nor “[t]he establishment by a governmental unit of any tax liability and any appeal thereof” are affected by the stay.¹⁶⁴

This section of the MCRA also clarifies the types of actions that are not stayed.¹⁶⁵ Neither criminal proceedings,¹⁶⁶ nor certain family law actions,¹⁶⁷ are stayed by the appointment of a general receiver. Subdivision (3) provides that the stay does not affect acts taken by secured creditors who are allowed, under Missouri law, to perfect, maintain, or continue the perfection of certain interests in estate property that are effective against a subsequent taker of the property.¹⁶⁸ This category of creditors includes holders of purchase-money security interests under Article 9 of the Uniform Commercial Code and holders of liens on real estate under Chapter 429 of Missouri statutes, such as the holder of a mechanics’ or materialmen’s lien.¹⁶⁹ Certain actions by a government unit are also not stayed, such as enforcing a non-money judgment related to a license held by the debtor,¹⁷⁰ beginning or maintaining an action to enforce the governmental unit’s police or regulatory power,¹⁷¹ or establishing tax debt, including any appeal resulting therefrom.¹⁷² As discussed above, the exercise of a right of setoff is also excluded from the stay under the MCRA.¹⁷³ Finally, § 515.575.3(8) provides that actions in courts other than the one that appointed the receiver are not stayed until the order of appointment is transcribed to such other court.¹⁷⁴

The authors note an interesting interaction between the MCRA and the federal courts. While state law cannot mandate a stay in an action in federal court, two orders from different U.S. district courts reviewed by the authors have found that

162. 11 U.S.C. § 362(a)(8) (2010).

163. §§ 515.575.1(1), (4).

164. §§ 515.575.3(4), (7).

165. § 515.575.3.

166. *Id.* § (1).

167. *Id.* § (2) (stating that “an action or proceeding to establish paternity, or to establish or modify an order for alimony, maintenance, or support, or to collect alimony, maintenance, or support under any order of a court” are not affected by the stay upon the appointment of a general receiver).

168. *Id.* § (3).

169. *Id.*

170. *Id.* § (5).

171. *Id.* § (4).

172. *Id.* § (7).

173. *Id.* § (6); *See supra* note 161 and accompanying text.

174. *Id.* § (8).

the appointment of a general receiver under the MCRA constituted grounds for each court's discretionary exercise of its power to stay proceedings before it.¹⁷⁵

B. Priorities Among Creditors: Section 515.625, RSMo., and 11 U.S.C. §§ 506 & 507

Another innovation contained in the MCRA that finds a counterpart in federal bankruptcy law is § 515.625.¹⁷⁶ This provision sets forth the priorities among claimants participating in a Missouri receivership.¹⁷⁷ Section 515.625 may properly be viewed as a distillation of §§ 506 and 507 of the federal Bankruptcy Code retrofitted for state law. These sections of Title 11, like § 515.625, provide a rank order of priorities to allow for the orderly and equitable payment of claims out of the receivership estate.¹⁷⁸ This part will take a detailed look at § 515.625 and highlight the complimentary provisions of the Bankruptcy Code where such provisions may be identified.

Subsection (1) of § 515.625 provides that “[c]laims not disallowed by the court shall receive distribution ... in the order of priority under subdivisions (1) to (8) of this subsection[,]”¹⁷⁹ and, with the exception of subdivisions (1) to (3) of this subsection, on a pro rata basis.¹⁸⁰ Subdivision 1, in turn, gives the highest priority under the MCRA to a secured creditor whose security interest is “duly perfected under applicable law,”¹⁸¹ and provides that a secured creditor who is properly perfected receives the highest priority regardless of whether such creditor has filed a claim in the receivership.¹⁸² Subdivision 1 goes on, however, to provide that “the receiver may recover from estate property secured by a lien or the proceeds thereof the reasonable, necessary expenses of preserving, protecting, or disposing of the estate property to the extent of any benefit to a duly perfected secured creditor.”¹⁸³ This particular provision is analogous to § 506(c) of the Bankruptcy Code.¹⁸⁴

Next, subdivision 1 provides that if the proceeds of the sale of the asset securing the creditor's claim are less than the amount of the claim, the excess of the creditor's claim is converted to an unsecured claim under subdivision 8 of the MCRA.¹⁸⁵ This

175. See *Keypath Educ., Inc. v. Vatterott Educ. Centers, Inc.*, No. 17-CV-2319-JTM-GLR, 2017 WL 10188801, at *1 (D. Kan. Aug. 9, 2017) (“the Court here finds that a temporary stay will “serve[] both judicial economy and efficiency to briefly stay this matter while [the receiver] complies with his duties” under the MCRA); see also *Rally Cap Consulting, LLC v. Vatterott Educ. Centers, Inc.*, No. 18-CV-00612-MEH, 2018 WL 3056073, at *1–2 (D. Colo. Apr. 27, 2018) (“While the Court typically discourages stays of discovery, the Court acknowledges the efficiency and fairness of delaying the proceedings at this early stage of the litigation in accordance with the MCRA, which provides for an automatic stay of all pending litigation against a debtor that is subject to a receivership.”).

176. David A. Warfield, STRATEGIC ALTERNATIVES FOR AND AGAINST DISTRESSED BUSINESSES: A STATE-BY-STATE GUIDE TO ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, *Distributing assets of creditor*, *Strat. Alt. Dis. Bus.* § 30:2 (2019).

177. MO. REV. STAT. § 515.625 (2016). Note that section 515.615 provides a claims administration process, which may be viewed as an additional innovation.

178. 11 U.S.C. §§ 506, 507.

179. A revisor's note indicates that the word “section” is used instead of “subsection” in section 515.625.

180. § 515.625.1.

181. § 515.625.1(1).

182. *Id.*

183. *Id.*

184. 11 U.S.C. § 506(c) (2018).

185. § 515.625.1(1).

provision is likewise similar to another section of the Bankruptcy Code, subdivision (a) of § 506.¹⁸⁶ Subdivision 1 concludes by establishing priorities among secured claimants, stating that they “shall be paid from the proceeds in accordance with their respective priorities under otherwise applicable law.”¹⁸⁷

One interesting distinction between the MCRA and the Bankruptcy Code is worth noting: under the Bankruptcy Code, a secured creditor whose claim is less than the value of the underlying property may receive interest and fees relating to the secured property from the proceeds before other creditors are paid.¹⁸⁸ This is not the case under the MCRA. Subdivision 2 gives the second-place priority to the administrative expenses connected to the receivership, noting that these expenses are those “other than those allowable under subdivision (1).”¹⁸⁹ To the extent that § 515.625.1(2) provides a relatively high priority status for administrative expenses, it is substantially similar to § 507(a)(2) of the Bankruptcy Code.¹⁹⁰

Subdivision 2 also clarifies that these administrative expenses include “reasonable charges ... of ... professional persons employed by the receiver,” along with the receiver’s own expenses and reasonable charges.¹⁹¹ The second sentence of subdivision 2 interestingly provides that the claims of secured creditors who “obtain[ed] or consent[ed] to the appointment of the receiver” will be subordinated in priority to the administrative expenses provided for in subdivision 2.¹⁹² While it may seem, then, that subdivision 1 of § 515.625 is designed to give the absolute highest priority to creditors who are secured but do not request the appointment of a receiver or consent to such an appointment (or that the administrative expenses are designed to be borne by the secured creditors, if any, that requested the appointment of a receiver or consented to the same), § 515.625.1(1) already provides for the payment of administrative expenses from a secured, duly perfected creditor in certain circumstances.¹⁹³

Subdivision 3 of § 515.625 puts in third place “[a] secured creditor that is not duly perfected under state law,” which nevertheless receives “the proceeds from the disposition of the estate property that secures its claim.”¹⁹⁴ However, this provision applies “if and to the extent that unsecured claims are made subject to those liens under applicable law.”¹⁹⁵ Consequently, a secured yet unperfected creditor appears to enjoy a better position under the MCRA than under the Bankruptcy Code, where such a creditor’s claim is subject to being avoided by the bankruptcy trustee or debtor-in-possession.¹⁹⁶

Subdivision 4 provides that after the payment of creditors who are not properly secured, “[c]laims for wages salaries, or commissions ... earned by the claimant within one hundred eighty days of the date of appointment of the receiver or the cessation of any business relating to the receivership, whichever occurs first.”¹⁹⁷ A

186. 11 U.S.C. § 506(a)(1).

187. § 515.625.1(1).

188. 11 U.S.C. § 506(b).

189. § 515.625.1(2).

190. 11 U.S.C. § 507(a)(2) (2019).

191. § 515.625.1(2).

192. *Id.*

193. *See* § 515.625.1(1).

194. § 515.625.1(3).

195. *Id.*

196. 11 U.S.C. § 544(a) (2018).

197. § 515.625.1(4).

“wage-earners claim” under this subdivision is limited, however, to \$10,950.¹⁹⁸ Section 507(a)(4) is analogous to this subdivision of § 515.625,¹⁹⁹ although the dollar limit for such claims in bankruptcy law is the slightly higher amount of \$13,650 as of the writing of this article.²⁰⁰

Next in order of priority are “unsecured claims . . . arising from the deposit with the person debtor before the date of appointment of the receiver of money” for goods or services “for personal, family, or household purposes” under § 515.625.1(5).²⁰¹ This subdivision only applies when such goods or services were never “delivered or provided” and the amount of such a claim is limited to \$2,425.²⁰² Subdivision 5 is substantially similar to 11 U.S.C. § 507(a)(4),²⁰³ although the limit for claims under that provision is the more generous amount of \$3,025.²⁰⁴

The MCRA gives sixth-place priority to claims for “marital, family, or other support debt, but not to the extent that the debt is assigned to another person, [whether] voluntarily, by operation of law, or otherwise.”²⁰⁵ Because this subdivision addresses marital, family and other support debt, it is similar to §§ 507(a)(1)(A) and (B).²⁰⁶ While these claims are given first priority among unsecured claims in bankruptcy, they enjoy sixth-place priority under the MCRA.²⁰⁷ This is presumably because the MCRA (as its name may suggest) is concerned with claims against commercial enterprises, whereas the Bankruptcy Code’s priority provisions are designed to apply to a wide range of bankruptcy cases, encompassing both individual and commercial proceedings.²⁰⁸

“Unsecured claims of governmental units for taxes which accrued prior to the date of appointment of the receiver” are placed in seventh-place priority.²⁰⁹ The Bankruptcy Code provision providing for the payment of the unsecured claims of tax authorities is found in 11 U.S.C. § 507(a)(8). In eighth (and last) place are all other unsecured claims.²¹⁰

Because the priorities of § 515.625.1 are likely familiar to those who have some exposure to the Bankruptcy Code, it is tempting to view this provision as less of an innovation than this article suggests. To truly appreciate the extent to which § 515.625 represents an improvement over prior law, consider the case of *United Cemeteries Co. v. Strother*.²¹¹

198. *Id.*

199. 11 U.S.C. § 507(a)(4) (2019).

200. Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(a) of the Code, 84 FR 3488-01 (Feb. 12, 2019).

201. § 515.625.1(5).

202. *Id.*

203. 11 U.S.C. § 507(a)(4).

204. Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(a) of the Code, 84 FR 3488 (Feb. 12, 2019).

205. § 515.625.1(6).

206. 11 U.S.C. § 507(a)(1)(A)-(B).

207. *Id.*; *See also* § 515.625.1(6).

208. 11 U.S.C. § 103(a) (2018) (“chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.”); MO. REV. STAT. § 515.500 (2019); *cf.* Mo. Rev. Stat. § 515.505(16) (Interestingly, despite being titled the “Missouri Commercial Receivership Act” in § 515.500, the definition of “Person” under the MCRA is much more inclusive, and “includes natural persons, partnerships, limited liability companies, corporations, and other entities recognized under the laws of this state.”).

209. § 515.625.1(7).

210. § 515.625.1(8).

211. *United Cemeteries Co. v. Strother*, 61 S.W.2d 907 (Mo. 1933).

In *United Cemeteries*, Louis A. Harbin held a promissory note in the amount of \$16,800, which was secured by a deed of trust in the real estate comprising Blue Ridge Lawn Cemetery in Jackson County, Missouri.²¹² The cemetery was owned by United Cemeteries Company.²¹³ Upon the company's default under the note, Harbin attempted to foreclose on the cemetery, prompting the company to file a suit requesting an injunction to stop Harbin from selling the real estate.²¹⁴

Although Harbin was the first of the company's creditors in court (albeit involuntarily), he was not the last.²¹⁵ Close on his heels was the Schooley Stationery Company ("SSC"), an unsecured creditor of the company holding a debt in the amount of \$245.55.²¹⁶ SSC filed a "suit to have a receiver appointed" four days after the company filed its suit to enjoin Harbin's sale of the cemetery.²¹⁷ The circuit court wasted no time in SSC's case and appointed a receiver on the day the case was filed.²¹⁸

Once appointed, the receiver asked the circuit court for authority to sell the cemetery, which was presumably the largest income-generating asset held by the company.²¹⁹ The court entered an order allowing the sale along with an order setting forth the priority among the company's creditors with respect to the proceeds of the sale.²²⁰ The court's order of distribution applied to each of the company's dozen creditors, including Harbin.²²¹ Collectively, these creditors held claims totaling \$33,438.44.²²² The court's order established a two-tiered distribution structure: "first, the costs and expenses of the suits, including the receivership, and next to pay pro rata all allowed claims ... [including] the amount due appellant, Louis A. Harbin" and SSC's unsecured claim.²²³

Harbin was ultimately successful in arguing that his status as a secured creditor entitled him to a priority position higher than that of the company's unsecured creditors.²²⁴ It is worth noting, however, that Harbin was still only afforded third priority (following court costs and the expenses of the receivership) on remand from the Missouri Supreme Court.²²⁵ Ultimately, the receivership was declared void on the grounds that a petition for appointment of a receiver stated insufficient grounds allowing the circuit court to make the appointment.²²⁶ Nevertheless, Harbin's experience in the receivership underscores the hazards of an ill-defined receivership statute, especially considering the extensive litigation that resulted from the insolvency of the cemetery company. The fact that the sale of the real estate (along with all other actions of the receiver) were ultimately declared void is further evidence of the importance of the MCRA's thorough treatment of the issue of priority among

212. *Id.* at 975.

213. *Id.* at 973.

214. *United Cemeteries Co. v. Strother*, 119 S.W.2d 762, 764 (Mo. 1938).

215. *United Cemeteries*, 61 S.W.2d at 907.

216. *Id.*

217. *Id.*

218. *Id.* at 907-08.

219. *Id.* at 908.

220. *Id.*

221. *Id.*

222. *Id.* at 907-08. (This amount includes both Harbin's secured claim in the amount of \$16,800 and SSC's unsecured claim for \$245.55).

223. *See id.* at 908.

224. *Id.* at 910.

225. *United Cemeteries Co. v. Strother*, 119 S.W.2d 764, 764-65 (Mo. 1938).

226. *Id.* at 767.

creditors. Section 515.625's ordering of priorities would have respected Harbin's secured status from the very beginning, resulting (presumably, at least) in fewer trips to the Missouri Supreme Court.²²⁷

V. CONCLUSION

With the enactment of the Commercial Receivership Act in 2016, along with the Small Business Reorganization Act's changes to the federal Bankruptcy Code effective in 2020, the legal landscape has changed significantly for insolvent businesses. The MCRA represents a significant step towards a more effective, efficient, and predictable receivership remedy in Missouri courts, while the SBRA was designed to make reorganization under the bankruptcy law more available to small businesses. The authors of this article hope that the foregoing selection of provisions from the MCRA with reference to federal bankruptcy law may provide a helpful roadmap for creditors, debtors, practitioners, and judges as they navigate this new landscape of debtor-creditor law.

227. Louis A. Harbin was before the Missouri Supreme Court one additional time in the case of *Harbin v. Schooley Stationery & Printing Co.*, where he unsuccessfully sued for wrongful receivership. The court held he was estopped from maintaining this argument because of his active participation in the receivership case. *Harbin v. Schooley Stationery & Printing Co.*, 247 S.W.2d 77, 81 (Mo. banc 1952).