

Fiduciary

Choosing a Proper Fiduciary

By Daniel Stermer

With the ups and downs of the current economic environment, business situations have arisen, and will continue to do so where the appointment of a fiduciary will be considered, whether inside or outside a formal court proceeding. In either case, the choice of a proper fiduciary is a critical decision and should not be made without due consideration, whether by the court or by counsel.

In those business circumstances where a court is involved, the parties' mutual agreement on a particular fiduciary is the most efficient way to move forward. Absent such an agreement, the court, after due deliberation, will choose the professional fiduciary it believes can accomplish what is necessary in that particular matter.

A receiver may have been appointed where there is a statutory provision for such a fiduciary, in circumstances:

where there is a contractual right built into the agreement between parties; where there is a disagreement among shareholders/partners; where there is a probability of fraudulent conduct that has or may occur to frustrate another party; where there is an imminent damage that property will be concealed, lost or diminished in value; or where other available remedies at law



are believed to be inadequate.

The appointed fiduciary is an arm of the court and is a neutral in the underlying matter before the court. The duties, powers, authorities, and responsibilities of the receiver, or any other fiduciary, are defined by the presiding judge in the order appointing the receiver/fiduciary and detailing that person's authority. As such, either the initial order of the receiver/fiduciary or a subsequent order clarifying and/or delineating the duties and responsibilities is critically important in ensuring that the receiver/fiduciary is authorized to do all of the things necessary to achieve the objectives of a given receivership. If the appointing order does not, a receiver/fiduciary may seek further instructions and clarification from the court as to a particular issue that the receiver may be facing.

As part of the court's appointment order, provisions are generally included with regard to the imposition of a bond and the frequency of reporting required by the receiver/fiduciary. Much discussion among professionals has centered on the bonding to be obtained by the selected fiduciary and the availability of the bond, separate from how often the fiduciary should file reports with the court, including the contents of the reports. As many fiduciary professionals are aware, being able to obtain a bond generally requires the completion of a personal financial statement and the execution of an indemnity contract with an insurance company. While many think that being appointed as a fiduciary is a glamorous position, serious consideration should be given as to the overall significant responsibility and time commitment of becoming one. The ability of a fiduciary to obtain a bond and the court's setting the amount of the bond are important protections for all involved and should not be taken lightly.

The filing of reports by the appointed fiduciary is another important requirement that the court should clearly state in the appointment order. If not set forth in the order, a receiver is required by the Florida Rules of Civil Procedure to file such every three months. In an Assignment for the Benefit of Creditors, the assignee is required by statute to file two reports: The first 180 days into the matter and the second at the conclusion of the matter. These two reporting requirements are vastly different from the ones for bankruptcy trustees who are, in Chapter 11 matters, generally required to file operating reports on a monthly basis, that represent a full and complete financial overview of assets being overseen and administered by the trustee. Moreover, at the end of a bankruptcy matter, the trustee needs to complete and file with the United States Trustee's Office a Trustee's Final Report (TFR) and its related financial detail, in addition to providing all bank statements and cancelled checks, for review prior to the TFR being submitted to the court.

These reporting requirements demonstrate the lack of uniformity as to the frequency with which an appointed fiduciary prepares and files reports with the supervising court. Much discussion has taken place with regard to moving toward a more uniform reporting requirement regardless of the nature of the fiduciary appointment, with the discussion focusing on the requirement of

monthly reporting.



Keeping the appointing court and interested parties aware of the current financial position of an estate is an important aspect of any appointment and the filing of regularly required reports by the appointment fiduciary is critical and cannot be overstated.

In addition to bonding and reporting requirements, a receiver's primary job in these matters is to marshal the assets of the receivership estate and protect the status quo until such time as the court authorizes how the assets should be dealt with, whether for the benefit of creditors, investors, and/or other interested parties. This issue can get interesting and be made more complicated in instances where the assets are a building in the midst of construction or what may be left in a Ponzi/bust-out scheme. Each of these circumstances will require the receiver/fiduciary to use experience, skill, and expertise in trying to maximize the value of and/or recover the assets in that matter. While the sale of a hard asset such as a building, may be accomplished in a relatively short period of time, performing an investigation and commencing litigation to recover assets in a Ponzi/bust-out scheme could take much longer and the recovery is less than certain.

Bonding and reporting are two critical aspects of a fiduciary appointment that a court must determine at the time of appointment and how a receiver/fiduciary maximized the value of the estate is something that the fiduciary must do once they are appointed. Their importance cannot be overstated.

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