WHEN SEEKING PRE-TRIAL RECEIVERSHIP FOR SOLVENT COMPANIES LESS MAY BE MORE

By: Robert M. Heller

Receivers may be appointed where a company is insolvent, in danger of becoming insolvent, winding up its affairs or a judgment debtor. However, did you know that prior to trial a plaintiff may seek a court-appointed receiver for a solvent, on-going business?

Receivers are primarily a statutory creation. California offers a broad "catch-all" provision permitting receivers when necessary to preserve the property or rights of any party. More specifically, receivers may be appointed where property or funds are in danger of being lost, removed or materially injured. These statutes come to the aid of plaintiffs when a solvent, on-going business is involved.

For example, a court may appoint a pre-trial receiver for a solvent, on-going concern when management dominating the corporation is accused of misappropriation, fraud, mismanagement, self-dealing, failure to share profits or failure to account. In such cases, a court is justified in appointing a disinterested party as a receiver to control the business, preserve its assets and protect the rights of the complaining stockholders or other owners pending trial.

Courts are also willing to appoint a pre-trial receiver where some aspect of the business is being conducted illegally, particularly if the business could lose its license to operate or is exposed to third-party litigation.

Receivers are particularly appropriate where defendants are likely to refuse to follow court orders or injunctions. Thus, a track record of violating court orders places the business at greater risk for appointment of a receiver.

Such pre-trial appointments can be a powerful tool to reign in renegade management, ensure the business is not run into the ground pending trial and preserve assets for proper business advantage and/or post-trial collection.

However, a plaintiff who has an ownership interest in the on-going business should also consider the downside. News of the appointment might negatively impact customer interest and supplier alliances. A receiver unfamiliar with the business or industry could even damage the company and impair its day-to-day operations. Moreover, the cost of a receiver can be significant, and may be borne by the business and/or the plaintiff.

Thus, when a receiver is sought for a solvent, on-going concern, the idea that "less is more" may be a sage strategy, and a plaintiff may find it advantageous to seek a receiver for limited purposes. For example, a plaintiff might request that a receiver merely "oversee" existing management rather than "replace" existing management, that a receiver merely take over

limited tasks (i.e., an accounting), or that a receiver merely preserve particular assets pending trial.

Tailoring a receiver's involvement to a plaintiff's actual needs may not only increase the likelihood a receiver will be appointed for a solvent, on-going concern, but may also offer the best long term benefits for both the plaintiff and business entity.