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## Deviation from Statutory Scheme in Sale of Receivership Property

The sale of real and personal property in a receivership estate is governed by 28 U.S.C. §§ 2001 and 2004, and both contain procedures for both a public and private auction of property. Regarding personal property, § 2004 provides that “[a]ny personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise.” Section 2001 provides the process pursuant to which real property may be sold under “any order or decree of any court of the United States.”

Specifically, under § 2001(a), the sale must be public and occur at either the courthouse of the county, parish or city where the greater of the property in the district is located; the premises or parcel thereof located in the county, parish or city, as the court directs; or in one or more ancillary districts if the court so orders. Under § 2001(b), in order to conduct a private sale of receivership property, either real or personal, a hearing must take place. Notice of the hearing must be given to all interested parties by publication, or otherwise as the court directs.

After the hearing, if the court finds that the best interests of the estate will be conserved, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves. Section 2001(b) further requires three disinterested appraisers to each appraise the properties of different classes or situated in different localities, and publication of the terms of the sale in a newspaper(s) of general circulation as the court directs at least 10 days before confirmation of the sale. With regard to confirmation of the private sale, § 2001(b) provides that the private sale shall not be confirmed at a price less than two-thirds of the appraised value, or if another bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 percent increase over the price offered in the private sale.

### Practical Problems with the Statutory Scheme

Although the rationale behind the statute is understandable, the requirements that it imposes can be costly and time-consuming for receivers to comply with its provisions, especially when strict

compliance serves little or no purpose. In some instances, the time and expenses that are needed to fulfill these requirements might significantly impact an already-dwindling receivership estate or chill a sale to a buyer who wants to purchase the assets quickly; therefore, the question left unanswered by the plain language of the statutes is this: May a court deviate from the statutory procedure under certain circumstances? For example, suppose that the defendant(s) in a receivership case consent to the sale of the property of the receivership outside of the statutory scheme, and there are few, if any, other creditors.

### Deviation from the Statutory Requirements in Case Law

Cases addressing the issue of noncompliance with the statutory procedures demonstrate that at least some courts have found that the requirements of §§ 2001 and 2004 may be altered under certain circumstances. As these cases show, the plain language of § 2004 particularly offers support for allowing deviation from the statutory requirements.

In *Huntington Nat'l Bank v. Big Sky Development Flint LLC*,<sup>1</sup> Huntington National Bank (the plaintiff) made loans to the defendants, *Big Sky Development Flint LLC* and related entities.<sup>2</sup> The parties agreed to a stipulated order appointing a receiver, which was entered by the court. However, a disputed Big Sky member sued to contest the receivership and the proposed sale of the receivership property.<sup>3</sup>

Loan documents among the parties in that case provided that Huntington had the right to seek the appointment of a receiver, and Big Sky consented to the receiver's appointment in the event of default.<sup>4</sup> In *Huntington*, the order appointing the receiver contained expansive powers over the property, and specifically stated that “[s]ubject to Huntington's consent, [the] Receiver shall have the authority to take any actions [that] the Receiver deems reasonable and appropriate in order to sell the Property, including, but not limited to, retaining a broker and listing the Property for sale.”<sup>5</sup> However, the litigating member claimed that the court could not



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<sup>1</sup> 2010 WL 3702361 (E.D. Mich. Sept. 16, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 2010 WL 3701361, at \*1.

<sup>5</sup> *Id.* at \*2.

approve the sale of the receivership property because the proposed sale did not follow the requirements of 28 U.S.C. § 2001 regarding price, publication and disinterested appraisals.<sup>6</sup> While he conceded that the requirements of § 2001 were waived by the receivership order, he stated that the court should not approve the sale because the sale was not shown to be in the best interests of the estate, in part because the property was not marketed.

The court found that the litigating member's argument was "without merit."<sup>7</sup> Critical to this holding was the fact that the requirements of § 2001 were waived by the receivership order.<sup>8</sup> The court noted that the receivership order granted the receiver "'the fullest powers and duties of a receiver permitted under applicable law and equity,' including the power to 'negotiate and execute sale.'"<sup>9</sup> Furthermore, the member could not demonstrate beyond mere conclusory statements that the sale was not in the best interests of the estate.<sup>10</sup> The receiver's testimony also showed that the property was marketed by the property broker and sold at an appropriate price based on the receiver's experience.<sup>11</sup> In fact, the sale price differed from the appraisal price only by a nominal amount and the court confirmed the sale.<sup>12</sup> *Huntington* shows the impact of waiver in a receivership order, as well as the burden that is placed on a defendant creditor in such a situation to demonstrate that a sale is contrary to the best interests of the receivership estate.

In *SEC v. Kirkland*,<sup>13</sup> the Securities and Exchange Commission (SEC) filed a complaint seeking injunctive relief, disgorgement and penalties against the defendants for the alleged violation of securities laws.<sup>14</sup> As part of the case, the court appointed a receiver and empowered her to take possession of the assets of the defendants.<sup>15</sup> The receiver subsequently moved to expand the receivership and sought authorization to sell the property, including a 2005 Harley Davidson.<sup>16</sup> The court authorized the expansion and granted the receiver the authority to sell the motorcycle.<sup>17</sup> In seeking to confirm the sale, the receiver requested that the court deviate from the requirements of 28 U.S.C. § 2004 by substituting a *Kelly Blue Book* trade-in value estimate instead of the three appraisals, and further, that the court waive the publication requirement.<sup>18</sup>

Although the *Kirkland* court noted that there was no controlling law regarding deviation from § 2004, it found that under the circumstances it could authorize the sale without requiring publication and an appraisal. The court cited the statutory language of § 2004, which states that the sale shall be in accordance with § 2001 "unless the court orders otherwise." It also noted that the difference between the *Kelly Blue Book* value and the estimate to buy the same make and model from a dealer was minimal, and that such a difference in price would be quickly offset by the costs of obtain-

ing three appraisals and the costs of publication. Although *Kirkland* does support a court's ability to deviate from at least § 2001, in that case, no objection to the sale was made by the defendant. It is unclear from that case whether the court would have felt inclined to deviate from § 2001 if a defendant or creditor had objected to the manner of appraisal and the sale.

In another case, *Cox Enterprises v. News-Journal Corp.*,<sup>19</sup> the plaintiff and receiver jointly moved that the court approve the proposed sale of the publication operations of the defendant, *News-Journal Corp. (NJC)*, pursuant to an asset-purchase agreement. Several creditors filed objections to the motion, arguing that the proposed sale failed to comply with the requirements of 28 U.S.C. § 2001.<sup>20</sup> The plaintiff and receiver responded with the argument that, although multiple appraisals are generally required under § 2001, in that case, the court was dealing "with property directly used in the publishing operations or necessary for future expansion."<sup>21</sup> Further, the plaintiff and receiver argued that the appraisals would not assist in evaluating the value of the publishing operations, were not necessary because the sale was a liquidation sale and would waste the receivership's limited resources.<sup>22</sup>

The court acknowledged the arguments of the plaintiff and receiver, but found that given the value of the real estate and the absence of case law allowing deviation from the statutory scheme, the requirements of § 2001 had to be followed. Thus, the court ordered that the appraisals be conducted prior to the sale. The *Cox Enterprises* court dismissed the plaintiff's and receiver's use of *SEC v. Kirkland*, distinguishing that case based on the extraordinary circumstances, namely the uniqueness of the property and because the *Kirkland* court saw no benefit to additional appraisals in light of the fact the purchase price being offered exceeded the only appraisal.

In another action brought by the SEC, *SEC v. T-Bar Resources*,<sup>23</sup> the court placed the defendants' assets into a receivership estate and appointed a receiver to manage them. Among the assets of the estate were oil and gas interests owed by the defendants arising out of a project entitled the Arrowhead Project.<sup>24</sup> After the receiver's appointment, the Arrowhead Project's operator, Reliance Oil, submitted invoices to the receiver demanding payment for its work.<sup>25</sup> The receiver failed to pay the operator due to the lack of available funds in the receivership estate.<sup>26</sup> Because the receiver was unable to pay for the maintenance and improvement of the Arrowhead Project, the receiver began looking for buyers of the estate's interest in the project. The receiver contacted eight petroleum engineers to obtain appraisals, and only one agreed to conduct an appraisal. The single appraiser discovered that the project's publicly reported information was untrue, so the appraiser was unable to provide an accurate appraisal value for the oil and

6 *Id.* at 5.

7 *Id.* at \*7.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 2008 WL 4264532 (M.D. Fla. Sept. 12, 2008).

14 *Id.* at \*1.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 2010 WL 556737, at \*1 (M.D. Fla. Feb. 12, 2010).

20 *Id.*

21 *Id.*

22 *Id.*

23 2008 WL 4790987, at \*1 (N.D. Tex. Oct. 28, 2008).

24 *Id.*

25 *Id.*

26 *Id.*

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gas interest.<sup>27</sup> The appraiser also stated that in its current state, the wells would not likely produce in paying quantities and constituted a substantial plugging liability.<sup>28</sup>

Despite the failed appraisal, the receiver obtained an offer to purchase the oil and gas interests in the Arrowhead Project and subsequently filed a motion to approve the sale with the court.<sup>29</sup> The court found that “[t]he procedures outlined in § 2001(b) define the court’s authority to authorize the sale of real property.”<sup>30</sup> Accordingly, the requirements of the statute must be fulfilled prior to confirming a private sale.<sup>31</sup> The appraisal requirement allows a court to determine whether a sale is in the best interests of the estate.<sup>32</sup> Although the court noted that the receiver had been unable to find three appraisals despite persistent efforts, it found that it was “without power to confirm the proposed sale.”<sup>33</sup> Thus, despite the circumstances that were present in that case, the court strictly construed the requirements of § 2001 to prevent a confirmation of the sale in the absence of three disinterested appraisals.<sup>34</sup>

In *Tanzer v. Huffines*,<sup>35</sup> the Third Circuit analyzed the statutory language of 28 U.S.C. § 2001. The *Tanzer* case involved an objection to a district court’s order authorizing the receiver to sell the controlling stock that the receivership corporation owned in another corporation.<sup>36</sup> The appellants argued that the sale was conducted under improper procedures,<sup>37</sup> relying on the statute regarding the sale of personal property, 28 U.S.C. § 2004, which incorporates by reference

the procedures outlined in 28 U.S.C. § 2001.<sup>38</sup> The court upheld the sale, stating:

We think it is clear that the federal statute does express a preferential course to be followed in connection with a court-authorized sale of property and that the district court should not order otherwise except under extraordinary circumstances. We nevertheless recognize that where, as here, the court does proceed apart from the statute, *the test is still one of whether there has been an abuse of discretion in the circumstances.*<sup>39</sup>

Furthermore, the court noted that the district court was justified in its actions because of the financial condition of the corporation and the deadline required by the buyer.<sup>40</sup> Although the court noted that the lack of an appraisal was cause for some concern, it stated that the importance of an appraisal was mitigated by other evidence showing that the best price under the circumstances was obtained for the stock.<sup>41</sup> Thus, *Tanzer* shows a potential standard of review for these types of cases, and it outlined an example of extraordinary circumstances under which a district court may allow for the sale outside the requirements of the statutory scheme.

## Conclusion

The few courts that have addressed the issue of deviation from the statutory scheme of 28 U.S.C. §§ 2001 and 2004 are split on whether strict compliance with the statutes is required. Furthermore, it remains an open issue in these cases as to whether consent or a further court order can address or cure concerns regarding a nonconforming sale. In light of these cases, a prudent receiver should be aware of this issue and consider it when analyzing the potential sale of receivership property. **abi**

27 *Id.*

28 *Id.*

29 *Id.* at \*2.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at \*3.

34 *Id.*

35 412 F.2d 221 (3d Cir. 1969).

36 *Id.* at 222.

37 *Id.*

38 *Id.*

39 *Id.* at 222 (emphasis added).

40 *Id.*

41 *Id.*

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