RECEIVERSHIPS REVISITED:
AN OLD REMEDY FOR NEW PROBLEMS?

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PART TWO
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OPINIONS & STATEMENTS REPRESENTED DURING THE PRESENTATION OF THIS ARTICLE ARE NOT LEGAL ADVICE. PAPER UPDATED AS OF OCTOBER 6, 2010.
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State Bar of Texas Section Memberships
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Litigation
Real Estate, Probate & Trust Law
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(2002) “Receivers And Special Remedies”, authored and presented seminar article for the State Bar of Texas Advanced Real Estate Law Course.
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ACKNOWLEDGEMENTS

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Mr. Tom Whelan, an attorney in Dallas, for permission to include Defendant's Motion To Compel Receiver To Insure Property, Name Defendant As Additional Insured, Pay Ad Valorem And Franchise Taxes And For Other Relief, attached as Exhibit "G" to this Article.

The Dallas Area Real Estate Lawyers Discussion Group, for their many hours of education and support to the author.

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Exhibit A – TRCP Rules 695 and 695a
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Exhibit G – Defendant's Motion To Compel Receiver To Insure Property, Name Defendant As Additional Insured, Pay Ad Valorem And Franchise Taxes And For Other Relief
EXHIBIT "A"
PART VI. RULES RELATING TO ANCILLARY PROCEEDINGS

Rule 693a. Bond in Divorce Case.

In a divorce case the court in its discretion may dispense with the necessity of a bond in connection with an ancillary injunction in behalf of one spouse against the other.

New rule effective December 31, 1943. See also Civil Practice & Remedies Code §§ 65.001--65.045.

SECTION 6

MANDAMUS.

Rule 694. No Mandamus Without Notice.

No mandamus shall be granted by the district or county court on ex parte hearing, and any peremptory mandamus granted without notice shall be abated on motion.

SOURCE: Art. 2328, unchanged.

CASE NOTES

mandamus was denied because the trial court's letter ruling directing that the insurer's claim of rescission initially be tried to the jury and if the jury were to find against the insurer on the issue, the claims of the wife then be tried, did not exceed the trial court's discretion given the trial court's conducting trials. In re Myers, 2006 Tex. App. LEXIS 1128 (Feb. 9, 2006).

SECTION 7

RECEIVERS.

Rule 695. No Receiver of Immovable Property Appointed Without Notice.

Except where otherwise provided by statute, no receiver shall be appointed without notice to take charge of property which is fixed and immovable. When an application for appointment of a receiver to take possession of property of this type is filed, the judge or court shall set the same down for hearing and notice of such hearing shall be given to the adverse party by service thereof not less than three days prior to such hearing. If the judge finds that the defendant is a nonresident or that his whereabouts is unknown, the notice may be served by affixing the same in a conspicuous manner and place upon the property or if that is impracticable it may be served in such other manner as the court or judge may require.

SOURCE: New rule.
Publication References. — See Texas Litigation Guide, Ch. 61, Receivership.

Rule 695a. Bond, and Bond in Divorce Case.

No receiver shall be appointed with authority to take charge of property until the party applying therefor has filed with the clerk of the court a good and sufficient bond, to be
approved by such clerk, payable to the defendant in the amount fixed by the court, conditioned for the payment of all damages and costs in such suit, in case it should be decided that such receiver was wrongfully appointed to take charge of such property. The amount of such bond shall be fixed at a sum sufficient to cover all such probable damages and costs. In a divorce case the court or judge, as a matter of discretion, may dispense with the necessity of a bond.

Publication References. — See Texas Litigation Guide, Ch. 48, Receivership. See also Civil Practice & Remedies Code §§ 64.001—64.092.

SECTION 8
SEQUESTRATION.

Rule 696. Application for Writ of Sequestration and Order.

Either at the commencement of a suit or at any time during its progress the plaintiff may file an application for a writ of sequestration. The application shall be supported by affidavits of the plaintiff, his agent, his attorney, or other persons having knowledge of relevant facts. The application shall comply with all statutory requirements and shall state the grounds for issuing the writ, including the description of the property to be sequestered with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located, and the specific facts relied upon by the plaintiff to warrant the required findings by the court. The writ shall not be quashed because two or more grounds are stated conjunctively or disjunctively. The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

No writ shall issue except upon written order of the court after a hearing, which may be ex parte. The court, in its order granting the application, shall make specific findings of facts to support the statutory grounds found to exist, and shall describe the property to be sequestered with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located. Such order shall further specify the amount of bond required of plaintiff which shall be in an amount which, in the opinion of the court, shall adequately compensate defendant in the event plaintiff fails to prosecute his suit to effect and pay all damages and costs as shall be adjudged against him for wrongfully suing out the writ of sequestration including the elements of damages stated in Sections 62.044 and 62.045, Civil Practice and Remedies Code. The court shall further find in its order the amount of bond required of defendant to reprieve, which shall be in an amount equivalent to the value of the property sequestered or to the amount of plaintiff’s claim and one year’s accrual of interest if allowed by law on the claim, whichever is the lesser amount, and the estimated costs of court. The order may direct the issuance of several writs at the same time, or in succession, to be sent to different counties.

SOURCE: Art. 3841.

Rule 697. Petition.

If the suit be in the district or county court, no writ of sequestration shall issue, unless a petition shall have been first filed therein, as in other suits in said courts.

SOURCE: Publicist Guide, Ch. 4

Rule 699.

No writ officer shall serve the writ of sequestration unless the court in his presence has determined the amount of the bond to be given and given it in writing.

The bond shall be made payable to the defendant to his use.

The plaintiff shall give security for the payment of the value of the property sequestered and for all costs and damages accruing during the period of sequestration.

SOURCE: Change 1978: The order of the value of the property and the amount of the bond required.

Rule 69.

The trial court shall determine the value of the property and the amount of the bond required.

Reple提起诉讼。

SOURCE: Change 1978: The amount of bond required of defendant to reprieve.

Rule 7.

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EXHIBIT "B"
RULE 65.1 PROCEEDINGS AGAINST A SURETY

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given by a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders must be served on the court clerk, who must promptly mail a "copy of each to every surety whose address is known.


RULE 66. RECEIVERS

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.


RULE 67. DEPOSIT INTO COURT

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party—on notice to every other party and by leave of court—may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) Investing and Withdrawing Funds. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2071 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

[Amend: December 20, 1949, effective October 20, 1949; April 20, 1952, effective August 1, 1952; April 20, 2007, effective December 1, 2007.]

RULE 68. OFFER OF JUDGMENT

(a) Making an Offer of Judgment on an Accepted Offer. More than 10 days before the trial begins, a party defending against a claim may serve an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer; either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not prejudice a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When a party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 10 days—before a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment and the offer finally obtained is not more favorable than the unaccepted offer, the offeror must pay the costs incurred after the offer was made.


RULE 89. EXECUTION

(a) In General.

(1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.
EXHIBIT "C"
Local Rules


Chapter 1: Local Civil Rules, Integrated with Titles of Federal Rules of Civil Procedure


L.R. 66-1 Temporary Receiver. Upon good cause shown by verified pleadings or declaration, the Court may in its discretion appoint a temporary receiver without notice to creditors.

L.R. 66-2 Temporary Receiver - Term of Appointment. A temporary receiver shall not be appointed for a period longer than the next Motion Day following the expiration of twenty (20) days after the date of appointment.

L.R. 66-3 Permanent Receiver - Order to Show Cause. Concurrently with appointment of a temporary receiver, the Court shall issue an order to show cause requiring the parties and the creditors of the defendant to show cause why a permanent receiver should not be appointed.

L.R. 66-4 Permanent Receiver - Notice. A copy of the Court’s order to show cause why a permanent receiver should not be appointed shall be served on the defendant, any other parties to the action, and all known creditors of the defendant by the person requesting appointment of a receiver.

L.R. 66-4.1 Notice - Change of Form. The Court may in its discretion, prescribe a different form of notice, other persons upon whom the notice shall be served, and the time for and manner of service.

L.R. 66-5 Schedule of Creditors. A schedule of names, addresses and amounts of claims of all known creditors of the defendant shall be filed by the temporary receiver within five (5) days after appointment of a permanent receiver. If no temporary receiver has been appointed, the defendant shall file that schedule within the same time.

L.R. 66-5.1 Known Creditors - Defined. Known creditors shall mean those creditors who are listed as such in the records or books of account of the person or entity for which a receiver is appointed.

L.R. 66-6 Permanent Receivers - Reports

L.R. 66-6.1 Report Required. Within six months of appointment, and semi-annually thereafter, the receiver shall serve and file with the Court a report showing:

(a) The receipts and expenditures of the receivership; and

(b) All acts and transactions performed in the receivership.

http://www.caed.uscourts.gov/CACD/LocRules.nsf/a224d2a6f8771599882567cc005e9d79... 1/20/2010
**L.R. 66-7 Permanent Receivers - Notice of Hearing.** The receiver shall give notice by mail to all parties to the action and to all known creditors of the defendant of the time and place for hearing of:

(a) Petitions for the payment of dividends to creditors;

(b) Petitions for the confirmation of sales of real property and personal property;

(c) Reports of the receiver;

(d) Applications for instructions concerning administration of the estate;

(e) Applications for discharge of the receiver; and

(f) Applications for fees and expenses of the receiver, the attorney for the receiver and any other person appointed to aid the receiver.

The provisions of L.R. 6-1 shall apply to such notice.

**L.R. 66-8 Permanent and Temporary Receivers - Administration of Estate.**

Except as otherwise ordered by the Court, a receiver shall administer the estate as nearly as possible in accordance with the practice in the administration of estates in bankruptcy.

**L.R. 66-8.1 Permanent Receivers - Attorney - Records.** A receiver, the attorney for the receiver, and such other persons appointed by the Court or employed by the receiver to aid the receivership, shall keep an itemized record of time spent and services rendered.

**L.R. 66-8.2 Failure to Maintain Itemized Record.** Failure to maintain the itemized records required by L.R. 66-8.1 may be grounds for denying reimbursement or compensation.
EXHIBIT "D"
Rule 172. Audit.

When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Exceptions to such report or of any item thereof must be filed within 30 days of the filing of such report. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

Rule 173. Guardian Ad Litem.

173.1. Appointment Governed by Statute or Other Rules. This rule does not apply to an appointment of a guardian ad litem governed by statute or other rules.

173.2. Appointment of Guardian ad Litem.

(a) When Appointment Required or Prohibited. The court must appoint a guardian ad litem for a party represented by a next friend or guardian only if:

(1) the next friend or guardian appears to the court to have an interest adverse to the party, or

(2) the parties agree.

(b) Appointment of the Same Person for Different Parties. The court must appoint the same guardian ad litem for similarly situated parties unless the court finds that the appointment of different guardians ad litem is necessary.

173.3. Procedure.

(a) Motion Permitted but Not Required. The court may appoint a guardian ad litem on the motion of any party or on its own initiative.

(b) Written Order Required. An appointment must be made by written order.

(c) Objection. Any party may object to the appointment of a guardian ad litem.

173.4. Role of Guardian ad Litem.

(a) Court Officer and Advisor. A guardian ad litem acts as an officer and advisor to the court.

(b) Determination of Adverse Interest. A guardian ad litem must determine and advise the court whether a party's next friend or guardian has an interest adverse to the party.

(c) When Settlement Proposed. When an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest.

(d) Participation in Litigation Limited. A guardian ad litem:

(1) may participate in mediation or a similar proceeding to attempt to reach a settlement;

(2) must participate in any proceeding before the court whose purpose is to determine whether a party's next friend or guardian has an interest adverse to the party, or whether a settlement of the party's claim is in the party's best interest;

(3) must not participate in discovery, trial, or any other part of the litigation unless:

(A) further participation is necessary to protect the party's interest that is adverse to the next friend's or guardian's, and

(B) the participation is directed by the court in a written order stating sufficient reasons.
ORDER APPOINTING RECEIVER

On the _____ day of _____________ 2010, this matter came on for hearing before the Court on Plaintiff's Request for Emergency Appointment of Receiver (the "Request") of Preceptor Asset Management LLC, as Special Servicer for Formerly Big Bank, National Association, as Trustee in Trust for the Registered Holders of Formerly Big Bank Commercial Mortgage Trust 1010-29, Commercial Mortgage Pass-Through Certificates, Series 2010-29 (the "Plaintiff"), seeking the appointment of a receiver for certain assets and property of Poison Creek Apartments, LLC (the "Defendant"), which are more particularly described as the real property as described in Exhibit A to the Deed of Trust (as defined in the Request) as well as all personal property described therein (collectively, the "Property").
Both parties appeared through their respective attorneys. The Court, having read the pleadings, examined the evidence and heard the argument of counsel, and it appearing that a receiver should be appointed as requested by the Plaintiff,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Trusty Doright, a citizen of the United States, possesses the necessary qualifications, is not related to any party to this action, and is a proper person to be, and is hereby, appointed receiver of the Property. Upon filing a receiver’s bond in the amount of $100.00 conditioned as provided by law and approved by this Court, together with the oath prescribed by law, he shall be authorized, subject to control of this Court, to do any and all acts necessary to the proper and lawful conduct of the receivership, including the following:

(a) Take charge and keep possession of the Property, including, but not limited to management and operation of the apartment complex thereon;

(b) Receive income from the Property, including, without limitation, any governmental funds payable to Defendant on account of the Property;

(c) Collect and compromise demands;

(d) Make transfers of or regarding the Property, including remission of all amounts in excess of over $20,000 after receiver satisfies the Property’s operating expenses, to Plaintiff on account of its first-priority claim;

(e) Invest any funds held as receiver in an interest bearing account;

(f) Enter into, assign as well as terminate contracts regarding the Property, provided, however, that before entering into any contracts that would cause the receiver to incur charges of over $5,000, receiver agrees to seek the prior written approval from the Plaintiff;

(g) Employ, as well as terminate the employ, of persons working at or with the Property;

(h) Take any and all actions necessary to preserve the income to and value of the Property;
(i) Take any and all actions necessary to market the Property for the highest and best value, including, but not limited to, sale of the Property to a third party or authorizing the Trustee under the Deed of Trust, or any successor thereto, to post the Property for a non-judicial foreclosure;

(j) Enter into contracts for sale of the Property and take any and all actions necessary to effectuate the sale of the Property to a third party subject to prior written approval from the Plaintiff (“Property Sale”);

(k) Take any and all actions in the name of Defendant to effectuate an assignment and assumption of the Note and related loan documents on terms and conditions approved by Plaintiff (“Loan Assumption”);

(l) Perform any other acts necessary to maintain the quality of the Property, including the apartment complex comprising part of the Property;

(m) Obtain access and use any funds held in any accounts with regard to the Property including but not limited to reserve accounts;

(n) Take any and all actions necessary and helpful to settle any and all insurance claims with respect to the Property;

(o) Take any and all action necessary and helpful to contest the valuation of the Property for real property tax purposes;

(p) Provide Defendant with copies of all documents, invoices, receipts; such that Defendant may timely file all federal, state, or local tax reporting returns or information reports; and

(q) Perform any other acts in regard to the Property as authorized by this Court.

IT IS FURTHER ORDERED that upon demand of the receiver, Defendant and any other person or entity in possession, custody, or control of the Property shall immediately turnover the Property to such receiver.

IT IS FURTHER ORDERED that the Defendant and any guarantor of the Note shall cooperate with the Receiver in consummating any proposed Property Sale and/or Loan Assumption.

IT IS FURTHER ORDERED that money coming into the possession of the receiver and not expended for any of the purposes authorized herein shall be held by the receiver subject to such orders as this Court may hereafter issue.
IT IS FURTHER ORDERED that except as otherwise provided herein, all persons, firms, and corporations are hereby enjoined from proceeding to levy upon or from otherwise interfering with the receiver's exclusive possession of the Property until final judgment of this Court.

IT IS FURTHER ORDERED that no lien, claim, or other security interest in any property affected by this receivership shall in any manner be affected by this order. Any party's failure to oppose the appointment of a receiver, any party's consent to the appointment, or any party's procurement of the appointment shall not constitute waiver of any lien, claim, or right.

IT IS FURTHER ORDERED that the receiver shall, within 30 days of qualification, file in this action an inventory of all property of which the receiver shall have taken possession. If the receiver subsequently comes into possession of additional property, he shall file a supplemental inventory as soon as practical.

IT IS FURTHER ORDERED that nothing herein shall interfere, prohibit, or impede the Plaintiff from exercising its rights against the Property, including, but not limited to, proceeding with non-judicial foreclosure on the Property.

IT IS FURTHER ORDERED that if Plaintiff seeks to dismiss or terminate the receiver, the Plaintiff shall provide written notice to Defendant of the filing of any motion to terminate or dismiss the receiver.

IT IS FURTHER ORDERED that this receivership shall continue in effect until further order of this Court.

IT IS FURTHER ORDERED that neither Borrower nor any guarantors of the Note shall have any liability under the non-recourse carve-out provisions of the Note and/or Guaranty with respect to any thing or matter which (a) happens after the date hereof that would have created liability on them absent the provisions of this Order or (b) arises under the indemnity provided in Section 55.4 of the Deed of Trust from the performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof, a lien

ORDER APPOINTING RECEIVER- Page 4
for which labor or services would be subordinate to the first lien under Plaintiff’s Deed of Trust and would have been extinguished as a result of any foreclosure by the Plaintiff, had the Plaintiff foreclosed on the Property, in lieu of obtaining the appointment of receiver or is for services such as utilities for which a mechanic’s and materialman’s lien is not available under Chapter 53 of Texas Property Code. By way of example, and not limitation, if the receiver fails to insure the Property, or fails to pay ad valorem taxes, or misapplies rents or insurance proceeds, etc., all of which create recourse liability on Borrower and any guarantor under the terms of the note and the Guaranty, neither Borrower or any guarantor shall have such liability.

SIGNED this _____ day of __________________ 2010.

______________________________
PRESIDING JUDGE
EXHIBIT "F"
NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

SPECIAL WARRANTY DEED

Date:

Grantor: Trusty Doright, solely in his official capacity as the duly appointed Receiver.

Grantor's Mailing Address (including county):

Grantee:

Grantee's Mailing Address (including county):

Consideration:

Grantor acknowledges the receipt of TEN AND NO/100 DOLLARS ($10.00) and other valuable consideration.

Property (including any improvements):

See Exhibit ______ attached hereto and made a part hereof (hereinunder called the "Property").

Reservations from and Exceptions to Conveyance and Warranty:

1. [ ]
2. [ ]
3. [ ]
4. [ ]
5. [ ]
6. [ ]
Grantor, for the consideration and subject to the reservations from and exceptions to conveyance and warranty, grants sells and conveys to Grantee the property, together with all and singular, the rights and appurtenances thereto in any wise belonging, to have and hold it to Grantee, Grantee's successors or assigns forever. Except as to the reservations from and exceptions to conveyance and warranty, Grantor binds Grantor and Grantor's successors to warrant and forever defend all and singular the property to Grantee and Grantee's successors and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, when the claim is by, through, or under Grantor but not otherwise.

Special Provisions:

This conveyance is made pursuant to an Order of the _____ Judicial District Court of Dallas County, Texas in Cause No. ________________ and has the full force and effect of a foreclosure deed.

When the context requires, singular nouns and pronouns include the plural.

________________________________________
Grantor

STATE OF TEXAS )
)___________________________
COUNTY OF DALLAS )

This instrument was acknowledged before me on the _____ day of _________________________, 2010, by Trusty Doright, solely in his official capacity as the duly appointed Receiver.

________________________________________
Notary Public, State of Texas

AFTER RECORDING, RETURN TO:
EXHIBIT “G”
CAUSE NO. ____________

WELLS FARGO BANK N.A., as Trustee for the Registered Holders of ____________ Commercial Pass-Through Certificates,

Plaintiff,

v.

_____________ LTD.,

Defendant.

_____________ COUNTY, TEXAS

JUDICIAL DISTRICT COURT

DEFENDANT’S MOTION TO COMPEL RECEIVER TO INSURE PROPERTY, NAME DEFENDANT AS ADDITIONAL INSURED, PAY AD VALOREM AND FRANCHISE TAXES, AND FOR OTHER RELIEF

_____________ (Borrower), the current owner of the property subject to the receivership, moves for an order compelling the receiver to keep the property insured, to carry liability insurance, to name Borrower as an additional insured, to pay property and franchise taxes on the property and on revenues from the property, and for other relief, including lender’s prompt foreclosure of the property.

BACKGROUND

1. Borrower owns the ____________ (Complex) located in ____________ County, Texas. The Complex secures payment of a non-recourse loan (Loan) believed to be held by ____________ as trustee for the Registered Holders of COMM ____________ Commercial Pass-Through Certificates (Lender).
2. Lender requested appointment of a receiver. Borrower admits it did not make certain payments on its non-recourse debt to Lender and, thus, did not oppose the appointment of a receiver.¹ This Court granted Lender's request.

3. Before this Court appointed the receiver, Borrower used all revenues from the Complex to pay operating expenses and debt service. When declining revenues became insufficient to pay both operating expenses and debt service, some of the partners in Borrower — for a time—advanced funds to pay expenses and cover the revenue shortfalls. When it became apparent that these revenue shortfalls would likely become chronic, Borrower requested that Lender modify the Loan. Lender denied Borrower's request and instead asked this Court to appoint a receiver.

4. Borrower — in principle — does not oppose the continuation of the receivership for a short period pending a prompt foreclosure if the receiver keeps the property insured, carries liability insurance and names Borrower as an additional insured, pays property taxes and other taxes on revenues from the property (including franchise taxes), and takes other appropriate measures to protect the interests of Borrower — which still owns the property, but no longer controls the property or revenues from the property.

5. Borrower holds approximately $____,000 in revenues from the Complex on

¹ Borrower denies certain of Lender's allegations in its application for appointment of the receiver, including any allegations of improper conduct or mismanagement of the Complex.
deposit in the Complex’s operating account and is holding an additional $\_\_000 in
security deposits. Borrower is requesting guidance from the Court as to whether these
funds should be transferred to the receiver or to the Court.

ARGUMENTS, AUTHORITIES, AND REQUESTED RELIEF

6. A receiver is a person appointed as “an arm or instrumentality of the
court, holding possession of property for the court which appointed him.” A receiver
must be disinterested, equally representing and protecting “the interests of all persons,
including creditors, shareholders and others, in the property in receivership.”

Borrower, as the owner of the Complex, is one of the persons whose interests the
receiver is obligated to protect.

7. Lender seeks to justify appointment of a receiver on 2 grounds.

a. The first ground is to protect Lender’s collateral pending

foreclosure under Section 61.004(a)(4) of the Texas Civil Practice and Remedies

Code. Borrower denies that any of the collateral securing the Loan is now, or

\begin{footnotes}
2 First S. Props., Inc. v. Vallone, 533 S.W.2d 339, 343 (Tex. 1976) (citing Farm & Home Sav. & Loan Ass’n
v. Breeding, 115 S.W.2d 615, 616 (Tex. 1938)).

3 Davis v. Bagless, Bagless & Stokes, 70 F.3d 367, 375 (5th Cir. 1995) (stating counsel for party to
receivership proceeding is not eligible for appointment as receiver and will not qualify for judicial
immunity as agent of receiver); TEX. CIV. PRAC. & REM. CODE § 64.021(a)(2) (stating receiver “must not be a
party, attorney, or other person interested in the action for appointment of a receiver”).

4 Sec. Trust Co. v. Lipscomb County, 180 S.W.2d 151, 158 (Tex. 1944); see also Payne v. Snyder, 661 S.W.2d
134, 143-44 (Tex. App. – Amarillo 1983, writ ref’d n.r.e.) (stating, as general rule, that receiver represents
all parties interested in litigation in which he is appointed and that receiver generally is agent of

\end{footnotes}

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ever was, in danger of being lost, removed, or destroyed by Borrower.

Moreover, Borrower does not oppose Lender's foreclosure of the Complex. In fact, Borrower asks the Court to order Lender to foreclose promptly as a condition of continuation of the receivership. The indefinite pendency of a receivership over the Complex – without a definite foreclosure date – leaves Borrower unnecessarily exposed to potential liabilities (e.g., for injuries to persons and property and for taxes on the Complex and on its revenues) for no apparent reason other than convenience of the Lender.

b. Lender also urged the Court to appoint a receiver on equitable grounds under Section 64.001(a)(6). Again, for the same reasons that the indefinite continuation of a receivership is not justified under Section 64.001(a)(4), it is not justified by any recognized rule in equity.

8. The indefinite continuation of a receivership imposes unnecessary burdens and liability risks on Borrower. Borrower, therefore, requests that the Court order Lender to foreclose at the earliest possible opportunity (i.e., the first Tuesday in April 2016).

INSURANCE

9. The receiver now has exclusive control over the operation of the Complex

appointing court and not an agent of owner whose property is placed in receiver's charge, except in certain circumstances under which receiver is held to be agent of property owner as a matter of law).
and any revenue from the operation of the Complex, even though Borrower remains the owner. Borrower and Lender have an interest in keeping the property insured and in maintaining effective liability coverage for occurrences on the property that Borrower still owns but no longer controls. To protect the property and the interests of Borrower, as well as Lender, Borrower requests that the Court order the receiver:

a. to maintain property insurance and other insurance coverages in accordance with the requirements of the Deed of Trust; and

b. to name Borrower as an additional insured under all applicable insurance policies.

**TAXES**

10. As record title holder, Borrower may have liability to governmental authorities for property taxes and franchise taxes accruing or coming due with respect to the Complex and revenues derived from the Complex. Because these taxes are properly considered operating expenses, and because the receiver has taken control of the Complex and its revenues for the benefit of the receivership estate, the receiver should be ordered to pay all such taxes attributable to the Complex and revenues derived from the Complex before delinquency.  

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5 The Deed of Trust is attached as Exhibit C to Plaintiff’s Original Verified Petition and Request for Emergency Appointment of Receiver (Lender’s Petition).

6 *Hennepin County v. M.W. Savage Factories*, 83 F.2d 453 (8th Cir. 1936).
OTHER EXPENSES

11. Borrower and its general partner – as required by the documents evidencing the Loan – are single asset, single purpose entities. Borrower and the general partner of Borrower continue to incur accounting fees, independent director fees required by Lender under the documents evidencing the Loan, tax preparation and tax reporting costs, potential tax and other liabilities associated with the receiver’s operation of the Complex, and other expenses and liabilities that Borrower and its general partner would not otherwise incur but for the continuation of the receivership. Borrower requests that the Court order the receiver to pay all such expenses and liabilities attributable to the continuation of the receivership.

PRAYER

Borrower asks that the Court grant this motion and set a foreclosure date, order the receiver to keep the property insured, to carry liability insurance, to name Borrower as an additional insured on applicable insurance policies, to pay property and franchise taxes on the Complex and on the revenues from the Complex before delinquency, and to grant Borrower other relief.