

PAUL L. NINE & ASSOCIATES, P.C.
Attorneys and Counselors at Law
100 West Long Lake Road, Suite 102
Bloomfield Hills, Michigan 48304-2773

(248) 644-5500
Facsimile: (248) 644-5640
E-Mail: Office@PaulLNinePC.com

PAUL L. NINE

Of Counsel:
Sommers Schwartz PC

August 15, 2013

Michigan Supreme Court
Lansing, MI 48909
MSC_clerk@courts.mi.gov

RE: ADM File No. 2012-30
Proposed Amendments of Rule 2.621 and Rule 2.622
of the Michigan Court Rules

Dear Sir/Madam:

The undersigned has served as a Court-appointed Receiver, both as a result of nomination by lenders with subsequent appointment by the Court and by the Court on its own motion appointing the undersigned. In addition, the undersigned has served as counsel to many debtors who were in default on various loans, as well as representing lenders whose customers were in default. Thus, the undersigned has a broad range of experience and has a knowledge of the conflicting interests which are involved in Receiverships. Based on that knowledge, the following observations and suggestions are made:

1.) General Observation

In general, the undersigned is impressed with the organization and completeness of the proposed Rule 2.622 and would complement the Committee which prepared the proposal. Thus, the following comments are not intended to be a criticism, but rather an attempt to further improve the proposed Rule.

2.) Rule 2.622 (C)

The undersigned's most serious concern about the Rule is this section because it, in fact, turns on its head, the power of the Court. Effectively, a lender will now select the "neutral" Receiver. As the proposed Rule observes, the Receiver has always been viewed as a

“neutral” “fiduciary for the benefit of all persons appearing in the action or proceeding”. As the Court must be aware, the public is very suspicious of the powers which lenders have received in the foreclosure/default process. This is most clearly reflected in the Congressional investigations, the litigation, and the huge settlements which have flowed out of the mortgage foreclosure process. When viewed in this light, the public would view it as scandalous to allow the moving party not only to obtain the appointment of a Receiver, but to, for all practical purposes, also name that Receiver.

It is my experience that in fact, most of the time, the Court accepts the nomination of the lender and appoints the nominated person, but occasionally the Court makes its own appointment. The practical effect of the new Rule is to assure that in virtually every instance, the nominated Receiver will be appointed. Remember, most Receivers are appointed in ex parte proceedings. There is only a Judge to question and object. The potential for abuse in this process is clear. Placing the restrictions proposed in this rule on the Court’s authority, certainly reduces the likelihood of the Court assuring a neutral Receiver.

It does not take much wisdom to realize that the nominated fiduciary is often nominated over and over again by the same lender. It is not likely that such a Receiver will view his “fiduciary duties” as “for the benefit of all persons ... in the proceeding”. Even if the Receiver is neutral, the appearance of evil is clearly present. Imagine the implications if the Receiver is appointed in a partnership dispute, in an ex parte proceeding.

Given a choice between potential abuses by a Judge, or potential abuses by a self-interested lender or partner/shareholder, it seems very clear where the Supreme Court should come down. The Court certainly has an ability to review, control, and ultimately discipline abuses by a Judge. It would have no such ability for abuses by a lender. If Judges abuse their power, then the Supreme Court can deal with that when it occurs.

3.) Rule 2.622 (E)

In specifying the powers of the Receiver, it would appear that the specified powers are very limited. At the very least, I would suggest the following two (2) powers be added:

- (i) A Receiver may operate the business of the Receivership Estate in the ordinary course.
- (ii) A Receiver may exercise such other powers as the Court, in its reasonable discretion may deem appropriate.

4.) Rule 2.622 (F)

In practice the compensation and expenses of a Receiver are virtually always paid by the nominating entity (i.e., the lender), subject of course to the Court’s approval. Among other benefits, the payment of the Receiver’s fees serves as a self-enforcing limit on the discretion and overreaching activity of the lender and of his nominated Receiver. The Rule should have a default provision that, absent a contrary order of the Court, the nominating entity

is liable for all costs and expenses of the Receiver.

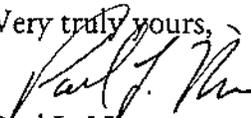
5.) Rule 2.622 (G)

The costs of a bond are significant in today's financial market. Thus, this section of the Rule should provide that, as an alternate to the bond, a letter of credit or other security approved by the Court may be posted. The Rule should recognize that the letter of credit may be issued by the nominating entity. In fact, since the nominating entity is often a bank, it may issue its own letter of credit if it is satisfied with the appointed Receiver, thus keeping the costs to the Receiver Estate at a minimum.

Subsection (G) (6) of the Rule allows the Court to consider whether a secured creditor is under secured. This section should recognize that if the secured creditor is under secured, that creditor is the only one with anything at risk. Therefore, if that under secured creditor does not require a bond, then the Court should have the power to waive the bond requirement.

As indicated, the proposed Rule is comprehensive and well thought out. Hopefully the Court will consider the suggestions contained herein.

Very truly yours,



Paul L. Nine