

Founded in 1852
by Sidney Davy Miller

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August 30, 2013

Larry Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: **ADM File No. 2012-30**

Dear Clerk Royster:

There has been considerable comment on and objection to the proposed amended Rule 2.622(C). This rule provides in part, "The court shall defer to the petitioner's nomination of a receiver, except for good cause shown," and sets forth certain standards for good cause.

I would recommend the Court modify proposed MCR 2.622(C) to read as follows:

(C) The court shall defer to the petitioner's nomination of receiver, unless a party to the action objects to the petitioner's nominee. If a party so objects, the court may appoint the petitioner's nominee, the nominee of any other party, or such other receiver as the court may deem appropriate, in the court's discretion.

By way of background, my practice is concentrated in representing lenders in commercial real estate loans which are in default. As such, I am frequently requesting the appointment of a receiver and have participated in nearly 100 cases in Michigan which a receiver was appointed over commercial real estate based upon the Court's decision in *Smith v Mutual Benefit Life*, 362 Mich 114 (1960). As such, I have participated in and witnessed the decision of many dozens of circuit judges throughout Michigan on this specific topic.

Commercial real estate comes in all shapes and sizes. I have been engaged in actions in which receivers have been appointed over licensed nursing homes, hotels with liquor licenses, mobile home communities, subdivisions with partially completed homes, time shares with fractional ownership, industrial property with environmental contamination, student housing projects, golf courses, as well as the more typical commercial property (office buildings, retail strip centers and regional malls, apartment complexes, and industrial parks). In my experience, the receivers nominated by petitioners/lenders have specific experience in managing the specific property type in question. As a consequence, the property can be efficiently and effectively managed during the foreclosure process for the benefit of all parties.

The parties often agree on the receiver in these commercial disputes. In my experience, if there is a dispute over who should be the receiver and the parties are unable to agree, then the assigned judge exercises his or her appropriate discretion to appoint a qualified receiver—which is very frequently the petitioning lender’s nominee. Based upon my experience, then, limiting the court’s discretion in the broad fashion proposed in MCR 2.622(C) is unnecessary.

Some limitation on the court’s discretion in selecting the receiver is appropriate, however. In some cases, the judge will appoint his or her “own” receiver even where the lender/petitioner’s nominee is not objected to—or even fully stipulated to by the parties. In my experience, such judges will invariably appoint a local lawyer in whom the judge has confidence. Since few lawyers have the skills or experience necessary to manage a complex commercial real estate project, that lawyer then typically hires a property manager. This adds an unnecessary layer of expense, which diminishes the receivership estate to detriment of all parties.

In the one recent example, the petitioning lender and the borrower were both sophisticated parties represented by experienced counsel who had stipulated to a local property manager to act as receiver. The court refused to accept the stipulation of the parties, and instead appointed its own receiver who, as a local attorney, then retained a different property management company. Not only did this result in an unnecessary \$160,947.09 expense to the receivership estate for fees of the receiver and other counsel in his firm (in addition to the customary expenses of the property management company), but the court initially refused to terminate the receiver when the redemption period expired (and fee title passed to the lender), until after the lender to file an emergency application for leave to appeal to the Court of Appeals. The details of this particular receivership are set forth in the briefs in *U.S. Bank National Association, as Trustee v SMC Investors, LLC*, Michigan Court of Appeals, Case No. 316698.

Although this is a fairly extreme example of a receivership which went awry, I have witnessed other instances where the trial court did not appoint the petitioner’s nominee despite either stipulation by the parties to the action or complete lack of opposition. This has universally resulted in additional expense being imposed on the already-distressed receivership estate. It is important to note that while the receiver enjoys the appropriate protection of the “business judgment rule” promulgated in *In re Motion to Sue Receiver of Venus Plaza Shopping Center*, 228 Mich App 357 (1998), it is the parties to a receivership who bear the consequences of those business decisions. Thus, the selection of an appropriate and experienced receiver for the specific receivership project is a matter of vital importance to the parties to the action.

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Larry Royster

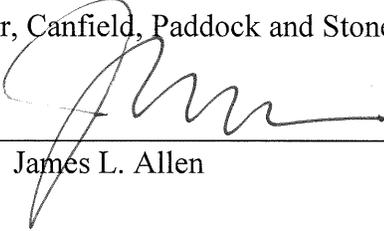
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The ultimate goal is to select a receiver who will act in the best interest of the receivership estate. In my judgment, the modification to MCR 2.622(C) proposed in this letter serves that goal while protecting the rights of all parties to the action.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By: 

James L. Allen

JLA/lhs

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