

**DEBTOR/CREDITOR RIGHTS COMMITTEE
REPORT PREPARED FOR THE JUNE 8, 2013 COUNCIL MEETING**

1. Next Scheduled Meeting of the Committee

No meeting is currently scheduled. The Committee's most recent meeting was on May 7, 2013.

2. Council Approval

At the May 4, 2012 Council meeting, the Council approved proposed amendments to MCR 2.621 and MCR 2.622 relating to the appointment and regulation of receivers. The Committee had a role in drafting these amendments at the request of the Michigan Supreme Court. The Michigan Supreme Court has now sent proposed MCR 2.621 and MCR 2.622, attached, out for public comment, with comments due by September 1, 2013. There were no changes of substance. The Clerk of the Supreme Court has requested that the Business Law Section submit a comment in support. May the Committee submit a comment in support?

The Committee also requests approval of its co-sponsorship of the Judge Rhodes' retirement dinner and the expenditure of \$1,000 for the Committee's budget for the dinner, described in Section 5 below.

3. Memberships

The Committee communicates regularly with its membership through its list serv, with announcements of Committee events, case law alerts, and announcements of events of interest to bankruptcy and insolvency law practitioners. This increases the Committee's profile. In addition, holding regular meetings and educational events increases the interest of the bar in becoming members. We regularly receive inquiries from bar members about joining the Committee and respond immediately to reach out to the individuals.

4. Accomplishments Toward Committee Objectives

See other sections of the report.

5. **Meetings and Programs**

The Committee met on May 7, 2013. Mike Weinczok of Dickinson Wright's Toronto office gave a presentation and answered questions on what U.S. business lawyers need to know about Canadian insolvency proceedings.

The Committee will co-sponsor a dinner honoring the Honorable Steven R. Rhodes on his retirement from the United States Bankruptcy Court for the Eastern District of Michigan, to be on December 12, 2013 at the Roostertail. Other expected sponsors include The Consumer Bankruptcy Association and the Federal Bar Association. The cost of the sponsorship is estimated at \$1,000.00

6. **Publications**

The Committee provided six articles for the Spring 2013 edition of the Michigan Business Law Journal.

7. **Method of Monitoring Legislation/Judicial Administrative Developments and Recommended Action**

As a bar group active in insolvency related issues, the Committee is often asked to participate in judicial and administrative developments, such as assisting in the drafting of the proposed amendments to the receivership rules, see Section 2 above, and to co-sponsor the dinner honoring retiring Judge Rhodes, see Section 5 above. We review new statutes, rules and cases at our meeting.

In addition, our members are active in informing us about legal advances, and will draft or assist in drafting case alerts for the Committee's list serv. Also, the co-chairs individually and through bar groups monitor new developments to discuss at our meetings or in alerts.

8. **Miscellaneous**

N/A

Judy B. Calton

Judith Greenstone Miller

Order

Michigan Supreme Court
Lansing, Michigan

May 1, 2013

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2012-30

Michael F. Cavanagh
Stephen J. Markman

Proposed Amendments
of Rule 2.621 and
Rule 2.622 of the
Michigan Court Rules

Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

On order of the Court, this is to advise that the Court is considering amendments of Rule 2.621 and Rule 2.622 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendments or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 2.621 Proceedings Supplementary to Judgment

(A)-(D)[Unchanged.]

(E) Receivers. When necessary to protect the rights of a judgment creditor, the court may appoint a receiver in a proceeding under subrule (A)(2), pending the determination of the proceeding held in conformance with MCR 2.622.

(F)-(H)[Unchanged.]

Rule 2.622 ~~Receivers in Supplementary Proceedings~~

(A) For good cause shown, the court may appoint a receiver in any action or proceeding. A receiver appointed under this section is a fiduciary for the benefit of all persons appearing in the action or proceeding. For purposes of this rule, "receivership estate" means the entity, person, or property subject to the receivership.

(B) The order of appointment shall include provisions related to the following:

- (1) bonding amounts and requirements as provided in subrule (G);
- (2) identification of real and personal property of the receivership estate;
- (3) procedures and standards related to the reasonable compensation of the receiver as provided in subrule (F);
- (4) reports required to be produced and filed by the receiver, including the final report and accounting;
- (5) a description of the duties, authority and powers of the receiver;
- (6) a listing of property to be surrendered to the receiver; and
- (7) any other provision the court deems appropriate.

(C) Appointment.

- (1) The court shall defer to the petitioner's nomination of receiver, except for good cause shown. If the court finds good cause not to appoint the nominated receiver, the court shall make findings of fact as to any receiver considered for appointment regarding each of the following:
 - (a) experience in the operation and/or liquidation of the type of assets to be administered;
 - (b) relevant business, legal and receivership knowledge, if any;
 - (c) ability to obtain the required bonding if more than a nominal bond is required;
 - (d) any objections to any receiver considered for appointment;
 - (e) whether the receiver considered for appointment is disqualified under subrule (C)(2); and
 - (f) any other factor the court deems appropriate.
- (2) Except as otherwise provided by law or by subrule (C)(3), a person or entity may not serve as a receiver or in any other professional capacity representing or assisting the receiver, if such person or entity:

- (a) is a creditor or a holder of an equity security of the receivership estate;
- (b) is or was an investment banker for any outstanding security of the receivership estate;
- (c) has been, within three years before the date of the appointment of a receiver, an investment banker for a security of the receivership estate, or an attorney for such an investment banker, in connection with the offer, sale, or issuance of a security of the receivership estate;
- (d) is or was, within two years before the date of the appointment of a receiver, a director, an officer, or an employee of the receivership estate or of an investment banker specified in subrule (b) or (c) of this section, unless the court finds the appointment is in the best interest of the receivership estate and that there is no actual conflict of interest by reason of the employment;
- (e) has an interest materially adverse to the interest of any class of creditors or equity security holders by reason of any direct or indirect relationship to, connection with, or interest in the receivership estate or an investment banker specified in subrule (b) or (c) of this section, or for any other reason;
- (f) has or represents an interest adverse to the receivership estate or stands in any relation to the subject of the action or proceeding that would tend to interfere with the impartial discharge of duties as an officer of the court;
- (g) has, at any time within five years before the date of the appointment of a receiver, represented or been employed by the receivership estate or any secured creditor of the receivership estate as an attorney, accountant, appraiser, or in any other professional capacity and the court finds an actual conflict of interest by reason of the representation or employment;
- (h) is an "insider" as defined by MCL 566.31(9);
- (i) represents or is employed by a creditor of the receivership estate and, on objection of an interested party, the court finds an actual conflict of interest by reason of the representation or employment; or

(j) has a relationship to the action or proceeding that will interfere with the impartial discharge of the receiver's duties.

(3) Any person who has represented or has been employed by the receivership estate is eligible to serve for a specified limited purpose, if the court determines such employment or appointment is in the best interest of the receivership estate and if such professional does not represent or hold an interest materially adverse to the receivership estate.

(D) Duties.

(1) Within 7 days after entry of the order of appointment, the receiver shall file an acceptance of receivership with the court. The acceptance shall be served on all parties to the action.

(2) Unless otherwise ordered, within 28 days after the filing of the acceptance of appointment, the receiver shall provide notice of entry of the order of appointment to any person or entity having a recorded interest in all or any part of the receivership estate.

(3) The receiver shall file with the court an inventory of the property of the receivership estate within 35 days after entry of the order of appointment, unless an inventory has already been filed.

(4) The receiver shall account for all receipts, disbursements and distributions of money and property of the receivership estate.

(5) If there are sufficient funds to make a distribution to a class of creditors, the receiver may request that each creditor in the class of all creditors file a written proof of claim with the court. The receiver may contest the allowance of any claim.

(6) The receiver shall furnish information concerning the receivership estate and its administration as requested by any party to the action or proceeding.

(7) The receiver shall file with the court a final written report and final accounting of the administration of the receivership estate.

(A)(E) Powers and Duties.

(1) A receiver of the property of a debtor appointed pursuant to MCL 600.6104(4) has, unless restricted by special order of the court, Except as otherwise provided by law or by the order of appointment, a receiver has

general power and authority to sue for and collect all the debts, demands, and rents belonging to ~~of the debtor~~ receivership estate, and to compromise and ~~or settle those that are unsafe and of doubtful character~~ claims.

- (2) ~~A receiver may sue in the name of the debtor when it is necessary or proper to do so, and may apply for an order directing the tenants of real estate belonging to the debtor, or of which the debtor is entitled to the rents, to pay their rents to the receiver.~~ liquidate the personal property of the receivership estate into money. By separate order of the court, a receiver may sell real property of the receivership estate.
 - (3) ~~A receiver may make leases as may be necessary, for terms not exceeding one year.~~
 - (4) ~~A receiver may convert the personal property into money, but may not sell real estate of the debtor without a special order of the court.~~
 - (53) ~~A receiver is not allowed the costs of a suit brought by the receiver against an insolvent person from whom the receiver is unable to collect the costs, unless the suit is brought by order of the court or by consent of all persons interested in the funds in the receiver's hands.~~ may pay the ordinary expenses of the receivership but may not distribute the funds in the receivership estate to a party to the action without an order of the court.
 - (64) ~~A receiver may sell doubtful debts and doubtful claims to personal property at public auction, giving at least 7 days' notice of the time and place of the sale.~~ A receiver may only be discharged on order of the court.
 - (7) ~~A receiver must give security to cover the property of the debtor that may come into the receiver's hands, and must hold the property for the benefit of all creditors who have commenced, or will commence, similar proceedings during the continuance of the receivership.~~
- (F) Compensation and Expenses of Receiver.
- (1) A receiver shall be entitled to reasonable compensation for services rendered to the receivership estate.
 - (2) The order appointing a receiver shall specify:
 - (a) the source and method of compensation of the receiver;

- (b) that interim compensation may be paid to the receiver after notice to all parties to the action or proceeding and opportunity to object as provided in subsection (5);
 - (c) that all compensation of the receiver is subject to final review and approval of the court.
- (3) All approved fees and expenses incurred by a receiver, including fees and expenses for persons or entities retained by the receiver, shall be paid or reimbursed as provided in the order appointing the receiver.
- (4) The receiver shall file with the court an application for payment of fees and the original notice of the request. The notice shall provide that fees and expenses will be deemed approved if no written objection is filed with the court within 7 days after service of the notice. The receiver shall serve the notice and a copy of the application on all parties to the action or proceedings, and file a proof of service with the court.
- ~~(8) A receiver may not pay the funds in his or her hands to the parties or to another person without an order of the court.~~
- (5) The application by a receiver, for interim or final payment of fees and expenses, shall include:
 - (a) A description in reasonable detail of the services rendered, time expended, and expenses incurred;
 - (b) The amount of compensation and expenses requested;
 - (c) The amount of any compensation and expenses previously paid to the receiver;
 - (d) The amount of any compensation and expenses received by the receiver from or to be paid by any source other than the receivership estate;
 - (e) A description in reasonable detail of any agreement or understanding for a division or sharing of compensation between the person rendering the services and any other person except as permitted in subpart (6).

If written objections are filed or if, in the court's determination, the application for compensation requires a hearing, the court shall schedule a hearing and notify all parties of the scheduled hearing.

- (6) A receiver or person performing services for a receiver shall not, in any form or manner, share or agree to share compensation for services rendered to the receivership estate with any person other than a firm member, partner, employer, or regular associate of the person rendering the services except as authorized by order of the court.
- (9) A receiver may only be discharged from the trust on order of the court.
- (G) Bond.
- (B) Notice When Other Action or Proceeding Pending; Appointment. In setting an appropriate bond for the receiver, the court may consider factors including but not limited to:
 - (1) The value of the receivership estate, if known;
 - (2) The amount of cash or cash equivalents expected to be received into the receivership estate;
 - (3) The amount of assets in the receivership estate on deposit in insured financial institutions or invested in U.S. Treasury obligations;
 - (4) Whether the assets in the receivership estate cannot be sold without further order of the court;
 - (5) If the receiver is an entity, whether the receiver has sufficient assets or acceptable errors and omissions insurance to cover any potential losses or liabilities of the receivership estate;
 - (6) The extent to which any secured creditor is undersecured;
 - (7) Whether the receivership estate is a single parcel of real estate involving few trade creditors; and
 - (8) Whether the parties have agreed to a nominal bond.
 - (1) The court shall ascertain, if practicable, by the oath of the judgment debtor or otherwise, whether another action or motion under MCR 2.621 is pending against the judgment debtor.

- (2) ~~If another action or motion under MCR 2.621 is pending and a receiver has not been appointed in that proceeding, notice of the application for the appointment of a receiver and of all subsequent proceedings respecting the receivership must be given, as directed by the court, to the judgment creditor prosecuting the other action or motion.~~
 - (3) ~~If several actions or motions under MCR 2.621 are filed by different creditors against the same debtor, only one receiver may be appointed, unless the first appointment was obtained by fraud or collusion, or the receiver is an improper person to execute the trust.~~
 - (4) ~~If another proceeding is commenced after the appointment of a receiver, the same person may be appointed receiver in the subsequent proceeding, and must give further security as the court directs. The receiver must keep a separate account of the property of the debtor acquired since the commencement of the first proceeding, and of the property acquired under the appointment in the later proceeding.~~
- (H) Intervention. An interested person or entity may move to intervene. Any motion to intervene shall comply with MCR 2.209.
- (I) Removal of Receiver. After notice and hearing, the court may remove any receiver for good cause shown.
- (C) Claim of Adverse Interest in Property.
- (1) ~~If a person brought before the court by the judgment creditor under MCR 2.621 claims an interest in the property adverse to the judgment debtor, and a receiver has been appointed, the interest may be recovered only in an action by the receiver.~~
 - (2) ~~The court may by order forbid a transfer or other disposition of the interest until the receiver has sufficient opportunity to commence the action.~~
 - (3) ~~The receiver may bring an action only at the request of the judgment creditor and at the judgment creditor's expense in case of failure. The receiver may require reasonable security against all costs before commencing the action.~~

- (D) ~~Expenses in Certain Cases. When there are no funds in the hands of the receiver at the termination of the receivership, the court, on application of the receiver, may set the receiver's compensation and the fees of the receiver's attorney for the services rendered, and may direct the party who moved for the appointment of the receiver to pay these sums in addition to the necessary expenditures of the receiver. If more than one creditor sought the appointment of a receiver, the court may allocate the costs among them.~~

Staff Comment: The proposed amendments of MCR 2.621 and MCR 2.622 were submitted to the Michigan Supreme Court on behalf of the "Receivership Committee" (a committee created because of a need identified by the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan) to expand and update the rules regarding receivership proceedings.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-30. Your comments and the comments of others will be posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-2-civil-procedures.aspx>.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 1, 2013

Corbin R. Davis

Clerk