

Should I Obtain a Provisional Director, or Special Fiscal Agent?

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For business owners, the word “receiver,” often brings a shudder. Many owners realize that a receiver can be the death-knell for a company – a precursor to bankruptcy or dissolution. The Westlaw glossary defines “receiver” as a court or government appointed fiduciary to “protect property pending a resolution of the underlying dispute.”

Clearly, no one wants a receiver appointed for their company unless they know they are winding it down. But owners may not realize that courts often have the power to fashion all sorts of relief in a business divorce litigation, including the appointment of various agents (who are *not* receivers or anything like them) to assist a company.

In New Jersey, one such creature of equity is a Special Fiscal Agent, and another is a Provisional Director. The Provisional Director’s function is rather easy to understand: there is a tie in a vote by the board, and the court appoints someone to break it. This type of agent is most common when there is 50/50 ownership, and the business partners’ failure to agree on a significant issue is harming the company. The court that appoints a Provisional Director does not instruct them on how to vote. Rather, the Provisional Director gathers facts and strives to make a fully informed decision.

On the other hand, the mandate of the Special Fiscal Agent (“SFA”) is limited only by the imagination of the parties and of the court. In other words, it can be as broad or as narrow as necessary. The SFA can be charged with overseeing or signing off on expenses, overseeing the entire operation, reporting back to the court, or weighing in on hiring and firing – there really is no limit. If a minority shareholder is alleging theft, improper expenditures, self-dealing, or cooking the books, an SFA may be an appropriate interim remedy.

As is easy to imagine, one issue that is sometimes unavoidable after the SFA is appointed is the ever-dangerous mission creep. An SFA appointed by the court for just a single issue can sometimes wind up effectively reviewing and overseeing the entire operations of a company, even if that is not the choice of the party who sought the SFA in the first place. Often, the SFA comes in as a “white knight” to one side, only to later prove the truth of the axiom “be careful what you wish for.”

Seeking an equitable remedy such as the appointment of either court agent could be an extremely useful tool in your business divorce litigation, or it could become your worst nightmare.

National Law Review, Volumess XIV, Number 30

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