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Superior Court eyes protection for businesses

Receivership program created to address COVID-19 issues

By: Barry Bridges | April 9, 2020

In response to the significant disruptions being wrought by the COVID-19 pandemic, the Superior Court has launched a business recovery plan designed to provide a participating company with court-supervised creditor protection using a “non-liquidating receivership” model.

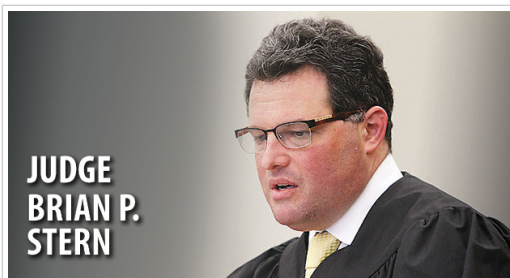
The program is intended to give companies an additional tool to survive the economic crisis through a mechanism that will keep a business and its assets intact as its owners continue operations, seek new capital, and work to restore revenue streams.

Significantly, an order appointing a non-liquidating receiver will also enjoin the commencement or continuation of creditor actions against the receivership business.

“Unprecedented situations call for innovative solutions,” Superior Court Presiding Judge Alice B. Gibney said in a press release announcing the program. “Many businesses are being affected by current events through no fault of their own. The Rhode Island Superior Court will provide temporary relief to local businesses so they can get back on their feet.”

Petitions from those companies seeking to enter the program will be assigned to the court’s business calendar, overseen by Judge Brian P. Stern. “We’ve been hearing from businesses who are just ready to throw up their hands and give the keys back to the landlord. We brought all hands on deck to consider what we could do to assist them,” Stern said.

Although receiverships typically result in either a liquidation or sale of the business to a third party, Stern contrasted the dynamics of a non-liquidating receivership, which allows for continuity of operations by the owner.



A non-liquidating receivership was recognized by the Rhode Island Supreme Court in a 1998 per curiam opinion, *Levine v. Bess Eaton Donut Flour Company*. There, the court wrote that the mechanism can “constitute a welcome lifeline to shareholders and other affected parties when no other relief appears to be adequate, when it is likely to benefit most if not all interested parties by allowing the corporation to continue to operate, or when it will

help to protect the interests of the shareholders by preserving company assets from being dissipated if they are in imminent danger of further loss or waste.”

Stern said the court’s directive two decades ago that the non-liquidating receivership is an “extraordinary remedy that should be reserved for extraordinary situations” provides an apt description for the current crisis.

“It has always been meant for emergencies that are not the norm, and for eligible businesses it acts sort of like a temporary stay in bankruptcy and allows the owners an opportunity to get a plan in place,” he said.

‘Attractive option’

The new initiative was formed by Gibney on March 31 through Administrative Order 2020-04, which Stern describes as “putting meat on the bones” of how the process will work.

Pursuant to the program, a business entity, including a sole proprietorship, that was not in default on its financial obligations as of Jan. 15, 2020 (prior to the pandemic), is eligible to file a verified petition with the Superior Court seeking the program’s protections.

The petition must demonstrate that, as a result of COVID-19, the business incurred a 20 percent reduction in gross revenue over a 60-day operating window compared to a previous period; was “forced to cease a substantial portion of its operation due to governmental or regulatory order; or can otherwise certify that it suffered an adverse impact on operations or a “substantial interruption of cash flow” that would have been used to satisfy business obligations.

Upon the receiver’s appointment, the business is temporarily shielded from actions by its creditors while it attempts to get back on track.

The receiver then oversees the creation of an operating plan, which outlines how the enterprise can return to a position of being able to pay its debts in the usual course of business. The recommended plan is distributed to creditors and other potential claimants for comment, and a hearing date is set for the court’s approval.

While the owner will continue to run the business on a day-to-day basis, its operation must be consistent with the plan. The owner cannot incur expenses or encumber assets of the receivership estate outside the established plan’s parameters without approval of the court.

If successful in solidifying its financial position, the business will exit the program and satisfy its debts from revenues. The duration of the receivership for individual participants will vary on a case-by-case basis.

Stern acknowledged that other options are available for businesses under the federal coronavirus relief act, or CARES, such as the Paycheck Protection Program and the SBA’s Economic Injury Disaster Loans.

“This is a program in addition to those available under the federal stimulus. It may not be right for everyone, but it’s an attractive option in providing businesses with a bridge to take care of expenses other than payroll, such as leasing equipment or satisfying lines of credit,” Stern said.

Businesses standing to benefit

Providence’s W. Mark Russo, who along with his law partner John A. Dorsey will serve as the program coordinators, said there currently is no reason to think that a company interested in a non-liquidating receivership could not also qualify for federal stimulus efforts such as PPP.



“If you’re an attorney representing a business and aren’t 100 percent comfortable with receivership issues, we will help get you into the program and once there we will continue to be a resource.”

— W. Mark Russo, program coordinator



“At the moment, we’re working to get a definitive answer on that,” Russo said.

In that spirit, he explained that part of his firm’s coordinating role will be to serve as a “clearinghouse of information” for receivers and participating businesses. The Superior Court has specified that a business will need to be represented by counsel in court proceedings, and Russo stands ready to lend a hand to those unfamiliar with receiverships or the workings of the court’s business calendar.

“If you’re an attorney representing a business and aren’t 100 percent comfortable with receivership issues, we will help get you into the program and once there we will continue to be a resource,” Russo said.



Nor should creating an operating plan be considered a stumbling block.

“More complex and sophisticated businesses might need a more sophisticated plan, but any business, no matter how small, will need a plan to get back into business,” Russo said. “There’s no reason not to consider this as a potential strategy. And as the program coordinators, we’re here to help.”

Broadly speaking, Russo said three types of businesses could stand to benefit from the non-liquidating option.

First is the company that has ceased operations, perhaps under a gubernatorial executive order.

“The program won’t help these businesses right away, but they will start to operate again at some point, and it may be that they can’t pay their debts in the normal course. In that context, this program can help convey the luxury of time to get things in order,” he said.

Second is an essential business that continues to operate but can’t pay its debts for various reasons. For example, some health care facilities are having financial difficulties in light of the cancellation of elective procedures, and they should be able to realize immediate benefits from the program.

The third, Russo said, consists of restaurant and food service providers.

“That is a sector we can help now, as well as in the future once they are back in full operation. Some will need help to start again,” he added.

Because the practical effect of a “regular” receivership is that a business is locked up with its sale being the ultimate goal, Russo said it is often a last resort.

“But that’s not the case with a non-liquidating receivership, which is supervisory in nature,” he said. “As our Supreme Court said, it can be a lifeline for companies, and it’s an equitable tool that courts can use in exceptional circumstances like we’re now seeing.”

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