Focus REAL PROPERTY

Purchase from a court-appointed receiver with care

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Particular care needs to be taken by lawyers who are involved in sales by and from court-appointed receivers. In these transactions, title passes not by way of the execution of a transfer, but by way of court order. A person may be appointed by court as a receiver, or receiver-manager, of the assets of a (typically) insolvent party, in lieu of a secured party (if any) proceeding to sell the assets under the authority of its security. For example, the assets might be being used in the course of an ongoing commercial activity, so that the sale of the entire business as a going concern will result in a higher sale price than the assets alone would command. There may be complicated priority disputes, the inventory may be perishable, or for any number of other reasons it may be necessary for one or more of the creditors to obtain the assistance of a court-appointed person to administer and sell the assets or business of a party rather than rely on the rights of recourse set out in its security.

While it may not be the universal standard of practice for the lawyer for a vendor to search title prior to advising on the execution of an agreement of purchase and sale, it is particularly important for the vendor's counsel, acting for a court-appointed receiver, to do so. As title passes to a purchaser by way of court order, it will be necessary for a vendor's lawyer, for example, to ensure that the court is not authorizing the sale of lands that include owners other than or in addition to the owner who is the subject of the receivership, or lands owned jointly or as tenants in common with the insolvent party. Any errors need to be discovered early in the process because, unlike a sale involving private parties in which errors may be fixed even in the course of registration, any last-minute changes in a sale by a court-appointed receiver will almost certainly require an attendance at court, with notice to all interested parties.

Title will pass by way of a specific type of court order, called a "vesting order." In modern practice, the receiver seeks the approval of the court for the sale of property on the specific terms set out in the purchase agreement that has been executed by both parties, usually subject to a condition that it will be approved by the court. If the approval order is made, the order generally includes a vesting order, which will be effective upon the filing of a certificate by the receiver that the purchaser has complied with all of its obligations under the purchase agreement. The closing occurs when the certificate, which has been filed in the court office, is appended to the vesting order, which is then registered on title. The vesting order "vests" title to the real property in the purchaser, free and clear of those encumbrances that are listed in it (such as charges and execution certificates and construction liens), but subject to the continuation of other expressly listed encumbrances that will continue to bind the property.

Purchaser's counsel should take comfort from the passing of title by vesting order. There is no requirement, for example, to direct a portion of the closing funds (unless a direction has been provided) or to see to the application of monies to all of the creditors who are listed in the vesting order and whose security is being discharged under its authority. However, it will be necessary for the purchaser's lawyer to ensure all of the encumbrances a purchaser would want to delete from title have been so deleted by the provisions of the vesting order. As there is typically no recourse to a receiver, a purchaser's lawyer needs to be particularly vigilant during any due diligence period. Generally, property is sold by a receiver in an "as is" condition, and receivers generally do not provide undertakings to re-adjust. Statutory declarations are likewise not usually given, and the registered owner of the property is usually not available to give the typical declarations that provide purchasers and their lawyers comfort in a standard transaction. For these reasons, reviewing and negotiating the purchase agreement takes on particular importance for a purchaser's lawyer.

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