Article

Presenting a Receivership Distribution Plan

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Following are some points and supporting authorities that we have found useful when presenting a distribution plan at the end of a federal equity receivership, particularly when it appears that the receivership defendants perpetrated a fraud scheme, and we are leaning toward a simple mass pro-rata distribution.

We often start by pointing out that the court has room to work. In this regard, it is well established that federal district courts have broad discretion in fashioning relief in equity receiverships.1 So long as a court divides the assets "in a logical way," a court's adoption of a distribution plan should not be disturbed.

When we are about to propose rough justice, we like to encourage the court with the fact that, when acting in equity, the court gets to do what is fair. After all, the over-arching test is whether the distribution plan is "fair and reasonable."

If we are really about to pick a fight, we might note that the court does not have to please everyone. As one court pointed out, "In any situation in which the pie is limited, each individual desiring a slice of that pie is, in a sense, adverse to others also wanting a slice of the pie." Of course, the unhappy people are the ones who don't want to share and share alike.

It helps that, when it comes to dividing up recovered stolen property, courts favor keeping it simple. The net cash loss methodology remains the most commonly utilized distribution method in the context of fraudulent schemes. It is hard to argue with a pro rata share divided out based upon the relative size of each person's out of pocket loss. Courts have been clear that sorting claims based upon false promises really makes no sense at all. By the same token, no matter how surprised the recipient may be that the "profits" were taken from a later investor, money out is money out.

When the case involves a mixture of fraud and an operating business, things can get very hard. The age old debate between defrauded investors and unsecured creditors still rages in the courts of equity. There is good authority to support a plan that prefers investors over unsecured creditors if you feel that is the direction to go. On the other hand, this authority works best in cases where there really was not much window dressing at all.

Finally, most courts will lean toward throwing things into a single pot. This is well justified when the case involves a single "unified scheme to defraud". Likewise, it is "fair and reasonable" to treat similarly situated investors the same, regardless of minor differences in the pitch to them.

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